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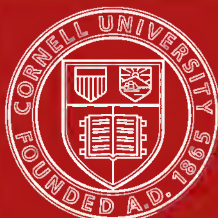

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THE

LAW OF PERSONAL INJURIES

IN THE

STATE OF ILLINOIS

AND THE

REMEDIES AND DEFENSES OF LITIGANTS.

BY

DAVID T. CORBIN,

OF THE CHICAGO BAR.

CITY OF CHICAGO,
STATE OF ILLINOIS.

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by the
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TO

HONORABLE BENJAMIN D. MAGRUDER,

A JUSTICE OF THE SUPREME COURT OF THE STATE OF ILLINOIS,

In recognition of his high judicial ability and attainments, this Work is respectfully dedicated.

THE AUTHOR.

INTRODUCTION.

This work on the Law of Personal Injuries in the State of Illinois, and the Remedies and Defenses of Litigants, herewith submitted to the public, has been prepared with some care with a view to bringing together, in convenient form, the body of the law and practice in the State in this very large class of cases.

The number of personal injury cases in the courts of this State has rapidly increased during the past few years, and is destined, apparently, to continue to increase in the future. It is estimated by careful observers that fully one-third of all the litigated cases now pending in the courts are on account of alleged personal injuries. These cases grow out of accidents incident to the large and increasing use of complicated and dangerous machinery in business houses and factories; from accidents on cable, electric and steam railroads, through the negligence of officers and employes and the carelessness of passengers; accidents in mines and mining, from negligent management and failure to observe the statute relating thereto, as well as the carelessness of working miners themselves; accidents to travelers in carriages and wagons, and pedestrians, from defective streets, sidewalks and bridges in cities, incorporated villages and towns, owing mainly to the neglect of municipal officers to maintain the same in a reasonably safe condition; injuries arising under the Dram Shop Act, and for violation of its provisions; and injuries to persons and property on the lines of railroads, from neglect of railroad companies to erect and maintain proper fences, cattle-guards and highway crossings, and failure to observe due care and the statutory regulations as to signals upon the approach of trains to street crossings.

The practice and procedure in personal injury cases in Illinois is more or less peculiar to the State, being the ancient common law, considerably modified by statute and the decisions of the courts. Some of the difficulties of preparing such a work as this will be easily apparent when the organization of our courts is considered. The decisions of the Supreme Court are authoritative and everywhere binding. The decis-

ions of the Appellate Courts, being intermediate tribunals between the trial courts of record and the Supreme Court, are not of "binding authority in any cause or proceeding other than that in which they may be filed," and *then* they are largely subject to review, reversal or affirmance by the Supreme Court. But, notwithstanding this statutory limitation upon the force and effect of the opinions of the Appellate Courts, they are, on account of the learning and ability therein uniformly displayed, treated with the very highest respect by our people, second only to those of the Supreme Court. They are usually in harmony and in line with the decisions of the Supreme Court, and, certainly to this extent, interpret the law and practice of the State.

In this work frequent reference has been made to the Appellate Court Reports, and much reliance has been laid upon them on questions of law and practice, seeking to evolve from the decisions of both the Supreme and Appellate Courts, as far as possible, a harmonious system.

The author is not vain enough to hope, or bold enough to assert, that he has been entirely successful, but trusts that he has been so in some measure, and hopes, as time goes on, errors that may be discovered may be eliminated, and that the work, as it is, may be found a valuable acquisition to the libraries of the practicing lawyers of the State.

The text is supported by liberal citations of authorities. A table of the cases cited is collected for the convenience of practitioners. The notes also furnish a very full statement of facts, in many important cases, upon which the rulings of the courts were made, illustrating and lending interest to the text, which all lawyers and students of law will appreciate.

It was the original purpose to accompany this work with a supplement of practical forms, but that part of the work could not be completed within the time limit set upon the publication of the main work. The practical forms must be delayed a few months, when they may be expected to appear as a supplement to this work. It is intended that it shall contain forms of declarations, pleas, instructions, etc., in a large class of personal injury cases, in harmony with the law and practice of the courts of the State, as herein set forth.

THE AUTHOR.

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THE

LAW OF PERSONAL INJURIES

IN THE

STATE OF ILLINOIS

AND THE

REMEDIES AND DEFENSES OF LITIGANTS.

CHAPTER I.

NEGLIGENCE.

SECTION 1. Negligence is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable man would not do.[1] An illustration of this definition occurs as follows: "The primary question for the jury to determine is whether the defendant's servant was guilty of negligence which was the proximate cause of the injury, their province being to determine whether by commission, in doing some act which ought not to have been done, or by omission, neglecting to do some act which ought to have been done, the injury resulted."

Negligence is the opposite of care and prudence—is the omission to use the means reasonably necessary to avoid injury to others.[2]

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[1] Wolff Mfg. Co. v. Wilson, 152 Ill. 9.

[2] Great Western R. R. Co. v. Haworth, 39 Ill. 353.

Sec. 2. An omission to perform a duty imposed by statute is *prima facie* negligence.[1] Yet such negligence is actionable only where it causes, or contributes to, the injury complained of.[2]

If an illegal act be done, the party doing or causing the same is responsible for all consequences resulting from the act. If an act be done from necessity, and is justified by such necessity, but which without such necessity would otherwise be illegal, it must appear that such necessity existed at the time, and that every possible diligence and care was taken in the manner of the execution of the act to avoid injury to others or their property.[3]

Sec. 3. Negligence is ordinarily a question of fact. Where the evidence on material facts is conflicting, or where, on undisputed facts, fair-minded men of ordinary intelligence may differ as to the inferences to be drawn, or where, on even a conceded state of facts, a different conclusion would reasonably be reached by different minds, in all such cases negligence is a question of fact. The fact to be determined is the existence or non-existence of negligence. With all the facts considered, if there is a reasonable chance of conclusions differing thereon, then it is a question for the jury. Negligence may become a question of law where, from the facts admitted or conclusively proved, there is no reasonable chance of different reasonable minds reaching different conclusions. It may also become a question of law if a single material fact is conclusively shown or uncontradicted, the existence or non-existence of which is conclusive of a right of recovery. If negligence exists, its degree, whether slight, ordinary or gross, must always depend upon the evidence, and not be determined by the court as a question of law, where there is evidence tending to prove the particular fact.[4]

If the conduct of the party charged with negligence, or whose duty it is to use due care, is so clearly and palpably negligent that all reasonable minds would so pronounce it,

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[1] St. Louis, J. & C. Co. v. Terhune, 50 Ill. 151.

[2] L. S. & Mich. S. R. R. Co. v. Parker, 131 Ill. 557.

[3] Burton v. McClellan, 2d Scammon, 434.

[4] Wabash Ry. Co. v. Brown, 152 Ill. 484.

without hesitation or dissent, then the court may so pronounce it by instructions to the jury.[1]

SEC. 4. The case being strictly one of negligence, the plaintiff can only recover by proving that he himself was, at the time he received his injury, in the exercise of due and proper care, and also that the defendant was guilty of the alleged negligence.[2]

The burden of proving negligence rests with the party alleging it.[3] But in case of fires started by sparks issuing from locomotive engines, this rule seems somewhat relaxed by statute. In an action against a railroad company for injury resulting from fire communicated from the defendant's engine on the line of its road, the act of March 29, 1869, having made the establishment of the fact that an injury had been occasioned from fire sparks, emitted from its engine while passing over the road, itself full *prima facie* evidence of negligence on the part of the company and its agents and servants in charge at the time, if the plaintiff establishes, in the first instance, the fact that the fire which occasioned the injury complained of was thus communicated, such proof will entitle him to a recovery, and places the burden of proof to rebut that *prima facie* case thus made upon the company, to show by affirmative evidence that the engine at the time was equipped with the necessary and most effective appliances to prevent the escape of fire, and that the engine was in good repair and was properly, carefully and skillfully handled by a competent engineer.[4] The statute makes the fire *prima facie* evidence of negligence on the part of those who at the time had the care and management of the engine.

Also, in the case of negligence charged against a carrier of passengers for hire, the burden of proof is not wholly upon the party alleging it, but is shifted to the carrier to explain said act. By law the carrier is bound to the utmost diligence and care, and is liable for slight negligence. Proof that the plaintiff was a passenger, proof of the accident and the injury,

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[1] Hoehn v. C., P. & St. Louis Ry. Co., 152 Ill. 229; C. & E. I. R. R. Co. v. O'Connor, 119 Ill. 586.

[2] East St. Louis Ice & Cold Storage Co. v. Crow, 155 Ill. 74.

[3] North C. St. Ry. Co. v. Boyd, 156 Ill. 416.

[4] Chicago & Alton R. Co. v. Quaintance, 58 Ill. 389.

and due care of plaintiff, make a *prima facie* case of negligence. This being done, the burden of explaining is thrown upon the carrier.[1]

SEC. 5. In case of the explosion of a locomotive boiler attached to the train, while at the depot, injuring a passer-by, said explosion is held to be *prima facie* evidence of negligence, to overcome which it must be shown by defendants that the materials used in the construction of such boiler are of the kind usually employed, have been subjected to and stood the usual tests, and have been used by experienced persons with prudence and skill, this *prima facie* evidence is overcome, and the inference must be drawn that the explosion occurred from some latent defect, not detected by the usual and proper tests. Of all these questions the jury must be the judges.[2]

SEC. 6. Negligence is said to be a mingled question of law and fact. (Shearman & Redfield on Negligence, Sec. 11.) If by this it is meant it is a question of law to determine the rule, that is, the definition of negligence, and a question of fact to determine, from the evidence, whether the particular case falls within the rule or defintion, it is entirely in harmony with the rulings of the supreme court.[3] It is for the jury to determine from the evidence, whether one or both of the parties may have been negligent in their conduct, and not for the court to take the question from them and declare, if certain facts exist, negligence is established.[4]

SEC. 7. "Due and proper care" means that degree of care which the law requires under a given state of circumstances; so that in every case where the measure of diligence is ordinary care, the exercise of such ordinary care would, within the meaning of the law, be using due care in that particular case; and so it would be in a case where the law exacts

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[1] Chicago & Alton R. R. Co. v. Clampitt, 63 Ill. 95; G. & C. U. R. R. Co. v. Yarwood, 15 Ill. 471; G. & C. U. R. R. Co. v. Fay, 16 Ill. 558; C., B. & Q. R. R. Co. v. George, 19 Ill. 510; Keokuk Packet Co. v. True, 88 Ill. 608; N. Y. C. & St. L. R. R. Co. v. Blumenthal, 160 Ill. 48; N. C. St. Ry. Co. v. Cotton, 140 Ill. 486.

[2] Ill. Cent. Ry. Co. v. Phillips, 49 Ill. 234.

[3] Pennsylvania Co. v. Conlan, 101 Ill. 107; Ind. & St. Louis Ry. Co. v. Morgenstein, 106 Ill. 216.

[4] Myers v. I. & St. L. Ry. Co., 113 Ill. 386; Ill. Cent. Ry. Co. v. Haskins, 115 Ill. 300.

a higher degree of diligence. The exercise of this higher degree of diligence would, within the meaning of the law, be using due care or diligence under the circumstances of that case. The term "ordinary care," when used in a general sense, without reference to the facts of any particular case, comes nearer expressing, perhaps, a definite measure of responsibility than the expression "due care;" yet the degree of diligence which it implies varies greatly, according to the character of the circumstances to which it relates.[1] A servant of a railroad company, to recover of the company for personal injury, growing out of negligence on the part of the company, must have used ordinary care on his part, that is, such care as men of ordinary prudence would usually exercise under the same or like circumstances.[2]

SEC. 8. To constitute *wilful* negligence, the act done, or omitted to be done, must be *intended;* mere neglect can not be considered as importing wilfulness.[3] Gross negligence is the want of ordinary care. There are no degrees of gross negligence. Where a party has been injured for the want of ordinary care on his part, no action will lie, unless the injury is *wilfully* inflicted by the defendant.[4]

Gross negligence is to be regarded as the want of but slight diligence.[5]

SEC. 9. The negligent act charged with producing an injury must be the proximate cause of it. The rule may be stated that if, subsequently to the original wrongful or negligent act, a new cause intervened, of itself sufficient to stand as the cause of the injury, the former must be considered too remote, unless the original wrongful act was in and of itself a violation of some law or ordinance.[6]

SEC. 10. Whether a person is guilty of negligence is usually a question of fact, to be found by the jury, and in a case of death (from a collision) an assumption of negligence on the

[1] Schmidt et al. v. Sinnott, 103 Ill. 165.

[2] Wabash R. R. Co. v. Elliott, 98 Ill. 481; Bloomington v. Perdue, 99 Ill. 329.

[3] Peoria Bridge Ass. v. Loomis, 20 Ill. 251.

[4] Chi., Burl. & Quincy R. R. Co. v. Lee, 68 Ill. 580.

[5] Chi., Burl. & Quincy R. R. Co. v. Johnson, 103 Ill. 512.

[6] Wolff Mfg. Co. v. Wilson, 152 Ill. 14.

part of the defendant, or that the decedent was not negligent, can not be stated under the facts as matter of law. What will be deemed reasonable care, in any case, by one injured in a collision, must always depend on the peculiar circumstances of the particular case. Whether a person was using due care at the time he was killed must ordinarily be determined by showing the surrounding facts, so far as it can be done, and submitting the question to the jury.[1]

SEC. 11. In an action to recover for the death of a party caused by the negligence of the defendant, it is necessary to prove, first, that the accident was occasioned by the wrongful act, neglect or default of the defendant; and second, that the party injured was in the exercise of due and proper care, and that the injury was not the result of his own negligence and want of proper precaution. If no one saw the fatal accident, consequently there is no one to detail the particulars. The plaintiff in such case should produce the highest possible evidence of which the nature of the case admits. In a case supposed, the evidence is not silent as to the manner of the death, or as to the degree of care used by the decedent. It is of a circumstantial character, but none the less convincing for that reason. The accident occurred in the darkness of the night. There was nothing to give deceased warning that danger was approaching. But a moment before, he was at his post, in the discharge of his proper duties, looking for signals on the left side of the locomotive, where the mail-catcher stood, and there the fatal collision occurred. Up to a moment of the accident, he was shown to have been in the exercise of due care and in his proper place, and it would do violence to the facts in the case to presume that in the instant that intervened he was guilty of negligence, in the absence of proof of any circumstances that tend to establish negligence.

The general rule is that it must affirmatively appear that the injured party was in the exercise of due care and caution. This material fact may be made to appear by circumstantial as well as by direct evidence.

Now, as to the second proposition, viz.: Does the evidence show any wrongful act, neglect or default on the part of the

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[1] Ill. Cent. R. R. Co. v. O'Keefe, 154 Ill. 508.

defendant? The act relied on to charge the company was the dangerous proximity of the mail-catcher to the track, being from seven to ten inches distant from the passing coach. There are facts and circumstances in evidence from which its dangerous character may be inferred. Such evidence may have all the force of direct testimony to produce conviction. Two men had been injured there before, of which the company had notice. This shows that the mail-catcher at this place was dangerous, and the company was guilty of negligence in permitting it to stand so near the track.[1]

The negligence of neither party is required to be established by positive or direct evidence, but may be inferred from circumstances, and so of their care or prudence; and these are questions for the consideration of the jury and not of the court.[2]

SEC. 12. Where the loss is the combined result of an accident and a defect in the road, and the damage would not have been sustained but for the defect, although the primary cause be a pure accident, yet, if there be no fault or negligence of the plaintiff, if the accident be one which common prudence or sagacity could not have foreseen and provided against, the town is liable.[3] The negligence is to be regarded as the proximate cause of the injury, though the injury is the result of combined negligence and accident, where, had there been no negligence, the injury would not have happened.[4]

SEC. 13. "*Res ipsa loquiter.*"—Where the act complained of is such as necessarily involves negligence, no proof of negligence is required beyond the proof of the act itself.

The defendant was constructing a five-story brick building, and upon a fair day, no tempest blowing, it fell upon and destroyed the dwelling of the plaintiff. This having been proven, it devolved upon the defendant to show that the fall was without his fault. Buildings properly constructed do not fall without adequate cause.[5]

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[1] C., B. & Q. R. R. Co. v. Gregory, 58 Ill. 272.

[2] Ill. Cent. R. R. Co. v. Cragin, 71 Ill. 177.

[3] City of Joliet v. Virley, 35 Ill. 58; City of Bloomington v. Bay, 42 Ill. 503; City of Lacon v. Page, 48 Ill. 499.

[4] St. Louis Bridge Co. v. Miller, 39 Ill. App. 366; 138 Ill. 465; Joliet v. Shufeldt, 42 Ill. App. 208, affirmed 144 Ill. 403.

[5] Martin v. Dufalla, 50 Ill. App. 371; Wabash Ry. Co. v. Brown, 152 Ill. 484.

Proof of an injury occurring as the proximate result of an act which, under ordinary circumstances, would not, if done with due care, have injured any one, is enough to make out a presumption of negligence. This is held to be the rule even where no special relation exists, like that of passenger and carrier.[1]

There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.[2] When the conduct of the party charged with negligence is so clearly and palpably negligent that all reasonable minds would so pronounce it, the court may so pronounce it as matter of law.[3]

SEC. 14. There are certain common law duties of the master that are not assignable; that is, that he can not be relieved from by any contract made with another, or, when delegated to another, that other occupies the relation of vice-principal, for whose negligence and want of care the master is responsible. Among such duties, with the assumption by the servant of the ordinary hazards in such case, are that he shall exercise reasonable care to see that tools, appliances and machinery are reasonably safe, and must use reasonable care that the place where the servant works is reasonably safe; to exercise ordinary care in the selection of superintending fellow-servants, and where he has notice of the unfitness of a fellow-servant, to discharge him; to inform the servant of special dangers of his situation, and of the machinery and appliances with and about which he is employed, when he is uninformed; and to use reasonable care to keep in repair machinery, tools and appliances with which and where the servant is employed.[4]

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[1] North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486; Hart v. Washington Park Club, 157 Ill. 9; Cooley on Torts, marg. p. 661–2.

[2] North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486.

[3] Jacob Hoehn v. Chicago, C. & St. L. Ry. Co., 152 Ill. 223.

[4] Monmouth Mining & Mfg. Co. v. Erling, 148 Ill. 521; M. & O. Ry. Co. v. Godfrey, 155 Ill. 78; Norton et al. v. Volzke, 158 Ill. 402; Libby, McNeill & Libby v. Scherman, 146 Ill. 540; Chicago & E. I. R. Co. v. Kneirim, 152 Ill. 458; Pull. Palace Car Co. v. Leach, 143 Ill. 242.

On the other hand, as a general rule, a servant assumes the natural and ordinary risks of the business in which he engages, and is held to impliedly contract that the master shall not be liable for injuries consequent upon the negligence of a fellow-servant, in the employment of whom the master has exercised proper care; but the servant does not assume or contract to waive the liability of the master for his own negligence, whether committed in person or by an agent authorized by the master to perform a duty resting upon him. In such case, the master being under contract duly to perform, the servant may, without sufficient appearing or being shown to put him upon notice to the contrary, rely upon the due and reasonable performance of the duty.[1]

SEC. 15. *Degree of care to be exercised by carriers of passengers.*—It is the duty of common carriers to do all that human care, vigilance and foresight can reasonably do, under the circumstances, and in view of the character of the mode of conveyance adopted, reasonably to guard against accidents and consequential injuries; and if they neglect so to do, they are to be held strictly responsible for all consequences which flow from such neglect; that while the carrier is not an insurer for the absolute safety of the passenger, it does, however, in legal construction, undertake to exercise the highest degree of care to secure the safety of the passenger, and is responsible for the slightest neglect resulting in injury to the passenger, if the passenger is, at the time of the injury, exercising ordinary care for his own safety; and this rule applies alike to the safe and proper construction and equipment of the road and the employment of skillful and prudent operatives, and the faithful performance by them of their respective duties.[2]

SEC. 16. *Accidents.*—For purely accidental occurrences causing damage without fault of the person to whom it is attributable, no action will lie, for though there is damage, the

[1] Pullman Palace Car Company v. Laack, 143 Ill. 242; U. S. Rolling Stock Co. v. Wilder, 116 Ill. 100.

[2] Chi. & Alton R. R. Co. v. Byrum, 153 Ill. 131; Chi., Burl. & Quincy R. R. Co. v. Mehlsack, 131 Ill. 61; Chi. & Alton R. R. Co. v. Pillsbury, 123 Ill. 9; Keokuk N. L. P. Co. v. True, 88 Ill. 608; Chi., Burl. & Quincy R. R. Co. v. George, 19 Ill. 510; Galena & C. N. R. R. Co. v. Fay, 16 Ill. 558.

thing amiss, the *injuria*, is wanting.[1] But where the injury would not have happened but for the negligence alleged, it will not relieve the defendant that it was the result also of mere accident.[2] An accident may be defined as an event happening unexpectedly and without fault. If there is any fault, there is liability.[3]

SEC. 17. *Degree of care required of a child.*—In determining the nature and degree of care the child was bound to exercise, the court said: "It must be remembered that he was a boy less than ten years of age, and that such care only was required of him as might be reasonably expected of a boy of his age and intelligence. It is also to be remembered that his little sister, whom he had in charge, had been accidentally separated from him and had been left on the other side of the train, and that he was naturally and properly solicitous for her safety. It was but natural that he should remain near the train, and that he should be endeavoring to assure himself that his sister was not in a place of danger. It was proper for the jury to interpret his conduct in the light of all these facts, and to determine from all the evidence whether his conduct manifested that degree of care for his own safety which might be properly expected from him under the circumstances."[4]

Negligence is not to be imputed to young children as to persons of mature years and judgment. The age must be considered.[5] In an action brought by parents or personal representatives, the negligence of a parent of a child of tender years, which contributed to an injury resulting, is imputable to the child, and if established will prevent a recovery. This is especially true where the parent is present with the child at the time of the injury, and the negligence consists of some

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[1] W. U. Tel. Co. v. Quinn, 56 Ill. 319; Chicago R. R. Co. v. Jacobs, 63 Ill. 178; Toledo R. R. Co. v. Jones, 76 Ill. 311; Cooley on Torts (2d Ed.), p. 91.

[2] Armour v. Ryan. 61 Ill. App. 314; Lincoln v. McNally, 15 Ill. App. 181; Norton v. Volzke. 158 Ill. 402.

[3] Leame v. Bray, 3 East, 593.

[4] Chi. & Alton R. R. Co. v. Nelson, 153 Ill. 89.

[5] Aurora v. Seidelman, 34 Ill. App. 285; Chi., Milwaukee & St. Paul Ry. Co. v. Doherty, 53 Ill. App. 282; Chicago City Ry. Co. v. Wilcox, 138 Ill. 370.

act or omission on the part of the parent.[1] Where a child of tender years is injured by the negligence of another, the negligence of his parents, or others standing *in loco parentis*, can not be imputed to the child so as to support the defense of contributory negligence to his suit for damages. But where the action is brought by the parent, or for the parent's own benefit, the contributory negligence of such parent may be shown.[2]

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[1] O. & M. Ry. Co. v. Stratton, 78 Ill. 88; Toledo, W. & W. Ry. Co. v. Grable, 88 Ill. 441.

[2] Chicago City Ry. Co. v. Wilcox, 138 Ill. 370.

CHAPTER II.

CONTRIBUTORY NEGLIGENCE.

SECTION 18. It is an essential element to the right of action in all cases that the plaintiff, or party injured, must himself exercise ordinary care, such as a reasonably prudent person will always adopt for the security of his person or property. The cases all go to the length of holding, where a party has been injured for the want of ordinary care, no action will lie unless the injury is wilfully inflicted.[1]

SEC. 19. An action can not be maintained for an injury caused by negligence where the person injured was not in the exercise of at least ordinary care for his own safety, that is, the care usually exercised by reasonably prudent men in like circumstances.[2]

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[1] C., B. & Q. R. R. Co. v. Hazzard, 26 Ill. 373; C., B. & Q. R. R. Co. v. Dewey, 26 Ill. 255; Ill. Cent. R. R. Co. v. Simmons, 38 Ill. 242; Chicago & Alton R. R. Co. v. Gretzner, 46 Ill. 76; C,. B. & Q. R. R. Co. v. Damerell, 81 Ill. 450; C., B. &. Q. R. R. Co. v. Johnson, 103 Ill. 512.

[2] Beardstown v. Smith, 150 Ill. 169;.L. S. & Mich. S. Ry. Co. v. Hessions, 150 Ill. 546; C. & N. W. Ry. Co. v. Reilly, 40 Ill. App. 416; National Syrup Co. v. Carlson, 42 Ill. App. 178; L., N. A. & Chicago Ry. Co. v. Johnson, 44 Ill. App. 56; C., R. I. & Pacific Ry. Co. v. Koehler, 4 Ill. App. 147; Smith v. Cairo, 48 Ill. App. 166; Ill. Cent. Ry. Co. v. Beard, 49 Ill. App. 232; Madigan v. Flaherty, 50 Ill. App. 393; C., C., C. & St. L. Ry. Co. v. Baddeley, 52 Ill. App. 94, affirmed 150—324; C., B. & Q. R. R. Co. v. Greenfield, Adm'x, 53 Ill. App. 424; North Chicago St. Ry. Co. v. Eldridge, 151 Ill. 542; P. D. & E. Ry. Co. v. Ross, 55 Ill. App. 638; B. L. & N. Co. v. Busson, 58 Ill. App. 17; Neer v. Ill. Cent. Ry. Co., 151 Ill. 141; L. S. & M. S. Ry. Co. v. Ouska, 151 Ill. 232; Western Stone Co. v. Whalen, 151 Ill. 472; Goldie v. Werner, 151 Ill. 551; Pitrowski v. The J. W. Reedy E. & M. Co., 54 Ill. App. 252; Werk v. Ill. Steel Co., 154 Ill. 427; Louisville, N. A. & C. Ry. Co. v. Wurl, 62 Ill. App. 381; Rabberman v. S. R. Callaway, Rec., 63 Ill. App. 154; West Chicago St. Ry. Co. v. McNulty, 64 Ill. App. 548; Ill. Cent. Ry. Co. v. Gilbert, Adm'r, 157 Ill. 354; Penn. Co. v. McCaffrey, 68 Ill. App. 635; C. & A. Ry. Co. v. Nelson, 59 Ill. App. 308; C. & W. I. Ry. Co. v. Reichert, 69 Ill. App. 91; Calumet Elec. Ry. Co. v. Nolan, 69 Ill. App. 104; South Chicago City Ry. Co. v. Adamson, 69 Ill. App. 110; Star Elevator Co. v. Carlson, 69 Ill. App. 212.

SEC. 20. Where a party by the exercise of ordinary care can ascertain and avoid a pending danger, or where he knows of the existence of danger, it is not only his duty to avoid such danger, but he is not in the exercise of ordinary care when he fails to do so.[1] There can be no recovery for negligence where the plaintiff by his own negligence proximately contributed to the injury, except where the more proximate cause is the omission of the defendant to use proper care, after becoming aware of the danger to which the former is exposed, to use a proper degree of care to avoid injuring him.[2]

SEC. 21. Whether, upon the evidence, there was what the law regards as contributory negligence on the part of the plaintiff, is in general a question of fact for the jury.[3] What particular facts amounted to an exercise of ordinary care, or what particular facts amounted to a want of ordinary care, it was for the jury and not for the court to determine.[4] Negligence and due care are questions of fact for the jury. Not only are the specific acts which are alleged to be negligent to be proved to the jury, but whether, if proved, they were negligent, is for the jury and not for the court to determine.[5]

SEC. 22. Contributory negligence is a defense, although not the natural and proximate cause of the injury. It is necessary only that it be *contributory*.[6]

Contributory negligence which relieves from liability is neg-

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[1] Clark v. Murton, 63 Ill. App. 49.

[2] Gallingham v. Christen, 55 Ill. App. 17.

[3] City of Chicago v. McLean, 133 Ill. 148; City of Chicago v. Moore, 139 Ill. 201; Pullman Palace Car Co. v. Laack, 143 Ill. 242.

[4] Wabash Ry. Co. v. Elliott, 98 Ill. 481; Myres v. I. & St. L. Ry. Co., 113 Ill. 386; Pennsylvania Co. v. Frana, 112 Ill. 398; L. & M. S. Ry. Co. v. Johnson, 135 Ill. 641; City of Chicago v. Babcock, 143 Ill. 358; C-C., C. & St. L. Ry. Co. v. Baddeley, 150 Ill. 328; Mount Sterling v. Crummy, 73 Ill. App. 572.

[5] Cl., T. & S. F. Ry. Co. v. Booth, 53 Ill. App. 303; St. L., A. & T. H. Ry. Co. v. Holman, 53 Ill. App. 618; Chicago, & N. W. Ry. Co. v. Bouck, 33 Ill. App. 123; Chicago City Railway Co. v. Smith, 54 Ill. App. 415; Lewis v. Wisconsin. C. Ry. Co., 54 Ill. App. 636; N. Y., Chi. & St. L. Ry. Co. v. Luebeck, 54 Ill. App. 551; Werk v. Ill. Steel Co., 54 Ill. App. 302; L. S. & M. S. Ry. Co., Ouska, 151 Ill. 232; North Chicago St. Ry. Co. v. Eldridge, 151 Ill. App. 542; City of Springfield v. Burns, 51 Ill. App; 595; C., B. & Q. R. R. Co. v. Greenfield, 53 Ill. App. 424.

[6] Cleveland, C. C. & St. L. R. R. Co. v. Ducharme, 49 Ill. App. 520.

ligence of the complaining party.[1] Where the party injured, at the time of the injury, is in the exercise of ordinary care, no contributory negligence is legally attributable to him, although he may not have been in the exercise of the highest degree of care.[2]

A verdict for the defendant should be ordered in an action for personal injuries where the evidence of contributory negligence on the part of the plaintiff is so clear and convincing that no verdict in his favor on that issue should be allowed to stand.[3]

SEC. 23. Where one is placed in extreme and sudden peril, it is not necessarily negligence to choose a means of escape which calm and prudent afterthought may not approve.[4] One who obeys the instructions or directions of another, on whom he has a right to rely, can not be charged with contributory negligence at the instance of such other in an action against him for injuries received in attempting to follow out the instructions.[5]

SEC. 24. In determining whether a person was at the time of an injury received so negligent of his own safety as to preclude a recovery, his age should be taken into consideration, it appearing that he was a minor;[6] and where a minor is employed in an extra hazardous line of work, it is the duty of the employer to see that the minor is properly instructed as to the perils of his position, and to guard him against the dangers incident thereto.[7] A person who voluntarily places himself in a place of danger to life and body, but for which position he would not have been injured, and he is injured or killed in con-

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[1] Pullman Palace Car Co. v. Laack, 143 Ill. 242.

[2] North Chicago St. Ry. Co. v. Eldridge, 151 Ill. 542.

[3] Valentine Werk v. Ill. Steel Co., 154 Ill. 427.

[4] C. B. & Q. R. R. Co. v. Peterson, 32 Ill. App. 139; Dunham T. & W. Co. v. Dandelin, 41 Ill. App. 175; Dunham T. & W. Co. v. Dandelin, affirmed, 143 Ill. 409; Peoria, Decatur & E. R. R. Co. v. Rice, 144 Ill. 227; Joliet St. Ry. Co. v. Duggan, 45 Ill. App. 450; Wolff Mfg. Co. v. Wilcox, 46 Ill. App. 381.

[5] Lake Shore & M. S. Ry. Co. v. Brown, 123 Ill. 176.

[6] Ill. Cent. R. R. Co. v. Reardon, 56 Ill. App. 542; Fisher v. Nubian I. E. Co., 60 Ill. App. 568.

[7] C. Brick Co. v. Reinneiger, 140 Ill. 334; Hinckley v. Horazdowsky, 133 Ill. 359.

sequence of such exposure, even through gross negligence of the defendant, if the act of the latter is not wanton or wilful, is guilty of such contributory negligence as to preclude any recovery by him or his personal representatives.[1]

Where a person, perceiving or having the means of perceiving by the exercise of ordinary care that danger is imminent if he pursues a certain line of conduct, nevertheless pursues it for the advantage supposed to be offered thereby, declining another which he sees to be certainly safe, in the belief that he will be able to escape, and is overtaken by the danger, he is chargeable with a want of ordinary care, and must suffer the consequences to which he has contributed.[2]

SEC. 25. When the plaintiff is himself in the wrong, or not in the exercise of legal right, or was at the time enjoying a privilege granted without legal compensation or benefit to the party granting it, and of whose carelessness complaint is made, plaintiff must exercise extraordinary care before he can properly and legitimately complain of the negligence of another.[3] When a person voluntarily and without authority undertakes to travel upon a railroad track, he ought not to recover damages for an injury received unless it appears that the injury was caused by the wanton and wilful misconduct of the employes of the defendant.[4]

SEC. 26. Where a married woman places herself in care of her husband, submitting her personal safety to his keeping, his negligence is to be imputed to her, and will preclude her from recovering for the negligence of a third person, where her own like negligence would preclude a recovery.[5] Where, by the rules of a railroad company, an engineer is required to approach railroad stations with great care, and is not entitled to notice that a preceding train is late, he must be presumed to have incurred the hazard and risk involved as an incident of the employment.[6]

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[1] Abend v. Terre Haute & Indiana Ry. Co., 111 Ill. 202.

[2] Chicago & N. W. Ry. Co. v. Bliss, 6 Brad. 411; C. & A. R. R. Co. v. Becher, 76 Ill. 25; Pittsburgh, C. & St. L. Ry. Co. v. Goss, 13 Ill. App. 619.

[3] C. & A. R. R. Co. v. McKenna, 14 Ill. App. 472.

[4] Ill. Cent. R. R. Co. v. Hethrington, 83 Ill. 510.

[5] Joliet v. Seward, 86 Ill. 402.

[6] Ill. Cent. R. R. Co. v. Neer, 26 Ill. App. 356.

SEC. 27. Where a person, knowing the hazards of his employment as the business is conducted, voluntarily continues therein, without any promise of the master to do any act to render the same less hazardous, the master will not be liable for any injury he may sustain therein, unless it is caused by the wilful act of the master.[1] Where the plaintiff is himself the means, as servant of the defendant, by which the act is done, and he does it with full knowledge of the facts, he can not recover, though the neglect is of a statutory duty. He is, under the statute, equally culpable and equally chargeable with negligence. Thus, a person who engages to run machinery propelled by an unboxed tumbling shaft, knowing that the shaft is unboxed, if injured by reason of the want of boxing, is not entitled to damages from his employer by reason of the employer's statutory negligence.[2]

SEC. 28. *Act of God.*—An unprecedented flood is an act of God. A loss or injury is due to an act of God when it is occasioned exclusively by natural causes, such as could not be prevented by human care, skill or foresight; and where property committed to a common carrier is brought, by the negligence of the carrier, under the operation of natural causes that work its destruction, or is, by the negligence of the carrier, exposed to such cause of loss, the carrier is responsible.[3] It is universally agreed that if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, including the act of God, * * * the defendant is, nevertheless, responsible if his negligence is one of the proximate causes of the damage. The opinion of the Supreme Court of Missouri, in Wolf v. American Express Company, 43 Mo. 421, is cited with approval, as follows: "The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the *sole* cause. And where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active co-operating cause, he is still responsible."[4]

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[1] Ill. Cent. R. R. Co. v. Neer, 26 Ill. App. 356.

[2] Wabash, St. L. & P. Ry. Co. v. Thompson, 10 Ill. App. 271; Wabash, St. L. & P. Ry. Co. v. Thompson, 15 Ill. App. 117.

[3] Wald v. P., C., C. & St. L. Ry. Co., 162 Ill. 545.

[4] Wald v. P., C., C. & St. L. Ry. Co., 162 Ill. 545.

SEC. 29. "COMPARATIVE NEGLIGENCE."—The doctrine of comparative negligence, so called, was first authoritatively announced in the State of Illinois by the Supreme Court, in the case of Galena & Chicago Union Railroad Company v. Frederick Jacobs, 20 Ill. 478, decided at the April term, 1858. This was an action for personal injury, brought by the next friend of Frederick Jacobs (a child of four and one-half years) for injuries sustained by said Jacobs by being run over by a locomotive of the railroad company. The damages were laid at $15,000. There was a trial by jury and a verdict for plaintiff for $2,000. Defendant appealed. The court, in its opinion upon the matter of negligence, among other things, held as follows: "It will be seen from these cases that the question of liability does not depend absolutely upon the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care as manifested by both parties, for all care or negligence is, at best, but relative, the absence of the highest possible degree of care showing some negligence, slight as it may be. The true doctrine, therefore, we think, is that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff; that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover. * * * We say, then, that in this, as in all like cases, the degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's is comparatively slight, and that of the defendant gross, he shall not be deprived of his action."

In the case of Lake Shore & Michigan Southern Railway Company v. Bridget Hessions, administratrix (150 Ill. 546, decided June, 1894), an action to recover damages from said railway company for negligently causing the death of James Hessions (her husband), the court disposes finally of said doctrine of comparative negligence as follows: "Slight negligence is not necessarily incompatible with due and ordinary care, and the effect of the instruction (under discussion) was so to inform the jury; and while the instruction attempts to state the doctrine of comparative negligence laid down in Galena & Chicago Union Railroad Company v. Jacobs, 20 Ill. 478, and

subsequent cases following that decision, it does not vitiate the instruction. We have repeatedly held, in effect, in the later decisions, beginning with Calumet Iron and Steel Company v. Martin, 115 Ill. 358, that the doctrine of comparative negligence, as announced in the earlier cases, was no longer the law of this State, and it is to be no longer regarded a correct rule of law, applicable in cases of this character. (Pullman Pallace Car Company v. Laack, 143 Ill. 242; Mansfield v. Moore, 124 Ill. 133.) The doctrine announced in the latter decisions, as applied to this class of cases, requires as a condition to recovery by the plaintiff that the person injured be found to be in the exercise of ordinary care for his own safety, and that the injury resulted from the negligence of the defendant."

Subsequent to the said case of Railway Company v. Hessions, there was, in the case of Wenona Coal Company v. Holmquist, 152 Ill. 581, decided October 29, 1894, an attempt to revive, for the purposes of that case, the doctrine of comparative negligence. But the court, speaking by Justice Magruder, refers to it as follows: "Plaintiff's first instruction, although unnecessarily announcing the now obsolete doctrine of comparative negligence, is not inconsistent with the five instructions of the defendant, which require the exercise of ordinary care as a condition to the right of recovery; and if it is read in connection with such instructions, it could not have misled the jury. * * * But the proper way to instruct the jury is to tell them that, in order to entitle the plaintiff to a recovery, he must show that at the time of the injury he himself was in the exercise of ordinary care and the defendant was guilty of such negligence as produced the injury."

Thus it appears that the doctrine of "comparative negligence," conspicuous in personal injury cases in the courts of Illinois for nearly forty years, has become obsolete, and received honorable sepulture. "*Requiescat in pace.*"

SEC. 30. A party seeking to recover damages for a loss which has been caused by negligence or misconduct, must have shown to the jury, or it must appear from the evidence, that his own negligence and misconduct, if old enough to exercise reasonable care and caution, or the negligence and misconduct of other persons, from whom care and circumspection under the particular circumstances should be required, has not con-

curred with the negligence of the party charged in producing the injury complained of. The burden of proof is on the plaintiff, or there must appear from the evidence not only negligence on the part of the defendant, but that the care and circumspection demanded in relation to the party injured was properly exercised, so as to indicate that plaintiff's own negligence, if of sufficient age and experience to exercise caution, or that of those who were bound to care for the party dying, if not able to exercise it for himself, did not contribute to produce the injury complained of.[1]

Unguarded premises, supplied with dangerous attractions, are regarded as holding out an implied invitation to children, which will make the owner of the premises liable for injuries to them, even though they be technically trespassers. Whether or not the dangerous premises are so attractive to children as to suggest the probability of injury, and thus render the owner liable, is a question for the jury. A deep pit in a populous city, wherein are water and floating timbers, on which children are in the habit of playing, near a driveway across lots only partially enclosed, will render the city, which owns the premises, liable for the drowning of a child playing there, if found by the jury so attractive as to entice children into danger, and to suggest the probability of the accident. A municipal corporation owning, leasing or controlling vacant lots, is chargeable with the same duties and obligations which devolve upon individuals in respect to their condition.[2]

Sec. 31. If a person injures personal property belonging to another, of which he has obtained possession by trespass, he is liable to pay for such injury. If the defendants, or either of them, directed the witness to go and get the plaintiff's horses, and he did go and get them, in pursuance of such direction, without the assent of the plaintiff, the person giving such instruction is a trespasser. * * * The rule of law is that all who aid, command, advise or countenance the commission of a *tort* by another, or who approve of it after it is done, if

[1] City of Chicago v. Major, Adm'r, 18 Ill. 349.*

[2] City of Pekin v. McMahon, 154 Ill. 141.

*Note.—In this case a child four years old fell into a partially covered water tank, constructed by the city, and was drowned.

done for their benefit, are liable in the same manner as they would be if they had done the same *tort* with their own hands.

The general rule is that the principal is liable for the *tort* of his agent, done in the course of his employment, although the principal did not authorize, or justify, or participate in, or even if he disapproved of them. If the *tort* is committed by the agent in the course of his employment, while pursuing the business of his principal, and is not a wilful departure from such employment and business, the principal is liable, though done without his knowledge.[1]

SEC. 32. The owner of premises, who contracts with reliable, skillful and competent builders to erect a building thereon, and delivers the actual possession for that purpose, and has no control over the contractors or their servants, is not, during the progress of the work, liable in damages to a stranger for an injury received in passing the street, growing out of the negligent acts of the contractors or their servants. If the sufferer has any recourse, it is against the contractor or the corporation in which the property is situated. In this case the law had conferred upon appellants (owners) no power to perform the act which resulted in the injury, nor did they authorize or direct the contractors to perform the act. The contractors had bound themselves to perform it, and it devolved upon them to obtain the requisite permission and authority. The negligence was wholly theirs, unnecessary to the accomplishment of their work, and in no way connected with its proper performance. * * * The true rule in cases of this character is, if the nuisance necessarily occurs in the ordinary mode of doing the work, the occupant or owner is liable; but if it is from the negligence of the contractor or his servants, then he alone should be responsible.[2] Where the relation of master and servant does not exist, nor directly that of employer and employe, but the work is let to a principal contractor to do the labor and furnish the materials for the erection of the building, the owner is not responsible for the negligent conduct of the workmen engaged in the use of machinery, or for any other negligence on their part.[3]

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[1] Moir v. Hopkins, 16 Ill. 313.

[2] Scammon et al. v. City of Chicago, 25 Ill. 361.

[3] Prairie State L. & T. Co. v. Doig, 70 Ill. 52; William E. Hale v. Johnson, 80 Ill. 185.

Where a contractor is in possession of that part of the premises upon which an excavation is to be made, with the exclusive control of the work, it becomes an incident to his undertaking to so do the work as to be reasonably safe to passers-by, observing due care, and that duty includes the making of necessary safeguards. In such case, the owner of the premises is not responsible for his neglect of duty.[1] Where the owner of land contracts with a builder to improve a building upon it, and surrenders the possession of the premises, he is not liable for an accident by which a person is injured through the negligence of the contractor.[2]

SEC. 33. A city is liable in an action for damages for the negligent performance of its duties.[3] In an action against a city to recover damages for injuries received from defective sidewalk, whether the plaintiff used due care, whether the city was negligent, and whether the injury resulted as charged and to the extent claimed, are questions of fact for the jury.[4]

Where a person, in preparing to build a house in a city, extends his cellar across the sidewalk, without procuring a license so to do, he is held liable for all damages arising from such unauthorized excavation in the sidewalk, the party receiving injury thereby having exercised reasonable care for his own safety.[5]

SEC. 34. The legal obligation of a city to repair highways, streets, sidewalks and bridges within its corporate limits, is one voluntarily assumed by its corporate authorities, and relates to such as are opened or constructed, or allowed to be opened or constructed, under its authority, and those which its officers assume control over for that purpose. Where the city assumed to construct a sidewalk or passage-way, it was held that it was grossly derelict in its duty for not having placed sufficient guards for the protection of travelers along a precipice of twelve feet, where a misstep or the slightest accident might precipitate the traveler headlong therefrom. The neglect of duty complained of is that the surface of the walk

[1] Kepperly v. Ramsden, 83 Ill. 354.
[2] McDermott v. McDonald, 55 App. 226.
[3] City of Chicago v. Seben, 165 Ill. 371.
[4] Village of Chatsworth v. Eliza Rowe, 166 Ill. 114.
[5] Pfau v. Reynolds, 53 Ill. 212.

was not kept in repair. After the city had constructed a walk, it was its duty to keep it in such repair as to enable travelers safely to pass over it.[1]

Where the duty is imposed by law upon a municipal corporation to keep its streets in a safe condition for use by the public, an action on the case will lie against it for damages arising from a neglect of such duty. Corporations, like individuals, are required to exercise their rights and powers with such precautions as shall not subject others to injury.[2]

Sec. 35. On principles of common law, it is held that an action for damages resulting from negligence will lie against a municipal corporation, if the duty to make repairs is fully declared, and adequate means are put within the power of the corporation to perform the duty.[3] It is not controverted that the city of Chicago owes the duty to keep its streets, sidewalks, etc., in repair, and that this is seen by reference to the various provisions of the general law in relation to the incorporation of cities, villages, etc., under which the city of Chicago is incorporated. (Rev. Stat. 1874, Chap. 24.) Nor is it denied that the city had adequate means within its power for that purpose. There is no limitation in the statute that the streets shall be kept in repair "for travelers." They are to be kept in repair as streets, and by necessary implication, for all the purposes to which streets may be lawfully devoted. They are open to the use of the entire public, as highways, without regard to what may be the lawful motives and objects of those traversing them; that those using them for recreation, for pleasure, or through mere idle curiosity, so that they do not impinge upon the rights of others to use them, are equally within the protection of the law while using them, and hence, equally entitled to have them in reasonably safe condition with those who are passing along them as travelers, or in pursuit of their daily avocations. In crowded cities their use for pleasure, and sometimes even for the promotion of health, may be regarded as a public necessity. On like principle, why may they not be used by children in play and amusement, so long

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[1] City of Joliet v. Amelia Verley, 35 Ill. 58.

[2] City of Springfield v. Leclaire, 49 Ill. 476.

[3] Browning v. City of Springfield, 17 Ill. 143; Clayburgh v. City of Chicago, 25 Ill. 440; City of Bloomington v. Bay, 42 Ill. 503.

as the rights of others being on, or passing along, the street shall not be prejudiced thereby? Such use is certainly the universal custom, subject to the regulation by ordinance of the common council.[1]

SEC. 36. If a city or town, or its officers, are guilty of no negligence in regard to a sidewalk, and it is in a reasonably safe condition for travel thereon, at the time of the injury to the plaintiff, no recovery can be had against the city or town, even if it be conceded that plaintiff was injured while in the exercise of ordinary care.[2]

SEC. 37. In an action against the owner of a building in a city for a personal injury, caused by a defective sidewalk in front of his premises, by having a hole therein in an unsafe condition, the fact that the city may be liable to the plaintiff for the injury is no defense. In such case, if a recovery was had against the city, the defendant would be liable over to the city.[3] It is negligence on the part of the city to permit the owner or occupant of premises to make an opening in the adjoining sidewalk and permit a trap-door for such opening to be left open, so that pedestrians may fall therein. A pedestrian upon such sidewalk may ordinarily assume that the same is in a reasonably safe condition for travel. He is not absolutely bound to keep his eyes constantly fixed on the sidewalk in search of possible holes or other defects therein, but ordinary and reasonable care and diligence should be exercised to avoid danger.[4] In the case of several *tort feasors* the party injured may, at his election, sue one, or several, or all.[5]

SEC. 38. In an action against a city to recover for a personal injury received from a defective sidewalk, it is not essential that the evidence should show actual notice to the city authorities of the defective condition of the walk. If the

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[1] City of Chicago v. Keefe, 114 Ill. 222; City of Joliet v. Conway, 119 Ill. 489.

[2] Anna Senger v. Town of Harvard, 147 Ill. 304.

[3] McDaneld v. Logi, 143 Ill. 487.

[4] Chicago v. Babcock, 143 Ill. 358.*

[5] City of Sterling v. Merrill, 124 Ill. 522; City of Chicago v. Dalle, 124 Ill. 386; City of Springfield v. Rosenmeyer, 52 App. 304; Village of Sorrento v. Johnson, 52 App. 659; Normal v. Gresham, 49 App. 196.

* NOTE—In this case the injured party sued the two—each separately.

defect in the walk has existed for such a length of time before the accident as that the city authorities might have discovered it by the use of reasonable diligence, then the city will be presumed to have had notice of it.[1]

SEC. 39. Permitting a plank to remain sticking up from a hole left by a broken cover of a man-hole in a street, from the morning of one day to the night of the next, makes it a question for a jury whether the city was negligent. The fact that the driver of a carriage may be careless, does not excuse the city if it has been negligent in permitting obstructions in the streets.

SEC. 40. It is the duty of a city to maintain its streets in a safe condition, and such duty can not be evaded or delegated to others, and if a city by its direct act or authority *causes* or *permits* its streets to get out of repair and neglects to use reasonable diligence to repair them after notice, it is liable for injuries received by any person on account thereof, while such person is exercising ordinary care. Traveling upon a street, by one having knowledge of dangerous defects therein, does not necessarily constitute negligence.[3] The city had ample time to repair the street after it was notified by the street car company that it would not repave (between its tracks) before the accident occurred; but instead of exercising reasonable diligence to put in the pavement, it spent its time in controversy with the street railroad company trying to induce it to make the improvement, and while this controversy was going on, the plaintiff, while in the exercise of ordinary care, in driving over that portion of the street which had been paved and was open to the public, was injured. The duty enjoined upon the city council is to act within a reasonable time after notice of the defect in the street.[4] Here was a part of a public sidewalk, which came to an abrupt termination at a distance

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[1] City of Sterling v. Merrill, 124 Ill. 522; City of Chicago v. Dalle, 124 Ill. 386; City of Springfield v. Rosenmeyer, 72 App. 304; Village of Sorrento v. Johnson, 52 App. 629; Normal v. Gresham, 49 App. 196.

[2] City of Chicago v. McCarthy, 61 App. 300; Village of Jefferson v. Chapman, 127 Ill. 438; City of Bloomington v. Bay, 42 Ill. 503.

[3] City of Peoria v. Amelia Gerber, 68 App. 255; Village of Noble v. Hattie Hanna, 74 App. 564.

[4] City of Peoria v. Gerber, 168 Ill. 318.

of three feet and six inches from the balance of the sidewalk, which lay upon the ground, or from the ground itself where the sidewalk had formerly been laid. This street was under the control of the city. Many persons had for months been in the habit of passing along the sidewalk in question. How were they to descend to the ground from the point where the higher portion of the sidewalk ended? It was necessary either to jump from the sidewalk to the ground, a distance of three feet and a half, or walk down a plank which had been used a considerable time, both for ascending and descending by persons passing there. It was immaterial, whether the plank had been placed there by a person unknown, or not. It is the duty of a city to keep its streets and sidewalks in a reasonably safe condition for persons to travel over; and when a sidewalk on a public street is in a defective condition so that it is unsafe to travel upon, and so remains for a considerable time, notice of the defective condition of the sidewalk will be presumed. (Chicago v. Dalle, 115 Ill. 386.) If there was an abrupt break in the sidewalk, making ascent and descent by persons passing upon it dangerous and unsafe, and a plank had been in use there for the purpose of accomplishing the ascent and descent without jumping, the question would arise, whether this condition of things had existed for a sufficient length of time prior to the injury to enable the city by the use of due diligence, to know of it. If the city had actual notice of the defect, or was bound by lapse of time to take notice of it, its freedom from liability would not necessarily result from the fact that the plaintiff attempted to descend in the manner stated, nor from the further fact that the city had never undertaken to furnish any means of descending from the sidewalk. Indeed, it would rather indicate that there was negligence on the part of the city, if, with actual or constructive knowledge of the condition of the sidewalk, it did not undertake to furnish a safe mode of descending therefrom.[1]

When the authorities so act with reference to the sidewalk as to hold it out to the people as a public thoroughfare, although it may be on private ground, they thereby invite the public to use it as belonging to the municipality; and the vil-

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[1] Hogan v. City of Chicago, 168 Ill. 551; Marsailles v. Howland, 124 Ill. 547.

lage is liable for damages if injury results from its neglect to keep the same in a reasonably safe condition.[1]

Sec. 41. The obligation of a city to keep the sidewalks within its limits in reasonably safe repair is not lessened or changed by the location of the sidewalk or the extent of their use, though such location and use may affect the question of notice. Whether a city is chargeable with notice of defects in a sidewalk for a sufficient length of time before an injury to have repaired it, is a question of fact for the jury, and not one of law to be stated by the court.[2]

Sec. 42. A city is liable for injuries received by a person observing due care for his safety, as the combined result of an accident and the city's negligence, although the accident is the primary cause of the injury, where the injury would not have occurred but for such negligence.[3]

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[1] Village of Mansfield v. Moore, 124 Ill. 133.

[2] City of Decatur v. Besten, 169 Ill. 340.

[3] City of Rock Falls v. Maggie Wells, 169 Ill. 224.*

* Note.—In order to avoid a threatened collision between her own horse attached to a sleigh and a runaway horse hitched to a buggy, Miss Wells undertook to cross over to the opposite side of the street. Along the center of the street was an electric street railway, which had been unused for several months. The ties and track were from six to ten inches above the street. Miss Wells' sleigh, when her horse got between the rails, stuck fast against the south rail, and, being unable to proceed further, she jumped out of the sleigh, and for the purpose of warding off the approaching runaway horse, went to the head of her horse and struck the runaway with her whip as he approached, which caused him to veer off, but one of the wheels of the buggy was running on the track, and, sliding on the rail as the horse turned, it struck Miss Wells and broke her leg and inflicted apparently a permanent injury. The court says: "She was in effect imprisoned and held in a place of imminent danger by the obstruction in the street, so that she was unable to avoid the injury, which she could have avoided had the street been in a reasonably safe condition."

CHAPTER III.

PLEADING, PRACTICE AND PROCEDURE.

SECTION 43. It is an elementary rule of pleading, that every fact essential to a cause of action is issuable. It is equally a fundamental rule of our system of practice that whatever it is indispensable to allege, in order to entitle a party to recover, must be proved upon the trial, unless admitted by the defendant, and it must be proved substantially as alleged. The primary object of pleading is, to apprise the opposite party of the nature of the plaintiff's claim, or the defendant's defense, or, in other words, to apprise the opposite party of what he will be called upon to meet upon the trial, and the policy of the general rules of pleading is the promotion of that object.[1] The rule is that the allegation of the declaration must be broad enough to let in the proof, and that no evidence will sustain a verdict that does not find support in such allegation. But in actions of tort it does not follow that every allegation of matters of substance must be proved. In general it will be sufficient if enough of the fact alleged in the declaration is proven to constitute a cause of action.[2] There is a material distinction between the statement of torts and of contracts, the former being divisible in their nature, and the proof of part of a tort or injury being, in general, sufficient to support the declaration. In torts, the plaintiff may prove a part of his charge, if the averment is divisible and there be enough proved to support his case.[3] The gist of a certain action was the negligence of the city in permitting the sidewalk to be and remain in bad and unsafe repair and condition, and the declaration was, in that respect, sustained by proof that it was in fact in such condition, either by reason of a plank being broken, or because the planks were loose or unfastened to the stringers. *Id.*

SEC. 44. It is a rule universally applicable to negligence

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[1] Quincy Coal Company v. Hood, Adm'r, 77 Ill. 68.

[2] C., B. & Q. Ry. Co. v. Blank. Adm'r, 24 App. 438.

[3] St. Louis & T. H. Ry. Co. v. Eggman, 60 App. 291.

cases, as well as others, that the allegations of the declaration and the proofs must correspond;[1] and in harmony with this rule is a further rule, that if the pleader, though needlessly, describe the tort and the means by which it was effected, with minuteness and particularity, and the proofs substantially vary from such statement, the plaintiff must fail of his action.[2]

SEC. 45. The objection stated to a declaration was that of vagueness, uncertainty and indefiniteness, and failure to state wherein the negligence complained of consisted. The supreme court, by Justice Magruder, said the declaration is not justly subject to the criticism made upon it. A general statement of facts, which admits of almost any proof to sustain it, is objectionable (1 Chitty on Plead., page 232). Facts only are to be stated, and not arguments or inferences (*Id.*, page 213). But in alleging a fact it is necessary to state such circumstances as merely tend to prove the truth of it (*Id.*, 225). In other words, it is not only a rule of pleading that the statement of facts must not be so general as to admit of almost any proof to sustain it, but it is also a familiar rule of pleading, which forbids alleging the evidence. The two rules should be harmonized, and the two extremes which they respectively define should be avoided. The facts must be set forth with certainty, that is to say, there must be a clear and distinct statement of the facts which constitute the cause of action or ground of defense, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court which is to give judgment. The declaration in the case at bar sufficiently fulfills the requirement of these definitions. It alleges that the defendant was possessed of a motor or grip-car, which had passenger or street cars attached to it; that it used this grip-car to propel the passenger cars along the street or avenue by means of a wire rope or endless cable; that the motor or grip and cars were under the care and management of drivers, servants of the defendant, who were driving upon the street near the place where it intersected another street; that the defendant by its

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[1] T. W. & W. Ry. Co. v. Foss, 88 Ill. 551; Gavin v. City of Chicago, 97 Ill. 66.

[2] City of Bloomington v. Goodrich, 88 Ill. 558; City of Chicago v. Dignan, 14 App. 128.

said servants so carelessly and improperly drove and managed the motor and train, that, by the negligence and improper conduct of the defendant by its said servants, the motor and train ran into the carriage of the plaintiff, while the latter was riding with due care along the public highway near the intersection of the two streets. It is well known that the grip-car is propelled, not only by the action of the driver on the car, who has his hand upon the grip, but also by operation of the machinery with which the cable is connected at a distant part of the line. It was the duty of the company to see to it that these appliances were reasonably safe, and that they were under the management of competent servants. The driver of the car should have the mechanical power propelling it under his control, and should so exercise this control as to avoid injury, if possible. The company has not the exclusive right to the use of the public streets, but only to the use of them jointly with the balance of the public, and therefore its servants must take notice of the numbers of travelers liable to be on the streets at street crossings, and must exercise the care demanded by the increased danger at such points.

The declaration specifically charges, as the act of negligence for which the company was responsible, that the servants or drivers placed in control of the propelling power which moved the cars, managed and drove the same carelessly and improperly, and that the collision at the crossing was due to their negligence and "improper conduct." Where a declaration charges that the employes of a railroad company carelessly and negligently run its train of cars over its road, it sufficiently states an act upon which the charge of negligence and carelessness is predicated.

The approved forms in the books of precedents seem to justify some generality in the averment of negligence. (Yates on Pleadings, 396; 1 Harris on Entries, 351; 2 Humphrey on Precedents, 807, 808; 8 Wentworth on Pleadings, 396.)

Where the act upon which the negligence is predicated is of a simple character, an allegation of an absence of care in its performance becomes reasonably intelligible, and hence *it is not necessary* to specify particularly the circumstances. For example (2 Chitty's Pl. 711), it is averred that defendant's boat, by his carelessness, mismanagement and want of care

struck plaintiff's vessel; and by this averment the defendant was sufficiently advised to be able to understand the case made against him. So in a suit against a railroad company for causing the death of the intestate, by carelessly and negligently running over him with a locomotive, the general averment that the defendant, "by its agents and servants, did carelessly and negligently run over," etc., was held to be sufficient, without stating the particular acts constituting such negligence. The court quotes with approval the following from Clark v. C., M. & St. P. Ry. Co., 28 Minn. 69: "Therefore, it has been generally settled by precedent and authority that a general allegation of negligence or carelessness, as applied to the act of a party, is not a mere conclusion of law, but is a statement of an ultimate fact allowed to be pleaded. So a general form of pleading negligence seems to have been permissible in common law pleading.[1]

SEC. 46. There is an increasing tendency, in actions of this kind, to go into much greater detail in the declaration than is necessary in stating the manner or particulars of the alleged negligence. The most approved precedents in cases of actions against carriers for injuries to passengers, allege the negligence in general terms only. In North Chicago Street Ry. Co. v. Cotton, the first count of the declaration—the most general one—was approved by the supreme court in the following words: "The circumstances of the injury do, in our opinion, give presumptive evidence of at least the specific negligence charged in the first count of the declaration. That charge, as we have seen, is very general, and consists of negligently running and operating its road, and the cars propelled thereon." In 2 Thompson on Negligence, 1247, it is said: "It is not necessary to set out the facts constituting the negligence complained of. An allegation specifying the act constituting the injury, and alleging that it was negligently and carelessly done, is sufficient." Tested by the above rules, the counts of the declaration referred to, were sufficient to support the *prima facie* case made by the evidence.

The law of this state, as declared in the case of G. & C. U. R. Co. v. Yarwood, 15 Ill. 468, and reiterated in the same entitled cause in 17 Ill. 509, and ever since adhered to, is that

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[1] Chicago City Ry. Co. v. Jennings, 157 Ill. 274.

a passenger in a railroad car need only show the accident, and that he received injury, to make a *prima facie* case of negligence against the carrier. This done and the burden of explaining is thrown upon the carrier.[1] For the purpose of pleading, the ultimate fact to be proven need only to be stated. The circumstances which tend to prove the ultimate fact can be used for the purposes of evidence, but they have no place in the pleadings.[2]

SEC. 47. It is the well settled rule of this state, that before a plaintiff can recover damages for an injury caused by the defendant's negligence, he must aver and on trial prove, the absence of contributory negligence on his own part; in other words, he must allege and prove that he was himself in the exercise of due care.[3] The declaration contains no allegation, in express terms, that the plaintiff was in the exercise of due care, although that fact is, as the court thinks, alleged argumentatively, and the question is whether the defect is one that was *cured by verdict.* Before verdict the intendments are against the pleader, and upon demurrer to a declaration, nothing will suffice, by way of inference or implication, in his favor. But on motion in arrest of judgment—and the same is true when the effect is sought to be availed of on error—the court will intend that every material fact alleged in the declaration, or fairly and reasonably inferable from what is alleged, was proved at the trial, and if, from the issue, the fact omitted and fairly inferable from the facts stated in the declaration, may fairly be presumed to have been proved, the judgment will not be arrested.[4]

SEC. 48. A count of the declaration set out not only the disregard of a positive duty owing by the defendants to the plaintiff, created by the facts averred, but also an agreement of the defendants to remove the cause of danger, by which agreement the defendants took upon themselves the responsibility of injuries resulting from such dangerous condition to the plaintiff while in the exercise of ordinary care. Whether the liability rests upon the disregard of duty, or upon the con-

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[1] Lavis v. Wis. Cent. Ry. Co., 54 App. 636.

[2] McAlister v. Kuhn, 96 U. S. 87.

[3] Chicago, B. & Q. Ry. Co, v. Hazzard, 26 Ill. 373.

[4] Gerke v. Fancher, 158 Ill. 375; Penna. Co. v. Ellett, 132 Ill. 654.

tract to replace the clutch pulley (wherein the defect consisted) it was not necessary that either such disregard or failure to comply with the agreement should be characterized as careless or negligent. If there was any disregard of duty it was necessarily *negligent* whether so averred in the declaration or not.

Where facts are stated, which in law raise a duty, and the disregard of duty and consequent injury are properly averred, the count will be regarded as sufficient. The pleader must state facts from which the law *will raise a duty* and show an omission of the duty and resulting injury and when that is done an allegation that the act was negligent is unnecessary.[1]

SEC. 49. A party must recover, if at all, on and according to the case he has made for himself in his declaration; and he is not permitted to make one case by his allegations, and recover on a different case made by his proof (Moss v. Johnson, 22 Ill. 633), where the plaintiff averred in his declaration that defendant carelessly ran and conducted and directed its train, it is error to instruct the jury that they might consider the condition of the brakes employed, as the action was for carelessness and not for failure to properly equip the road.[2]

In a suit against a car company for damages on account of personal injury alleged to have been caused by defendant carelessly *running its train against a horse*, it is not competent for the plaintiff to prove that the railroad track was not properly fenced, or that the cars were not provided with wheel-brakes; and it was said: "The plaintiff could not in the declaration aver negligence in one particular, and on the trial prove that defendant was negligent in another regard."[3] In a suit against a railway company to recover for a personal injury alleged to have been produced by defective wheels, defective ties and unskillfulness of the company's servants, it is error to permit the plaintiff to introduce evidence tending to show that the accident was caused by the *high rate of speed* the train was running.[4]

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[1] Taylor v. Felsing, 164 Ill. 331; L. C. & St. L. Consolidated R. Co. v. Hawthorn, 147 Ill. 226; Ayers v. City of Chicago. 111 Ill. 406.

[2] C. B. & Q. R. R. Co. v. Magee, 60 Ill. 529.

[3] Toledo, W. & W. Ry. Co. v. Foss, 88 Ill. 551.

[4] Toledo, W. & W. Ry. Co. v. Boggs, 85 Ill. 80; Ebsery v. Chicago City R. Co., 164 Ill. 518.

SEC. 50. In an action by a servant against the corporation he is serving, to recover for a personal injury caused by negligence, the declaration need not show affirmatively, by express averments, that the injury complained of was caused by the negligent act of agents or servants of the defendant, "*who were not fellow-servants of the plaintiff.*" The allegation that the defendant—that is, the corporation itself—negligently did the acts complained of, excludes *ex vi termini*, the theory that they were performed by parties for whose conduct the defendant was not responsible. The rule governing the responsibility of a master for the acts and directions of a vice-principal is given as follows: that one who has charge and control of other servants, and has authority to govern and direct their movements in the branch of the principal's business in which they are engaged, is, while acting in pursuance of and within the scope of such authority, a vice-principal, so as to make his acts and directions the acts and directions of the principal.[1]

The allegations of the declaration are in the form which has been universally recognized by the rules of common law pleading, as sufficient to charge a corporation with negligence. They are, that the defendant, that is, the corporation itself, negligently did the acts complained of, allegations which exclude, *ex vi termini*, the theory that they were performed by parties for whose conduct the defendant was not responsible.

SEC. 51. In an action for damages for a personal injury, caused by negligence, the jury, in assessing the plaintiff's damages, may take into consideration any permanent injury the plaintiff may have sustained, without any allegation in the declaration of a permanent injury. It is enough that the declaration showed the injury received, without describing it in all its seriousness, and the recovery can be to the whole extent of the injury.[2]

SEC. 52. In actions for personal injuries occasioned by the negligence of the defendant, on the question of damages, it is not only proper but important, for the plaintiff to show, by the evidence, his previous physical condition and ability to labor, or follow his usual avocation, as well as his condition

[1] Libby, McNeill & Libby v. Scherman, 116 Ill. 540.

[2] City of Chicago v. Sheehan, 113 Ill. 658.

since the injury, to enable the jury to properly find the pecuniary damage. In an action of a married woman against a city, for personal injuries sustained by her, through a defective sidewalk, the damages must be confined to such as she herself sustained. The fact that she had a family, or had the care of or maintained the same, will form no proper element in the assessment of her damages.[1]

SEC. 53. When an action for negligence resulting in injury to a child is brought by the parent or the personal representatives, negligence of the parent, contributing to the injury, is to be imputed to the child.[2] And this is especially true where the parent was with the child at the time of the injury, and the negligence consists in some act or omission on the part of the parent.[3] But it is otherwise where the infant sues on his own account.[4]

SEC. 54. The plaintiff may aver in his declaration as many grounds of recovery as he sees proper, but it is not necessary to prove all that is alleged. It is sufficient to prove enough of the negligence charged to make out a case.[5] A declaration contained two counts. In the first it was averred, in substance, that it was the duty of defendant to keep a soft wood floor in front of the shaper, for the plaintiff to stand on without slipping, and that it was also defendant's duty to place guards over the knives of said machine, so that if plaintiff should slip or fall against said machine he would be prevented from being cut by said knives, yet defendant negligently placed a hard wood floor in front of said shaper, which became slippery and unsafe, and defendant in no way protected said knives, but negligently permitted the same to be without guards, and the plaintiff, by reason of the slippery floor, slipped and fell against said machine, and by reason of the negligence of the defendant in not guarding said knives, plaintiff's hand came in contact with said knives, and he was injured. The second count is substantially like the first, with

[1] City of Joliet v. Conway, 119 Ill. 489.

[2] Chicago & Alton Ry. Co. v. Logue, 158 Ill. 621; Canley v. East St. L. Elec. St. Ry. Co., 58 Ill. App. 151.

[3] Daube v. Tennison, 154 Ill. 210.

[4] N. Y. C. & St. L. R. R. Co. v. Blumenthal, 160 Ill. 40.

[5] St. Louis & T. H. R. R. Co. v. Eggman, 60 Ill. App. 291.

the additional allegations that a short time before the injury, plaintiff notified defendant of the said dangerous condition of said floor and machine, and the defendant thereupon promised the plaintiff, and agreed to remedy said defects, and plaintiff was induced by the defendant to believe that there would be a change in said condition of said floor and said machine, and that said machine would be speedily put in a proper and safe condition, and plaintiff was induced to go on working with the expectation that said floor and machine would be right away put in proper and safe condition; that said machine and floor were not placed in safe condition, and plaintiff was injured by reason of defendant's allowing the floor to become slippery, without protecting the same, as is usual and necessary in such cases, and by reason of the negligence of said defendant in not placing proper guards and protection over said knives as aforesaid. On the trial plaintiff introduced evidence tending to prove the allegations of the declaration, except the averment that the defendant promised or agreed to place guards over the knives of the shaper. As to this averment no proof whatever was introduced, and on account of a failure to introduce any proof upon this question the defendant claimed that no recovery could be had. The court said it was sufficient to prove enough of the negligence charged to make out a case. There was evidence in support of the dangerous and slippery condition of the floor where the plaintiff was required to work; that plaintiff made complaint in regard to its dangerous condition; that defendant promised to remedy the defect, and that the injury occurred in consequence of defendant slipping on the floor while in the discharge of his duty—and that was all that could be required. The plaintiff had the right to aver in his declaration as many grounds of recovery as he saw proper; but it was not necessary to prove all that was alleged. Webber Wagon Co. v. Kehl, 139 Ill. 644.

SEC. 55. A servant, in order to recover for an injury for defects in the appliances in the business, is required to establish three propositions: (1) that the appliances were defective; (2) that the master had notice thereof, or knowledge, or ought to have had; and (3) that the servant did not know of the defect, and had not equal means of knowing with the master. The declaration upon which this ruling was made averred, in

substance, that plaintiff was in the employ of defendants as a carpenter in the erection of a certain building, and in performance of his duties as such carpenter, and by direction of the foreman and servants of defendants, was required to go upon a certain scaffold made of wood, and it became the duty of defendants to furnish a strong and substantial scaffold which should not break or fall, but defendants negligently permitted the scaffold to remain in a bad and unsafe condition, in that the same was constructed so poorly and defectively that it became dangerous; that it became necessary to carry a large piece of timber to a place designated by the foreman, and that while plaintiff was assisting in carrying said timber over and upon said scaffold, with all due care, and without any knowledge as to the insufficiency of said scaffolding, the scaffolding gave way, whereby plaintiff fell and was injured.[1]

SEC. 56. *Matter of description must be proved.*—While it may be true that a plaintiff, in an action against a railroad company, need not state the *termini* of his contract for carriage, and it may be sufficient for him to state generally that he became a passenger on defendant's road for being carried, yet if he goes into detail and states the points from and to which he took passage, he must prove the express or implied contract as alleged. The plaintiff had the right when the question (of inaccurate description) was raised, to amend his declaration and thus obviate the difficulty, but he saw proper to take another course, and he occupies no position now to complain should the rules of law that control in such cases be strictly enforced against him. When the plaintiff's right consists in an obligation on the defendant to observe some particular duty the declaration must state the nature of such duty, which may be founded either upon a contract between the parties, or on the obligation of law arising out of the defendant's particular character or situation, and the plaintiff must prove such duty as laid, and a variance will, as in actions on contract, be fatal.[2]

SEC. 57. Where the action is for a personal injury, evidence is admissible to show special damages only where special damages are alleged.[3] But damages which are a necessary result

[1] Goldie v. Werner, 151 Ill. 551.

[2] Wabash Western Ry. Co. v. Friedman, 146 Ill. 583.

[3] Wabash Western Ry. Co. v. Friedman, 146 Ill. 583.

of the injury, termed general damages, may be proved without special averments. The plaintiff is always entitled to recover all damages which are the natural and proximate consequence of the act complained of; and these damages, which necessarily result from the injury, are termed general, and may be shown under the general allegations of the declaration.[1] Those damages which are not the necessary result of the injury are termed special, and are required to be stated specially in the declaration.[2]

SEC. 58. *Variance—Amendment.*—A declaration alleged that plaintiff was standing at the point where Root street crossed the defendant's main track, and that defendant's servants were driving one of its locomotive engines across said street at said point or place where she was standing and there struck and injured her. The evidence is, that at the time plaintiff was struck she was standing at a point twenty-five or thirty feet south of the south line of Root street. This would seem to be a *material variance*, and it would doubtless have been available if it had been properly pointed out and insisted upon by the defendant *at the trial.* That, however, was not done. At the close of the evidence the defendant's counsel asked the court to instruct the jury to find a verdict for the defendant on the ground that there was no negligence on the part of the defendant; that the accident occurred through the negligence of the plaintiff, and *that the proof varies from the declaration.* This was the only attempt to point out a *variance*, and it was clearly insufficient. It was incumbent upon the defendant to indicate and point out in what the variance consisted, so as to enable the court to pass upon the question intelligently, and also to enable the plaintiff to so amend her pleading as to make it conform to the evidence, and thus avoid defeat upon a point in no way invading the merits of her claim. Under our statute the amendment might have been instantly made, subject only to such terms as the court might have seen fit to impose,

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[1] Chicago v. McLean, 133 Ill. 148.

[2] Quincy Coal Co. v. Hood, Adm'r, 77 Ill. 68; Adams v. Gardiner, 78 Ill. 568; R. R. Co. v. Hale, 83 Ill. 360; Chicago v. O'Brennan, 65 Id. 160; Miles v. Weston, 60 Id. 361; Horne v. Sullivan, 83 Id. 30; Barrelett v. Belgard, 71 Id. 280; Sherman v. Dutch, 16 Id. 283.

and the cause might then have proceeded as though no variance had ever existed.[1]

SEC. 59. *Evidence—Preponderance.*—In an action to recover for a personal injury, resulting from alleged negligence of the defendant, the burden of proof is upon the plaintiff to show that he was exercising ordinary care and diligence at the time of the accident, and he is required to prove that fact by a preponderance of the evidence. To "preponderate" is to "outweigh." There may be evidence which, standing by itself, establishes a certain state of facts, but the evidence does not preponderate in favor of any given state of facts unless it is sufficient to outweigh all the testimony introduced in opposition thereto. Timmons v. Kidwell, 138 Ill. 9.

SEC. 60. Actionable negligence, or negligence which constitutes a good cause of action, grows out of a want of ordinary care and skill in respect to a person to whom the defendant is under an obligation or duty to use ordinary care and skill. The owner of land and of buildings assumes no duty toward one who is on his premises by permission only, and as a mere licensee, except that he will refrain from wilful or affirmative acts which are injurious. As was said in Sweeny v. Railroad Co., 10 Allen 368, "a licensee, who enters on premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, can not recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils." Since appellee (defendant) owed no duty to appellant, (plaintiff) and was under no obligation to him either to keep his buildings and premises in a safe condition, or construct and maintain his hoist or elevator in such manner as that it could be safely used, it follows that it was not error for the trial court to instruct and direct the jury to return a verdict in favor of appellee.[2]

SEC. 61. *Damages—Measure of.*—In case of collision (between two vehicles on a street) the innocent party is entitled to recover from the wrongdoer what is reasonably necessary for him to pay in order to repair the damage done,

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[1] Lake Shore & M. S. Ry. Co. v. Annie Ward, 135 Ill. 511; St. Clair Co. B. S. v. Fietsam, 97 Ill. 474.

[2] Gibson v. Leonard, 143 Ill. 182.

and also a reasonable sum for the loss of the use of his carriage while he is necessarily deprived of its use.[1] Where the action is for physical injuries, the suffering, mental as well as physical, may be considered in estimating the damages, and the plaintiff may recover all damages which are the natural and proximate consequence of the acts complained of.[2]

SEC. 62. *Damages—Measure of.*—A verdict for $6,000 is to be regarded as excessive for injuries caused by mere negligence, where the person injured is a laborer, and the injuries consist of a broken nose, a broken cheek bone, a serious injury to one eye and a rupture—the injuries not preventing a return to lighter labor in a short time.[3] A verdict for $1,500 is not unreasonable for an injury by negligence to a sewing woman who supports herself and her two children, where it confined her to her bed for three weeks, prevented her walking across the room for five, and still prevents her from working more than an hour or two a day, and leaves her subject to fainting in case of unusual exertion.[4]

Neither is a verdict for $5,000 for an injury caused by negligence, so excessive as to be set aside for that reason, where the evidence shows the plaintiff, a healthy young woman of nineteen, was confined to her bed in hospital for seven weeks, that she suffered great pain, that there is a permanent stiffness of the hip joint, that the leg can not be straightened down, but is drawn so as to be apparently shorter than formerly, which will always cause a limp in walking; that from the injury till the trial she has been unable to walk without a crutch; that prior to the accident she always enjoyed good health and was dependent upon her own labor for support, and was able to earn $1.50 per day at her trade (dressmaking); that since her injury she is very feeble and unable to do work of any kind, and will never be able to resume her former occupation.[5]

A verdict for $15,000 was sustained where the injury was to

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[1] Travis v. Pierson, 43 App. 579.
[2] Chicago v. McLean, 133 Ill. 148.
[3] Chicago P. B. Co. v. Sobkowiak, 34 Ill. App. 312.
[4] Chicago v. Sanders, 50 Ill. App. 136.
[5] Evanston v. Fitzgerald, 37 Ill. App. 86.

a child six years old, and consisted in the loss of a leg, leaving a stump so short that no use can be made of an artificial leg.[1]

SEC. 63. Compensatory damages in an action for personal injuries are not limited to those injuries which impair or destroy the ability of the person injured to earn money for his own support or for the support of his family, but in estimating such damages, pain and suffering, shattering of the nervous system, permanent physical injuries reducing one to the condition of a physical wreck and hopeless invalid, incapacitated to enjoy the pleasures of life, whether the injured was a wage earner or not, are proper elements to be considered by the jury in assessing damages, and the court in entering judgment on the verdict. The plaintiff was an unmarried lady thirty-five years of age, without any trade or occupation, living with her parents in Virginia. Before she received the injuries complained of she enjoyed excellent health, was strong and active, and her physical condition unimpaired by any ailment or infirmity. As a result of said injuries she suffered great pain for a long period, and yet, at times, suffers pain; she became, and continues to be, unable to endure fatigue, or take active exercise as she had been accustomed to, and her nervous system is permanently shattered. A verdict of $7,000 is not excessive.[2] Complainant's arm was crushed and had to be amputated. Jury found defendant guilty and assessed damages $6,000, and court sustained verdict.[3]

Plaintiff was a boy eighteen years old, and in the service of defendant earned $1.25 per day. He was severely injured; three of his fingers were amputated, the fourth rendered useless; the jury awarded $8,500 damages; plaintiff remitted $1,000, and took judgment for $7,500. Court says the damages are liberal, but will not disturb the verdict on the ground of excess.[4] Godfrey is a physical wreck since his injury; before that time he was a sound, healthy man. It is very difficult to measure the damages for such an injury. There is nothing in this record to show jury was influenced by prejudice or passion unless it is the amount of the verdict. While that amount is

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[1] Chicago City Ry. Co. v. Wilcox, 138 Ill. 370.

[2] Ill. Cent. R. R. Co. v. Robinson, 58 App. 181.

[3] Penn. Co. v. Backes, 35 Ill. App. 375.

[4] L. S. & M. S. Ry. Co. v. Hundt, 41 Ill. App. 220.

large, yet, in view of the helpless condition of the plaintiff, and the pain and suffering he endures, court says, "we do not feel that we should substitute our judgment for that of the jury and the court below."[1]

The appellee (plaintiff in court below) was a brakeman in the employ of appellant (defendant). Damages $5,000, were claimed to be excessive. It is said this is a question for the jury to determine; unless the amount is so large as to indicate the jury in fixing that amount were influenced by prejudice or passion, the verdict given ought not to be put aside on the ground of excessive damages. Jury saw injured arm and heard the testimony.[2]

In Chicago Anderson P. B. Co. v. Renbaich, 51 App. 554, the appellee (plaintiff) was injured by having his hand caught in a defective machine of his employer; the jury assessed the damages at $12,500, of which sum $2,500 was remitted on suggestion of the court. In the opinion of the court it is said, the verdict was for a large amount, and the judgment is for a large sum, but not so large as to shock our sense of remedial justice. The judgment is the act of the court before whom the cause was tried, and there is more than the usual evidence of a careful consideration of the sum for which judgment should be rendered, and we do not feel warranted in interfering with the conclusions of the trial court.[3]

In Ill. C. Ry. Co. v. Wheeler, 50 App. 205, the plaintiff sustained injuries in alighting from a train. He was seventy-two years of age; was somewhat crippled and infirm, in consequence of a previous injury and was obliged to use crutches in walking about. Up to the time of the injury he was possessed of his normal powers of speech and was a good penman; by reason of the injury he was, to a considerable extent, deprived of these faculties. His power of moving about was materially impaired; he was in continual pain, and his capacity for sleep was seriously interfered with. It was held that $6,000 was not so excessive as to warrant a reversal on that ground.[4]

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[1] Mobile & Ohio Ry. Co. v. Godfrey, 52 App. 564.

[2] M. & O. R. R. Co. v. Harmes, 52 App. 650.

[3] 51 Ill. App. 543.

[4] Ill. Cent. Ry. Co. v. Wheeler, 50 App. 205.

In Goldie v. Werner, 50 App. 297, the plaintiff, a carpenter, while working for defendant, was seriously injured by the giving way of a scaffold, over which he was carrying a heavy piece of lumber. The verdict was for $20,000; a remittitur of $12,500 was entered to prevent the granting of a new trial; it was urged that the giving of so large a verdict and requiring so great a remittitur are evidence that the verdict was the result of passion or prejudice, and so regarded by the trial court. The plaintiff was injured permanently, crippled and disabled for life. What sum is proper compensation for his injury is a matter concerning which men and jurors will differ largely. The court said: "We do not think that the very large sum shows that the jury were actuated by prejudice or passion. In a certain sense, there is no adequate compensation for such injuries as the plaintiff received. The law has regard to human infirmities as well as man's necessities; it forbids the judge to sanction a verdict he deems unjust, but it does not require that he refuse to add his judgment, soberness and experience to the decision of the jury, and in so doing to award a result more equitable than either setting aside or wholly affirming a verdict." The judgment is affirmed.[1]

In J. A. & N. Ry. Co. v. Velie, 36 Ill. App. 450, the plaintiff was conductor and acted as brakeman for defendant, and was run over by an engine of defendant. His injury was severe; the flesh of his leg was shoved up and pushed back, and the foot was crushed, and he was crushed in the chest, and the ribs were torn loose from the breast bone; he was incapacitated from ever doing any labor, and has suffered great pain; his nervous system is so shattered that he is a perfect wreck. Verdict for $14,000 damages is held not to be excessive.[2]

In C., M. & St. P. Ry. Co. v. Yando, 26 Ill. App. 601, a verdict for $5,000 damages was sustained.

In C., M. & St. P. Ry. Co. v. Harper, 26 Ill. App. 621, a verdict for $5,000 was sustained.

In C., B. & Q. Ry. Co. v. Sullivan, 21 Ill. App. 580, judgment for $5,000 sustained.

In C. & E. I. R. R. Co. v. Holland, 18 Ill. App. 418, the

[1] Goldie v. Werner, 50 Ill. App. 297. Affirmed, 151 Ill. 551.

[2] Joliet, Aurora & N. Ry. Co. v. Velie, 36 App. 450.

plaintiff was injured by a collision of the train in which he was a passenger and the train of another railroad company. He was thrown against the back of a seat and seriously and permanently injured; $25,000 were assessed for the injuries. The plaintiff was, at the time of the injury, a healthy, robust man of thirty years. His injuries are incurable; nervous prostration and debility; this condition has manifested itself in continual suffering, in great nervous excitability, loss of appetite, and an almost complete and permanent loss of the use of his feet and lower limbs. The damages are held not to be excessive.

For killing a boy five years old $3,000 is not excessive damages. W. C. St. Ry. Co. v. Wanita, 68 App. 482.

SEC. 64. *Exemplary damages.*—In a proper case, a jury may give exemplary or punitive damages, as they are called. If a trespass is committed, wantonly or maliciously, upon real property, it has been held vindictive damages may be given (Pickens v. Towle, 43 N. H. 220), but whether they should give them or not is a question which should be submitted with proper instructions to the jury. The mere pecuniary injury received is not, in such cases, the full measure of damages. The intention with which the act was done is to be regarded.

In Merest v. Harvey, 1 E. C. Law, 230, which was for trespass for breaking and entering the plaintiff's close, treading down his grass and hunting for game, and it appears the defendant refused to leave when notified, and used insulting language to the plaintiff, it was held a verdict for £500 was not excessive. Gibbs, Chief Justice, said: "I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages." So in trespass *de bonis asportatis*, it was held, in Treat v. Barlon, 7 Conn. 279, that the jury were not bound by the mere pecuniary loss sustained by the plaintiff, but may award damages for the malice and insult attending a trespass. Generally where gross fraud, malice or oppression appears, the jury are not bound to adhere to a strict line of compensation, but may, in the shape of damages, impose a punishment on the defendant, and make an example to the community. These are the elements of vindictive actions, so called, in which juries are allowed to give such damages as shall not only compensate

the plaintiff, but operate as a punishment to the defendant, and tend to deter him and others from the commission of similar enormities. In theory, damages are given as compensation for the injury, and the allowance of punitive damages is a departure from the rule which once obtained both in England and in this country, yet it has become, by repeated decisions, a settled principle in the law, and there is no corrective but the legislature. While the courts of some states have expressed a different view, the Supreme Court of Illinois adheres to the doctrine that to authorize the giving of exemplary or vindictive damages, either malice, violence, oppression or wanton recklessness must mingle in the controversy. The act complained of must partake of a criminal or wanton nature, else the amount sought to be recovered must be confined to compensation.[1]

SEC. 65. Where a party seeks to recover damages for a loss which has been caused by negligence or misconduct, he must be able to show that his own negligence or misconduct has not concurred with that of the other party in producing the injury; and the burden of proof is upon the plaintiff to show not only negligence on the part of the defendant, but also that the plaintiff exercised proper care and circumspection; or, in other words, that he was not guilty of negligence.

The plaintiff is only bound to show that the injury was produced by the negligence of the defendant, and that he exercised ordinary care and prudence in endeavoring to avoid it; or that, by the exercise of ordinary care, he could not have avoided it.[2]

SEC. 66. In an action for damages occasioned by negligence, the evidence must conform to the allegations as to the cause of the injury. In such actions it is error to instruct the jury that the plaintiff may recover the expenses of a physician in being cured of the injury, unless there is some evidence that the plaintiff has paid, or become liable to pay, some amounts as such expense.[3]

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[1] City of Chicago v. Martin, 49 Ill. 241; Toledo, P. & W. R. Co. v. Patterson, 63 Ill. 304; White v. Navrupt, 57 App. 114.

[2] Aurora Branch R. R. Co., appellants, v. Jacob Grimes, appellee, 13 Ill. 585; I. C. R. R. Co. v. Godfrey, 71 Ill. 500.

[3] City of Joliet v. Henry, 11 Ill. App. 154; City of Chicago v. Hon y, 10 Ill. App. 535.

SEC. 67. It is not enough to create a liability for stock killed by a railroad train, to prove the bell was not rung or whistle sounded. It must be made to appear, by facts and circumstances proved, that the accident was caused by reason of such neglect. The burden of proving negligence rests on the party alleging it, and when the plaintiff charges negligence on the part of the defendant, and the evidence is equally balanced, the law is for the defendant, and no recovery can be had.[1]

SEC. 68. In suits to recover damages caused by negligence, the burden of proof rests on the plaintiff, not only to show the negligence of the defendant causing the injury, but also to show he was exercising due care on his part. It is error to instruct the jury that the burden of proof to show negligence of the plaintiff rests on the defendant.[2]

SEC. 69. In an action against a railway company to recover damages for the killing of the plaintiff's intestate through negligence and carelessness in the management and running of a train of cars, the declaration should show in what such negligence and carelessness consisted, and not charge the same in general terms, without disclosing any specific acts or omissions.

An objection which goes to the sufficiency of the declaration should be taken before trial by demurrer. It is too late to urge such an objection for the first time on error.[3]

SEC. 70. In an action for injuries sustained by reason of a collision with the defendant's runaway horse, the burden of proof is upon the plaintiff to show that the runaway of the defendant's horse was the result of the negligence of the defendant. In order to charge the defendant it was necessary to show that he had been guilty of negligence or want of care, which contributed to the injury. Negligence on the part of the defendant was the gist of the plaintiff's cause of action, and the affirmative rested on the plaintiff to establish it by proof.[4]

SEC. 71. In a suit against a railroad company to recover

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[1] Q., A. & St. L. R. R. Co. v. Wellhoener, 72 Ill. 60; I. & St. L. R. R. Co. v. Evans, 88 Ill. 63; C. & A. R. R. Co. v. Mock, 88 Ill. 87.

[2] I. & St. L. Ry. Co. v. Evans, 88 Ill. 63.

[3] C., B. & Q. R. R. Co. v. Clara M. Harwood, 90 Ill. 425.

[4] Hunting et al. v. Baldwin, 6 Ill. App. 547.

damages for causing the death of the plaintiff's intestate, on the ground of negligence, it appeared that the deceased at the time of his injury was engaged in his duty of inspecting cars then standing in the yard occupied for that purpose. He was under a standing car, examining the same, which, by being suddenly struck by the other cars in motion, caused the injury resulting in his death. It further appeared that the defendant, in taking some of its cars to the yard, there to be left, detached them from the engine propelling them before entering the yard, and suffered the cars, without any brakeman to control their momentum, to enter the yard and strike the cars then standing on the track, thereby causing the injury. It was also shown that the deceased, who was engaged as a car inspector about the yard, placed no signal on the track to notify the switchman or any one else that he was engaged in inspecting the cars, and that no warning was given the deceased, by bell, whistle or otherwise, of the approaching cars. On the trial the defendant asked a witness what the custom was at the time of the accident in letting cars into the yard on tracks and permitting them to run against standing cars, which the court refused to allow. It is held by the supreme court that the question was proper, as, if such was the custom, the answer would have aided the jury in determining the degree of care the deceased observed, and whether he was guilty of such negligence on his part as to prevent a recovery.

In an action based upon alleged negligence of the defendant it is not allowable to prove by a witness that the act complained of was not negligence. It is for the jury to say, from all the facts and circumstances, whether an act constitutes negligence.[1]

SEC. 72. In an action by a young lady against a city to recover damages for an injury, based upon the negligence of the defendant in not keeping the sidewalk in repair, involving the question of the plaintiff's freedom from negligence, instructions which do not refer as a standard of action to what ordinary young ladies would do, but to the conduct of an ordinarily prudent person, and of a woman of common or ordinary prudence, are not faulty in respect to the standard referred to.

[1] Penn. Co. v. Stoelke, Adm'r, 104 Ill. 201.

In a suit by a young lady against the city to recover damages for an injury caused by a fall from a defective sidewalk, the defendant proved that she did not take proper care of herself after the injury by remaining quiet, as showing negligence on her part increasing the injury. On cross-examination of the physicians called by the defense, the plaintiff proved, over defendant's objection, that an unmarried woman, not acquainted with the anatomy of the injured part, could not be expected to act as promptly and intelligently as one understanding it, or as a medical man would, and that it was a common thing for women to suffer from a displacement of the organ spoken of without themselves knowing the trouble. It was held by the court that there was no error in allowing the evidence.[1]

SEC. 73. *Evidence—In an action to recover for the death of a party caused by the negligence of the defendant.*—Before a recovery can be had in such a case, it is necessary to prove, first, that the accident was occasioned by the wrongful act, neglect or default of the defendant; and, second, that the party injured was in the exercise of due and proper care, and that the injury was not the result of his own negligence or want of proper precaution.

But while it is the general rule that it must affirmatively appear in such cases that the party injured was in the exercise of due care and caution, yet this material fact may be made to appear by circumstantial as well as by direct evidence.

In an action against a railroad company to recover for the death of the plaintiff's intestate, alleged to have been occasioned by the negligence of the company, it appeared that the deceased was a fireman on the locomotive of the company, and while passing a station in the night time he was struck and killed. The circumstances show that he was acting in the line of his duty, looking out for signals, and while so doing, and in the exercise of due care and caution, he was struck by a mail-catcher which had been placed near the track by the company. Two other accidents had previously occurred from the same cause, of which the company had notice. It was held by the court that the company was guilty of gross negligence

[1] City of Bloomington v. Amanda Perdue, 99 Ill. 329.

in having omitted to place the mail-catcher a safe distance from the track. It was further held, in an action by the administrator of the deceased, that those servants of the company whose duty it was to see that the mail-catcher was placed a safe and proper distance from the track could not be regarded as fellow-servants of the deceased in the same line of employment, so as to prevent a recovery in an action against the common master.

In such case, where it was shown the accident occurred in the night time, and while the fireman who was killed was acting in the line of his duty, watching for signals in approaching a station, it was proper to instruct the jury, on behalf of the plaintiff, that they might consider the fact that the alleged casualty happened in the darkness of the night; and that it was customary and usual for the firemen, in the discharge of their duty, to look out of the side window or gangway of the locomotive, for the purpose of discovering signals. Such facts are proper to be considered, as tending to show the exercise of due care and caution on the part of the deceased at the time of the accident.[1]

SEC. 74. The law creating a right of action against a railroad company for causing the death of a person by wrongful act or negligence is purely local to the state in which the right is created, although it may be otherwise in cases of actions under the statute against individuals. Corporations being local to the state which creates them, the right of action against them must be local in the same state, and can not be enforced beyond its territorial jurisdiction.

In an action by an administrator against a railroad company to recover damages for causing the death of the intestate, evidence tending to show that the deceased was drunk at the time of the accident causing his death is proper, and it is error to refuse the same, as tending to show negligence on his part.

The negligence of neither party is required to be established by positive or direct evidence, but may be inferred from circumstances, and so of their care and prudence, and these are questions of fact for the jury, and not for the court.

In such a case it is proper for the jury to consider all the cir-

[1] C., B. & Q. R. R. Co. v. Gregory, 58 Ill. 272.

cumstances attending the accident, and determine whether, under such circumstances, the train was running at an improper speed in reference to the safety of the deceased, but not in reference to other travelers, unless it was so reckless as to imply a disregard for the safety of others.

In a suit against a railroad company to recover damages for a personal injury, it is not sufficient for the plaintiff to prove the injury, but he must also prove the negligence alleged. If it is alleged that the whistle was not sounded, the burden of proving that fact rests upon the plaintiff, and the defendant is not bound to prove that the whistle was sounded.[1]

SEC. 75. In an action against a city to recover damages for a personal injury received in consequence of negligence and mere omission of duty, the plaintiff was allowed to testify against objection that he had a wife, seven young daughters and two sons in Ireland at the time of the accident, and that he was their supporter as a lecturer. It was held by the supreme court that the court erred in admitting the testimony, as exemplary damages were not recoverable in such a case, and it was not relevant to any issue.

In an action on the case against a city to recover damages for personal injury received through the mere negligence of the city, the only special damage alleged in the declaration was the amount he paid out in endeavoring to be cured. The court permitted the plaintiff to give in evidence the fact of a particular engagement to lecture in Virginia and the probable gains thereof. It is held by the supreme court that such testimony was inadmissible under the pleadings; that to justify its admission, these special damages and the facts upon which they were based should have been set out in the declaration.[2]

SEC. 76. In an action against a village corporation for damages for injuries arising from the negligence of the corporation, evidence that the plaintiff is a poor man and of the destitution of his family is irrelevant and not to be admitted.[3]

SEC. 77. In an action against a village to recover damages for injuries from the falling of a sidewalk, it was error to per-

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[1] I. C. R. R. Co. v. Cragin, Adm'r, 71 Ill. 177.

[2] City of Chicago v. Martin O'Brennan, 65 Ill. 160.

[3] Village of Warren v. John W. Wright, 5 Ill. App. 429.

mit evidence on the part of the plaintiff that he was a married man and had a family; but the defendant having proved the same fact, and the plaintiff's counsel afterward having withdrawn such evidence from the jury, the error was regarded as a harmless one, though there might be a question whether the withdrawal of the plaintiff's evidence on this point would have cured the error.

An instruction is faulty that details certain facts as constituting ordinary care and diligence, instead of leaving it to the jury to determine from all the evidence in the case whether there had been the exercise of due care and diligence by the party charged with negligence.[1]

SEC. 78. Persons operating elevators are carriers of passengers, and the same rules applicable to other carriers of passengers are applicable to those operating elevators for raising and lowering persons from one floor to another in buildings. It is a duty of such carriers of passengers to use extraordinary care in and about the operation of such elevators, so as to prevent injury to persons therein. The fact of the falling of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faultily constructed, and the instruction in this case, in alleging that the plaintiff was in the elevator for the purpose of being carried from one floor to another, and that the elevator, owing to its negligent and faulty construction or to the negligence and carelessness on the part of the servants in operating the same, fell, and caused the injury to the plaintiff, stated a correct proposition of law, and stated a liability for causes alleged.[2]

SEC. 79. Where a brakeman was killed in attempting to couple cars, no one being present or knowing how the accident occurred, in a suit by his personal representative to recover damages of the railroad company, evidence of his prior habits as to his care, prudence and sobriety is admissible, as tending to prove that the deceased was prudent, cautious and sober at the time of the injury; but if there were witnesses who saw the transaction and can describe how the accident took place, such evidence would not be admissible.[3]

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[1] Village of Warren v. John W. Wright, 103 Ill. 298.

[2] Hartford Deposit Co. v. Oliver Solitt, 172 Ill. 222.

[3] C., R. I. & P. Ry. Co. v. Clark, Adm'x, 108 Ill. 113.

SEC. 80. In a suit to recover damages for personal injuries occasioned by the negligence of the defendant, the allegation and proof must correspond. The plaintiff can not aver negligence in one part and prove on the trial that the defendant was guilty of negligence in another.

In a suit against a railroad company for damages on account of personal injuries alleged to have been caused by the defendant carelessly running its train against a horse, it is not competent for the plaintiff to prove that the railroad track was not properly fenced, or that the cars were not provided with brakes, or any other negligence than that averred.

Where the only negligence averred in a declaration in a suit against a railroad company is that it ran its train carelessly, it is error to instruct the jury that if the defendant was negligent in its failure to use air brakes or other proper machinery in running its train, the plaintiff is entitled to recover.[1]

SEC. 81. The declarations or admissions of an agent or servant are only evidence where they enter into and form part of the *res gestae;* they must be made not only during the continuance of the agency, but in regard to the transaction depending at the very time; and they must be within the scope of the agency, and are admissible only so far as there is authority to make them.

The employer is not bound to employ absolutely safe machinery. He is not an insurer. The law imposes upon him only the obligation to use reasonable and ordinary care in providing suitable and safe machinery, implements and tools.

An instruction that does not confine the right of recovery to the defects specified in the declaration is erroneous.[2]

SEC. 82. In an action to recover damages sustained for a personal injury resulting from the alleged negligence of the defendant, one count of the declaration alleged that plaintiff was hindered from transacting her business and affairs and was deprived of large gains and profits which she otherwise would have earned, and in another count that the injuries received had a permanent effect upon her personal bodily strength and ability to make a living, and that she had been rendered unable to make or earn her own living, and had been deprived of large

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[1] T., W. & W. R. R. Co. *v.* Foss, 88 Ill. 551.

[2] W., St. L. & P. Ry. Co. *v.* Fenton, 12 Brad. 417.

gains and profits which she otherwise would have earned. It was held by the supreme court that under these averments it was admissible for the plaintiff to show what was her business and that she had been disabled from pursuing it by reason of her injuries.

In such a case the court permitted the plaintiff to testify that she had taught school at fifty dollars per month, and that at the time of receiving the injury, she and another lady were making arrangements to teach a select school, but on account of the injury she was compelled to give it up. She had already testified without objection that she had followed the business of teaching school, and that she had supposed she could not prosecute that business. It was held by the court that the only objection to this was the witness' stating what she had received, instead of what was the usual compensation for school-teaching, and that that was sufficiently removed by the remark of the plaintiff's counsel, "If he objects, strike it out," made on objection to her stating what she received. Such evidence went to show no more than an actual interruption of the business of school-teaching. Had it gone to show the loss of the profits of a particular engagement to teach, another question would have been presented.[1]

SEC. 83. It is a principle of jurisprudence, under both the civil and common law, that, to entitle a party to recover for damages alleged to have been sustained in consequence of the negligence of another, there must not only be negligence in fact, but it must have been the proximate cause of the injury.

Based upon the leading and governing principle that the defendant's negligence must be the proximate cause of the injury, is the common law rule that, although there was negligence on the part of the defendant, yet if there was also intervening negligence on the part of the plaintiff, but for which latter the misfortune of the plaintiff would not have happened, or if the plaintiff, by the exercise of ordinary care and caution, could have avoided the consequence of the defendant's negligence, and he fails to exercise that care and caution, he can not recover.

This general rule, like most others, admits of exceptions and qualifications; as, for instance, where a party injured might

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[1] City of Bloomington v. Chamberlain, 104 Ill. 268.

have avoided the injury by the exercise of ordinary care and caution; but if, as a direct and immediate result of the defendant's negligence, he is placed in a position of compulsion and sudden surprise, bereft of independent moral agency and opportunity of reflection, the law will not hold the injured party responsible for contributory negligence.

There is no inflexible rule of law by which to determine the capacity of children for observing and avoiding danger, as affecting the question of contributory negligence in case of an injury to them; but it is a question of fact in each case for the jury, to be determined from the facts and circumstances in evidence, the law holding them responsible only for the exercise of such measure of capacity and discretion as they possess.[1]

SEC. 84. An instruction that the orders of the superintendent, when given in the presence and hearing of his principal or employer, are to be considered by the other employes as the orders of his principal, if no objection or dissent is made at the time the orders are given, is erroneous, its effect being to relieve the foreman of all responsibility and make the contractor responsible for orders he never gave, and had not the necessary knowledge about the particular kind of work or the condition of its progress to judge of their correctness.

The jury were instructed that even if they believed, from the evidence, that the accident in this case resulted from the lewises or pins not being sufficiently large or strong to be safely used in the hoisting or supporting of the stone in question, yet if they further believe from the evidence that the defendant had provided other pairs of pins of sufficient size and

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[1] C. & A. R. R. Co. v. Becker, Adm'r, 76 Ill. 25.*

* NOTE.—Frederick Becker, being a boy of between six and seven years of age, was run over and accidentally killed, September 30, 1872, at the city of Atlanta, Illinois, by one of the defendant's freight trains, at the time passing through from the north. The basis of recovery made by the declaration is that Frederick, being in the act of crossing defendant's track at the street crossing and in the exercise of due care, the train of defendant approached without ringing the bell or sounding the whistle upon the locomotive, as required by law, and while running at a greater rate of speed than was permitted by the ordinances of the city of Atlanta in that behalf, by means whereof he was run over by said train and killed. Trial resulted in a verdict and damages of $2,500 against the defendant.

strength, which were at hand and could have been used, but that any of the fellow-employes of the plaintiff, through negligence or error of judgment, selected and used pins of insufficient size and strength, whereby the injury complained of resulted to the plaintiff, then the defendant is not liable for such negligence or error of judgment; provided the jury further believe from the evidence that such fellow-employes were persons of adequate skill and were careful and prudent persons. This instruction is held by the court to correctly embrace the law of the case on the question to which it refers, and was pertinent to the issue on trial.[1]

SEC. 85. The passage-way to the bridge was made of boards or plank, which had become loose or warped, so that a step upon them was not firm. A lady, in the act of stepping from the bridge upon this walk, caught her dress upon a protruding nail in the floor of the bridge, and in turning to relieve it one of the boards on which she was standing tipped and she was precipitated down a flight of stone steps which led down immediately from the abutment of the bridge to the bank of the canal, a distance of some twelve feet. There were no guards or railing, by the aid of which the fall might have been avoided. It appearing that there was no want of prudence or care on the part of the person injured, but the injury being attributable to the insecure condition of the walk, conspiring with the accidental cause, the city was held liable.

The rule is, that where the loss is the joint result of an accident and of a defect in the road, and the damage would not have been sustained but for the defect, although the primary cause be a pure accident, yet if there be no fault or negligence of the plaintiff—if the accident be one which no prudence or sagacity could have foreseen and provided against, the town is liable.[2]

SEC. 86. The streets of a city extend to and include the portion thereof occupied and used as sidewalks. The establishment of sidewalks is an act of the city authorities; the space occupied therefor is a part of the street as originally established. In a grant by the legislature of control over the

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[1] Harms v. Sullivan, 1 Ill. App. 251.

[2] City of Joliet v. Verley, 35 Ill. 58.

streets of a city to the city authorities, control over the sidewalks passes to them, being a part of the street.[1]

The streets of a city being under the control of the city authorities imposes on the city the duty of keeping them in repair, and as sidewalks are a part of the street, a like duty is imposed to keep them in repair. *Id.*

The rule is well settled that where a plain duty is neglected, and one is injured by such neglect, the party upon whom the duty is imposed is liable for the damages sustained. Thus, where an injury was sustained by reason of defect in a sidewalk which it was the duty of the city to keep or have kept in repair, the city is liable in damages for accidental injury sustained by reason of such defect. *Id.*

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[1] City of Bloomington v. Bay, 42 Ill. 503.*

*NOTE.—An action was brought by James M. Bay for damages alleged to have been occasioned to plaintiff by a defective sidewalk in the city of Bloomington. The declaration contains five counts; the first alleging that the city at the time when, etc., and previous thereto was incorporated, and as such city had the right under its charter to build, or cause to be built, sidewalks along its streets, to keep the same in repair, etc., and that it did, prior to the 5th day of January, 1866, under and by virtue of its charter, take possession of and control over the sidewalk on the east side of East Street, between Washington and Front streets, and that on the 9th day of January, 1866, a plank, a part of said sidewalk, was so loosely lying as to make it dangerous for persons to pass along and upon said sidewalk; and averred that the defendant, well knowing, etc., permitted it to remain so, and that on that day plaintiff was passing along such sidewalk with ordinary care, and was then and there necessarily and unavoidably thrown down by the raising of the loose plank above mentioned; and avers that his left wrist was put out of joint and the large bone fractured from which he became sick, lame, etc.

The second and third counts alleged the same facts in substance. It was insisted in argument by defendant that the city charter placed the liability for sidewalks upon lot owners; that the charter on this subject gave the city authorities power to open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve or keep in repair, streets, avenues, lanes and alleys, and to require the owners of any lot or piece of ground to lay a good and substantial sidewalk along any street or alley passing such lot or piece of ground, in such manner as the council may provide; and the defendant's counsel contend that the liability is not on the city, but upon the owner of the lot. The supreme court said: "The first question that arises in this case is, what should be and are known and considered as the streets of a city? In appropriating a tract of land or lot of ground for the purpose of a city, town or village, the owner first marks out the streets, specifying their width, and usually bestowing upon each street a name. These streets, after designating the width, are dedicated to the public use. Lots abutting

SEC. 87. The rule has been laid down by the supreme court that when the injury produced was the result partly of a defect in the street, but also partly of an accident happening, which was the primary cause, the latter fact forms no excuse for the negligence of such corporation to keep its streets in proper repair, where the damage would not have been sustained but for the defect, which was the result of carelessness, and the plaintiff was guilty of no fault or negligence.

And the liability of the corporation is not changed by reason of the fact that the defect, in consequence of which a party, while driving his horses, which ran away, was injured, was in that portion of the street set apart and intended as a sidewalk, when such portion, instead of being used for foot passengers alone, was devoted to the common use of both teams and foot passengers.[1]

SEC. 88. Where a person in the exercise of due care is

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on the street are measured and marked on the plat by numbers. Usually the town receives a name. The plat is recorded and in due time municipal authority is organized and in operation over it. The town is incorporated, with its streets and alleys, as the case may be, of a certain width, over which municipal authorities exercise supreme control. The establishment of sidewalks is the act of the authorities, they, by ordinances, requiring along certain streets, along both sides, a certain width to be left as sidewalks for passengers. The fact that the city authorities could impose the duty of constructing sidewalks upon the lot owners, can not relieve them from their liability in case a sidewalk, no matter by whom constructed, is suffered to be and remain out of repair and dangerous to use. The charter of the city of Bloomington gives the authorities of the city plenary power over this whole subject. It is a subject in which the public interests are deeply concerned, and full power having been bestowed, its execution can be insisted upon as a duty, in the neglect of which the city should be responsible for a resulting injury."

[1] City of Lacon v. Jesse Page, 48 Ill. 499.*

*NOTE.—The city of Lacon, having constructed a covered drain under one of its streets, allowed it to get so far out of repair that a hole about two feet long, a foot wide and eight inches in depth, had been made in it, near the edge of the street, no sidewalk having been laid. The plaintiff was driving his horses with a lumber wagon, when they ran away, and one wheel of the wagon went into this hole, and rebounding several feet in the air, threw the plaintiff violently to the ground and injured him. He brought this action against the city and recovered. "We are now asked," the court said, "to reverse the judgment, on the ground that the injury was the result partly of the defect in the street, but also partly of the accident that the horses ran away, and it is urged that the city is not liable unless the injury is attributable solely to its own carelessness. One great

injured by the joint result of accident and negligence of a city, and the injury would not have occurred but for such negligence, the city will be liable.[1]

SEC. 89. Individuals who hold a fair and erect structures for the use of their patrons are liable for any injury such patrons may receive by the breaking down or falling of such a structure, if caused by the negligence or unskillful manner of its construction, and their liability can not in any manner be affected by their giving to such fair the name of an old society. The following instruction is approved by the court as embodying the law of the case:

"If the jury believe from the evidence that the defendants were the proprietors of the said fair ground, and selected or adopted a plan for the building of said amphitheatre, including the quantity, size, quality and strength of the materials to be used, and that the amphitheatre was constructed upon such plans, and shall further believe from the evidence that the said structure was, in fact, weak, insufficient and dangerous to the life or limbs of those who might go upon it, and that before it was used by the visitors and patrons of such fair the defendants, or any of them, were informed that it was weak, insufficient or dangerous, and did nothing to render it more secure; and, further, that said amphitheatre, or any part of it, did give

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reason for requiring a corporation to keep its streets in repair is to reduce as far as possible the injuries that may result from the accidents so liable to occur in crowded thoroughfares. If the accident would not have caused the injury but for the defect in the street, and that defect is the result of carelessness on the part of the city, and the plaintiff has used ordinary prudence, the city must be held liable."

[1] City of Danville v. Makemson, 32 Ill. App. 112.*

*NOTE.—It appears that the street in question is a public and common thoroughfare in the city of Danville; that the ground being quite low at the point where the injury occurred, the city had constructed an embankment in the center of the street, about fourteen feet high and about thirty feet wide at the top. South of the center line of this embankment a street car track was laid, with iron rails projecting about three inches above the surface. North of this track, the space was fifteen feet wide. There was no guard or railing of any kind on either edge of this embankment. The plaintiff, with her husband, drove into the city in a two-horse wagon and passed on to this street. Presently one of the horses shied at a child's carriage, which was being pushed along the sidewalk, and the wagon in which plaintiff was riding was overturned and thrown to the foot of the embankment, whereby the plaintiff was seriously injured. The negligence alleged

way, break and fall, in consequence of such weakness and insufficiency, and plaintiff, as a visitor and patron of such fair, without fault on her part, was injured in consequence thereof, such defendant should be held responsible to the plaintiff in damages."[1]

SEC. 90. Where an act is done which is unlawful in itself, such as placing an obstruction in a public street or highway, which detracts from the safety of travelers, the author of it will be held liable for the injury resulting from the act, although other causes subsequently arising may contribute to the injury.

Where an act unlawful in itself is done, from which an injury may reasonably and naturally be expected to result, the injury, when it occurs, may be traced back and visited upon the original wrong-doer, and this upon the principle that every person shall be held liable for all those consequences resulting from his unlawful act which might have been expected and foreseen as the result.[2]

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is in not providing a guard or railing along the edge of the embankment. Upon the trial the jury returned a verdict for the plaintiff for $900. The court cited the following decisions in support of its ruling: City of Joliet v. Verley, 35 Ill. 58; City of Bloomington v. Bay, 42 Ill. 503: City of Lacon v. Page, 48 Ill. 499; Village of Carterville v. Cook, 129 Ill. 152; City of Champaign v. Jones, 32 Ill. App. 179.

[1] Latham et al. v. Mary Roach, 72 Ill. 179.

[2] Weick v. Lander, Adm'r, 75 Ill. 93.*

* NOTE.—At the time the accident occurred, certain buildings were in process of erection by defendant upon the west side of North Wells street, in Chicago. The defendant had the sole control of the mason work and all material to be used in the construction of the buildings. The street was eighty feet wide; the sidewalk on each side of the street was sixteen feet wide, which left forty-eight feet for a roadway. The street, although paved and a thoroughfare much used, was obstructed by a large pile of brick, extending from the sidewalk on the west, east about thirty-three feet. Opposite this, on the east side of the street, was a pile of lumber. There were also lime, sand and mortar in the street. On the east side of the street, nearly opposite the brick pile, was a scale hole, eight feet wide and twelve feet long, which had been filled to near the surface of the street with dirt and brickbats. The obstruction was so great that it was difficult for teams to pass each other. Some of the witnesses testified that, owing to the obstructions, teams were frequently stopped. The ordinances of the city prohibit, under a penalty, the obstructing of any street with building material without a permit from the Board of Public Works; no permit had been obtained by the defendant. On the day of the accident the father of

SEC. 91. In actions for damages occasioned by the negligence of servants of a corporation, where the evidence is conflicting, instructions to the jury should be accurate, complete, free from a tendency to mislead, and there should be no discrepancy in them. So an instruction on the part of the plaintiff as to the liability of the defendant, by reason of negligence, is defective if it omit an allegation of due care or absence of negligence on the part of the plaintiff.[1]

SEC. 92. Where the conductor of a railway train fails to have the same brought to a stop not less than 200 feet before reaching a crossing of another railroad, as required by statute, and such failure contributes to a collision with a train on the other road, causing the death of the conductor so neglecting his duty, no recovery can be had by his personal representative. If the injury might have been avoided by his bringing his train to a full stop the proper distance before reaching the crossing, no recovery can be had, although the agent of both roads at the crossing might have been guilty of negligence in signaling the several trains when to pass.

Where it was the duty of the conductor killed to hold his train until the proper signal was given for him to make the crossing, and the signal was given for the train on the other road to cross, and while it was in the act of crossing such con-

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the deceased had two teams hauling sand from Lake View to the central part of the city. In the afternoon, when the teams started for sand, the deceased, a boy of twelve years old, went with them. When they obtained their loads and started back, the deceased rode upon the rear wagon until within about half a mile of where the accident occurred. He then got down and walked several blocks, and then got upon the front wagon and occupied a seat formed by the projection of the plank forming the bottom of the wagon box, beyond the tail-board. The deceased sat with his back to the tail-board and his face to the north.

The teams were going south. As the front sand team came near the pile of brick a wagon passed going north. Following this was an express wagon.

One hub of the express wagon struck the hub of the sand wagon; the other hub struck the pile of lumber; while the west hub of the sand wagon encountered the pile of brick, and the team was suddenly stopped. The driver of the rear wagon was watching the wagon going north, in order to avoid a collision, and did not notice that the front team had been stopped until he was near it. He then attempted to stop his team, but he had gone too far. The tongue of his wagon struck the deceased in the abdomen and inflicted a wound which, in a few days, caused his death.

[1] Chicago City Railway Company v. Mary Freeman, 6 Ill. App. 608. (Also see C., M. & St. P. R. R. Co. v. Mason, 27 Ill. App. 450.)

ductor negligently failed to observe the signal and undertook to make the crossing, in disregard of such signal, which was well understood, whereby a collision occurred resulting in the conductor's death, it was held by the court that no recovery could be had in an action by his personal representatives against either of the railroad companies whose trains collided.

In an action against a railroad company to recover for an injury alleged to have been caused by the negligence of its servant in the discharge of his duty, an instruction assuming as true the negligence of such servant would be erroneous. In such case it is for the jury to find from the evidence whether such servant was guilty of the imputed negligence as a question of fact; and it is not within the province of the court to direct the jury that any person was negligent, or assume the negligence of any one alleged to be responsible for the injury.

Where the evidence is conflicting it is improper to select isolated portions of the evidence and give them prominence by calling the attention of the jury especially to them. But an instruction which in substance informs the jury that if they find from the evidence the facts alleged in the declaration and relied upon as proof (reciting them) their verdict should be for the plaintiff, is not liable to the objection of selecting and giving undue prominence to isolated parts of the evidence.

The court should always instruct the jury that if they find the facts involved in the issue are proved (reciting them), then they should find for the party in whose favor they so find the facts. This is not giving undue prominence to any particular fact.[1]

It was held also, in the case of The Village of Warner v. Wright, 3 Ill. App. 602, that an instruction which assumed that the defendant neglected to exercise ordinary care and diligence, when the fact of such negligence was contested, was erroneous.

SEC. 93. In an action by an administratrix to recover damages for injuries causing her husband's death, where the question of contributory negligence on the part of the deceased is fairly raised, it is error in the court to ignore entirely that question in instructing the jury.

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[1] Snyder, Adm'x v. C. & N. W. Ry. Co., 117 Ill. 376.

In such a case the trial court instructed the jury that if they believed, from the evidence, that the plaintiff was administratrix of the estate of the deceased, and that he left surviving him a widow and next of kin, who had suffered pecuniary loss by his death, and that, under the instructions and evidence, the defendant is guilty as charged in the declaration, they should find for the plaintiff, etc.

This instruction was held by the court erroneous in that it ignored the question of contributory negligence raised, and omitted the requirement of any care or caution on the part of the deceased.

In the same case the trial court instructed the jury on what grounds they might find for the plaintiff, and if they did so find, that then they might give such damages as they should deem a fair and just compensation for the pecuniary loss resulting from such death to the widow and next of kin, not exceeding $5,000. It is held by the court that this instruction was erroneous in not requiring the jury to find the damages from *the evidence.* For these errors the judgment was reversed.[1]

It was also held, in the case of C., B. & Q. R. Co. v. Harwood, 80 Ill. 88, that it is error to give an instruction which authorizes a recovery against a railroad upon the ground of negligence in omitting to sound the whistle or ring the bell, without a requirement of any care or caution on the part of the person injured.

It was further held in the same case as follows: "Where one instruction is given authorizing a recovery against a railroad for injuries caused by negligence of its servants, which contains no requirement of care or caution on the part of the injured party, the error will not be cured by other instructions which do contain such requirement."

SEC. 94. In an action to recover damages resulting from the alleged negligence of the defendant, if it appear that the

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[1] North Chicago Rolling Mill Company v. Morrissey, Adm'x, 111 Ill. 646. (See also the case of Alexander Moody et al. v. John Peterson, Adm'r, 11 Brad. 180, where it was held as follows: "Where there is evidence tending to show negligence on the part of the plaintiff, an instruction as to the liability of the defendant which ignores the question of contributory negligence is erroneous.")

plaintiff was himself guilty of gross negligence in respect to the injury complained of, he can not recover.[1]

Where there is evidence tending to show the plaintiff was guilty of some negligence contributing to the result complained of, so that the question of contributory negligence is involved, and the case is closely contested upon that question, every instruction given in the case which professes to lay down the grounds upon which a recovery may or may not be had should state the rule in regard to the question of care or caution on the part of the plaintiff. It is not enough that the instructions given for the opposite party give *the rule of law on this subject, and accurately. Id.*

SEC. 95. For separate acts of trespass separately done, or for positive acts negligently done, although a single injury is inflicted, the parties can not be held jointly liable to the party injured. If there is no concert of action, or no common intent, there is no joint liability. But a different principle applies where the injury is the result of the neglect to perform a common duty resting on two or more persons, although there may be no concert of action between them. In such a case the injured party may have his election to sue all parties owing the common duty, or each separately, treating the liability as joint or separate.

Where a duty rests upon both a city and the owner of premises within the city to keep the sidewalk in repair fronting the premises, and over an excavation, a failure to do so is a common neglect of duty, and both will be liable, either jointly or severally, to one injured in consequence of such neglect, who has himself exercised due care.[2]

The tenant in possession, and not the landlord, is responsible to third persons for injuries occasioned by a failure to keep the demised premises in repair, unless the owner has agreed to keep them in repair, or when the premises were let with the alleged nuisance upon them, in which case the owner, and not the tenant, is responsible for injuries caused by the nuisance. *Id.*

Instruction.—The practice of giving an instruction which,

[1] C. & N. W. Ry. Co. v. Dimick, Adm'r, 96 Ill. 42. (See also W., St. L. & P. Ry. Co. v. Shacklet, Adm'x, 105 Ill. 364, and The City of Peoria et al. v. Simpson, 110 Ill. 294.

[2] City of Peoria v. Simpson, 110 Ill. 294.

standing alone, does not correctly state the law of the case upon the facts, and then giving a separate instruction which, if read with the other, would announce the true rule, is not to be commended, if it is not an error. It is better that such instruction should be as nearly *accurate as it can be made in itself*. *Id.*

SEC. 96. It is a settled doctrine with the supreme court that the plaintiff may recover for injuries resulting from the negligence of the defendant if he has observed ordinary care for his personal safety and to avoid the injury.

In an action against a railroad company to recover for a personal injury by a collision on a street crossing, the trial court, on its own motion, instructed the jury, in substance, that the gist of the action was negligence, which the plaintiff must prove by a preponderance of the evidence, substantially as alleged in the declaration, and that it could not be presumed from the fact of the plaintiff's injury, that the question of negligence was one of fact for the jury, but that the court instructed that it is the duty of all persons approaching highway crossings where there is a railroad, to exercise care and caution to learn if any trains are approaching, and to take such measures as any competent or cautious man would under like circumstances, and that if they believed from the evidence he failed to exercise such care, and was injured in consequence thereof, he could not recover. Held, by the court, that while the instruction contained some inaccurate expressions, yet that it could not have misled the jury to the prejudice of the defendant.[1]

Whether a person injured from the negligence of another has exercised proper care and caution is a question of fact, and not one of law. It is for the jury to determine whether he has been guilty of negligence, by a consideration of his conduct under the circumstances shown to have surrounded him at the time of the alleged negligent act or conduct. *Id.*

Where it is considered that a party charged with negligence has failed to perform a legal duty, or in cases of this character if it be considered that the plaintiff did not exercise that degree of care and caution which ordinarily cautious and prudent men would observe under like circumstances, the court will be required to state, as a matter of law, that the party

[1] C., St. L. & P. R. R. Co. v. Hutchinson, 120 Ill. 587.

failing to perform his legal duty, or failing to observe such degree of care, has been guilty of negligence. But so long as the question remains whether the party has performed the legal duty, or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, *the question must be submitted as one of fact to the jury. Id.*

SEC. 97. In an action against an incorporated village to recover for personal injury caused by a defective sidewalk, the court, in substance, instructed the jury that if they found the defendant guilty, the plaintiff would be entitled to recover for any pain and anguish which he had suffered, or would thereafter suffer, in consequence of the injury; for any and all damages to his person, permanent or otherwise, occasioned by such injury; the loss of time, if any, caused by the injury, or expense incurred in a reasonable effort to effect a cure of such injury; and, generally, recover all damages alleged in the declaration which they believed from the evidence he had sustained by the injury. It is held by the supreme court that as an instruction in regard to the measure of damages it was substantially correct, and that it was not open to the objection that it allowed the jury to give damages, although the plaintiff had failed to exercise due care.[1]

An instruction as to the plaintiff's right to recover for personal injuries resulting from the alleged negligence of the defendant should include the hypothesis of ordinary care on the part of the plaintiff to avoid the injury. *Id.*

It is not necessary that every instruction asked with regard to its office or purpose should have embodied in it every fact or element essential to sustain action, or that it should negative matters of defense. *Id.*

SEC. 98. In an action on the case against a railroad company to recover for a personal injury by its employe, based on alleged negligence in using a car, the couplings of which were out of repair, the court instructed the jury that if they believed from the evidence that the car so used was the property of a company other than the defendant, and that such car was, at the time of the alleged injury, and for several months next prior thereto had been, and was regularly and daily running

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[1] Village of Sheridan v. Hibbard, 119 Ill. 307.

into and out of defendant's yard, at the premises of the defendant, and that at the time of the alleged injury, and for several months next prior thereto, the said car was regularly and daily controlled and handled in the defendant's yard, by the defendant, with its own engine and employes, then it was the duty of the defendant to use ordinary diligence to keep said car in a reasonably safe condition for handling, or else require and see to it (if by the use of ordinary diligence defendant could do so) that such car was kept by its owners in such reasonably safe condition. It is held by the court that the objection to the instruction, that it assumed as a fact that the car being out of repair and being permitted to come into the yard in an impaired condition, was the cause of the injury to plaintiff, was not well founded. Nor was it subject to the objection of singling out and giving undue prominence to a part of the facts of the case and in omitting reference to any care as required of the plaintiff.[1]

Where the purpose of an instruction is simply to define the duty of the defendant arising out of facts supposed, and it does not purport to contain a complete hypothesis on which a plaintiff, suing for an injury caused by alleged negligence, can recover, it is not necessary in such instruction to refer to the duty or supposed negligence of the plaintiff. *Id.*

In a suit for injury arising from negligence, when there is no proof of any other negligence than that alleged in the declaration, an instruction stating what is negligence is not erroneous, in not confining the right of recovery to the negligence alleged in the declaration. *Id.*

Sec. 99. In an action to recover damages for causing the death of the plaintiff's intestate by negligence, the court, on behalf of the plaintiff, instructed the jury that if they should find from the evidence in the case and under the instructions of the court that the defendant is "guilty of the wrongful act, neglect or default, as charged in the plaintiff's declaration, and that the same resulted in the death of the intestate, then the plaintiff is entitled to recover in this action for the benefit of the widow and next of kin of such deceased, such damages as the jury may deem from the evidence and proofs a fair and

[1] C., B. & Q. R. R. Co. v. Avery, 109 Ill. 314.

just compensation therefor, having reference only to the pecuniary injuries resulting from such death to such widow and next of kin, not exceeding the amount claimed in the declaration." It was objected that the instruction failed to state the law with regard to comparative negligence, and ignoring the question of the care or negligence of the deceased. It was held by the court that the instruction was not to be regarded as one stating the law in respect to negligence, but as relating to the measure of damages in case the plaintiff should recover, and that there was no error in giving the same.[1]

SEC. 100. In an action against a railroad company to recover damages for injury occasioned by the alleged negligence of defendant's servants, in the manner of running its trains, it is not an unusual, nor is it an objectionable practice, where the plaintiff's counsel desires an instruction as to the rule of damages, to say to the jury that if they find from the evidence that the defendant is guilty as charged in the declaration, then the plaintiff is entitled to recover, and to define the measure of damages. Such a mode obviates the necessity of stating, and perhaps reiterating, hypothetically, each element of the cause of action before coming to the real point in the instruction.[2]

An instruction is properly refused which purports to take the case, when there is a conflict of testimony, away from the jury, by telling them how to find their verdict.

SEC. 101. In an action against an employer for an injury sustained by an employe by reason of defective machinery provided by the employer, the right of recovery is confined to the defects specified in the declaration, and it is error to instruct the jury that the plaintiff is entitled to recover if the injury was caused by *any* defect or insufficiency of the machinery.

An instruction given for the plaintiff, that he is entitled to recover if the injury complained of was caused by *any* defect in the machinery provided by his employers, is not cured by a subsequent instruction given for the plaintiff that he is entitled to recover if the injury was occasioned in manner and form as charged in the declaration.

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[1] C., M. & St. P. R. R. Co. v. Dowd, Adm'x, 115 Ill. 659. (See also Sheridan v. Hibbard, 119 Ill. 307.)

[2] C., B. & Q. R. R. Co. v. Payne, Adm'r, 59 Ill. 534.

Nor does the fact that instructions given for the plaintiff restrict the right to recover to the defects alleged in the declaration obviate the objection to the plaintiff's instruction that he may recover for *injury caused by any defect in the defendant's machinery.*[1]

SEC. 102. In a suit against a railroad company to recover damages for striking a person by a train of cars through negligence, a party is not bound to prove matters which are merely surplusage.[2]

SEC. 103. Instructions that assume to state to the jury as matter of law that certain facts *per se* constitute negligence on the part of the plaintiff's intestate should not be given. In Great Western Railroad Company v. Haworth et al. the supreme court held as follows: "Negligence is not a legal question, but one of fact, and must be proved like any other. Juries are intended to be selected from intelligent, practical men, who, after hearing the evidence, will be able to determine whether, considering all the circumstances, the issues have been proved; and as negligence is the opposite of care and prudence, and is the omission to use the means reasonably necessary to avoid injury to others, it is proper that such questions should be left to practical men to determine whether a duty has been omitted, and, if so, whether, under the circumstances, it constitutes slight or gross negligence."

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[1] The Camp Point Manufacturing Co. v. Ballou, Adm'r, 71 Ill. 417.*

[2] C. B. & Q. R. R. Co. v. Harwood, 80 Ill. 88.

* NOTE.—This was an action brought to recover damages occasioned by the death of the plaintiff's intestate in consequence of the bursting of an emery stone, at which he was engaged, in the employ of the defendant, in grinding and polishing irons used in the construction of agricultural implements. The stone was mounted on a wooden frame and moved by a steam engine, which propelled the other machinery in the defendant's factory. It turned on an iron axle, and was supported and held to its place by means of iron clamps, which were tightened upon the stone by nuts turning upon a screw thread cut on the axle. The engine had a governor attached, the office of which was to regulate the motion of the engine. It was claimed by the declaration that the death of the deceased was caused by reason of the insufficiency of defendant's machinery in three respects: First, that the governor was defective; second, the clamps upon each side of the stone were too small; third, that a strong, firm and steady frame was required for the purpose of supporting and holding the stone so as to prevent same from being shaken and jostled.

This case was followed and approved by the supreme court in the case of C. & A. R. R. Co. v. Pennell, 94 Ill. 448. This does not mean that the definition of negligence is one of fact, and that the jury shall be left to their own fancies to determine what in each case shall be the measure to which the proof shall be applied in determining whether there is negligence, but simply, *the general rule being declared to the jury as matter of law*, the jury must determine whether such facts have been proved as bring the case within the general rule. It is the office of the judge to instruct the jury in point of law—of the jury to decide on matters of fact. (Penn. Co. v. Conlan, 101 Ill. 93; Springfield City Railway Co. v. DeCamp, Adm'x, 11 Ill. App. 475; C. & A. R. R. Co. v. Elsie Bragonier, Adm'x, 11 Ill. App. 516; C. B. & Q. R. R. Co. v. Bridget Dougherty, Adm'r, 12 Ill. App. 181; C. & A. R. R. Co. v. Edward Barber, Adm'r, 15 Ill. App. 630; T. H. & I. R. R. Co. v. Jacob Jenuine, 16 Ill. App. 209; C. & A. R. R. Co. v. Adler, 28 Ill. App. 102; C. & A. R. R. Co. v. Adler, 129 Ill. 335; Lorenzo James et al. v. Isabel Johnson, 12 Ill. App. 286.)

SEC. 104. In a suit for injury arising from negligence, when there is no proof of any other negligence than that alleged in the declaration, an instruction stating what is negligence is not erroneous, in not confining the right of recovery to the negligence alleged in the declaration.

The negligence of fellow-servants is one of the ordinary perils of the service, which one takes the hazard of in entering into any employment; but the master's own duty to the servant is always to be performed. The neglect of that duty is not a peril which the servant assumes.

Care in supplying safe instrumentalities in the doing of work undertaken by the servant is a duty the master owes to the servant, and when the performance of that duty is devolved upon a fellow-servant, the master's responsibility in respect to that duty still remains. In such case, the negligence of the fellow-servant is the master's neglect of duty.[1]

SEC. 105. If a flagman of a railroad company signals to a person with a horse and buggy to cross over a street crossing at the time when a train, unseen by the person in the buggy,

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[1] C., B. & Q. R. R. Co. v. Avery, 109 Ill. 314.

but which the flagman was bound to observe, was moving near and directly toward the team, this will be negligence on the part of the flagman, such as will render the company liable for the injury caused thereby.

While the company owning a railway, its engines, cars and equipments, may be liable to a party injured through the negligence of the servants of the lessee operating the same, the lessee company is also liable.

Where separate causes of action are set up in different counts, and the defendant pleads the statute of limitations to the whole declaration, the plaintiff will be entitled to recover if any one of his causes of action is not within the bar.[1]

SEC. 106. In an action against a street railway company to recover damages for causing the death of a child, it was held by the appellate court that the trial court properly overruled a motion to instruct the jury to find for the defendant, and that the questions whether the deceased was in the exercise of reasonable care, and whether the defendant was guilty of negligence, were for the jury.

It is ordinarily a question for the jury whether, under the circumstances of the particular case, the failure to stop until the view is clear and look for an approaching train is such negligence as should defeat a recovery. Where the child injured is in the exercise of ordinary care, the question whether the parent was negligent does not arise.[2]

SEC. 107. In an action for an injury by the breaking of the plaintiff's arm, there is no error in admitting proof that the bones at the fracture failed to unite, and had formed what is called a "false joint." It is not a question of law for the court to determine whether this was the result of the breaking of the arm as a proximate cause, or the result of a new, independent factor. Such question can only properly be tested by hearing evidence and submitting the question of fact to a jury, under appropriate instructions.

A plaintiff can not hold the defendant responsible for an injury to himself caused even in part by his own fault in failing to use ordinary care or ordinary judgment, or for an injury

[1] Penn. Co. v. Sloan, 125 Ill. 72.

[2] Chicago City Railway Co. v. Mary Robinson, Adm'x, 27 Ill. App. 26.

not resulting from the fault of the defendant, but caused by some new intervening cause, not incident to the injury caused by the defendant's wrongful act or remission of duty.

In a case where the plaintiff's arm had been broken from the negligent conduct of the defendant, and the plaintiff exercises ordinary care to keep the parts together, and uses ordinary care in the selection of surgeons and doctors, and nurses, if needed, and employs those of ordinary skill and care in their profession, and still, by some unskillful or negligent act of such surgeon, doctor or nurse, the bones fail to unite, thereby making a false joint, the defendant, if responsible for the breaking of the arm, will be liable in damages for the unfavorable result of the injury.

A party when injured is bound by law to use ordinary care to render the injury no greater than necessary. It is his duty to employ such surgeons and nurses as ordinary prudence in his situation may require, and to use ordinary judgment and care in doing so, and to select only such as are of at least ordinary skill and care in their profession; but the law does not make him an insurer in such case.[1]

SEC. 108. In an action against a railroad company to recover damages for negligence, whether there was contributory negligence, and, if so, to what extent, and whether the negligence of the company caused the injury, are questions of fact to be determined by the evidence.[2]

SEC. 109. The question of whether there is or is not negligence, in general, is held to be a question of fact for the jury

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[1] Pullman Palace Car Company v. Bluhn, 109 Ill. 20.*

[2] Ill. Cent. R. R. Co. v. Gillis, 68 Ill. 317; C., B. & Q. R. R. Co. v. Lee, 87 Ill. 454; Penn. Co. v. Frana, 112 Ill. 398; C. & I. R. R. Co. v. Lane, 130 Ill. 116; Chicago Hansom Cab Co. v. Havelick, 131 Ill. 179; C. & A. R. R. Co. v. Kelly, 28 App. 655.

* NOTE.—Action by the plaintiff to recover for damages for personal injury. The action rests upon allegations in his declaration that, being a laborer for the defendant, the Pullman Palace Car Company, using a defective derrick in lifting lumber to the upper part of a building, he was hurt by the falling of the lumber upon him. maiming, bruising and battering him and breaking his arm; and charging that the falling of the lumber was caused by reason of the unskillful and defective workmanship of defendant in constructing and erecting the derrick, and without any fault upon the part of the plaintiff.

in the following cases: Skelley v. Kahn, 17 Ill. 170; G. & C. Union R. R. Co. v. Yarwood, 17 Ill. 509; Gt. West. R. R. Co. v. Haworth, 39 Ill. 346; I. & St. L. R. R. Co. v. Stables, 62 Ill. 313; I. C. R. R. Co. v. Gillis, 68 Ill. 317; Nor. Line Packet Co. v. Binninger, 70 Ill. 571; I. C. R. R. Co. v. Cragin, 71 Ill. 177; Schmidt v. C. & N. W. Ry. Co., 83 Ill. 405; I. & St. L. R. R. Co. v. Evans, 88 Ill. 63; C. & N. W. Ry. Co. v. Scates, 90 Ill. 586; Wabash Ry. Co. v. Elliott, 98 Ill. 481; Penn. Co. v. Conlan, 101 Ill. 93; C. & A. R. R. Co. v. Bonifield, 104 Ill. 223; Linington v. Strong, 111 Ill. 152; Myers v. I. & St. L. R. R. Co., 113 Ill. 386; Chicago v. Keefe, 114 Ill. 222; I. C. R. R. Co. v. Haskins, 115 Ill. 300; C. & N. W. Ry. Co. v. Snyder, 117 Ill. 376; C., St. L. & P. Ry. Co. v. Hutchinson, 120 Ill. 587; C., B. & Q. R. R. Co. v. Warner, 123 Ill. 38; L. S. & M. S. R. R. Co. v. Brown, 123 Ill. 162; Earlville v. Carter, 2 App. 34; St. L., A. & T. H. R. R. Co. v. Pflugmacher, 9 App. 300; Chicago West Div. Ry. Co. v. Klauber, 9 App. 613; L. E. & W. Ry. Co. v. Zoffinger, 10 App. 252; C., R. I. & P. Ry. Co. v. Clark, 11 App. 104; James v. Johnson, 12 App. 286; C. & A. R. R. Co. v. Lammert, 12 App. 408; C., B. & Q. R. R. Co. v. Spring, 13 App. 174; C. & A. R. R. Co. v. Barber, 15 App. 630; P. D. & E. Ry. Co. v. Reed, 17 App. 413; Citizens' Gas Light & Heating Co. v. O'Brien, 19 App. 231; C., B. & Q. R. R. Co. v. Kuster, 22 App. 188; Fisher v. Cook, 23 App. 621; C., M. & St. P. R. R. Co. v. Krueger, 23 App. 639; C., M. & St. P. R. R. Co. v. Harper, 26 App. 621; C. & N. W. Ry. Co. v. Dunleavy, 27 App. 438; C. & A. R. R. Co. v. Adler, 28 App. 102; C. & A. R. R. Co. v. Adler, 129 Ill. 335; Chicago Dredging & Dock Co. v. McMahon, 30 App. 358; C. & A. R. R. Co. v. Fisher, 31 App. 36; T., St. L. & K. C. R. R. Co. v. Cline, 31 App. 563; C. & N. W. Ry. Co. v. Trayes, 33 App. 307; Chicago v. McLean, 133 Ill. 148; Chicago v. Moore, 139 Ill. 201; C. & A. R. R. Co. v. Fisher, 141 Ill. 614; Sandwich v. Dolan, 34 App. 199; Aurora v. Seidelman, 34 App. 285; Trott v. Wolfe, 35 App. 163; Chicago Hansom Cab Co. v. McCarthy, 35 App. 199; C., M. & St. P. R. R. Co. v. Wilson, 35 App. 346; Chicago City Railway Company v. Brady, 35 App. 460; J. A. & N. Ry. Co. v. Velie, 36 App. 450; Lincoln Ice Company v. Johnson, 37 App. 453; I. C. R. R. Co. v. Slater, 39 App. 69; Chicago City Ry. Co. v. Van Vlack, 40 App. 367;

L. S. & M. S. R. R. Co. v. Hundt, 41 App. 220; St. Louis Brewing Association v. Hamilton, 41 App. 481; L. & N. R. R. Co. v. Shelton, 43 App. 220; Chicago v. Edson, 43 App. 417; Chicago Anderson Pressed Brick Co. v. Sobkowiak, 45 App. 317; P., Ft. W. & C. R. R. Co. v. Callaghan, 50 App. 676; L. S. & M. S. R. R. Co. v. Ouska, 51 App. 334; Western Stone Co. v. Whelan, 51 App. 512; L. E. & St. L. Consolidated R. R. Co. v. Kloes, 52 App. 554.

Where there is a *conflict of evidence* upon the question as to whether the plaintiff at the time of the injury was in the exercise of ordinary care, the verdict of the jury is conclusive, no error having been committed in giving of the instruction.

To constitute a negligent act, the connection between the act and the result need not be such that the particular injury could have been foreseen. If injury in some form would be the only sequence, the party guilty of negligence must be held as warned of the danger of his course and admonished of the necessity of guarding against liability for his negligence, and this is all the warning to which he is entitled under the law.[1]

SEC. 110. Instructions undertaking to tell the jury what specific facts show negligence are properly refused, as it is not the province of the court to instruct the jury that certain facts constitute negligence.[2]

Certain instructions asked by the defendant (appellant) company, and refused, asked the court to declare to the jury, as a matter of law, that failure on the part of the plaintiff to exercise ordinary care should be regarded as established if certain facts specified in the instructions were proven. What constitutes ordinary care is a question of fact to be determined by the jury, and the court rightly declined to invade the province of the jury by assuming to declare to them that the particular facts in question were sufficient to charge the plaintiff with negligence.[3]

SEC. 111. Whether the negligence of the defendant, as charged in the declaration, is the proximate or remote cause

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[1] I. C. R. R. Co. v. Creighton, 63 App. 165; Pullman Palace Car Company v. Laack, 143 Ill. 242.

[2] Penn. Co. v. McCaffrey, 173 Ill. 169.

[3] Pittsburg Bridge Co. v. Walker, 170 Ill. 550.

of the plaintiff's injury, is a question of fact for the jury, which is conclusively settled by the appellate court's judgment of affirmance.[1]

SEC. 112. In a personal injury case, whether the plaintiff's intestate was guilty or free from negligence is a question of fact for the jury, and it is not the duty of the court to say that the existence of a certain state of facts does or does not constitute negligence.[2]

SEC. 113. In an action based on negligence, the court, of its own motion, instructed the jury, in substance, that if the defendant was shown to have been guilty of negligence, and that such negligence caused the injury complained of, and it was also shown that the plaintiff was not guilty of any negligence contributing to her injury, the jury should find for the plaintiff, and in one of defendant's instructions it was held that if the plaintiff had failed to prove that at the time of the injury she was in the exercise of ordinary care and prudence, she could not recover. It was held by the supreme court that these instructions laid down with substantial accuracy the law applicable to the question of negligence of both plaintiff and defendant.

Negligence in all cases of this character is a mere question of fact, or at most a mixed question of law and fact, and whether the parties are negligent in the particular instance must be found by the jury, and not declared by the court.

Whether the mere omission on the part of the defendant to perform a duty which the defendant ought to perform will render him liable, must depend upon the circumstances of such omission. If shown to have resulted in injury to the plaintiff, the court can not say, as a matter of law, that it of itself does not involve the defendant in liability to the plaintiff.[3]

SEC. 114. Negligence of the parent of a young child which contributes to the child's injury is imputed to the child, especially if the parent is present and the negligence consists of some act or omission.

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[1] City of Rock Falls v. Wells, 169 Ill. 224; Springfield Coal Mining Co. v. Dora Grogan, Adm'x, 169 Ill. 50; West Chicago St. Ry. Co. v. Feldstein, 169 Ill. 139.

[2] L., N. A. & C. Ry. Co. v. Patchen, Adm'r, 167 Ill. 204.

[3] North Chicago Street Ry. Co. v. Eldridge, 151 Ill. 542.

In an action for the negligent killing of a child, a request to instruct for defendant presents on appeal only the question whether the evidence tends to establish the case, and not whether the evidence proves the negligence charged, or whether the parents of the child were guilty of contributory negligence.[1]

SEC. 115. *Appeal.*—The negligence of the defendant and want of negligence of the deceased, in an action for wrongful death, are made controverted questions by the plea of not guilty, so as to prevent review of the evidence by the supreme court, on the ground that there is no controversy in the testimony.

Practice.—To raise the question on appeal, where there is evidence in the record tending to prove negligence or want of contributory negligence, there must be a motion at the close of all the evidence to withdraw the case from the jury, or have the jury instructed to find for defendant.[2]

SEC. 116. *Instructions.*—An instruction that if the plaintiff in a suit for personal injuries has proved all the allegations in his declaration in manner and form as alleged he is entitled to recover, is not erroneous, as omitting requirement that he must have been in the exercise of due care where due care on his part is averred in the declaration.

The omission of the element of *due care* upon plaintiff's part, from an instruction as to recovery for negligence, is not prejudicial error where such element was not relied upon by defendant, and the case was tried upon the theory of the plaintiff's freedom from negligence.[3]

SEC. 117. *Variance.*—When the variance is pointed out on the trial between the declaration and the plaintiff's proofs, if the plaintiff prefers to stand by his declaration, instead of amending the same, it is proper to instruct the jury to find for the defendant.

If the breaking of machinery or tools is caused by defects therein, to charge the master with negligence it must be shown

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[1] C. & A. R. R. Co. v. Hattie Logue, Adm'x, 158 Ill. 621.

[2] L., N. A. & C. Ry. Co. v. Rosa Red, Adm'x, 154 Ill. 95; City Electric Ry. Co. v. Christina Jones, 161 Ill. 47.

[3] St. L., A. & T. H. R. R. Co. v. Holman, 155 Ill. 21.

that he either knew or ought to have known of the weakness which caused the accident.[1]

SEC. 118. The question whether a release from damages by an injured employe was executed with knowledge or under circumstances that would bind him, is one of fact which will not be reviewed by the supreme court.

Plaintiff in an action for personal injuries, claiming that he was induced to sign a release by misrepresentations and had no knowledge of its contents, may be asked whether at the time he signed his name, he knew in any way that he was settling with the company for damages on account of his injury, but can not state his understanding as to the purport or purpose of the paper.[2]

SEC. 119. Where injury causes instant death of person injured, evidence of due care need not be direct where the accident is unseen. Due care on the part of a girl killed by a train may be found by the jury where there is evidence that box cars on a track and curve in the main track near street crossing at which she was killed, made it difficult or impossible for her to see the train until it was too late; and that the train was running at an unlawful rate of speed and without ringing the bell as required by ordinance.[3]

SEC. 120. *Province of jury.*—In determining where the preponderance of the evidence is, the jury may take into consideration, with other facts, the instincts and presumptions which naturally lead men to avoid injury and preserve their lives.[4]

SEC. 121. In an action for personal injuries, based upon the negligence of defendant, the exercise of ordinary care is an essential element of the plaintiff's case; but it is not indispensable that it should be directly shown by affirmative evidence.

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[1] Myers v. American Steel Barge Co., 64 App. 187.

[2] National Syrup Co. v. Carlson, 155 Ill. 210.*

[3] B. & O. S. S. Ry. Co. v. Then, Adm'r, 159 Ill. 535.

[4] Chicago City Ry. Co. v. Dinsmore, 62 App. 473.

* NOTE.—Plaintiff testifies that he was unable to read and write the English language, and it is not shown the paper was read to him, nor is his testimony in reference to the release contradicted. He was told he should sign his name for the money, and did so.

There is in all men a natural instinct of self-preservation, and such instinct is an element of evidence in cases of personal injuries founded upon the negligence of the defendant, of which the jury may take notice, and in the absence of all testimony upon the subject, find that the deceased party, in obedience to such instinct, exercised that care for his safety which a prudent man would have made use of under the same conditions.

The fact that the person was standing on the track of a railroad when injured is not conclusive proof or evidence.[1]

SEC. 122. *Instructions.*—Under the declaration charging that certain things had been negligently done, an instruction which takes this question from the jury is erroneous.

In instructing the jury, it is error in the court to make the declaration that a certain act is gross negligence.

An instruction which directs a verdict upon the proof of a single fact, where the proof of other facts is essential to recovery, is erroneous.[2]

SEC. 123. *Instruction as to the time due care was used.*—In an action to recover for a personal injury to the plaintiff's intestate, the court, in instructing the jury in regard to the degree of care required of the deceased, used this language: "If the jury further believe from the evidence that the said deceased at the time of the injury was exercising due and proper care and means to foresee and prevent such injury," etc. Held, that the words "at the time of the injury" could not be held to restrict the exercise of due care to the moment of the injury, but that they had reference to the whole transaction.[3]

SEC. 124. *Instructions.*—Where a case is close on the facts the jury should be accurately instructed.

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[1] Broadbent, Adm'r, v. C. & G. T. R. R. Co., 64 App. 231.

[2] C. & E. I. R. R. Co. v. Johnson, Adm'r, 61 App. 464.*

[3] L. S. & M. S. R. R. Co. v. Ouska, Adm'x, 151 Ill. 232.

* NOTE.—This was an action by the plaintiff, as administrator of his deceased child, to recover damages for her death, resulting from injuries caused by an engine of the defendant at a street crossing in Watseka, Illinois. The deceased, who was nine years of age, was riding a pony along the street, and while crossing the railroad just as an engine which had been detached from a freight train moved upon the crossing, the pony was struck by the engine and knocked down, the child was thrown off, and both were run over. The child died the next morning from her injuries.

A party is precluded from asserting that the court erred in instructing the jury upon a certain theory, when he has requested instructions upon the same theory himself.

It is a question of fact, to be determined by the jury, whether or not, in a particular case, the lack of ordinary care is negligence.

An instruction which informs the jury that if they believe certain things "from the weight of the evidence" is tantamount to saying "from a preponderance of the evidence," and the term "free from negligence," as used in an instruction, is equivalent to "use of ordinary care."[1]

SEC. 125. *Instructions.*—An instruction upon a question of negligence must be confined to the scope of the negligence alleged in the declaration.

In order to convict a railroad company of negligence in not maintaining a signal at a crossing of another railroad, it must be shown that the signal was necessary.[2]

SEC. 126. *Instructions.*—In a suit for personal injury against a railroad company, an instruction that "plaintiff was rightfully on the space between defendant's tracks" is erroneous, where that question is in controversy.

An instruction which authorizes the jury to base a verdict against a railroad company upon negligence not charged in the declaration is erroneous.[3]

SEC. 127. *Instructions.*—The expression "due care," in an instruction requested in an action for personal injuries, through the malicious frightening of a team by a railroad engineer, is properly changed to "ordinary care" and "reasonable care," as the terms are convertible, and the latter are preferable.[4]

SEC. 128. *Limitations.*—Where allegations are introduced into a declaration in an action for personal injuries more than two years after the cause of action occurred, if the gist of the action remains the same, a plea of the statute of limitations is inapplicable.[5]

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[1] B. & O. R. R. Co. v. Wheeler, 63 App. 193.

[2] C., C., C. & St. L. R. R. Co. v. McLaughlin, Adm'x, 56 App. 53.

[3] C. & A. R. R. Co. v. Rayburn, 153 Ill. 290; Springfield Consolidated Ry. Co. v. Flynn, 55 App. 600.

[4] C., B. & Q. R. R. Co. v. Yorty, 158 Ill. 321.

[5] Illinois Steel Co. v. Szutenbach, 64 App. 642; I. C. R. R. Co. v. Swisher, 74 App. 164.

SEC. 129. *Limitations.*—A new cause of action, distinct from that set up in the declaration, can not be brought into a case by an additional count after the time for suing upon it has expired.

In actions for personal injuries resulting from negligence, the plaintiff may properly file new counts amplifying and enlarging upon matters of negligent management, etc., without making them obnoxious to the statute of limitations; but he can not charge a particular negligence in his declaration and at the trial recover for another and different negligence.[1]

SEC. 130. *Negligence.*—Negligence is a question of fact for the jury. Not only are the specific acts which are alleged to be negligence to be proved to the jury, but whether, if proved, they were negligence, is for the jury and not the court to determine.[2]

SEC. 131. *Practice.*—The question of the insufficiency of the evidence to warrant a recovery is raised as a question of law by demurrer to it, moving to exclude it, or by asking an instruction to find for the defendant. If the defendant goes to the jury upon the facts, without any of these, no question of law is reserved upon the facts.

Where the question of negligence necessarily results from certain facts, the court may instruct the jury that proof of such facts establishes negligence; but if negligence may or may not result from the facts, the question is for the jury.[3]

SEC. 132. *Trial.*—Evidence must be of such a character that reasonable minds may differ as to conclusions to be drawn from it, in order to make a question for the jury as to negligence.[4]

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[1] Harper v. I. C. R. R. Co., 74 App. 74.

[2] Chicago City Railway Co. v. Smith, Adm'r, 54 App. 415.

[3] I. C. R. R. Co. v. Larson, 152 Ill. 326.

[4] Block v. Swift & Co., 161 Ill. 107.*

* NOTE.—This was an action for damages for injuries suffered in an elevator accident. On the trial in the circuit court, at the close of the evidence for the plaintiff, the court directed a verdict for the defendant, which was returned and judgment entered accordingly. The judgment was affirmed by the appellate court. In this case there was an entire want of evidence of any negligence or improper conduct on the part of the person in charge of the elevator. There was no duty on the part of the plaintiff to get upon the elevator while ascending, and his injuries resulted from his attempt.

SEC. 133. *Negligence.*—Where, from the facts admitted or conclusively proved, there is no reasonable chance that reasonable minds would reach different conclusions as to negligence, it becomes a question of law. And likewise where a single material fact is conclusively shown or uncontradicted, the existence or non-existence of which is conclusive on the right of recovery.

If negligence exists, its degree, whether slight and ordinary or gross, must always depend upon the evidence, and can not be determined by the court.[1]

SEC. 134. *Pleading.*—It is a fundamental principle of pleading that a party is not required to plead the evidence upon which his action is to be maintained; but in charging negligence it is necessary to set forth the negligence on account of which he seeks a recovery. It is unnecessary, however, to set forth the circumstances contributing to the negligence, for this would be pleading the evidence.[2]

SEC. 135. *Pleading.*—One desiring to have the action of the trial court in overruling his general demurrer, reviewed on appeal, should abide by his demurrer, as by pleading to the merits he waives the right to assign such overruling as error.

One pleading over, after the overruling of his demurrer, does not waive such substantial defects in the declaration as would render it insufficient to sustain a judgment, and the question whether such defects exist may be reviewed on appeal.

A defect in pleading, in substance or form, which would be fatal on demurrer, is cured by verdict, where the issue joined is such as necessarily requires proof of the facts so imperfectly stated or omitted, and with which proof it is not to be presumed that the judge would have directed, or the jury have returned, the verdict.

A verdict will aid a defective *statement* of a cause of action, but will not aid a statement of a *defective cause* of action.

The relative rights of carrier and passenger are matters of law, and the fact that the duty alleged in a declaration against a carrier, as a conclusion of law, does not harmonize with the

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[1] Wabash R. R. Co. v. Brown, 152 Ill. 484; Braun v. Conrad Seipp Brewing Co., 72 App. 232.

[2] Chicago City Ry. Co. v. Jennings, 57 App. 376.

facts alleged as a breach of the duty, does not render the declaration insufficient to sustain a judgment if it avers sufficient facts to raise the duty the breach of which is alleged.

A declaration against a carrier, alleging in substance that the plaintiff became a passenger, and while attempting to alight at his destination, using due care, the defendant carelessly and negligently caused the train to be violently started, whereby plaintiff was thrown and injured, is sufficient, after verdict, to sustain a judgment.

A defendant who introduces his evidence, after the refusal of his peremptory instruction offered at the close of the plaintiff's testimony, and who fails to renew the request for such instruction at the close of all the evidence, can not assign its refusal as error on appeal.

Variance.—The objection of variance, to be preserved as a question of law for review on appeal, must be raised in the trial court and the variance pointed out to enable the court to pass upon it.

Every presumption being in favor of the action of the trial court, the bill of exceptions must show that the question of variance upon which a ruling is asked was presented to the trial court, and the supreme court will not presume that the question was argued in support of a motion to exclude, or of an instruction directing a verdict.

Whether the damages awarded by a jury in an action at law are excessive, is a question of fact conclusively settled by the judgment of the appellate court.[1]

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[1] C. & A. R. R. Co. v. Clausen, 173 Ill. 100.*

* NOTE.—The plaintiff (now appellee) brought this suit against the defendant (appellant) in the court below, to recover damages for injuries alleged to have been sustained by the starting of a train, on which he was a passenger, while he was attempting to get off at defendant's station at Gardner, Illinois. There was a judgment for the plaintiff, which has been affirmed by the appellate court. It is averred that the plaintiff became a passenger on the passenger train of defendant at Dwight, to be carried from that place to Gardner, and that while he, with due care, caution and diligence, as alleged, was about to alight from the train at Gardner, the defendant carelessly and negligently caused the train to be violently and suddenly moved forward, and thereby he was thrown from off the train to and upon the wooden platform of defendant, and thereby injured. And in different counts it is alleged that defendant did not stop the train at Gardner a sufficient length of time to receive and let off passengers, but

SEC. 136. *Pleading.*—It is sufficient to allege facts which disclose an omission of a legal duty. It is not an essential that the omission should be expressly denounced as negligence.[1]

suddenly started the train, whereby the plaintiff, while attempting to alight, was thrown off and injured. Under the issue joined, the declaration was held to be sufficient after verdict. At the close of the plaintiff's evidence, the defendant entered a motion to exclude it, and offered an instruction that the jury should find the defendant not guilty. The court denied the motion and refused to give the instruction, and the defendant thereupon proceeded to offer evidence in its behalf. The motion was not renewed or the instruction asked at the close of all the evidence, and defendant thereby abandoned his motion and instruction and can not complain of the action of the court in that regard.[2]

[1] Taylor v. Felsing et al., 63 App. 624.*

[2] J., A. & N. Ry. Co. v. Velie, 140 Ill. 59; Harris v. Shebek, 151 Ill. 287.

* NOTE.—This action by Henry Felsing was to recover from the defendant damages for the loss of his right hand and wrist while in the employ of the defendant; the material allegations being that "the defendants were operating a steam flour mill, wherein they had certain machinery and appliances for receiving, cleaning and elevating wheat; that the plaintiff was in their employ, and charged with the duty of operating said machinery; that there was placed, kept and maintained on the main shaft which turned the gearing of certain cog-wheels a certain contrivance called a clutch pulley, with a lever attached, by means of which said shaft and cog-wheels could be, and were thrown out of gear, and would and did cease to revolve or run, at the pleasure of the plaintiff, and thereby all danger to life and limb from said cog-wheels could be and was averted; that plaintiff was required by defendants, while so in their employment, to go and pass along the certain space or passage between said gearing of cog-wheels and said wall of said basement, and to climb to and from said basement floor into and from said space or passage-way to and in order to clean out said conduits, pipes, etc., when so clogged and choked as aforesaid; that when it became necessary for plaintiff to clean and clear said conduits, pipes, etc., from clogging and choking, he could, by means of said clutch pulley, when it was on said main shaft, throw said shaft and gearing of cog-wheels out of gear and stop them from revolving, and then climb up into said space or passage and clean and clear said conduits, pipes, etc., so that the wheat might freely pass through the same; that afterward, and on August 1, 1892, said clutch pulley was out of repair, so that it became necessary to remove the same, and it was then so moved from said main shaft, temporarily, to the end that it might be properly repaired, and a stiff pulley was temporarily put on said main shaft in the place and stead of said clutch pulley, and until said clutch pulley should be repaired and replaced; and said stiff pulley was used by defendants in causing said shaft and gearing of cog-wheels to run and revolve; and that by said stiff pulley said shaft and gearing of cog-wheels could not be thrown out of gear and caused to cease to revolve; that the removal of said clutch pulley and the

SEC. 137. *Pleading.*—Where a declaration contains several distinct charges of negligence, if either of such charges sets forth a cause of action and is sustained by the evidence, a recovery may be had, although the other charges are not proved.

Special findings.—Where a declaration in an action for damages caused by death resulting from negligence contains three several and distinct charges of negligence, and special findings are returned by the jury at the request of the defendant as to some of such charges and none as to the others, because no special interrogatories based upon those charges were submitted, such special charges do not show that the jury

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substitution for the same of said stiff pulley rendered the service of plaintiff in cleaning said conduits, pipes, etc., more hazardous than it had theretofore been, and thereupon plaintiff repeatedly and shortly before the injury objected to said defendants about the absence of said clutch pulley from said machinery and the use of said stiff pulley in place thereof, and repeatedly, and shortly before said injury, requested defendants to have said clutch pulley replaced on said machinery and said stiff pulley removed, and the defendants promised plaintiff to have said clutch pulley replaced on said machinery and have said stiff pulley removed; and that plaintiff, relying on said promises, continued in his said service and in the performance of the duties thereof for a reasonable time to permit the performance of said promises on the part of said defendants," etc. And in describing just how the accident happened, it is further alleged: "And plaintiff then and there while in the exercise of ordinary care for his own safety, climbed up into said space or passage between said gearing of cog-wheels and said west wall of said basement, and then and there cleaned out and cleared out said conduits, pipes and spouts, and freed the same from such clogging and choking, so that the wheat might freely pass through the same, and the said mill continue to be supplied with wheat; and thereupon, then and there, and while in the exercise of ordinary care for his own safety, plaintiff necessarily attempted to climb down from said space or passage between said gearing of cog-wheels and said wall of said basement, and while in the exercise of such ordinary care, his foot accidentally slipped, and he was thereby then and there thrown with his right arm in and upon, and his said right arm was then and there caught in said gearing of cog-wheels, whereby plaintiff's right hand, wrist and arm, up to within four inches of the elbow, was crushed and severed from his body." Defendants demurred to said count, but the demurrer was overruled by the court. Afterward general issue was pleaded, and a trial had before a jury. The jury rendered a verdict in favor of the plaintiff and assessed damages at $2,660.[1]

[1] Julius Thann and John Hofert v. Joseph S. Lahey, 59 App. 73; Henry Gerke v. John Fancher, 57 App. 651.

did not find such charges proved, and where the evidence justifies them in so finding their verdict should be sustained.

Special interrogatories which do not relate to ultimate facts in issue are properly refused.

Where the evidence shows that an ordinance was in force on a certain day, the presumption, in the absence of evidence showing its repeal, is that it remains in force.

Burden of proof.—Where a declaration in an action for personal injuries, resulting in death, avers that the deceased and those causing his death were not fellow-servants, and the general issue is pleaded, the burden is upon the plaintiff to prove that they were not fellow-servants as alleged.[1]

SEC. 138. *A contractor and not a servant.*—One who contracts to do a specific piece of work, furnishes his own assistants and executes the work, either entirely in accordance with his own ideas, or in accordance with a plan furnished by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor and not a servant, and a person injured by his negligence in the performance of the work has no right of action against the party for whom the work is being done.

Where work is being done for a railroad company, under a contract, the fact that it retains the right to demand the dis-

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[1] St. L. & T. H. R. R. Co. v. Eggmann, 60 App. 291.*

* NOTE.—Edward O'Connell had been working for defendant for some time in the capacity of chief yard clerk and watchman, with the powers of a policeman, at the city of East St. Louis. On May 2, 1895, one of defendant's engines was to be sent to Pinckneyville for purposes of extra work, and O'Connell rode on the engine as far as the lumber yard, as it is called, and then alighted from the engine. There is a conflict of the evidence as to what engaged his attention for the next few minutes. On the one hand, it is alleged that he was engaged in taking car numbers and examining the seals, and, on the other hand, that he was devoting his time to the loading of a revolver. The evidence was such as to authorize the jury to find that he was taking car numbers and examining seals, as it was his duty to do under the terms of his employment. In the meantime, the engineer, finding the main track blocked with cars, backed the engine, by direction of the yard-master, that he might run upon a side track and proceed around the obstruction, instead of waiting for the main track to be cleared. O'Connell's back was toward the engine, which moved down the track, with the tank or tender in advance. He turned as the engine was upon him and struggled heroically but unsuccessfully for his life. He received fatal injuries and died that afternoon.

charge, under certain circumstances, of an employe of the person doing the work, does not make such company the principal or master so as to render it liable for the negligent acts of the contractor whereby injuries result to his employes.

When the evidence, with all fair and legitimate inferences therefrom, is so insufficient to sustain a verdict for the plaintiff that the court must set it aside if rendered, the court will be justified in directing a verdict for the defendant.[1]

SEC. 139. *Negligence.*—The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been performed.

Duty as to overhead wires.—The law does not require a street railroad operated by electricity, and using a wire suspended in the street, to anticipate every possible circumstance or state of facts liable to occur, which would make it dangerous to string the wire at a particular height, but only that such wire should be so placed as to be reasonably safe for the passage of persons who have a right to pass under it, not for persons who, for their own convenience or pleasure, see fit to pass under it by other than the usual and ordinary methods of travel or business.[2]

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[1] Bayer v. C., M. & N. R. R. Co., 68 App. 219.

[2] Gross, Adm'r, v. South Chicago City Ry. Co., 73 App. 217.*

*NOTE.—The plaintiff brought suit against the defendant and two steam railway companies to recover for alleged negligence which caused the death of one Herman Schneegas, who was sixteen years of age at the time of his death, June 15, 1894. The Baltimore & Ohio Railroad Company owned railroad tracks which crossed Ewing avenue, in the city of Chicago, the place where deceased was killed. Two other railroad companies also owned and operated railroad tracks which crossed Ewing avenue at the same place. By consent of the Baltimore & Ohio Railroad Company the Chicago & Calumet Terminal Railroad Company used and was accustomed to use the tracks of the former company in operating the trains of the latter company at that time. The Calumet company, besides ordinary freight cars, was in the habit of running in its trains on said tracks high box cars, or what are known as barrel cars, which are from eighteen inches to two feet or more higher than the ordinary freight cars. Defendant, South Chicago City Railway Company, operated an electric line of railway along Ewing avenue, and strung its trolley wire, which was from one-half to one inch in diameter, across the tracks of the Baltimore & Ohio Railroad Company at Ewing avenue, at a height of twenty feet and one inch above the tracks, but it does not appear by what authority, whether of the city or otherwise.

Deceased was a helper in the employ of the Rock Island Railroad Com-

SEC. 140. Where a party seeks to recover damages for a loss which has been caused by negligence or misconduct, he must be able to show that his own negligence or misconduct has not concurred with that of the other party in producing the injury, and the burden of proof is upon the plaintiff, to show not only negligence on the part of the defendants, but also that he exercised proper care and circumspection; or, in other words, that he was not guilty of negligence. The degree of care which the plaintiff is bound to exercise will be found to depend upon the relative rights, or position of the parties, in relation to the right exercised or position enjoyed by the plaintiff at the time the injury complained of happened. As growing out of these two positions of right, two classes of cases will be found. Where both parties are equally in the position of right, which they hold independent of the favor of each other, the plaintiff is only bound to show that the injury was produced by the negligence of the defendant, and that he exercised ordinary care or diligence in endeavoring to avoid it. Or that by the exercise of ordinary care he could not have avoided it. The substance of the instruction (asked for) was, that if the plaintiff alone was in fault, or if both parties were equally in fault, the plaintiff could not

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pany, and was in the habit of riding back and forth between South Chicago and Whiting, Indiana, on the freight trains of the Calumet company, without objection by the trainmen. His brother was a switchman for the Baltimore & Ohio Railroad company. On the day of the accident, deceased and a switchman in the employ of the Calumet company, boarded, near its head while moving, a freight train of said company, consisting of about fifty cars, being ordinary box cars and tank cars, except one, which was a barrel car about two feet higher than the ordinary box car. This barrel car was the "second hind" car of the train. When the train was crossing Ewing avenue two of the trainmen were sitting on the front end of the barrel car, and deceased stood on the same car back of these men and facing the engine. The train was going eight to ten miles per hour, and the time was between eleven and twelve o'clock in the day. The trolley wire was large enough to be readily seen by any one of ordinary eyesight. There was about six feet between the top of the ordinary freight car and this wire, and about four feet between it and the top of the barrel car. Deceased as he stood on the barrel car, was struck about the breast by the wire, thrown off between the cars and so injured that he died. The negligence alleged as against the defendant was in stringing its wire over the railway tracks so low as to make it unsafe and dangerous for persons passing over the tracks on the top of barrel cars.

recover. This, certainly, is the rule of law, even though the plaintiff was only bound to use ordinary care; for, if both used ordinary care, then the misfortune was an accident, without the fault of either, and the loss must rest where the misfortune placed it; and if neither used ordinary care, then for the want of it, the plaintiff can not recover, even admitting that he had as much right to be upon the track as the company had to dig the well.[1]

SEC. 141. In an action against a city the plaintiff can not recover for a personal injury caused by a defective sidewalk, however negligent the defendant may have been in failing to keep its sidewalk in proper repair, unless the plaintiff, at the time of the accident, was exercising ordinary care to avoid injury; and whether plaintiff was in the exercise of ordinary care, as has been often held, is a question of fact. * * * If there were two routes from plaintiff's residence to the church, one dangerous and the other entirely safe, and in the selection of a route plaintiff saw proper to pass over the dangerous one, it could not be determined, as a matter of law, that plaintiff was justified in selecting the dangerous route, but the question ought to have been left to the jury. As an abstract question, it may

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[1] The Aurora Branch Ry. Co. v. Grimes, 13 Ill. 585.*

*NOTE.—The railroad company had a well between its main and side track at Batavia. It was six feet across and covered with oak boards one inch thick and twelve feet long, mostly with two thicknesses—had no other inclosure. The place where the well was situated was not frequented by teams of the public. The top of the well was even with the surface of the ground, which was nearly level with the two tracks. A carload of lumber arrived at the depot for plaintiff (Grimes), which was left standing on the west track where freight was usually discharged. He desired it moved so that it might be discharged at his lumber yard. The agent of the road declined moving it from the usual place of discharging freight, when Grimes, with the consent of the agent, hitched his mare to the car, and moved it to the desired place. A few days after, another load arrived and was left in the same place as the former, when Grimes, without consulting the agent, again hitched the mare to the car and removed it. When he had got a short distance beyond the well, the mare refused to draw, backed off the track, became entangled in the traces and got down, and in her struggles got into the *well*, and was killed. When the first car was removed, Grimes *led* the mare, and she worked well. Upon the last occasion, one witness says he led her, while another says he was behind and driving her, when she refused to draw and backed off the track, and he thinks plaintiff pulled her off with the lines. Mare was a spirited animal.

be, plaintiff was not obliged, as declared in the instruction, to take another less convenient sidewalk; bnt if she failed to do so, it would be a question of fact whether, in the selection of a route known to be dangerous, she was in the exercise of ordinary care.[1]

SEC. 142. In order to a recovery for negligence, it is not sufficient to show that the defendant has neglected some duty or obligation existing at common law or imposed by statute, but it must be shown that the defendant has neglected a duty or obligation which it *owes to him* who claims damages for the neglect.

The duty of railroad companies to ring a bell or sound a whistle on a train approaching a highway crossing is intended for the benefit or protection of travelers upon the public highway and passengers upon the passing train, and the place indicated is the intersection of a railroad with a public highway.[2]

SEC. 143. The declaration charges that "the defendant (Town of Harvard) negligently suffered and permitted a certain sidewalk within its corporate limits, and on the north side of Washington street, and opposite a lot owned by Henry Z., to remain out of repair and covered with planks, boards, timbers, stones, ashes, cinders, and other material, so that it was dangerous and unsafe to travel upon, by means whereof, as the plaintiff was then and there, in the night time, walking and passing along said sidewalk or street at the place last aforesaid, to wit, on said street near the line of said lot owned by Henry Z., exercising due care and caution, and without fault or negligence on her part, she then and there necessarily and unavoidably tripped, stumbled and fell upon and against the said planks, boards, timbers, stones, stumps, ashes, cinders and other things, and was thereby thrown and fell to and upon the said ground, sidewalks, planks, boards, timbers, stones, ashes, cinders and other things, with great force and violence, thereby breaking the left leg of the plaintiff below the knee joint." The trial resulted in a verdict for the plaintiff of $1,500. The Town of Harvard appealed.

The appellate court found the facts different from the circuit court and entered its judgment as follows: "Whereas, the

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[1] City of Sandwich v. Belle F. Dolan, 133 Ill. 177.

[2] Charles M. Williams v. C. & A. R. Co., 135 Ill. 491.

judgment in this case is reversed, for the reason, in part, that this court finds the facts differently from the finding of the same facts by the court below which tried the case, therefore, in accordance with the provisions of the statute in that respect, this court finds the facts to be as follows: 'We find that the plaintiff was in fact injured, as she alleges in the declaration, upon the sidewalk named and described in the declaration and at the time therein stated, but we find that appellant, or its officers, agents or servants, were not guilty of any negligence or want of care in the construction or care of its sidewalk, in manner and form as charged in the declaration, where appellee fell and hurt herself. We find the sidewalk upon which plaintiff fell was in a reasonably good and safe condition at the time appellee was injured, and that appellant was not guilty of any negligence or want of care in the construction, or of not keeping of said sidewalk in a good and safe condition, in the manner and form as charged in the declaration, and, therefore, are of the opinion that in the record of the proceedings aforesaid, and in the rendition of the judgment aforesaid, there is manifest error.'" Affirmed by the supreme court.[1]

SEC. 144. *Burden of proof.*—The court below refused to give any of the instructions asked by either party, and, in lieu thereof, gave one of its own motion. In two of the instructions asked for by the defendant, it was stated to be the law, that the burden of proof was upon the plaintiff to prove her case as alleged in the declaration, and that she must prove by a preponderance of all the evidence that she was, at the time of the accident complained of, exercising ordinary care and prudence for her own safety. Each count of the declaration averred that she was "exercising all due care and diligence on her part." The propositions of law embodied in the instructions, as above set forth, were correct. In such actions as this, the burden of proof is always held to be on the plaintiff to show he was himself exercising ordinary care and diligence at the time the accident happened. It is also a requirement of the law that, in civil cases, the plaintiff must prove his case by a preponderance of the evidence. * * * Where

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[1] Senger v. Town of Harvard, 147 Ill. 304.

the trial court throws aside all the instructions asked by one or both of the parties, and prepares written instructions of his own, the latter must fairly instruct the jury on all the legal questions involved in the case, and it must appear that no injury has been done to the defeated party by the refusal of the instructions asked by him. (Wacaser v. People, 134 Ill. 438; Hill v. Parsons, 110 Ill. 107.) In this case there was no language in the instruction given by the court of its own motion which expressed the proposition of law contained in the refused instructions of the defendant as above set forth. The evidence was close and conflicting, both in regard to the exercise of due care by the plaintiff, and in regard to the question whether the defendant was guilty of negligence or not. It was, therefore, important that the jury should be accurately instructed. The defendant was entitled to have these propositions of law submitted to the jury, and we can not say that the defendant was not injured by the refusal of the court to submit them. Judgments of appellate and superior courts reversed and cause remanded to superior court.[1]

SEC. 145. In a suit based upon personal injuries occurring through the negligence of the defendant in a given case, to entitle the plaintiff to recover he must be shown to have been, upon the occasion in question, in the exercise of ordinary care. And an instruction in such a case purporting to state the requisites to a recovery by the plaintiff and omitting that of ordinary care, is erroneous. A person riding with another but not driving, is as much bound to exercise such care as the person driving.[2]

SEC. 146. The general rule is, that in actions for personal injuries the plaintiff must prove that he was using due care at the time he was injured, and it is a question of fact for the jury to determine from the evidence, and the proper determination of this question depends largely upon the circumstances surrounding the person injured at the time of or immediately preceding the injury. Hence what might be required of such person in one case, to establish the fact that he was using due

[1] Timmons et al. v. Kidwell et al., 138 Ill. 13.

[2] Chicago, Santa Fe & C. Ry. Co. v. Bentz, 38 Ill. App, 485.

care for his personal safety when injured, might not be required in another case under different circumstances.

In this case of Monks, immediately before the accident, deceased and others were talking together on the track of the C. & A. Ry. Co., about fourteen feet west of the west rail of defendant's track. That on defendant's track south of crossing were a number of cars obstructing the view of a person to the south who was going east over the crossing, so that he could not see the approaching train coming from the south until he stepped on the north side of the crossing. Deceased remarked that he believed he would go down to Venice and get shaved, and started east over the crossing toward his home, and, as he stepped off the side track and was about to step on defendant's main track, its passenger train from the south came rapidly along and he was struck by the pilot beam of the engine, which extended six inches over the west rail, and was thrown quite a distance north and instantly killed. Two of the persons he had just left were witnesses and testified they were standing about fourteen feet west of him and saw the engine strike him. That no bell was rung or whistle blown on the train. That they did not hear or see the train until the engine struck him. That he walked deliberately as men usually do. According to these witnesses the deceased was unwarned of the approach of the train and might well have felt secure in attempting to cross the track, relying upon defendant's performance of its statutory duty. The jury might fairly conclude from the evidence that the train came so rapidly and suddenly upon him, after he reached the place where he could see it, that looking would have been unavailing to protect himself from the collision, or being startled and terrified by being put in peril of his life, he was incapable of acting for his own protection. If the jury so found, deceased was not guilty of contributory negligence, such as would bar recovery, and exercised due care under the circumstances required by the law.[1]

Railroad companies, under their charters, have the same right to use that portion of the public highway over which their track passes as other people have to use the same. Their

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[1] Cleveland, C., C. & St. L. Ry. Co. v. Monks, 52 App. 627.

rights and those of the people as to the use of the highways at such points of intersection are mutual, co-extensive, and reciprocal, and in the exercise of such rights all parties will be held to a due regard to the safety of others, and to the use of every reasonable effort to avoid injury to others.[1]

SEC. 147. *Joint liability—Concurring negligence of several.*— If two or more persons are jointly concerned in a particular act which occasions injury to another, they may be sued jointly, and all persons who co-operate in an act directly causing injury are jointly liable for its consequences, if they act in concert, or unite in causing a single injury, even though acting independently of each other.

The ice machine company undertook to erect a refrigerator plant for the brewing company at its brewery, which included a large iron tank. The brewing company was to fix the location for the plant, and make and put in proper supports for the tank. It selected its engine room for this purpose, and the iron tank was to be set upon supports eighteen or twenty feet from the ground. To do this, part of the roof of the engine house was cut away, and one side of the tank was to rest upon one wall of the engine room, and the other be supported by a truss made of two wooden beams, fourteen inches wide and seven inches thick, twenty-four feet long, bolted together, and these beams were further strengthened by a log chain. This chain consisted of two iron rods anchored, one in the north and one in the south wall of the engine room, and joined together in the center of the supporting beams by a swivel. Timbers were laid from this truss to and upon the east wall of the engine house, and upon this structure the iron tank was placed, extending three feet over the beam, so that the greater portion of the weight of the tank rested upon the truss. It is shown that when the truss was completed, the superintendent of the ice machine company told the president of the brewing company that it was insufficient, and never would support the tank, who replied in substance, that it would do. Without further objection the ice machine company placed the tank on the support, as intended by the brewing company. After the tank was up, the superintendent of the ice machine com-

[1] Indianapolis & St. L. R. R. Co. v. Stables. 62 Ill. 313; Chicago, Burlington & Q. R. R. Co. v. Lee, 87 Ill. 454.

pany directed the intestate, with others, to go upon the roof of the engine house and fit in it the heater. The tank was, at the time, being filled with water, and while the intestate was on the roof in compliance with such direction, the truss gave way, the tank fell, taking with it part of the roof of the engine house, and precipitating Keifer to the floor of the engine room, whereby he was killed.

Under the state of facts alleged and shown, it was the duty of each of the defendants, in the performance of their several parts of the work, to use reasonable care to avoid injury to the servants of either, and to third persons. If the superintendent of the ice machine company knew that the truss provided by the brewing company would not support the tank, he was guilty of negligence in sending the intestate to work upon the tank, while it was being filled with water. On the other hand, it was the plain duty of the brewing company, when it undertook to provide the support, to make it sufficient to sustain the tank when filled with water. The purpose of the erection of the tank was that it might be filled with water, and the disastrous consequences of an insufficient support could be readily foreseen. The tank fell because of the insufficient support furnished by the brewing company, and the knowledge of such insufficiency was brought home to said company before the tank was placed thereon. It is claimed that if either defendant had been guilty of negligence, resulting in injury to the intestate, it is their *several* negligence and can not be charged against the other defendant. The evidence shows beyond dispute, that both defendants in respect to the matters being considered, were acting together to accomplish a common purpose. It is true the work was apportioned among them, but this does not change the common purpose of their several acts. The brewing company was negligent in providing a structure which was unsafe and insufficient, whereby the deceased incurred an extra peril, when at his work, not incident to his employment. The ice machine company was negligent in directing deceased to work in a place of danger, it having knowledge, and he being without notice or knowledge of such danger, and the successive concurrent negligence of appellants thus united in causing the death of Keifer.

In Wabash, St. L. & P. Ry. Co. v. Shacklet, 105 Ill. 364, which was a case where a passenger upon one train of cars was killed by the collision with the train of another company using the same track, through the mutual negligence of the servants of the two companies, the supreme court said: "We are of opinion that public interests will be best subserved by adhering strictly to the long and well established principle that one who has received an actionable injury at the hands of two or more wrongdoers, all, however numerous, are severally liable to him for the full amount of damages occasioned by such injury, and the plaintiff, in such case, has his election to sue all jointly, or he may bring his separate action against each or any one of the wrongdoers."

There can, in such case, be no apportionment of damages as between the several parties whose negligent acts and conduct have contributed to the injury. There can be but one recovery for the damages sustained.[1]

SEC. 148. In an action against two, where concurring negligence is alleged, proof that one defendant told his co-defendant that certain supports for a water tank which was proposed to be erected by the former for the latter, were not strong enough to sustain the weight of the tank before the same gave way and caused the death of a servant, is competent evidence against both defendants, in an action to recover for the servant's death, to show that both defendants had notice of the insufficiency of the supports, and therefore both were guilty of negligence. *Id.* Where evidence is competent as to one defendant but not as to another, there will be no error in its admission, but its use and application may be limited by instructions. If evidence is proper for any purpose, its admission is not error. *Id.*

SEC. 149. In an action under the statute, by the administrator of a deceased person against an incorporated company, to recover for negligence causing the death of the intestate, a stockholder in the company, being interested in the result of the litigation, is incompetent to testify as a witness on behalf of the defendant.

SEC. 150. As a general rule, proof of an injury occurring

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[1] Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481.

as the proximate result of an act which, under ordinary circumstances, would not, if done with due care, have injured any one, is enough to make out a presumption of negligence; and this rule applies even when no special relation, like that of passenger and carrier, exists between the parties.[1] In a suit by a passenger for an injury, the mere proof of the accident by which the injury is inflicted, may be sufficient to throw the burden on the carrier to show that he used due care; and when there is absence of the *vis major*, and it is shown that the injury happened from the abuse of agencies within the defendant's power, it will be inferred from the mere fact of the injury that the defendant acted negligently.

SEC. 151. Where a workman in a shop is injured while at service, in consequence of the smooth and slippery condition of the floor, which was of hard wood, the fact that the superintendent of the works, or any one else in charge thereof, directed a carpenter to put down a soft wood floor, is a circumstance to be considered by the jury, in connection with other evidence, whether the floor as laid and used was safe or not. Evidence that the floor was changed after the accident is not strictly proper. Whether the floor was in an unsafe and dangerous condition, whether the servant exercised due care, and whether he notified the master's foreman of the condition of the floor, and was promised, by those who had authority, to remedy the difficulty, that the floor would be made safe, and whether, relying upon such promises, he was induced to remain in the master's employment until he was injured, are all questions of fact for the jury. If a servant is assured, from time to time, that an unsafe floor will be repaired, he will have the right to rely on such assurance.[2]

SEC. 152. In an action for negligence causing the death of the plaintiff's intestate by a train of a railway company, the question of negligence is one of fact, for the jury to find from the evidence, and the court has no right to instruct the jury that one thing is negligence and the other is not.

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[1] North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486.

[2] Weber Wagon Co. v. Kehl, 139 Ill. 644.*

*NOTE.—The declaration contains two counts. In the *first*, it was averred that it was the duty of the defendant to keep a soft wood floor in front of the "shaper," for plaintiff to stand upon without slipping, and

The jury should be left free and untrammeled to determine, from all the evidence, who has been negligent and who has not. Hence, it is improper for the court, by an instruction, to inform the jury that it is not a want of ordinary care for a train of cars to approach a highway crossing at its usual speed, although there is a team approaching. And so an instruction that the engineer had a right to presume that a team approaching a crossing would stop, is properly refused. Presumptions had nothing to do with the question involved. Deceased had lost his life in crossing the railroad track, and the question was whether the negligence of the defendant contributed to the injury, the deceased having exercised ordinary care.[1]

On a charge of negligence against a railway company in failing to ring a bell on approaching a highway crossing, there is no error in permitting witnesses to testify that they would have heard the bell if it had been rung.[2] The evidence was all in on Saturday morning, except the testimony of two absent witnesses of the defendant as to one point, and the defendant asked the court to hold the case open until 11:10 o'clock of that forenoon, when the witnesses were expected to arrive on the train, or to allow counsel to call them on the next Monday and examine them, which the court refused. This

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also defendant's duty to place guards over the knives of said machine, so that if plaintiff should slip or fall against said machine he would be prevented from being cut by said knives, yet defendant negligently placed a hard wood floor in front of said shaper, which became slippery and unsafe, and defendant in no way protected said knives, but negligently permitted the same to be without guards, and the plaintiff, by reason of the slippery floor, slipped and fell against said machine, and by reason of the negligence of the defendant in not guarding said knives, plaintiff's hand came in contact with said knives, and he was injured. The second count is substantially like the first, with the additional allegations that a short time before the injury plaintiff notified appellant of the said dangerous condition of the said floor and machine, and the defendant thereupon promised the plaintiff, and agreed to remedy said defects, and the plaintiff was induced by the defendant to believe there would be a change in said condition of said floor and said machine, and plaintiff was induced to go on working with the expectation that said floor and machine would be speedily put in proper and safe condition; that this was not done, and plaintiff was thereby injured.

[1] Ill. Cent. Ry. Co. v. Slater, administrator, 139 Ill. 190.

[2] Chicago & Alton Ry. Co. v. Dillon, 123 Ill. 570; Ill. Cent. Ry. Co. v. Slater, 139 Ill. 190.

request was addressed to the discretion of the court, and while the supreme court would have been better satisfied if counsel had been allowed to examine the witnesses on their arrival on Saturday or the following Monday, the refusal of the request was the exercise of a discretion which could not justify a reversal of the judgment.[1]

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[1] Ill. Cent. Ry. Co. v. Slater, 139 Ill. 190.*

* NOTE.—Action by Belford Slater, administrator of Lewis W. Slater, deceased, against Ill. Cent. Ry. Co. to recover damages resulting from death of deceased, caused by the negligence of the railway company. Belford Slater, father of Lewis W. and Arthur B. Slater, on the 24th day of August, 1886, sent the two boys from his farm to Polo with a wagon and span of horses for the purpose of getting certain goods. Lewis was thirteen and Arthur ten years old. On their return home, while attempting to cross the railroad track, a passenger train on defendant's railroad collided with the wagon and both boys were killed. Belford Slater was appointed administrator of the estate of each of his sons, and brought separate actions to recover for the death of each. The action for the death of Arthur B. was tried at the August term, 1887, and resulted in a verdict and judgment for plaintiff for $1,000. The action to recover for the death of Lewis W. was tried at the March term of the same court and resulted in a verdict and judgment in favor of plaintiff for $1,350. The declaration in both cases was the same, except that Lewis Slater, deceased, was mentioned in one and Arthur Slater, deceased, was mentioned in the other. The declaration, in substance, was that Lewis W. Slater was then, with all due care, riding upon said highway in a wagon drawn by two horses, and with all due care and caution came upon said railroad at a crossing, and while so riding, with all due care, across said railroad, at said crossing, upon said highway, in said wagon, defendant then and there, by its servants, so carelessly and improperly drove and managed its locomotive engine and train, by running the same at a high and dangerous rate of speed, and by failing to keep a proper watch for persons about to pass over said crossing or to give such signals as would apprise such persons, using due care, of the approach of said locomotive engine and train, and by failing and neglecting to stop or endeavoring to stop said engine and train, so as to prevent injury to said Lewis W. Slater upon said crossing, that by and through said negligence and improper conduct of defendant in that behalf, said engine and train then and there struck said wagon, and said Lewis W. Slater was then and there thrown out of said wagon with force and violence, and against said engine, and was thereby then and there killed; that said Lewis W. Slater left surviving him, Belford Slater, his father, etc., etc.

It was contended in this case by the defense, that the trial in one case was a bar to the second; that the second trial was a repetition in all respects of the first. The killing of the two boys resulted from one and the same transaction. The testimony in one case was repeated in the other. Indeed, it was impossible for the plaintiff to prove the death in one case without at the same time and by the same evidence proving the death in the other

SEC. 153. *Expert witnesses.*—Witnesses who have experience in the use of a machine called a "shaper," and who are thereby possessed of a peculiar skill, may be allowed to give their opinions; one who has no skill or experience in the matter is properly rejected.[1]

It was claimed that the trial court erred in allowing plaintiff to testify that he was not careless at the time he received the injury. No objection was interposed to the question when it was asked, and on this ground the court denied a motion to strike out the answer to the question; but conceding that the court erred in this regard, plaintiffs allowed the answer to be stricken out and they have no ground for complaint. *Id.*

SEC. 154. It is insisted that the court erred in permitting evidence that the floor was changed after the accident. The evidence introduced on this point was stricken out or withdrawn except the cross-examination of witness Swigert, who said, "Yes, sir, there was a soft wood floor put down by Mr. Sunday, under his own direction. He proposed it, and asked Mr. Weber about it. I believe he gave permission to put it down. Mr. Sunday was running a 'shaper' at that time." Evidence that the floor was changed after the accident ought not to have been admitted (Hodges v. Percival, 132 Ill. 53) but the effect was harmless. *Id.*

SEC. 155. The jury found defendant guilty and assessed plaintiff's damages at $2,000. On account of its importance an extended statement of this case is given. On the 3d of December, 1888, plaintiff boarded defendant's train of cable cars, to be carried from the South Division to the North Division of Chicago. He took the rear car of the train, and the seats being all occupied, took position with others standing on rear platform.

The train proceeded about half way through the tunnel and came to a halt. A few minutes later another train approached rapidly on the same track from the rear, and those in charge

case, or to establish a cause of action in the one case without at the same time and by the same evidence proving the facts which led to a recovery in the other. The court holds that the parties are not the same in both actions. The plaintiffs are different and have no interest or connection whatever—are separate and distinct.

[1] Weber Wagon Co. v. Kehl, 139 Ill. 644.

being unable or failing to stop it, said train ran against the car on which the plaintiff was standing, and struck the plaintiff, inflicting the injury complained of. The colliding train consisted of a grip car and two ordinary cars all heavily loaded with passengers. The driver of the grip car tried in vain to check the speed of his train by use of the brake, and the conductors being busy collecting fares, failed to notice signals to put brakes on the passenger cars. As a consequence the weight and momentum of the passenger cars forced the grip car forward until it collided with the car in front of it. The plaintiff, against objection of the defendant, was permitted by the trial court to prove there was no sand box on the colliding train, and that such is a great help when the track is slippery. It is insisted this was error, because failing to have a sand box on the grip car was not averred in the declaration. The rule is fundamental that a plaintiff must recover, if at all, upon the case made in the declaration, but this rule can not be invoked here for two sufficient reasons.

In the first place, under the circumstances of this case this evidence could have resulted in no prejudice to the defendant. The evidence of the injury to the plaintiff and the circumstances under which it was inflicted, were alone sufficient to raise a presumption of negligence on the part of the defendant, and as no evidence was offered to rebut that presumption, a verdict in favor of the plaintiff necessarily followed, wholly regardless of the evidence objected to. The general rule seems to be, that proof of an injury occurring as the proximate result of an act which, under ordinary circumstances would not, if done with due care, have injured any one, is enough to make out a presumption of negligence. And this is held to be the rule even where no special relation, like that of passenger and carrier, exists between the parties. (Byrne v. Boadle, 2 Hurlst. & Colt. 722; Scott v. London, etc., Docks Co., 3 Hurlst. & Colt. 596.) In these cases the court holds as follows: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the acci-

dent arose from want of care." In many cases it has been held that, in a suit against a carrier for an injury, the mere proof of the accident by which the injury was occasioned is sufficient to throw the burden on the carrier to show that he exercised due care; and there seems to be very general concurrence of authority that, where there was an absence of *vis major*, and it is shown that the injury happened from the abuse of agencies within the defendant's power, it will be inferred from the mere fact of the injury, that the defendant acted negligently. (See Wharton on Negligence, Sec. 661, and cases cited.) In the State of Illinois this doctrine as to presumptions has been fully recognized in repeated decisions. G. & C. U. R. Co. v. Yarwood, 17 Ill. 509; P. C. & St. L. R. Co. v. Thompson, 56 Ill. 138; P. P. & J. R. Co. v. Reynolds, 88 Ill. 418; Eagle Packet Co. v. Defries, 94 Ill. 598.

The circumstances of the injury do, in our opinion, give presumptive evidence of at least the specific negligence charged in the first count of the declaration. That charge is very general and consists of negligently running and operating its road and the cars propelled thereon. A collision between the trains having occurred under the circumstances detailed by the evidence, the first and most natural inquiries, arising in any ordinary mind, are those which call for explanation in relation to the operation and running of the two trains. Why was the train on which the plaintiff was a passenger brought to a halt and allowed to stand several minutes when half way through the tunnel, when other trains were coming down the steep descent from the entrance to the middle of the tunnel? Why was this done without taking the ordinary precautions to prevent collisions from the rear? Why were not proper parties stationed at the brakes on all the cars of the colliding train while making the descent, so as to be ready to guard against or prevent disasters of this character? These and other similar inquiries, all pertaining to the operation and management of the road and its cars, naturally arise and call for an answer, and being unanswered, a conclusive presumption arises that the defendant was negligent in those respects.

But, secondly, the evidence complained of was not improper. It may be admitted that evidence of want of a sand box on the colliding grip car, or of the fact that said grip car was an old

horse car modeled over, was admissible as tending to support an independent charge of negligence in those respects, and the defendant was entitled to have the jury instructed that, under the declaration, the plaintiff could not recover on the ground of such negligence. But we think evidence of the structure and condition of the colliding car, and of the fact that it was not supplied with an appliance which would have made it more easy to slacken or arrest its progress on a descending grade, was material and proper as bearing upon the question of the manner in which it should have been run and operated, and the character and degree of care with which it should have been managed. The fact that said evidence tended to support a charge of negligence not made in the declaration, did not render it improper, so long as it had a material bearing upon one or more of the charges of negligence made.[1]

SEC. 156. Whether a person in getting upon a horse car while it is in motion is chargeable with a want of ordinary care, is a question of fact for the determination of the jury under all the circumstances of the case. In the case of Chicago C. Ry. Co. v. Mumford, 97 Ill. 560, the plaintiff was injured while alighting from a horse car which was in motion, and it was held that it was properly left to the jury to decide whether the injury was due to the negligence of the plaintiff, or the negligence of the driver of the car.

In that case the court remarked: "From the evidence it is probable that the car did stop—but that did not relieve the car driver from further care for the safety of the passenger. It was his business to know, before he started up, whether the passengers were in a position to be injured, and it can not be regarded otherwise than an act of negligence to start the car with a 'sudden jerk,' without the exercise of any precaution for the safety of those who might be on or off the car; and none seems to have been exercised." In the case at bar, while the proof shows that the car was in motion, it does not show that this motion was otherwise than very slow.[2]

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[1] North C. St. Ry. Co. v. Cotton, 140 Ill. 486.*

[2] North Chicago St. Ry. Co. v. Williams, 140 Ill. 275.

* NOTE.—The declaration consisted of three counts. The charge of negligence in the first is as follows: "And the defendant, then and there, so

SEC. 157. *Due care—Evidence of, in cases where death ensues and no one saw the accident.*—The rule in the State of Illinois undoubtedly is that in suits for personal injuries caused by the negligence of another, the plaintiff must allege and prove that he was, at the time, in the exercise of due care, and when the action is for causing the death of another, the burden is upon the administrator to show that the deceased exercised ordinary care to avoid the injury. In the latter class of cases, however, and especially when no one saw the killing, direct testimony as to such care is not necessary, but may be inferred from the circumstances of the case, as shown by the evidence.[1] The precise issue of *due care* on the part of the deceased was raised in the case of Nowicki (148 Ill. 29). At the close of the plaintiff's evidence the court was asked to instruct the jury to return a verdict for defendant, which was denied.

After the evidence was all in, the request was renewed and again denied. That ruling is assigned for error, and is the principal ground for reversal now urged. It is insisted that the evidence, and all inferences which can properly be drawn from it, fail to prove that the deceased used reasonable care to avoid the injury complained of, and therefore comes under the rule that when a material part of the plaintiff's case is wholly unsupported by proof the court should exclude all the evidence from the jury, or instruct it to return a verdict for

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negligently ran and operated its said road, and the cars propelled thereon, that by reason thereof, the car in which the plaintiff was then and there being carried as aforesaid, was run into from the rear by another car then and there being run by the said defendant upon said street, and thereby the plaintiff, who was then and there in the exercise of all due care and caution, was greatly hurt, bruised," etc. The second count alleges that while the car on which the plaintiff was being carried was temporarily stopped and at rest, it was approached from the rear by another car called a grip car, drawing a train of two ordinary cars; "that by and through the negligence of the said defendant, the grip of the said grip car was then and there defective and out of order, so that the same could not be detached or disconnected from the said cable, and thereby the said grip car was propelled violently against the car in which the plaintiff was riding as aforesaid," and thereby he was injured. The third count alleged defective brakes and consequent collision, etc.

[1] Chicago, B. & Q. Ry. Co. v. Gregory, 58 Ill. 272; Missouri Furnace Co. v. Abend, 107 Ill. 44; Chicago & Atlantic Ry. Co. v. Carey, 115 Ill. 115; Ill. Cent. Ry. Co. v. Nowicki, 148 Ill. 29.

the defendant. The overruling of the motion at the close of all the evidence, and proper exception thereto, present the question raised as one of law, subject to review in this court. (Bartelott v. International Bk., 119 Ill. 259; Collar v. Patterson, 137 Ill. 403.) But this is so only to the extent of determining whether there is, or is not, evidence legally tending to prove the fact affirmed, *i. e.*, evidence from which, if credited, it may reasonably be inferred, in legal contemplation, the fact affirmed exists, laying entirely out of view the effect of all modifying or controverting evidence.

The evidence in this case shows that the defendant was operating a double track railroad, running substantially north and south across Eighty-third street in South Chicago, the track making a sharp curve to the east immediately south of the street, and at a distance of about 120 feet across the tracks of the B. & O. Railroad. The east track was used for south-bound trains, and the west one for those going north. About eight o'clock in the evening a train headed south stopped to take water from a tank on the east side of the track, fifty feet south of the street, the cars standing on the crossing. At the same time a train from the south, on the west track, ran across the street, as the evidence tends to show, at a high rate of speed, and while on the crossing the engineer saw the body of the deceased roll off the pilot of his engine. The night was very dark, and it was raining. It is clear from all the evidence, that by reason of the curve in the tracks and the position of the south-bound train, the view of the approaching train going north was more or less obstructed. It was proved that the deceased lived east of the tracks, near the Eighty-third street crossing, and worked at a rolling mill west of the railroad. The evidence also tends to show that Eighty-third street was the convenient and usual route from the rolling mill to the dwelling of the deceased. He was seen a moment before he was struck, standing on the crossing between the rails of the west track. The plaintiff, his widow, testified that he left home about four o'clock that afternoon with some papers, intending to go to a real estate office, on business connected with a lot, and she saw him no more until after his death. She also stated that he was "a sober, good, hard-working man," and

that when he left her that afternoon, "he was a strong man—sound."

The conclusion from the facts proved is reasonably *certain* that the deceased was, at the time he was struck, attempting to cross the railroad track on Eighty-third street from the west, for the purpose of reaching his home. It is also reasonable to suppose that he expected no train on the west track while the one was standing in front of him; that his attention was directed to the train which obstructed his way, and which he doubtless expected momentarily to move on. In other words, the evidence tends to show that he was acting reasonably, in pursuance of his purpose, and as men ordinarily act under like circumstances. That he was, when last seen, between the rails, instead of standing on some other part of the crossing, was a circumstance to be taken into consideration by the jury, with all the other facts, in determining whether he used ordinary care, but is by no means conclusive proof of his negligence. He had a lawful right to be upon any part of the crossing, and whether, under all the circumstances, he exercised proper care for his personal safety, in being between the rails, was a question of fact. Proof that the deceased was a sober, industrious man, possessed of all his faculties, also tended to prove that he was in the exercise of proper care. (Missouri Furnace Co. v. Abend, *supra;* Chicago, R. I. & P. R. Co. v. Clark, 108 Ill. 113; T., St. L. & K. City R. Co. v. Bailey, 145 Ill. 159.) The argument on behalf of appellant proceeds upon the theory that inasmuch as the *burden of proof is upon the plaintiff* to show due care on the part of the deceased, there must be testimony tending to prove that he did certain things usually done by one about to cross a railroad track, and which generally should be done, as, looking and listening for approaching trains. If such proof were necessary in cases of this kind, a recovery could seldom if ever be had, however inexcusable the negligence of the defendant. The law is not so unreasonable. The decisions of the Supreme Court of Illinois are direct to the contrary. There are other authorities to the same effect. Way v. Ill. Cent. Ry. Co., 40 Iowa, 345; Gay v. Winter, 34 Cal. 153; Teipel v. Hilsendegen, 44 Mich. 461; Mayo v. Boston Ry. Co., 104 Mass. 137.

The court entertains no doubt that under the repeated de-

cisions of the supreme court, as well as upon other authorities, there was competent evidence in this case tending to support the allegation of *due care* on the part of the deceased, and that the court very properly refused to take it from the jury.[1]

SEC. 158. The rule requiring the plaintiff to prove care on the part of the person injured, only requires evidence of the facts and circumstances attending the injury, and if these show negligence in the defendant, from which the injury followed as a direct and proximate consequence, and do not show any contributory negligence on the part of the person killed or injured, a *prima facie* case for the jury is made out.[2]

SEC. 159. *Ordinary care—Evidence of, in case of death, and not seen.*—In this case it was insisted that the trial court erred in refusing to instruct the jury to find for defendant on the ground that the evidence failed to show deceased exercised any care to avoid the injury, but her conduct showed she was guilty of gross negligence.

This was a question of fact for the jury. The evidence in cases of this kind, to establish the fact that deceased exercised due care, need not be direct, but such care may be inferred from the circumstances existing at the time of the injury and other facts in evidence.

The evidence in this case was sufficient to prove that there were a number of box cars on the side track, and a curve in the main track above the street crossing, which would obstruct the view, and make it quite difficult, and perhaps impossible, for the deceased to see the approaching train until she was on the main track at the crossing and too late to escape. She had a right to rely upon the performance of the duty imposed upon the defendant by the city ordinance to warn her of the approach of the train by continuously ringing the bell upon the engine, and not to run said train faster than ten miles per hour

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[1] Ill. Cent. R. R. Co. v. Nowicki, 148 Ill. 29.*

[2] Ill. Cent. Ry. Co. v. Nowicki, 148 Ill. 29.

* NOTE.—The first count of the declaration alleged that the deceased, while on one of the streets of Chicago, exercising due care, was struck and killed by a locomotive of the defendant, negligently run over and across said street at a rapid and reckless rate of speed. Also, by a second count, that the defendant negligently failed to erect gates at said street crossing, whereby the deceased, while walking over said crossing, using due care, was struck by one of defendant's locomotives and killed. Verdict $5,000.

within the city, and there was evidence tending strongly to show this duty was not performed. Among other things proper for the jury to consider in determining this question of due care is the instinct prompting to the preservation of life and avoidance of danger.

In the judgment of the court the evidence justified the jury in finding deceased exercised reasonable care at the time in question.[1]

SEC. 160. In the case of Corbin, Adm'r, v. The Western Electric Co., a very able opinion, written by Justice Francis Adams, of the Illinois Appellate Court for the First District, was filed. The case shows that this disaster occurred at the experimental station or shop of the defendant at Hawthorne, Illinois, and arose out of the explosion, first of one shell, and then of several, charged with the new explosive compound manufactured by the defendant company; that by said explosion four men were killed, among whom was the plaintiff's intestate, Frederick R. Corbin. No one in the shop, at the time of the explosion, survived; and no eye witness was alive at the trial who could testify as to what occurred just at the instant or immediately preceding said explosion.

Among other things, it is said by his Honor: "Some remarks of the learned judge who presided at the trial would seem to indicate that in his opinion direct proof by eye witnesses of the manner and cause of the accident is necessary to a recovery. We do not understand this to be the law. Circumstantial evidence, from which the manner and cause of death may reasonably be inferred, is sufficient on which to submit that question to the jury."*

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[1] B. & O. S. W. Co. v. Then, 159 Ill. 535.

* NOTE.—It appears in this case that the defendant (Western Electric Co.), a company mainly engaged in the manufacture and sale of electrical appliances and machinery, entered upon the business of developing a new explosive compound intended for use in blasting work, into which the use of electricity and electrical appliances largely entered. As to said new explosive compound it was claimed, as a special feature, on the part of the defendant, that it was perfectly safe for workmen to handle and that there was no danger from an explosion thereof. It was specifically claimed by Charles H. Rudd, who was given sole charge of the work upon said explosive, that it would not explode and could not be exploded, until after being treated with electricity for thirty minutes by passing an electric current

SEC. 161. Evidence as to plaintiff's complaint of pain and suffering is competent. The weight of such evidence is for the jury.[1] Where there is a question of damage arising in consequence of being prevented from doing business, evidence is

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through the loaded shell, and then only by an electric spark produced in a detonating powder inside the shell. * * *

The first explosion occurred about eleven o'clock A. M., July 31, 1894. It is described by the witnesses Bates, Goodman and Stevenson as a sort of muffled sound, like an explosion in a building, and not like a sharp explosion in the quarry when shells go off. The witnesses, on hearing the explosion, looked toward the shanty and saw that it was in flames. They ran toward it and when nearly there Rudd came out of the door, covered with flames and bleeding, and they heard Corbin moaning and crying out, "Save me! Oh, save me!" and the two Clarks moaning, hallooing in the basement, all three being too disabled to escape. The explosion had sprung the boards on the side of the shanty, and the men tried to pull them off to get at Corbin, but could not. They ran to get fire hose and water, but in a few minutes a a second and terrific explosion occurred, which completely wrecked the building and scattered it in all directions, killing Corbin and the two Clarks. Mr. Rudd subsequently died. Corbin's body was found near to or on the railroad tracks, about fifteen feet from the shanty, and the bodies of the two Clarks in the quarry, about 150 to 200 feet from the shanty. The boiler, which had been in the basement, was also found in the quarry. The evidence is that there had been no fire in the boiler that morning; that the dynamo had not been in operation, and there had been no treatment of the explosive by passing a current of electricity through it; also that there had been no fire in the shanty except the flame in the kerosene torch in the iron T, five or six feet away from the pipe on which Corbin was last seen working. V. J. Hall, Professor of Chemistry in the Woman's Medical College of the Northwestern University, to whom had been submitted for examination some of the material with which the pipes were charged, and also some of that contained in the exploders, testified that the material with which the pipes were loaded would not produce an explosive shock when unconfined, even if exposed to flame, but, if confined, it could be exploded by friction, pressure and shock; that if a small quantity of it were placed on an iron plate or anvil and stricken with a hammer an explosion would result. Also that it would explode without having been previously treated with electricity, as heretofore described. He further testified that the black mixture of chloride of potash and lamp black, used as an exploder, is an exceedingly sensitive exploder; that slight friction, shock or flame would explode it; that he put a small quantity of it in a mortar and rubbed it slightly with a pestle and it exploded. He also testified that driving of the plug into the top of the pipe, as heretofore described, was not a safe mode of procedure; that it might create atmospheric pressure on the material in the pipe and thus produce an explosion. The following question was asked the witness and answer given: Q. "You were examined by

[1] City of Bloomington v. Osterle, 139 Ill. 120.

admissible to show the capacity of plaintiff before the injury to carry on business; it goes to show the reasonable value of the plaintiff in business and thus show a fair compensation for prevention.[1] Evidence is admissible to prove the capacity of

Mr. Wheeler in reference to the effect of driving this plug, Exhibit C, with the wires in it, with a mallet down into one of these shells that were loaded—driven below the upper rim. You may state the effect or what effect it might have? A. If the main explosive compound, with the exploders placed in their proper position, were filled approximately to the iron tubing, filled full, and this plug driven down upon that mixture, there would be friction within the large particles of this main explosive, potassium chlorate, and also friction of those large particles against the small black compound, which I have already stated is very sensitive, and sufficient, I think, almost to bring about a spark or a flame from the exploder, from the black compound, and thereby causing an explosion of the main substance. Furthermore, in the driving down of that plug, if small quantities of this black compound, or possibly the main explosive or light compound, got between the iron flue or shell and this plug, and were struck by a blow with a hammer, it might produce a spark which, conducted to the main explosive, would bring about an explosion."

The court said: We are of opinion that the evidence tended to prove that Corbin lost his life in the manner stated in the declaration. The evidence further tended to prove that the deceased received no instruction as to explosives at the Northwestern University; that he had no practical experience in relation to explosives prior to his going to Hawthorne; that he was unaware of any danger in handling the explosive in question, or of doing the work which he did under Rudd's superintendence and direction, and that the evidence strongly tends to prove that Rudd claimed, and, on a number of occasions, the last within a month prior to the accident, stated in the presence and hearing of the deceased, that it was entirely safe to handle and work with the explosive as did the deceased, and that it would not explode unless treated with electricity for thirty or forty minutes, as heretofore described. The evidence of Professor Hall, with regard to the dangerous character of the explosive, tends to prove that the appellee, by its agent and vice-principal, Rudd, might, in the exercise of ordinary care, have discovered its dangerous character, and that it would explode without having been previously treated with electricity. The evidence that the deceased was sober, temperate in his habits, industrious and generally cautious and careful, was evidence from which (there being no eye witnesses) the jury might infer that at the time of the accident he was exercising ordinary care for his personal safety. Dallemand v. Saalfeldt, 73 Ill. App. 151, and cases there cited.

In brief, we are of opinion that the evidence tended to prove the material allegations of the declaration, and that the case should have been submitted to the jury. Cicero St. Ry. Co. v. Meisener, 160 Ill. 320; Railway Co. v. Patchen, 167 *Id.* 204; North C. St. R. R. Co. v. Wiswell, 168 *Id.* 613; Siddall v. Jansen, *Id.* 43; Dallemand v. Saalfeldt, 73 Ill. App. 151.

[1] Beardstown v. Smith, 150 Ill. 169.

the plaintiff to earn money in any employment for which he was fitted.[1] Where the damages claimed are for the loss of a hand, it may be shown that the plaintiff is incapacitated for labor on account of the injury.[2]

SEC. 162. Evidence was offered by the defense to prove experiments made with piles of barrels, similar to the one from which the barrels fell upon the plaintiff and injured him, and from which a barrel located relatively the same as the empty barrel in question, was entirely taken out without causing the pile to fall. Witnesses were also asked whether an empty barrel, located as was the one in question, could be taken out of the pile without causing it to fall or give way, or whether knocking out the head of the barrel thus situated and removing its contents, would affect the stability of the pile. This evidence was excluded by the trial court. Held properly excluded; that experiments of that character and their results, and inferences drawn from them by witnesses, were mere collateral matters which could have no legitimate bearing upon the issues before the jury; besides the impossibility of showing that the conditions under which these experiments were made were in all respects identical with those existing at the time the plaintiff was injured, and the multitude of collateral issues which an attempt to prove identity of conditions would arise. The fact that one experiment had been conducted to a successful issue, would have little if any tendency to show that in another case precisely like it, an accident might not happen. A thousand men may pass an impending wall with safety or at least without injury, but the next man who attempts to pass it may be crushed by its fall.

The question is not whether a pile of barrels might not stand with an empty barrel situated as was the one in this case, but whether leaving such barrel in the condition shown rendered the support of the barrels above it less secure, and that to such a degree as to constitute negligence, and whether the plaintiff's injury occurred as the result of such negligence. So far as these witnesses were sought to be examined as *experts*, it does not appear that they had any special knowledge or skill on the subject, unless it was gained by means of the experiments

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[1] Chicago v. Edson, 43 App. 417.

[2] Weber Wagon Co. v. Kehl, 159 Ill. 644.

which counsel attempted, but was not permitted, to prove. Nothing, therefore, is proved which tends to show that they were any better qualified to express an opinion on the subject than were any of the jurors before whom the case was being tried. And even admitting that the subject was one for expert testimony—a proposition which may well be doubted—their answers to questions put to them calling for their opinions, would obviously have been merely a means of getting before the jury, by indirection, the results of the experiments, if not the experiments themselves.[1]

SEC. 163. In an action to recover damage for death by negligent acts, evidence tending to show that the deceased was habitually careless and reckless in the performance of his duty, is competent. It was a material question for the jury whether at the time he (deceased) was injured, he exercised ordinary care. There was no direct proof upon this point. (As no one saw the fatal accident. 42 App. 646.) Indeed, it is but a matter of inference how he received his injury. Under the circumstances, proof as to his habit as to carelessness was competent.[2]

SEC. 164. It is claimed that the trial court erred in permitting the injured limb of the plaintiff to be examined in the presence of the jury by a physician who was called as an expert witness. There was no error in the action of the court in this respect. In an accident case it is held to be within the discretion of the court to allow the plaintiff to exhibit to the jury his injured limb or body.[3]

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[1] Libby, McNeil & Libby v. Scherman, 146 Ill. 540.*

[2] Peoria, D. & E. Ry. Co. v. Puckett, 52 App. 222; C., R. I. & P. Ry. Co. v. Clark, 108 Ill. 113.

[3] City of Lanark v. Dougherty, 153 Ill. 163.

* NOTE.—Among other allegations plaintiff sought to prove was, that defendants (packers) carelessly and negligently kept and maintained rows of barrels defectively piled in rows one upon another, and while so defectively piled drove in the head of one of said barrels and took therefrom the contents thereof, to wit, certain brine and pork, so that the said barrel was then and there greatly weakened and rendered unable to support the weight of the barrels piled above the same, and by reason of the carelessness and negligence of defendant, in manner as aforesaid, and while plaintiff was in exercise of all due care for his own safety, the said barrels spread, tilted and gave way and fell upon and against the plaintiff, thereby breaking the plaintiff's leg, and otherwise injuring him.

SEC. 165. Where a railroad company constructs a crossing over its tracks in a public street, leaving a space between the rail and sidewalk for the flanges of the car wheels, and the exact dimensions of the space thus left, in point of width and depth, are shown by the evidence, it is a question of fact for the jury to determine, in the light of all the evidence, whether the crossing is so constructed as to be reasonably safe for persons passing over the street.[1]

SEC. 166. The declaration set up negligence in running the engine at a high and dangerous rate of speed in a populous part of the city, no reliance being placed upon the provisions of the ordinance. The evidence shows that the crossing in question is in a place in the city of Aurora which is much frequented by people passing along the street, and especially by school children going to and returning from school; and while there is considerable conflict in the evidence as to the rate of speed at which the engine was running as it was approaching the crossing, there is much evidence tending to show that it was moving at the rate of twenty-five miles per hour. Whether, independent of the ordinance, the rate of speed was such as, under the circumstances, constituted negligence, was a question presented under the fourth count, which it was the duty of the court to submit to the jury.[2]

SEC. 167. In an action against the railway company by a child, to recover for a personal injury inflicted while it was attempting to cross a street intersection in company with an elder sister, who was killed, both sides tried the case on the theory that the negligence of the parents of the plaintiff might be imputed to it in support of the claim of contributory negligence.

The father testified, without objection, that he occupied position of night car inspector, and was in the habit of working in the night time and of sleeping in the day time. He also testified, against the objection of defendant, that at the time of the accident he had a wife and three children, viz.; the plaintiff, then five and one-half years old, a daughter seven years old, who was killed, and a son a little over two years old, and that his wife was at that time in an advanced preg-

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[1] Springer v. City of Chicago, 135 Ill. 552.

[2] Elgin, Joliet & Eastern Ry. Co. v. Mabel Raymond, 148 Ill. 241.

nancy, and that he did not employ a servant at his house. It was held by the court that there was no error in the admission of this evidence, as it tended to show that plaintiff's parents were so situated as to make it impracticable for them to attend the plaintiff to and from school.[1]

SEC. 168. Evidence was admitted, over the defendant's objection, in the trial court, that other accidents had occurred of a similar character to that which resulted in injury to the deceased.* Evidence of any other accident occurring from the cause is held by many courts incompetent.

This court has held such evidence competent, not for the purpose of showing independent acts of negligence, but as tending to show the common cause of these accidents to be a dangerous, unsafe thing. When an issue was made as to the safety of any machinery or work of man's construction, which is for practical use, the manner in which it has served that purpose, when put to that use, would be a matter material to the issue, and ordinary experience of that practical use, and the effect of such use, bear directly upon such issue. It no more presents a collateral issue than any other evidence that calls for a reply, which bears upon the main issue. Such evidence is held competent by the weight of authority.[2] The same rule is adopted in Georgia, Alabama, Minnesota, Michigan and other states. In addition to being evidence material to the issue, to show a dangerous condition, it is also evidence material as tending to show notice. City of Chicago v. Powers, Adm'x, 42 Ill. 170.

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[1] Elgin, Joliet & E. Ry. Co. v. Mabel Raymond, 148 Ill. 241.

[2] Ottawa Gas Light & Coke Co. v. Graham, 35 Ill. 346; City of Chicago v. Powers, Adm'x, 42 Ill. 170; City of Fort Wayne v. Coombs, 107 Ind. 75; City of Topeka v. Sherwood, 39 Kan. 690; District of Columbia v. Armes, 107 U. S. 519; Darling v. Westmoreland, 52 N. H. 401.

* NOTE.—Action to recover damages for the death of Silas M. Legg. It is alleged in the declaration that the city of Bloomington erected a fountain on North Main street, to be used for drinking purposes, and watering horses; that around the fountain was a basin, into which water was conducted by two spouts; that the spouts were placed where the heads and bridles of the horses would come when drinking; that the spouts projected out several inches over the basin, and then bent, forming a hook, so that horses in drinking and after drinking, in lifting their heads, were liable to catch or break their bridles, of which the city had notice. The deceased, September 10, 1889, was driving a team of horses, hitched to an oil wagon, on which he was riding, on said street, and while exercising due care and

The frequency of such accidents would create a presumption of knowledge and would be material to the question of diligence used to obviate the cause of injury.

The further point is made that plaintiff was permitted to show, over the objection of defendant, that other accidents occurred on account of the fountain spouts, when they were not in the same condition as they were at the time of the injury to the deceased. The rule is clear that to render evidence of similar accidents, resulting from the same cause, competent, it must appear, or the evidence must reasonably tend to show, that the instrument or agency which caused the injury was in substantially the same condition at the time such other accidents occurred, as at the time the accident complained off was caused. The fountain spouts, when the fountain was first erected, projected two or three inches from the standard, and an elbow was screwed onto the outer end, which in position was perpendicular to the end of the spout, and projected downward. That elbow was removed and that was the changed condition. The trial court instructed the jury that they were not "to consider any testimony regarding accidents or trouble with horses, occurring at the fountain in question, at a time or times when you believe from the evidence the spouts complained of were in a materially different condition from what they were at the time of the injury complained of in this case."

Considering the instruction, and what was said by the court in ruling on the objection, we are not disposed to hold there was such error in the admission of that evidence that the judgment should be reversed.[1]

SEC. 169. It is claimed that the trial court erred in admitting certain testimony introduced by the plaintiff upon the rebuttal. Witnesses for defendant had sworn that the boy's hand could not have been drawn under the frame-work enclosing the plunger in the manner stated by him, mainly upon the

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diligence for his own safety, and permitting the horses to drink from the basin of the fountain, the bridle of one of the horses caught upon a bent and curved spout and was pulled off, and the horses ran away, without his fault, threw him off, and the wagon onto him, thereby causing his death.

Trial resulted in verdict for plaintiff and damages assessed at $1,000.

[1] Chicago Anderson Pressed Brick Co. v. Morris Reinneiger, by next friend, 140 Ill. 334.

alleged ground that there was not space enough between the bottom of the frame and the surface of the disc to admit the hand.

The testimony offered in rebuttal was that other workmen, who had worked upon that machine or a similar one, and who swore that the hand could be drawn, while remaining in the mold sideways under the frame-work to the plunger, and that such occurrences had actually taken place. The court said: We do not see why the evidence was not competent, as being in rebuttal of what defendant had sought to show as to the impossibility of receiving the injury in the manner claimed by plaintiff.[1]

SEC. 170. Evidence of precautions taken after an accident is apt to be interpreted by a jury as an admission of negligence. The question of negligence should be determined by what occurred before and at the time of the accident, and not by what is done after it. New measures and new devices adopted after an accident do not necessarily imply that all previous devices or measures were insufficient. A person operating a passenger elevator is bound to avail himself of all new inventions and improvements known to him, which will contribute materially to the safety of his passengers, whenever the utility of such improvements has been thoroughly tested and demonstrated, and their adoption is within his power, so as to be reasonably practicable. For this reason it was proper to show that a valuable device for securing safety was known to the defendant, and its use neglected by him before the accident; but it would seem unjust that he could not take additional precaution after the accident without having his acts construed into an admission of prior negligence. The happening of an accident may inspire a party with greater diligence to prevent a repetition of a similar occurrence, but the exercise of such increased diligence ought not necessarily to be regarded as tantamount to a confession of past neglect.[2]

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[1] City of Bloomington v. Legg, 151 Ill. 9.

[2] Hodges v. Percival, 132 Ill. 53.*

* NOTE.—Evidence of precautions taken after the accident has been held competent—Penn. Ry. Co. v. Henderson, 51 Penn. 315—but held inadmissible in New York, Connecticut, Iowa and Minnesota.

SEC. 171. On the trial in the court below a section of the ordinance of the city, regulating the speed of horses and vehicles at street crossings and corners, was offered in evidence by (plaintiff) appellant, and was excluded by the court. As the evidence tended to show that appellee (defendant) was driving at greater speed than allowed by the ordinance, the evidence was relevant upon the question of negligence, and should have been admitted.[1]

SEC. 172. Where inferences of facts are to be drawn from evidence, they must be drawn by the jury. So, where the inference to be drawn is disputed, as where it may be contended that the facts will equally support one inference or another, the court is not at liberty to take the case away, but must submit it to the jury to determine which is the correct inference of fact to be drawn from the evidence.[2]

SEC. 173. A question was presented which required the case to be submitted to the jury. The defendant was driving on the wrong side of the street in violation of the law of the road. (Elliott on Roads and Streets, 618, 620; Sec. 77, Chap. 121, R. S.) The mere fact that he was on the wrong side of the street would not of itself make him liable, if the negligence of the boy was of such a character as to relieve the defendant under the rules of law; but whether the boy was guilty of negligence in running across the street behind the car as he did was a question for the jury to decide in view of all the evidence in the case. Parties using the streets owe to each other the duty of exercising reasonable care. What is reasonable care, in any given case, is a question for the jury, in view of all the circumstances of the case.[3]

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[1] Lind v. Beck, 37 Ill. App. 430.

[2] Lind v. Beck, 37 Ill. App. 430; Rice v. Ill. Cent. R. Co., 22 Ill. App. 643; Wight F. P. Co. v. Rozchekai, 30 Ill. App. 266.*

[3] Lind v. Beck, 37 Ill. App. 430; Lowry v. Linch, 57 Ill. App. 323.

* NOTE.—An action to recover damages for the negligent killing of a boy about nine years old. The boy was run over by a horse and grocery wagon driven by appellee (defendant). The evidence tended to show that defendant was driving *north* on Wells street, and when he came to the crossing of Chicago avenue he turned *west* into that street, keeping to the left hand on the south side of the street; that a horse car was standing on the track on Chicago avenue; that defendant drove through the space between said horse car and the south sidewalk at a rapid pace, and struck deceased, who

SEC. 174. A plaintiff must recover, if at all, upon the case made by his declaration. So a plaintiff can not charge one species of negligence in his declaration, and recover upon proof of negligence of a different character. The fact that evidence admitted in an action based on negligence may tend to support a charge of negligence not made in the declaration, will not render it improper, if it has a material bearing upon one or more of the charges of negligence made. The defendant may, by instruction, limit such evidence to the charges made in the declaration.[1]

SEC. 175. Where the plaintiff in an action to recover damages for a personal injury alleges that he was compelled to and *did pay* out and expend large sums of money in and about being cured of his injuries, it will not be sufficient for him to prove merely that he has paid a certain physician's bill, in order to its recovery, but he must also show that by reason of his injuries he necessarily incurred such bill, and that it is reasonable.[2]

SEC. 176. *Evidence of injuries.*—It was claimed that the court erred in admitting evidence that the plaintiff's injuries were of so serious a nature as to prevent her entering the marriage state. The averment as to the nature and extent of her injuries is that she "was knocked down upon the ground and thereby bruised, hurt and wounded, and that divers bones of her body were broken, and that she was grievously wounded internally, and became sick, sore, lame and disordered, and has so remained hitherto, and that she fears greatly that her said injuries are of such a grievous nature that she may not recover therefrom for a long time and possibly not during the term of her life." The allegation is clearly broad enough to include injuries to the internal reproductive organs, and was sufficient to admit evidence tending to show that said injuries had produced permanent sterility or incapacity to perform the sexual

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was running across Chicago avenue toward the south, just after he passed the west end of the horse car, and dragged him some distance. From the injury received the boy died. When the plaintiff's evidence was closed, the court instructed the jury to find for the defendant. Reversed and remanded.

[1] North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486.

[2] North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486.

duties incident to the marriage state. The evidence offered was therefore clearly admissible as descriptive of the nature, extent and permanency of her internal injuries.[1]

SEC. 177. *Variance between declaration and proofs.*—There is no doubt of the existence or the propriety of the rule which requires that the facts alleged in the declaration must agree with the facts disclosed by the evidence. The proofs must support the allegation of negligence charged in the declaration, and it will not avail a plaintiff to charge in the declaration a particular negligence, and prove another and different negligence. But the objection of variance between the declaration and proof is a mere technical objection, and is not favored by the courts, and when the transaction out of which the controversy arises is the same, and the substantial cause of damage is the same, the variance is regarded as immaterial, and is overlooked. Shaw v. B. & W. Ry. Co., 8 Gray, 45.[2]

SEC. 178. The doctrine that the explosion of a steam boiler makes out a *prima facie* case of negligence is not to be confined to cases of explosions by common carriers, or injuries to persons to whom they owe particular or special care; but that where a bystander, lawfully present on his own business, was injured by the explosion of a boiler, such explosion makes out

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[1] Lake Shore & Mich. Southern Ry. Co. v. Annie Ward, 135 Ill. 511.

[2] Stearns v. Reidy, 135 Ill. 119.*

*NOTE.—Appellee was in the employ of appellant, in his limestone quarry, and while drilling in a hole which had heretofore been drilled in a stone for the purpose of blasting, exploded a charge of dynamite which had been placed therein, and thereby lost the sight of both his eyes, and was otherwise injured. The charged dynamite in the hole originally drilled had failed to explode, whereby the hole became and was known as a "missed hole." The verdict and judgment in the trial court, and the judgment of affirmance in the appellate court, conclusively establish the truth of the facts claimed by the appellee that the stone was a rotten stone; that the dynamite had been covered with broken limestone and fine stuff out of the quarry, and the hole filled up and tamped with that material, and that in afterwards drilling in such hole it was difficult or impossible to tell the difference between the hole as filled and tamped and the rotten stone by which it was surrounded. It was alleged that the foreman directed the drilling to be done, that he knew of the dynamite in the hole, and plaintiff did not and could not know it, and was not informed of it by defendant, and with due care proceeded with the drilling, etc. The variance was between order to "clean out the hole there," and to "drill there," both amounting to same thing.

a *prima facie* case of negligence, and imposes upon the owner or operator of the boiler the duty of discharging himself from the consequences of the explosion by proving that he had exercised ordinary care in the selection, repair, management and operation of the boiler.[1]

SEC. 179. The presumption of negligence, arising from the bursting of the boiler, may be rebutted by its being shown that those responsible for its management used proper diligence in furnishing and maintaining in repair suitable machinery and employed servants who had ordinary fitness and competency for the performance of their duties. The owner and operator of a steam boiler is not an insurer of the absolute safety of the boiler, nor a warrantor of the absolute competency of his employes. The law devolves upon him the duty of exercising ordinary care and diligence to furnish suitable instrumentalities and appliances and to keep the plant free from defects which are dangerous, and to select for its operation and management skillful and prudent servants. This is the extent of the burden upon him.[2]

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[1] The John Morris Co. v. Burgess, 44 Ill. App. 27; Illinois Central Ry. Co. v. Phillips, 49 Ill. 234.*

[2] The John Morris Co. v. Burgess, 44 Ill. App. 27; Ill. Cent. Ry. Co. v. Phillips, 49 Ill. 234; Ill. Cent. Ry. Co. v. Phillips, 55 Ill. 194.*

* NOTE.—This action was to recover damages for the death of George W. Burgess, which was occasioned by the explosion of a steam boiler or boilers owned and operated by the John Morris Company, appellant. The boilers were situated in the rear of the building on Monroe street, Chicago. At the time of the explosion deceased was working as a teamster, and was upon his wagon waiting for a load (he was from a business house which he was serving) in the public alley south of and adjoining the building in which the boiler or boilers were located. The effects of the explosion was to throw deceased from his wagon across the alley, and to inflict injuries upon him which resulted within a few days in his death. Verdict against appellant, $5,000.

This matter came casually before the supreme court in the case of John Morris Co. v. Southworth, 154 Ill. 118, which was a bill of equity, brought to determine who (Southworth, landlord, or the Morris Co., lessee) should pay for the repairs to the building and machinery made necessary by the explosion of the boilers which injured George W. Burgess, as above described. This was an issue between landlord and tenant, and the decision was made to turn, upon the terms of the lease, in favor of the lessee, the court holding that the landlord should pay for the repairs.

Incidental to this question, between landlord and tenant, decided, the supreme court takes occasion to announce its views upon the boiler explo-

SEC. 180. While one may voluntarily and unnecessarily expose himself or his property to danger without thereby becoming guilty of contributory negligence, as a matter of law, yet it is an established rule that when one does knowingly put himself or his property in danger there is a presumption that he, *ipso facto*, assumes all the risks reasonably to be apprehended from such course of conduct. But knowledge in this respect does not necessarily constitute contributory negligence. One may exercise due care with full knowledge of the danger to which he is exposed, or to which he may lawfully expose himself. In an action against a village for personal injury resulting from a hole in a sidewalk, one of the ultimate facts for the jury is, was the plaintiff guilty of contributory negligence. And the fact that he or she returned home in the night time over the defective sidewalk, with knowledge of the unsafe condition, is a circumstance proper to be shown, as tending to establish such negligence. It is an evidentiary fact proper to go to the jury, as having a tendency to prove the ultimate fact in question.[1]

An instruction is properly refused which tells the jury, as a matter of law, that certain facts *per se* constitute negligence.[2]

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sion as follows: "We are not disposed to hold that the mere explosion of a *stationary boiler* is, of itself, *prima facie* evidence of negligence," etc. It is to be regretted, considering the importance of this announcement, that it was not made in a case where a direct personal injury was involved as in Ill. Cent. Ry. Co. v. Phillips, *supra*, and where it was necessary to a decision of the matter before the court.—[ED.]

[1] Village of Clayton v. Louisa W. Brooks, 150 Ill. 97.*

[2] Clayton v. Brooks, *Id.*

*NOTE.—On the night of July 22, 1886, between the hours of nine and ten o'clock, the appellee, while returning to her home in the village of Clayton, and while passing over the sidewalk along Jefferson street, one of the streets of the village, stepped into a hole in the sidewalk, in consequence of which she fell and received severe personal injury. It appears from her testimony that she knew of the defect in the sidewalk three or four weeks before the accident, and that when she left the lodge building, where she had been for the evening, it was too dark to see or distinguish anything on the sidewalk; that the night was a dark and cloudy one. There were no lights on the street or from adjacent buildings at the place of accident. The streets were dry. The nearest and most direct route from the lodge room to her residence was over this sidewalk. The hole in the walk was not a large one. She could have gone by another route in safety, which, however, was nearly two blocks farther. On the trial a verdict finding

SEC. 181. A court can never be called upon to say to the jury that negligence has been established as a matter of law, unless the conduct of the injured party has been so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent. If the case is open to a difference of opinion, the jury must pass upon it.[1]

SEC. 182. *Proof sufficient to sustain the action.*—Under a declaration alleging that the defendant failed to maintain a crossing so as to be safe to a person passing thereon as by the statutes of Illinois provided, but on the contrary, carelessly and negligently maintained it so that there were openings and holes therein so large as to allow the feet of pedestrians to be caught therein while passing over it, that the planks and material thereof were rotten, broken and insufficient to make said crossing safe for persons passing thereon, the evidence showed that the crossing, and the material thereof, were insufficient for the safety of the traveling public; that there were openings in the crossing so large that the foot of a pedestrian might be caught therein while passing over it. It was held to be proof enough of the declaration upon this point to authorize a recovery. In actions for negligence, resulting in the death of a person, it is sufficient, in order to entitle the plaintiff to recover, for him to prove enough of the allegations of his declaration to constitute the cause of action.[2]

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defendant guilty and assessing plaintiff's damages at $4,800 was rendered. The court required plaintiff to remit all above $2,500, and rendered judgment for that sum.

[1] Lake Shore & M. S. Ry. Co. v. Swan Johnson, 135 Ill. 641.

[2] Terre Haute & Indianapolis R. R. Co. v. Eggman, Adm'r of William Kennedy, 58 Ill. App. 21, affirmed in Illinois Sup. Ct., 159—550.*

* NOTE.—Action to recover damages for killing William Kennedy, a lad of twelve years, who, with his brothers, Joseph and James, aged respectively ten and fourteen years, attended eight o'clock mass at St. Patrick's church in East St. Louis on Sunday morning, March 5, 1893. In going to and returning from the church, the boys passed along Pennsylvania Avenue, which was crossed by appellant's roadway. The accident occurred about nine or ten o'clock at the intersection of the street and railroad track. The space between the rails of appellant's main track at the road crossing was filled with oak planks three inches thick and sixteen feet long, with room enough between the rails and plank for the flange of the engine and car wheels. There was a conflict of the evidence as to the width of the space between the east rail and the adjacent plank. Appellee's witnesses, some

SEC. 183. *Special interrogatories to the jury must relate to ultimate facts.*—Special interrogatories to be submitted to a jury, under the statute, must relate to the ultimate facts and not to mere evidentiary facts that tend more or less to establish the ultimate facts upon which the rights of parties depend.

The interrogatory proposed by appellant at the trial and refused to be put to the jury by the court was as follows: "Was the deceased passing over the crossing in the usual way and going directly across the same?" There was no error in this ruling of the court.[1]

SEC. 184. *Coroner's verdict.*—A finding in a coroner's verdict that a death was not occasioned by negligence of a char-

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of whom measured the space, fix it at from three and one-quarter to three and one-half inches. Appellant's witnesses say that the space was not more than two and one-half inches. The evidence on both sides shows that a space of three inches or more at this point would be a negligent construction of the track. While the difference of one inch, as between two and one-half and three and one-half inches, seems very inconsiderable, yet when it is observed that this difference determines in many cases whether the feet of an animal or human being shall be hopelessly caught in this dangerous space, it seems at once that the testimony upon this point is all-important on the question of negligence of the railroad company. It is sufficient to say that the evidence justified the jury in finding that the space was more than three inches, and that the track was, therefore, even according to appellant's testimony, in a dangerous condition. * * * At the time of the accident one of appellant's engines was *backing toward the crossing* from the south, pulling twenty-one freight cars, some loaded and some empty. As the tender approached the crossing it was moving at the rate of one or two miles per hour. William Kennedy, who was in advance of his two brothers as they were returning from church, attempted to cross the track, when his foot became caught in the space already described between the plank and the east rail of the track. He endeavored to extricate his foot from this dangerous position, but was unable to do so. He cried aloud so as to be heard by one of his brothers. The engineer and fireman did not see him—latter was cleaning a window and the former was looking another way. The tender, which was in advance of the engine, ran over the boy, and the train was stopped while the tender was still upon him. The shoe upon the foot which was caught between the plank and the rail was broken from the boy's limb and pressed into the space so that a pick was used by one of the railroad men to remove it. The boy's limbs were horribly mangled and he died between twelve and one o'clock, in consequence of the injuries received.

[1] T. H. & I. R. R. Co. v. Eggman, 58 Ill. App. 21; T. H. & I. R. R. Co. v. Walker, 129 Ill. 540; L. E. & W. R. R. Co. v. Morain, 140 Ill. 117; E. J. & E. R. R. Co. v. Raymond, 148 Ill. 241.

acter sufficient to support an action at law for damages, is extra-judicial and void, and is properly stricken out before the verdict is admitted in evidence in an action for damages resulting from the death of the person in question. It is not within the jurisdiction of a coroner or of the jury impaneled by him, at an inquest, to inquire who, or whether any one is legally liable to respond in damages because of the death of the person upon whom the inquest is held.

SEC. 185. It is not indispensable that proof of the value of the labor of the child should be made in order to warrant the assessment of damages for the benefit of the father and mother. They were entitled to her services while she was a minor and the law implies pecuniary loss to them by reason of her death. It could be estimated by the jury from proof of the age of the child and the number of years she would render service to her parents, considered in connection with the knowledge and experience possessed by the jurors in relation to matters of common observation. Proof of personal characteristics of the deceased may be introduced to enhance the damages, but it is not necessary that such testimony be produced.[1]

SEC. 186. A declaration by the motorman running an electric car, made while the car was still on the body of one it had

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[1] Callaway v. Spurgeon, 63 Ill. App. 571; City of Chicago v. Scholten, 75 Ill. 468; City of Chicago v. Hesing, 83 Ill. 204.*

* NOTE.—On June 3, 1893, Goldie M. Spurgeon, a girl aged nine years and five months, while walking along the track of the Toledo, St. L. & Kan. C. R. Rd., upon a bridge across Kickapoo Creek, Coles Co., Illinois, was run upon, struck and instantly killed by an engine attached to, and drawing a passenger train. She was at the time in company with one George Walters, her uncle, a man of mature age, both of whom were walking together, and endeavoring to make their way across the bridge. They were trespassers upon the track of appellant's road and both were struck at the same time by the same train. He suffered a broken arm and other hurts.

The two cases are the same in point of law, except that this action is for the benefit of next of kin, the father and mother. The chief question of fact in both cases was, did the engineer, after he discovered Walters and Goldie upon the bridge and in danger, use due care to avoid injuring them? The evidence bearing upon the cases was not materially different, and we are constrained to accept the conclusion of the jury in one case as in the other. * * * It was proven and conceded that the engineer saw Walters and Goldie upon the bridge and the right of recovery was based upon the claim that he failed, after seeing them, to use ordinary care to avoid striking them.

run down, that the reason he did not stop was that he *could not reverse the car*, is admissible in evidence as part of the *res gestæ*, in a suit for the injury.[1]

It was no error to permit the attending physician of plaintiff to testify that such injury, sued for, would impair plaintiff's ability to work when on his feet, but to what extent he could not tell, and that he was a cripple.*

SEC. 187. Proof of an injury occurring as the proximate result of an act which, under ordinary circumstances would not, if done with due care, have injured any one, is enough to make out a presumption of negligence, and this is held to be the rule even where no special relation, like that of passenger and carrier, exists between the parties.[2] In the case of the use of a highly dangerous agent, like electricity, for the propelling of street cars for the carrying of passengers, the law requires a high degree of care, commensurate with the danger. If a wire highly charged with electricity is allowed to hang loose in the street where people are traveling, the result to pedestrians or horses coming in contact with it is instant death. Therefore a party who employs such agency should use the highest degree of care to avoid exposing the public to such danger. If such care had been exercised, either this wire would not have been broken by the trolley pole, or if broken the conductor would have discovered it and the wire been instantly removed. Instead of this the street car conductor operating the car in question was not aware of the accident until called to and informed that his trolley pole was

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[1] Springfield Consolidated Ry. Co. v. Welsch, 155 Ill. 511; Quincy Horse Ry. Co. v. Gunse, 137 Ill. 264.

[2] North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486.

* NOTE.—The plaintiff, a boy seven years old, was walking south on Second street, in the city of Springfield, when he was set upon by a pack of four or five dogs, and by them chased west on Carpenter street, upon which appellant operated an electric street railway. As he ran to escape the dogs, all the while looking back over his shoulder, he came upon appellant's track along which a trolley car was approaching. His attention being wholly taken up with the pursuing dogs, he neither saw nor heard the car, which presently reached and ran over him, breaking his leg: and further that the injury to plaintiff was caused by the negligence of the servants of appellant, the plaintiff having observed due care for one of his years and capacity.

off the wire. Then instead of examining whether any damage had been done by it he simply replaced the pole and moved on.[1]

Sec. 138. Proof that a passenger was injured while exercising ordinary care is not sufficient to raise a presumption of negligence against the carrier, unless it is shown that the cause of the injury was in some manner within its control. Where the injury occurs by reason of any defect in the machinery, or cars, or apparatus, or track of the carrier, or where there is anything improper or unskillful or negligent in the conduct of its servants, or unsafe in the appliances of transportation, the presumption then arises in favor of the negligence of the carrier and the burden of rebutting this presumption is thrown upon it. But if the plaintiff's own evidence shows that the accident was due to a cause beyond the control of the carrier, as the presence of *vis major*, or the tortious act of a stranger, tending to produce the accident, no such *prima facie* case is made out as will throw the burden upon the carrier of showing that it was not guilty of negligence. The presumption in question comes from the nature of the accident and the circumstances surrounding it, rather than from the mere fact itself. These circumstances must be such as tend to connect the carrier with the cause of the injury. If the circumstances surrounding the accident are such as to indicate that it probably would not

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[1] Larson v. Central Ry. Co., 56 Ill. App. 263.*

* Note.—Charles Larson, son of appellant, was driving the latter's horse attached to a delivery wagon, appellant being a grocer, and the horse stepped on an electric wire and dropped dead. Appellee had power by ordinance of the city of Peoria to operate an electric railway in the street at the place of the accident. The wire on which the horse stepped rested on the trolley wire directly over the track and car. The wire, before it was broken, was fastened to a pole at the corner of Washington and Main streets, toward the bank, and went diagonally across the street. The horse was worth $150. The driver did not see the wire till the horse was down; the wire was hanging down on the track and in the middle of the street. The wire had been hanging above the appellee's trolley wire at the corner named for two years. While the electric car was coming up Main street the trolley pole slipped off the trolley wire on which it ran and flew up and against the suspension wire and broke it so it fell down, where it was stepped on by the horse. It had been down three or four minutes before it was stepped on by the horse. The conductor did not know that the trolley was off until called to by a bystander. *Prima facie* the accident was due to the negligence of the appellee and it offered no evidence to rebut such proof.

have occurred if the company had been in the use of suitable machinery or safe apparatus, or if it had employed proper and competent servants to manage such machinery and apparatus, then the burden of proof will be shifted to the carrier. Such presumption of negligence has been held to exist against the carrier in case of the overturning of a stage coach, or of the derailment of a car, or of the sudden jerk of a train, or of a blow from part of a passing train, or of a collision between the trains belonging to the same carrier, or the breaking down of a bridge upon the line of a railway.[1]

SEC. 189. The fact that a passenger upon a street car, while exercising ordinary care, was struck by a passing wagon and injured, does not of itself raise a presumption of negligence against the street car company. It is reasonable that a presumption of negligence should arise against the carrier in cases where the cause of the accident is under its control, because it has in its possession the almost exclusive means of knowing what occasioned the injury and explaining how it occurred, while the injured party is generally ignorant of the facts.[2]

SEC. 190. Where the injury causes the instant death of the person injured, the evidence to prove due care on his part need not be direct; due care may be inferred from the circumstances existing at the time of the injury. Among other things proper for the jury to consider in determining this

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[1] Chicago City Railway Co. v. Rood, 163 Ill. 477.

[2] Chicago City Railway Co. v. Rood, 163 Ill. 471.*

* NOTE.—The car in which the appellee was riding was traveling along the public street of the city, which the owners of other vehicles had as much right to use as the owners of the cable cars. Plaintiff's own testimony showed that he was injured by a wagon traveling along the public street and passing the car in which he was riding. The accident may have been due, so far as plaintiff's evidence shows, to careless driving on the part of the driver of the wagon. Plaintiff's proof was equally consistent with the absence as with the existence of negligence on the part of appellant. At any rate, such evidence left it doubtful whether appellant was guilty of negligence or not, and the presumption that the accident was unavoidable was as reasonable as that it was due to appellant's negligence. The doctrine announced in this case is in harmony with that of North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486; New York, Chicago & St. L. Ry. Co. v. Blumenthal, 160 Ill. 40; Hart v. Washington Park Club, 157 Ill. 9.

question of due care is the instinct prompting to preservation of life and avoidance of danger.[1]

SEC. 191. In an action based on negligence the court, of its own motion, instructed, in substance, that if the defendant was shown to have been guilty of negligence, and that such negligence caused the injury complained of, and it was also shown that the plaintiff was not guilty of any negligence contributing to her injury, the jury should find for the plaintiff; and in one of defendant's instructions it was held, that if the plaintiff had failed to prove that at the time of the injury she was in the exercise of ordinary care and prudence, she could not recover; held, that these instructions laid down with substantial accuracy the law applicable to the question of negligence of both plaintiff and defendant.[2]

Negligence, in all cases of this character, is a mere question of fact, or at most a mixed question of law and fact, and whether the party is negligent in the particular instance, must be found by the jury, and not declared by the court.

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[1] B. & O. Ry. Co. *v.* Then, Adm'r, 159 Ill. 535; Ill. Cent. Ry. Co. *v.* Nowicki, 148 Ill. 29.

[2] North Chicago Street R. R. Co. *v.* Lizzie Eldridge, 151 Ill. 542.*

* NOTE.—Action to recover damages for a personal injury received by plaintiff while trying to alight from one of defendant's cars. The negligence charged consisted of the defendant's carelessly and negligently using, for the transportation of its passengers, a car so unfinished and incompleted, and in such bad and unfinished condition, that, by reason, thereof, the plaintiff's clothes were caught on the car while she was alighting therefrom, whereby she was thrown down from and off the car, to and upon the ground. and thereby received the injuries complained of. Trial resulted in a verdict of $13,500, of which $3,500 was remitted—judgment for $10,000 entered. The evidence tends to show that the plaintiff, at the time of her injury, was a passenger on one of the defendant's cable cars running south on North Clark street. The car was an open one, with the seats running across it, and was entered and alighted from by means of a foot-board suspended upon iron bolts, and running the entire length of the car. The plaintiff was riding on the westerly track, and the car had stopped just north of Division street to allow a Lincoln avenue car to pass in front of it. As the car stopped, the plaintiff, who was desirous of taking a State street horse car, which was standing near, and for which the conductor had given her a transfer, attempted to alight from the easterly side of the car, so as to pass over the easterly cable track to the State street car. The north-bound cable train was approaching from the south on the easterly track, and was at the time within a short distance. The plaintiff, in getting off the car, was compelled to pass in front of another passenger who

SEC. 192. The question of the sufficiency of the evidence to warrant a recovery is raised as a question of law by demurring to it, moving to exclude it, or by asking for an instruction to find for the defendant. If defendant goes to the jury upon the facts, without any of these, no question of law is preserved upon the facts.[1]

SEC. 193. *Negligence, when may be stated as a matter of law—When not.*—It is only when the conclusion of negligence necessarily results from the statement of fact that the court can be called upon to say to the jury that a fact establishes negligence as a matter of law. If the conclusion of negligence, under the facts stated, may or may not result, as shall depend on other circumstances, the question is one of fact for the jury.[2]

SEC. 194. *Negligence—A question of law.*—Where, from the facts admitted or conclusively proved, there is no reasonable chance that reasonable minds would reach different conclusions as to negligence, it becomes a question of law; and likewise, where a single material fact is conclusively shown or uncontradicted, the existence or non-existence of which is conclusive of a right of recovery.[3]

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was sitting at the easterly end of the same seat, and as she was stepping down from the car, as the evidence tends to show, the bottom of her dress caught on the head of the bolt which was projecting some distance above the floor of the car, whereby she was held fast, but as her dress was torn from its fastenings she was thrown forward, and after taking three or four steps, sufficient to carry her across the space between the tracks and the easterly track, she was thrown heavily to the ground and received the injuries complained of.

[1] Ill. C. R. R. Co. v. Larson, 152 Ill. 326; Abend v. T. H. & Ind. R. Co., 11 Ill. 202; Holmes v. C. & A. R. R. Co., 94 Ill. 439; Chicago & N. W. Ry. Co. v. Scates, 90 Ill. 586.

[2] Ill. Cent. R. R. Co. v. Larson, 152 Ill. 326; Chicago & E. Ill. R. R. Co. v. O'Connor, 119 Ill. 586; Chicago, M. & St. P. Ry. Co. v. Wilson, 133 Ill. 55; Hoehn v. C. P. & H. L. Ry. Co., 152 Ill. 223.

[3] Wabash Ry. Co. v. Brown, 152 Ill. 484.*

* NOTE.—Appellees, in April, 1892, having purchased in Chicago a number of high-bred cattle, shipped same to New Berlin, on appellant's road. The car was an ordinary stock car in which the cattle were shipped—the only car that had live stock in the train—and was placed third from the engine in a train of twenty-six cars. The cattle had hay to eat and enough more to bed them. When not far from Springfield, one of appellees saw trainmen running to front of train, and supposing something wrong had occurred, ran there too, and found the engineer and firemen had just

SEC. 195. Whether the escape of sparks from an engine, or the placing of a car containing combustible material near the engine in a train, constitutes negligence, is a question of fact to be determined by the inferior and appellate courts, and there can be no assignment of error upon controverted questions of fact in the supreme court. If negligence exists, its degree, whether slight, ordinary or gross, must depend on the evidence, and can not be determined by the court. *Id.*

SEC. 196. The rule is, that a common carrier can not relieve itself, by contract, from any portion of the loss sustained by a consignor upon goods in possession of the carrier, and being transported by it, resulting from gross negligence. *Id.*

SEC. 197. *Withdrawing a case from the jury at the close of plaintiff's testimony.*—The case of Charles F. Offutt v. World's Columbian Exposition Company was an action to recover damages for personal injuries sustained by plaintiff while in the employ of the defendant. At the close of the evidence for plaintiff, the trial court, upon motion of the defendant, instructed the jury to find the defendant not guilty. The supreme court, in passing upon the case, speaking through Chief Justice Carter, says:

"An instruction to find against the party upon whom rests the burden of proof, on the ground that there is no evidence legally tending to prove the cause, or, as it is now more generally stated, on the ground that the evidence, with all the inferences which the jury could justifiably draw from it, is so insufficient to support a verdict for such party that such verdict, if returned, must for that reason be set aside, is in the nature of a demurrer to the evidence, and, except as to technical methods of procedure, is governed by the same rules. The maker of the motion to so instruct admits the truth of all opposing evidence, and all inferences which may be fairly and rationally drawn from it. The motion does not involve a determination of the weight of the evidence nor the credibility of witnesses. (*Bartelott* v. *International Bank*, 119 Ill. 259, and cases cited; *Phillips* v. *Dickerson*, 85 Id. 11;

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extinguished a fire in the cattle car. It was in the end nearest the engine. One cow, "Fourth Duchess of Hillsdale," was badly burned, so much so that she was practically of no value. The value of the cow was $850. Verdict $650.

Chicago and Northwestern Railway Co. v. *Dunlevy*, 129 Id. 132.) It has been said in some cases that if there is any evidence, however slight, tending to prove plaintiff's cause of action, such an instruction would be erroneous, as it is the province of the jury, and not of the court, to pass upon the weight of the evidence, or its sufficiency in probative force, to authorize a verdict. In *Simmons* v. *Chicago and Tomah Railroad Co.*, 110 Ill. 340, in delivering the opinion of the court, Mr. Chief Justice Sheldon said (p. 346): 'There may be decisions to be found which hold that if there is any evidence—even a *scintilla*—tending to support the plaintiff's case, it must be submitted to the jury. But we think the more reasonable rule, which has now come to be established by the better authority, is that when the evidence given at the trial, with all inferences which the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.' (*Pleasants* v. *Fant*, 22 Wall. 120; *Randall* v. *Baltimore and Ohio Railroad Co.*, 109 U. S. 478; *Metropolitan Railway Co.* v. *Jackson*, 3 App. Cas. 193; *Reed* v. *Inhabitants of Deerfield*, 8 Allen, 524; *Skellenger* v. *Chicago and Northwestern Railway Co.*, 61 Iowa, 714; *Martin* v. *Chambers*, 84 Ill. 579; *Phillips* v. *Dickerson*, 85 Id. 11.) In the recent case of *Frazer* v. *Howe*, 106 Ill. 563, this court recognized the rule to be: 'If there is no evidence before the jury on a material issue in favor of a party holding the affirmative of that issue, on which the jury could, in the eye of the law, reasonably find in his favor, the court may exclude the evidence, or direct the jury to find against the party so holding the affirmative.' This language was quoted in *Bartelott* v. *International Bank*, *supra*, and Mr. Justice Scholfield, in speaking for the court, said (p. 272): 'Since it was not intended in this case to overrule *Simmons* v. *Chicago and Tomah Railroad Co.*, *supra*, it is apparent that 'evidence tending to prove' means more than a mere *scintilla* of evidence, but evidence upon which the jury could, without acting unreasonably in the eye of the law, decide in favor of the plaintiff or the party producing it. It is not intended by this practice that the function of the jury to pass upon questions of fact is to be invaded, any more than it is intended that

such function is to be invaded by a motion to set aside a verdict and for a new trial upon the ground of the want of evidence to sustain the verdict. In neither case is the court authorized to weigh the evidence and decide where the preponderance is." See also *Siddall* v. *Jansen*, 168 Ill. 43, and *Rack* v. *Chicago City Railway Co.*, 173 Id. 289.

It is clear from the case cited, and others, that what is called the "*scintilla* rule of evidence" is not in force in this State.

"A mere *scintilla* of evidence, if it means anything, means the least particle of evidence—evidence which, without further evidence, is a mere trifle; and as the law does not regard trifles, we see no reason why, on such a motion, the court may not adjudge such evidence insufficient in law, and direct a verdict as in cases where there is no evidence. As well said in *Connor* v. *Giles*, 76 Me. 132, 'there is no practical or logical difference between no evidence and evidence without legal weight.' It is true that such motions are not to be regarded with favor. The province of the jury must not be invaded (*Frazer* v. *Howe*, 106 Ill. 563), and where reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury." [1]

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[1] Charles F. Offutt v. World's Columbian Exposition Co.*

*NOTE.—The court reviews the evidence in the said case and shows that the trial court erred in withdrawing the case from the jury; that there was evidence that tended to prove that one Hunt was acting as foreman, representing the common master, and in that capacity he gave specific orders to the plaintiff (Offutt) to perform the very act (improper fastening of a scaffold to work on) which caused the injury, and the court stated the rule to be, that "where the servant is injured while obeying the orders of his master to perform work in a dangerous manner, the master is liable, unless the danger is so imminent that a man of ordinary prudence would not incur it" (which was not the fact in this instance), citing Illinois Steel Co. v. Schymanowski, 162 Ill. 447; Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573; West Chicago Street Railroad Co. v. Dwyer, 162 Ill. 482. (The judgment was reversed and the cause remanded.)

CHAPTER IV.

MASTER AND SERVANT.

SECTION 198. The master's own duty to the servant is always to be performed. The neglect of that duty is not a peril which the servant assumes, and where the performance of that duty is devolved upon a fellow-servant the master's liability in respect thereof still remains. Reasonable and ordinary care in supplying safe instrumentalities in the doing of the work undertaken is the duty of the master to the servant.[1]

SEC. 199. As respects the master's duty toward an employe in his service, the master (employer) is not bound to provide absolutely safe machinery. The law imposes upon the employer only the obligation to use reasonable and ordinary care and diligence in providing suitable and safe machinery. The machinery is not required to be the best or most improved kind, or to be absolutely safe. It is sufficient if it is reasonably safe.[2]

SEC. 200. The rule is well recognized that the employer is only liable where he fails to employ reasonably skillful workmen or suitable machinery and implements, properly constructed for the use intended; but the master is not an insurer that the servants he employs are skillful and prudent, or that the workmanship or materials employed in the construction of machinery and other implements are absolutely proper and suitable, but he is bound to a high degree of care and skill in

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[1] C., B. & Q. Ry. Co. v. Avery, 109 Ill. 314; Kranz v. White, 8 Ill. App. 583; Camp Point Mfg. Co. v. Ballou, 71 Ill. 417; Richardson v. Cooper, 88 Ill. 270; Pennsylvania Co. v. Lynch, 90 Ill. 333; C., B. & Q. R. Co. v. Abend, 7 Ill. App. 130; Fairbank Canning Co. v. Innes, 24 Ill. App. 33; Tudor Iron Works v. Weber, 31 Ill. App. 306.

[2] Camp Point Mfg. Co. v. Ballou, Adm'r, 71 Ill. 417; Richardson v. Cooper, 88 Ill. 270; Pennsylvania Co. v. Lynch, 90 Ill. 333; Ill. B. & W. Ry. Co. v. Toy, Adm'r, 91 Ill. 474; C., B. & Q. Ry. Co. v. Avery, 109 Ill. 314; North Chicago R. M. Co. v. Monka, 4 Ill. App. 664; Heyer v. Salisbury. Adm'x, 7 App. 93; Ill. Cent. R. R. Co. v. Jones, 11 Ill. App. 324; Springfield Iron Co. v. Gould, 11 Ind. App. 439; Chicago E. Ill. R. v. Hager, 11 Ill. App. 498; Wabash, St. L. & P. Ry. Co. v. Fenton, 12 Ill. App. 417; Chicago & Alton Ry. Co. v. Pratt, 14 Ill. App. 346; C., B. & Q. Ry. Co. v. Smith, 18 Ill. App. 119

their selection or construction. A servant, when he engages in an employment, is held to have done so with a knowledge of the risk of its ordinary hazards, whether from the carelessness of fellow-servants in the same line of employment or from latent defects in the ordinary dangers in the use of machinery and appliances used in the business. The qualification to the rule is that the master must use all reasonable precautions to select capable and prudent fellow-servants, and machinery and implements properly constructed and of good material.[1]

It is the duty of a master to provide his servant with suitable and safe machinery, but there is no implied warranty of fitness or soundness; neither will the master be liable for injuries arising from hidden defects, unless the master has notice of such defects, or might have had by the exercise of ordinary diligence.[2]

SEC. 201. The employer is bound to use diligence in providing and maintaining safe machinery and instrumentalities to be handled by the employe. This obligation rested upon the defendant railroad company in respect to the cars of other railroad companies, which were permitted to come into its yard, as this one was, and which, while there, were moved and handled by defendant's employes, and that the defendant could not divest itself of this responsibility to its own employes by such a contract with another company (*i. e.*, each was to make repairs of its own cars) as supposed.[3]

SEC. 202. In an action by an employe for personal injury occasioned through the negligent repair of a coupling, held, that the plaintiff was justified in assuming the same to be in proper condition.[4] The question whether an appliance was properly made or repaired is for the jury.[5] It is the duty of the employe to observe whether the machinery furnished by the master for his use is in repair and good working order, and to report to the master in case it is not.[6]

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[1] Richardson v. Cooper, 88 Ill. 270.

[2] Chicago & N. W. Ry. Co. v. Scheuring, 4 Ill. App. 533; Chicago & Alton Ry. Co. v. Mahoney, 4 Ill. App. 262.

[3] C., B. & Q. Ry. Co. v. Avery, 109 Ill. 314.

[4] Tudor Iron Works v. Weber, 31 Ill. App. 306.

[5] Tudor Iron Works v. Weber, 129 Ill. 535.

[6] Chicago & Alton Ry. Co. v. Bragonier, 119 Ill. 51.

SEC. 203. Where a servant is injured, not by anything occurring in his employment or that is incident thereto, but by a temporary peril, to which he and other servants are exposed by the negligent act of the employer, without any negligence on the servant's part, he is entitled to recover damages from the employer on account of such injury.[1] When a temporary peril is created by a positive act of the employer it is not necessary that a servant, in order to maintain an action for injuries occasioned thereby, should have given notice of such temporary peril and demanded its removal. While there is no element in the contract of service that the servant shall be protected absolutely from danger, nevertheless the master may not with impunity expose the servant to danger not contemplated in his original employment or connected therewith.[2]

SEC. 204. It is the duty of the master to use reasonable care to protect his servant from extra hazard. He should not direct his servant to work in a place which he knows, or might by reasonable care and diligence have discovered, to be dangerous.[3]

SEC. 205. The relation of master and servant can never

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[1] N. K. Fairbank v. Haentzsche, 73 Ill. 236.

[2] Fairbank et al. v. Haentzsche, 73 Ill. 236.*

[3] Consolidated Ice Machine Company v. Kiefer, 26 Ill. App. 466, and same case in 134 Ill. 481.†

* NOTE.—The main shaft projected through the division wall into the work room, occupied by the deceased and other employes, a distance of four to six feet. This change was made on the 14th of December, in the evening. On the morning of the 16th of December Mary Arnold, with other girls, went to her work at the usual hour. Having taken some pails from the "crimper," which stood near center of room, and placed them on her bench, she started to get some solder kept in another part of the room. In going to or returning from that point, she passed the shaft then in motion, and in some unexplained way her clothing was caught, drawing her around it, which occasioned the injuries causing her death.

† NOTE.—The negligence alleged as creating the liability, is that the Brewing Co. failed to exercise care in providing supports safe and sufficient to support an iron tank, part of a refrigerator plant, and the Ice Machine Co. carelessly and negligently undertook the erection of the plant and directed deceased, then in its service, to go upon the roof of the engine house of the brewery, when it knew, or should have known, the supports for said tank were wholly insufficient. That while deceased was there performing his work as directed, the tank fell by reason of such insufficiency and he was killed.

imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to take of himself.[1]

SEC. 206. While there is an implied contract between employer and employe that the former should procure and keep suitable tools, implements, means, etc., with which to perform the labors required of the latter, and also that the latter shall be advised by the former of all dangers incident to the service, of which the latter is not cognizant, yet the failure of the employer in this regard furnishes no excuse for the conduct of an employe who voluntarily incurs a known danger. He must himself use due care and caution to avoid injury. If he has full knowledge of all the perils of a particular service, he may decline to engage in it, or require that it shall first be made safe; but if he does thus enter it he assumes the risk and must bear the consequences. Where the defects in the machinery or other appliances are as well known to the servant as to the master, the servant must be regarded as voluntarily incurring the risk resulting from its use, unless the master, by urging on the servant or coercing him into danger, or in some other way, directly contributes to the injury.[2]

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[1] Whittaker v. Coombs, 14 Ill. App. 498; Chicago, M. & St. P. Ry. Co. v. Standart, 16 Ill. App. 145.*

[2] Pennsylvania Co. v. Lynch, 90 Ill. 333.†

* NOTE.—Plaintiff was employed as common laborer to assist in unloading cars and filling an ice house. While so employed the superintendent directed him to couple cars, which were being carelessly pushed together by other servants. While he was attempting to do this his right hand was caught between said cars and crushed. Plaintiff considered it his duty to do whatever he was told to do. When told to make the coupling he did not inform the superintendent that he had never made a coupling before, or that he was without experience in that business. He went on the inside of track curve instead of the outside and got his hand caught. The ice was brought to ice house on cars.

† NOTE.—Plaintiff, with another employe of defendant, was transferring a large bale of wool from one freight car to another. (Had been doing this kind of work a year and nine months.) The breaking of the platform was caused by letting the bale (500 or 600 pounds) from a slight elevation on a pile of bales down on a truck with a jerk or fall. The platform was a common grain car door composed of pine boards. There were other platforms and of better construction, and stronger, in the yards, which plaintiff might have used had he desired. He could have strengthened the one used if desired, having boards, hammer and nails. The platform used was selected

Sec. 207. A servant, to recover for an injury caused by the use of defective machinery and materials, must have been in the observance of due care and caution.[1]

Sec. 208. Where a person is employed in a place of danger, it is his duty to exercise a high degree of care, in view of the danger to which he may be exposed, but the law does not require that he shall exercise the highest degree of care and caution to entitle him to recover for an injury received from the negligence of other servants and agents of his employer.[2]

Sec. 209. While the law requires of the employer a high degree of care in furnishing his workmen with safe tools, it also requires in the case of a skilled workman, operating with a dangerous implement, a correspondingly high degree of care on his part in its use. In respect to the manufacture of implements for use by his employes the employer is not bound to insure them as absolutely safe and sound, but is held only to the employment of every precaution which a reasonably prudent man would use under like circumstances; and where he has selected his materials with proper care, and employed competent and skilled workmen in their manufacture, he has dis-

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by plaintiff; no one on part of the company directed its use. Plaintiff had no order but to transfer the wool, and in the choice of means used his own judgment.

[1] Missouri Furnace Co. v. Abend, 9 Ill. App. 319; Penn. Co. v. Lynch, 90 Ill. 333.

[2] L. S. & M. S. Ry. Co. v. O'Connor, 115 Ill. 254.*

* Note.—Action to recover damages for death of Jeremiah O'Connor, caused by negligence of servants of railway company in running its trains, while in discharge of his duty as switchman. Trial resulted in verdict for $5,000. On the trial plaintiff offered in evidence an ordinance of Lake, restricting speed of passenger trains to twelve miles an hour and freight trains to eight miles. It was the duty of O'Connor to couple and uncouple cars and give signals. While doing this the defendant's train, running at great and unlawful speed (twenty miles an hour) struck and so injured him that he died. The said ordinance regulating speed of trains is set out in the declaration, and proof of it, though objected to, was held proper. It was claimed that the engineer had a right to expect that O'Connor, seen by him signaling, etc., would get out of the way of his engine before it reached him. The evidence tends to show that said engineer was running his engine at a speed (twenty miles per hour) prohibited by law. The court says, it may be that if the engineer had been running at a slow rate of speed (eight miles per hour) he might have assumed that the deceased would have gotten out of the way—otherwise he had no right to expect it.

charged his duty, unless by the exercise of reasonable care he might have had knowledge of existing defects therein.[1]

SEC. 210. When a servant enters upon an employment that, from its nature, is necessarily hazardous, he accepts the service subject to the risks incidental to it; or if he thinks proper to accept an employment on machinery defective in its construction, or the want of proper repair, and *with knowledge of the facts* enters on the same, the master can not be held liable for injury to the servant within the scope of the danger which both contracting parties contemplated as incidental to the employment.[2] An employe engaged in a hazardous service, is required to use very great precaution to avoid danger, and if he fails so to do and is injured he has no right of action against his employer. It was gross carelessness on the part of plaintiff to attempt to get upon a moving engine by stepping upon the front foot-board, especially in the night time, and this is so, independent of an express rule of the railroad company forbidding it, which rule plaintiff took the responsibility of disregarding.

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[1] C. & A. R. R. Co. v. Mahoney, 4 Ill. App. 262.*

[2] Lake Shore & Mich. S. Ry. Co. v. Roy, 5 Ill. App. 82.†

* NOTE.—Action to recover damages for loss of an eye. While plaintiff with three other men was at work for defendant in the line of his employment as a boiler maker, a piece of steel separated from the tool with which he was at work, and, entering his eye, destroyed the sight. At the time of the accident plaintiff was head man of the gang of four, engaged in riveting the smoke arch of a portable engine. Hot rivets being inserted into holes prepared for them, it was the business of plaintiff and one other man to form heads on them on the outer surface of the shell. To accomplish this purpose an improvement was used called a "set," or "button set," which is described as being a hammer-shaped tool, with a cavity in one of its faces of the dimensions of the rivet head to be formed, while the other face is so formed as to receive heavy blows from a hammer. While appellee was holding his tool upon the rivet by means of a wooden handle inserted therein, the other man was striking it with a heavy hammer in a horizontal direction. Under a blow so delivered a piece of steel became detached from the "set," which caused the damage complained of. The case rests wholly upon the charge of negligence in not furnishing plaintiff with a suitable tool with which to preform his work. Plaintiff was employed as a skilled workman.

† NOTE.—Action to recover from defendant company damages for personal injuries suffered by him as night switchman in yards of company at Chicago. Plaintiff, while attempting to get onto the front foot-board of a

SEC. 211. A servant working about dangerous machinery is by law required, though but twelve years of age, to exercise such care and caution as may reasonably be expected from a person of his age and understanding in like circumstances.[1]

SEC. 212. Where employes were free to adopt their own method of doing the work, and the work can easily be done without injury to life and limb, but they voluntarily choose a perilous method because it is considered more convenient, they can not in case of injury recover from their employer. It appears, from all the evidence, that the injury in this case is the result of plaintiff's want of ordinary care rather than the defendant's negligence.[2]

SEC. 213. The master is not liable where the servant, instructed to do certain work, without instruction as to mode, and he, of his own choice, selected a mode that was dangerous, and was injured, when there was another way to perform the work without danger. Held, that plaintiff did not use ordinary care and prudence and can not recover.[3]

SEC. 214. It is well settled that a master is responsible to his servant for injuries received by him from defects in the structures or machinery about which the services were rendered, which defects the master knew or ought to have known.[4]

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locomotive engine, fell upon the track and his right hand was cut off by the wheels passing over it. A verdict was rendered in the trial court for plaintiff for $7,500. of which $2,500 was remitted and judgment entered for $5,000. The grounds of plaintiff's claims to recover were (1) that company failed to furnish him suitable lantern; and (2) because the foot-board of the engine was placed unusually high from the ground, causing him to stumble and fall as he attempted to step on it. Plaintiff used a lantern with knowledge of its defects. He selected the front foot-board to get onto, when he should have selected the rear one.

[1] Glover v. Gray, 9 Ill. App. 329.

[2] St. Louis Bolt and Iron Co. v. Brennan, 20 Ill. App. 555.

[3] St. Louis Bolt and Iron Company v. Burke, 12 Ill. App. 369.

[4] Schooner Norway v. Jensen, 52 Ill. 373; * Chicago & N. W. R. R. Co. v. Swett, 45 Ill. 197.

* NOTE.—The plaintiff was employed as a seaman May 1, 1868, on board Schooner Norway for a voyage from Chicago to Muskegon, Michigan; that on same day while plaintiff was in discharge of his duty and obeying the commands of the officers of said vessel, in taking in the anchor, the fish tackle pennant, a part of the rigging attached to the mast, and used for

SEC. 215. A servant can not recover of his employer damages for an injury received while in the discharge of his duty, from a defect in the machinery used, without showing that the employer had knowledge, or might have had knowledge, of the defect by the use of reasonable diligence.[1] The burden was upon plaintiff to make this proof.[2]

SEC. 216. The master is deemed to have knowledge of defects in appliances furnished the servant, where, by the exercise of ordinary care, he might have such knowledge.[3]

SEC. 217. The master is not liable to a servant for an injury caused by the negligence of a fellow-servant, there being no negligence in employing or retaining such fellow-servant.[4]

SEC. 218. The statute imposes on all coal companies the obligation to erect gates at the top of the shaft, and, of course, to use reasonable care to keep them safely closed at all times when it is not necessary to open them for use, and if they do not do this and in consequence there is injury to any of their employes, they are held liable under the statute, and the law as to fellow-servants would not be applicable.[5]

SEC. 219. As a general rule the servant assumes the natural

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hoisting or catting the anchor, broke, and the block connected with and being part of said tackle, fell on plaintiff with great force, breaking his arm and doing him other bodily injury. The rigging of the vessel was rotten and had been for some time, and this was known to the owners. The captain representing them was told so more than once, and that this particular rope was frayed and in a damaged condition.

[1] East St. L. P. & P. Co. v. Hightower, 92 Ill. 139; C. & A. Ry. Co. v. Platt, 89 Ill. 141.

[2] C. & A. Ry. Co. v. Stites, 20 Ill. App. 648.

[3] Goff v. Toledo, St. L. & K. Ry. Co., 28 Ill. App. 529.

[4] Honner v. Ill. Cent. Ry. Co., 15 Ill. 550; Ill. Cent. Ry. Co. v. Cox, 21 Ill. 20; C. & A. Railway Co. v. Murphy, 53 Ill. 336; Gartland v. Toledo, W. & W. Ry. Co.. 67 Ill. 498; Columbus, C. & Ind., C. Ry. Co. v. Troesch, 68 Ill. 545; St. L. & Southeastern Ry. Co. v. Britz, 72 Ill. 256; Toledo, W. & W. Ry. Co. v. Durkin, 76 Ill, 395; Toledo, W. & W. Ry Co. v. Moore, 77 Ill. 217; C. & A. R. R. Co. v. Rush, 84 Ill. 576; C. & N. W. Ry. Co. v. Moranda, 93 Ill. 302; C. & E. Ill. R. R. Co. v. Geary, 110 Ill. 383; C. & N. W. Ry. Co. v. Snyder, 117 Ill. 376; C. & N. W. Ry. Co. v. Scheuring, 4 Ill. App. 533; Kranz v. White, 8 Ill. App. 583; Anglo-A. P. & Prov. Co. v. Lewandowski, 26 App. 629.

[5] Coal Run Coal Co. v. Coughlin, 19 Ill. App. 412; Bartlett Coal & Mining Co. v. Roach, 68 Ill. 174.

and ordinary risks of the business in which he engages, and is held to impliedly contract that the master shall not be liable for injuries consequent upon the negligence of a fellow-servant, in the employment of whom the master has exercised proper care, but he does not assume or contract to waive liability of the master for his own negligence, whether committed in person, or by an agent authorized by the master to perform a duty resting upon him. In such case, the master being under contract duty to perform, the servant may, without sufficient appearing or being shown to put him upon notice to the contrary, rely upon the due and reasonable performance of the duty. The law will not permit the master to evade the duty which it has cast upon him, by shifting it upon another. * * The persons thus discharging the duty of the master are vice-principals, and their negligence is the negligence of the master.[1]

SEC. 220. The master is liable where the servant, employed in a particular line of duty, is, by a fellow-servant to whom he is subordinate, put at other and more hazardous work in which he has no skill, and is thereby injured—the injured servant using due care and caution for his own safety.[2]

SEC. 221. A servant, in entering upon an employment, assumes generally only such risks as he has notice of, either express or implied. Some are so obvious that notice of them will be presumed. When there are any special risks, of which the servant is not, from the nature of the employment, cognizant, or which are not patent, it is the duty of the employer to notify him of them, and on failure to do so, if the servant is injured by exposure to such risks he is entitled to recover from his employer.[3] All the law demands of a servant entering a hazardous service is to observe what is passing and to avail himself of such information as he may receive in respect to the talents and characteristics of his fellow-servants; and if, from any source, he finds any of them incompetent, so that his position is extra hazardous, it is his duty to notify his employer, and if the latter fails to discharge the incompetent

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[1] Pullman Palace Car Co. v. Laack, 143 Ill. 242.

[2] Lalor v. C., B. & Q. Ry. Co., 52 Ill. 401; U. S. Rolling Stock Co. v. Wilder, 116 Ill. 100.

[3] U. S. Rolling Stock Co. v. Wilder, 116 Ill. 100.

or unfit servant, he should quit the master's employment, otherwise he will be deemed to have assumed the extra hazard of his position.[1] *Id.*

SEC. 222. The master is not liable to a servant for an injury caused by the negligence of a fellow-servant or employe engaged in the same line of duty or incident thereto, provided such fellow-servants are competent and skillful to discharge the duty assigned them.[2]

SEC. 223. *Fellow-servants, who are—General rule.*—Where servants are habitually consociated in their daily duties (as most servants were at an earlier day in England) they may well be supposed to have an influence over each other, and power to promote in each other caution, by their counsel, exhortation and example, at least equal to that of the master, and perhaps greater. In such cases the well being of society does not seem to demand that the master should be made to answer, in cases where he had done all that he ought to have done, and the injury was to one such servant and from the negligence of another. The negligence of such servants in such case may well be supposed to have a greater stimulant to constant exercise if each one knows that neither he nor his comrades can have any redress for injury to one by the negligence of the other. But where servants of a common master are not consociated in the discharge of their duties—where their employment does not require co-operation, and does not bring them together or into such relations that they can exercise an influence upon each other promotive of proper caution,—in such case, the reason of the rule holding the master responsible for damage resulting from the negligence of one of his servants seems reasonably to apply with as great force

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[1] Stafford v. Chicago, B. & Q. R. R. Co., 114 Ill. 244.

[2] Honner v. Ill. Cent. Ry. Co., 15 Ill. 550; Ill. Cent. Ry. Co. v. Cox, 21 Ill. 20; C. & A. R. R. Co. v. Murphy, 53 Ill. 336; Gartland v. Toledo, Wabash & W. Ry., 67 Ill. 498; C., C. & Ind. Cent. Ry. Co. Troesch, 68 Ill. 545; St. L. S. Ry. Co. v. Britz, 72 Ill. 256; T. W. & W. Ry. Co. v. Durkin, 76 Ill. 395; T. W. & W. Ry. Co. v. Moore, 77 Ill. 217; C. & A. R. R. Co. v. Rush, 88 Ill. 570; C. & N. W. Ry. Co. v. Moranda, 93 Ill. 302; C. & E. Ill. R. R. v. Geary, 110 Ill. 383; C. & N. W. Ry. Co. v. Snyder, 117 Ill. 376; C. & N. W. Ry. Co. v. Schewring, 4 Ill. App. 533; Kranz v. White, 8 Ill. App. 583; A. A. Park & P. Co. v. Levandowski, 26 Ill. App. 629.

as if a stranger were the party injured. The influence of one servant upon another in the encouragement of caution can not be relied upon in such case, for that can only operate where they are co-operating, or are brought together by their usual duties, or where there is habitual consociation. Then, indeed, in cases where they can not be supposed to have it in their power in any way to promote caution in each other, the well-being of society, if it is to have any such security, must depend entirely upon the vigilance of the master in promoting constant caution in each of his servants, and upon the desire of servants to protect the master from liability. Hence in such case the master must be held responsible for the neglect of his servant. The application of these views, it is believed, will render it entirely practicable to maintain the rule adopted by this court, recognizing a distinction between the case of co-servants, whose duties are entirely distinct from each other, and are not such as to imply consociation or co-operation, and the case of co-servants consociated by means of their daily duties, or co-operating in the same department of duty or the same line of employment.

The supreme court, speaking by Justice Dickey, said: "The line of argument, briefly stated, is this: The ancient common law rule which holds a master (even in cases where he is guilty of no fault) responsible for the neglect of his servant, where a third person suffers damage from the negligence of such servant, rests entirely upon considerations of its practical effect upon society—upon considerations of policy, and these considerations of policy rest upon the idea that the subordination of the servant to the will of the master and his devotion to the interests of the master give him, under that rule, incentives to caution he would not otherwise have, and upon the idea that the rule will incite the master to greater vigilance in the selection of prudent servants, and to greater zeal in the exercise of his influence over his servant to secure the exercise of care in all cases. When the reason of the rule ceases, the application of the rule ought also to cease, and especially is this true of a rule which rests not upon its own justice, but solely upon considerations of policy. Where servants of the same master are directly co-operating with each other in a particular business at the time of the injury, or are,

by their usual duties, brought into habitual consociation, it may well be supposed that they have the power of influencing each other to the exercise of constant caution in the master's work (by their example, advice and encouragement, and by reporting delinquencies to the master) in as great, and in most cases in a greater, degree than the master. If, then, each such servant knows that neither he nor his fellow-servant, if injured by the other's negligence, can have redress against the master, he has such incentive to constant care, and such incentive to the exercise of his influence upon his fellow to incite him to constant care, that the well-being of society in such case does not demand that the master be made to answer. * * * But though servants are employed by the same master, and are engaged in doing parts of some great work carried on by the master, still, unless either their duties are such that they usually bring about personal association between such servants, or unless they are actually co-operating at the time of the injury in the business in hand, or in the same line of employment, they have generally no power to incite each other to caution by counsel, exhortation or example, or by reporting delinquencies to the master, and the well-being of society in such case must depend upon the devotion of the servant to the interests of the master, and the zeal of the master to promote a constant exercise of due care by his servant.'

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[1] Chicago & N. W. Ry. Co. v. Moranda, 93 Ill. 302;* Chicago & N. W. Ry. Co. v. Moranda, 108 Ill. 576; Chicago & E. Ill. Ry. Co. v. Geary, 110 Ill. 383; N. C. Rolling Mill Co. v. Johnson, 114 Ill. 57; John Stafford v. Chicago, B. & Q. Ry. Co., 114 Ill. 244; Chicago & N. W. Ry. Co. v. Snyder, 117 Ill. 378; Chicago & Alton Ry. Co. v. Hoyt, 122 Ill. 369; Chicago & Alton Ry. Co. v. Kelly, 127 Ill. 637; C. & A. Ry. Co. v. O'Bryan, 15 Ill. App. 134; C. & A. Ry. Co. v. Fietsam, 24 Ill. App. 210.

* NOTE.—John Moranda was foreman of a party of track repairers, whose duty it was to repair and keep in order a section of the railroad track of appellant, and to be upon the track and to see that it was kept in order for the running of trains. The hypothesis on which it is sought to sustain the recovery in the circuit court in this case is, that while Moranda was so engaged in this duty an express train passed by at the rate of some thirty or thirty-five miles per hour; that on the approach of the train to the place where Moranda and his party were at work on the track they stepped aside to avoid the passing train, he standing some five or six feet from the nearest rail of the track; and that as the train passed, a large lump of coal was

SEC. 224. The servants of the same master, to be co-employes, so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business, *i. e.*, the same line of employment, or that their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution.[1]

SEC. 225. When a company confers authority upon one of its employes to take charge and control of a gang of men in carrying on some particular branch of its business, such employe, in governing and directing the movements of the men under his charge with respect to that branch of its business, is the direct representative of the company itself, and all commands given by him within the scope of his authority, are, in law, the commands of the company, and the fact that he may have an immediate superior, standing between him and the company, makes no difference in this respect. In exercising his power he does not stand upon the same plane with those under his control. His position is one of superiority. When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey, at the peril of losing their situations, and such commands are, in contemplation of law, the commands of the company, and hence it is held responsible for the consequences. These views are in strict accord with all that is said in the Moranda case.[2]

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carelessly cast by the fireman from the tender attached to the locomotive, which struck Moranda and caused his death. This is an action under the statute, by the administratrix of the estate of the deceased. A trial by jury resulted in a verdict of guilty and damages assessed at $4,000. It was insisted at the trial that the plaintiff's intestate and the persons running the locomotive bore such relation to each other in the service of the defendant, that one could not recover of the common employer damages caused by the negligence or carelessness of the other. Upon the issue, thus raised, the opinion of the court was rendered.

[1] N. C. Rolling Mill Co. v. Johnson, 114 Ill. 57.

[2] Chicago & Alton Ry. Co. v. May, Adm'r, 108 Ill. 288.*

* NOTE.—May's death was the direct result of an improper and inconsiderate order of foreman Fricke, that no one exercising ordinary skill or prudence would have given. It was not a mere careless act done by him in performing his work as a *co-laborer* or *fellow-servant*, but it was negligent and unskillful exercise of his power and authority over the men in his

SEC. 226. One servant of a company to whom is delegated the power of hiring and discharging other servants, and in whom the corporation vests the sole control and direction of such other servants in and about the work which they may be ordinarily required to do, is as to such servants whom he so hires, discharges and controls, the representative of the master when exercising such power or control, and is not a fellow-servant, nor is he in the same line of employment as the servants he so controls.[1]

SEC. 227. Where a master confers authority upon one of his employes to take charge and control of a certain class of workmen in carrying on some particular branch of his business, such employe, in governing and directing the movements of the men under his charge with respect to that branch of the business, is the direct representative of the master, and not a mere fellow-servant; all commands given by him within the scope of his authority, are, in law, the commands of the master; and if he is guilty of negligent and unskillful exercise of his power and authority over the men under his charge, the master must be held to answer.[2]

An employe acting under the orders of a foreman, to perform a certain piece of work with help selected by himself, is thereby placed in authority over such help, and for the consequence of obedience to any orders given by such employe, the master is responsible.[3]

The mere fact that he had no power to employ or discharge men, does not necessarily render him other than a vice-principal.[4]

SEC. 228. One servant may be, in relation to a co-servant,

charge, for which, as we have already seen, the company must be held to answer. The court cites Buckner v. New York Cent. Ry., 2 Lansing, 506; C., B. & Q. Ry. Co. v. McLallen, 84 Ill. 116; Lalor v. C., B. & Q. Ry. Co., 52 Ill. 401; Mullen v. P. & S. M. Steamship Co., 78 Pa. State, 25; Gormly v. Vulcan Iron Works, 61 Mo. 492.

[1] Fauter v. Clark, 15 Ill. App. 470; C., B. & Q. R. R. Co. v. Blank, 24 Ill. App. 438; Chicago & A. Ry. Co. v. Caroline May, 108 Ill. 288; Chicago, R. I. & P. Co. v. Touhy, 26 App. 99.

[2] Wenona Coal Co. v. Holmquist, 152 Ill. 581; Illinois Steel Co. v. Schymanowski, 162 Ill. 447.

[3] Fraser & Chalmers v. Schroeder, 60 Ill. App. 519.

[4] Fraser & Chalmers v. Schroeder, affirmed, 163 Ill. 459.

a vice-principal in one relation and a fellow-servant in another, the particular relation depending upon the particular duties he is discharging at the time. It is not for the court to determine whether the plaintiff, in relation to Rathwell, conductor, was a fellow-servant with him. Rathwell also discharged the duties of foreman, and, under proper instructions, it would be a question for the jury to determine if there was negligence on the part of Rathwell, and if so, in what relation it occurred.[1]

SEC. 229. The rule in this state is, that where one servant is injured by the negligence of another servant, where they are directly co-operating with each other in a particular business in the same line of employment, *or*, their duties being such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master is not liable.[2]

SEC. 230. *Hazards ordinary and known.*—When a servant of a company engages in their service, he undertakes, as between himself and his employer, to run all the ordinary risks of the said service.[3]

SEC. 231. *Hazards subsequently discovered.*—An employe can not recover for an injury suffered in the course of the business about which he is employed, from defective machinery used therein, after he had knowledge of the defect, and con-

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[1] M. & O. R. Co. v. Godfrey, 155 Ill. 78.

[2] Chicago & E. Ill. R. R. Co. v. Kneirim, 152 Ill. 458; Wenona Coal Co. v. Holmquist, 152 Ill. 581: Chicago & Alton R. R. Co. v. O'Brien, 155 Ill. 630; Terre Haute & Ind. R. Co. v. Leeper, 60 Ill. App. 194; Leeper v. T. H. & Ind. R. Co., 162 Ill. 215.

[3] Ill. Cent. R. R. Co. v. Cox, 21 Ill. 20; I. B. & W. R. R. Co. v. Flanigan, 77 Ill. 365; T. B. & W. R. Co. v. Black, 88 Ill. 112; Richardson v. Cooper, 88 Ill. 270; Missouri Furnace Co. v. Abend, 107 Ill. 44; Coal Run Coal Co. v. Jones, 127 Ill. 379; Clark v. C., B. & Q. R. R. Co., 92 Ill. 43; R. I. & P. R. R. Co. v. Clark, 108 Ill. 113; McCormick H. M. Co. v. Burandt, 136 Ill. 170; Pullman Palace Car Co. v. Laack, 143 Ill. 242; H. H. Milling Co. v. Spehr, 145 Ill. 329; Consolidated Coal Co. v. Haenni, 146 Ill. 614; Chicago A. P. Brick Co. v. Sobkowiak, 34 Ill. App. 312; Chicago, B. & Q. R. Co. v. Merckes, 36 Ill. App. 195; Chicago A. P. Brick Co. v. Reinneiger, 140 Ill. 334; Fitzgerald v. Honkomp, 44 Ill. App. 365; Chicago A. P. Brick Co. v. Sobkowiak, 148 Ill. 573; Libby v. Sherman, 146 Ill. 540; Peoria, Decatur & E. R. Co. v. Harwick, 53 Ill. App. 161.

tinued his work, it being held that, upon becoming aware of the defective condition of such machinery, he should desist from his employment; but if he does not do so, and chooses to continue on, he is deemed to have assumed the risk of such defects, at least when he had not been induced by his employer to believe that a change would be made, and had not plainly objected.[1]

Sec. 232. When the master, on being notified by the servant of defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of the promise without being guilty of negligence, and if any injury results therefrom he may recover, unless he should continue in the employment when the danger is so imminent that no prudent man would undertake to perform the service. The promise of the master in such case relieves the servant from the charge of negligence by continuing in the service.[2]

Sec. 233. *Servant or contractor.*—Where the owner of premises enters into a contract with a workman to erect a building upon a public street, and surrenders possession for that purpose, neither the contractor nor his employes are regarded in law as the servants of the owner, as they are not under his control, but are bound by the terms of the contract only. All liability for injury sustained proceeds upon the theory that the party liable has committed a wrong or neglected some duty—that direct or consequential injury has resulted from the

[1] Camp Point Mfg. Co. v. Ballou, Adm'r, 71 Ill. 417; T., W. & W. Ry. Co. v. Eddy, 72 Ill. 138; St. L. & S. Ry. Co. v. Britz, 72 Ill. 256, Chicago & A. Ry. Co. v. Munroe, 85 Ill. 25; Richardson v. Cooper, 88 Ill. 270; Penna. Co. v. Lynch, 90 Ill. 333; Mo. F. Co. v. Abend, 107 Ill. 44; Morris v. Gleason, 1 Ill. App. 510; C., R. I. & P. Ry. Co. v. Clark, 108 Ill. 113; C., B. & Q. Ry. Co. v. Montgomery, 15 Ill. App. 205; C., B. & Q. Ry. Co. v. Stafford, 16 Ill. App. 84; C., B. & Q. Ry. Co. v. Stafford, 114 Ill. 244; Legnard v. Lage, 57 Ill. App. 223; Tesmer v. Boehm, 58 Ill. App. 609; William Graver Tank Wks. v. McGee, 58 Ill. App. 250; Stobba v. Fitzsimons & Connell Co., 58 Ill. App. 427; Pitrowsky v. Reedy Elevator Mfg. Co., 54 Ill. 253; Lincoln Coal M. Co. v. McNally, 15 App. 181.

[2] Mo. F. Co. v. Abend, 107 Ill. 44; Morris v. Ind. & St. L. R. R. Co., 10 Ill. App. 389; C., R. I. & P. Ry. Co. v. Clark, 11 Ill. App. 104; C.,

employment of immediate force, or the negligent performance of some legal duty, or in the negligent use of persons or property.[1]

SEC. 234. Where the person contracting is put in exclusive possession, and has exclusive control, furnishing his own assistance and executing the work in detail, clear of any supervision, he is an independent contractor, and the employer is in general not liable.[2] This applies where one undertakes by way of a contract for building and is so put in possession and control. But it is otherwise where the owner retains control, as, when the work is being done under direction of the owner's superintending.[3]

In order that the contractor may be liable it is necessary that he have such exclusive control over the erection in respect to the plan, materials to be used, etc., as would enable him to avoid or avert the danger.[4]

Where the owner continued to occupy the building, and the contractor was employed to make repairs or alterations in the roof (putting in new skylights), and the contractor left the roof open so that the tenant was injured by reason of a storm, held, that the owner was liable therefor.[5]

SEC. 235. Where the principal retains supervision and control, it makes no difference that the contractor, departing from the plan of the architect, does the work upon defective plans

R. I. & P. Ry. Co. v. Clark, 108 Ill. 113; C., B. & Q. Ry. Co. v. Smith, 18 Ill. App. 119; Ill. Cent. Ry. Co. v. Neer, 26 Ill. App. 356; Sendzikowski v. McCormick H. Co., 58 Ill. App. 418; Taylor v. Felsing, 63 Ill. App. 624.

[1] Scammon v. Chicago, 25 Ill. 361; Arasmith v. Temple, 11 Ill. App. 39; Chicago City Ry. Co. v. Hennessy, 16 Ill. App. 153; Andrews v. Boedecker, 17 Ill. App. 213.

[2] Hollenbeck v. Winnebago Co., 95 Ill. 148; East St. L. v. Giblin, 3 Ill. App. 219; Chicago City Ry. Co. v. Hennessy, 16 Ill. App. 153; Moline v. McKinnie, 30 Ill. App. 419; Scammon v. Chicago, 25 Ill. 361; Schwartz v. Gilmore, 45 Ill. 455; Pfau v. Williamson, 63 Ill. 16; Prairie State Loan & T. Co. v. Doig, 70 Ill. 52; Hale v. Johnson, 80 Ill. 185; Kepperly v. Ramsden, 83 Ill. 354.

[3] Schwartz v. Gilmore, 45 Ill. 455; Chicago v. Joney, 60 Ill. 383; Chicago St. P. & Fond du Lac R. Co. v. McCarthy, 20 Ill. 385.

[4] Hollenbeck v. County of Winnebago, 95 Ill. 148.

[5] Glickauf v. Maurer, 75 Ill. 289.

of his own; the principal, retaining supervision and control, is bound to see that the work is properly done.[1]

Where a plumber is employed to make repairs in the plumbing in the building, no special terms being agreed on, he is a servant, not an independent contractor.[2]

SEC. 236. Where the contract to do certain work in a street requires the use of concrete, the employer is not liable for injury to a child who is playing about the machine used by the contractor for mixing the concrete, the use of the machine being a matter with which the employer has nothing to do.[3]

In general the principle of *respondeat superior* does not extend to cases of independent contractors, where the employer is not the immediate superior of those who are guilty of the wrongful act, and has no choice in the selection of workmen and no control over the manner of doing the work.[4]

One of the exceptions to this rule is, where the contract directly requires the performance of a work which, however skillfully done, will be intrinsically dangerous. The principle upon which this exception depends for support is that one who authorizes a work which is necessarily dangerous, and the natural consequence of which is an injury to the person or property of another, is justly to be regarded as the author of the resulting injury.[5]

There is another exception, where the party causing the work to be done is charged by the law with the duty of keeping the subject-matter of the work in a safe condition.[6]

SEC. 237. Where the act complained of necessarily occurs in the ordinary mode of doing the work, the owner is not relieved from his liability for injuries thereby caused, on the ground that the person employed is an independent contractor.[7]

SEC. 238. When a suit is brought against a city for damages caused by the act of one who obstructs or excavates in

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[1] Chicago v. Dermody, 61 Ill. 431; Chicago v. Joney, 60 Ill. 383.

[2] Bernauer v. Hartman Steel Co., 33 Ill. App. 491.

[3] Chicago City Ry. Co. v. Hennessy, 16 Ill. App. 153.

[4] Jefferson v. Chapman, 127 Ill. 438.

[5] Jefferson v. Chapman, 127 Ill. 438.

[6] Jefferson v. Chapman, 127 Ill. 438.

[7] Scammon v. Chicago, 25 Ill. 424; Joliet v. Harwood, 86 Ill. 110.

the street, and such person has notice of the suit, the judgment will be conclusive against him in an action by the city to recover the amount it has been compelled to pay, so far as relates to all matters necessarily included in the adjudication; such as that the person was injured at the place alleged without fault on his part, and that damages were sustained to the amount of the judgment, and that the excavation was wrongfully and negligently permitted to remain uncovered and unguarded.[1]

Sec. 239. Where different portions of the work are let to different contractors, the interval between the completion of his work and departure from the premises by one contractor, and the actual entry on the premises in the performance of his particular contract, by another, must be held to be the possession of the owner, and during such interval it is the duty of the owner to maintain such barriers or guards around an excavation which he has caused to be made in the sidewalk as will protect passers-by against the pitfall. In order to charge the contractor with the duty of maintaining safeguards about an excavation, and relieve the owner from such duty, the contractor must be in actual possession of the premises and have the entire and exclusive control of the work in his charge.[2]

The question must always arise who was, in fact, in possession of the premises where the injury occurred and at the time of the occurrence, and this is a question of fact.[3]

Sec. 240. Where a building is in process of erection under separate contracts for carpentry and masonry, the owner is not liable for injuries to a laborer employed on the masonry received in climbing a temporary ladder erected by the carpenter, and caused by a defect therein, it not appearing that it was the duty of the carpenter in the course of his employment, nor that he was specially employed, to make a ladder for the use of the mason.[4]

Sec. 241. In an action by a servant against the master for

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[1] Todd v. Chicago, 18 Ill. App. 565; Bloomington v. Boush, 13 Brad. 339; Severin v. Eddy, 52 Ill. 189.

[2] Todd v. City of Chicago, 18 Ill. App. 565; Kipperly v. Ramsden, 83 Ill. 354.

[3] Pfau v. Williamson, 63 Ill. 20.

[4] Mercer v. Jackson, 54 Ill. 397.

negligence in selecting and retaining an incompetent servant, the burden of proving such negligence is on the plaintiff.[1]

SEC. 242. *Fellow-servants—Question of law and fact.*—The definition of fellow-servants may be a question of law, but it is always a question of fact, to be determined from the evidence, whether a given case falls within that definition. The inquiry arises whether they were in the service of a common master; were they engaged in the same line of employment; were the existing relations between them of such character and their duties such as to bring them often together, co-operating in a particular work. These, and perhaps other facts of a kindred character, are matters to be proven before a jury, and from the facts thus proven it is for the jury to say whether the two servants in the discharge of their duties are or were fellows.[2]

SEC. 243. The servant is regarded as assuming all ordinary known hazards of the employment; he is presumed to contract with reference to them.[3] And this is true when the servant is young and inexperienced the same as when he is older, if he has capacity to understand and does understand the dangers.[4] But such hazards only; he does not assume hazards not ordinarily incident to the employment.[5]

SEC. 244. The servant does not assume the hazard of the negligence of the master in the inspection of appliances provided by the master for his use.[6] And there is no assumption by the servant of the hazard of a failure on the part of the master to do his duty toward the protection of the servant. A

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[1] Stafford v. C., B. & Q. Ry. Co., 114 Ill. 244; C., C. & Ind. Cent. Ry. Co. v. Troesch, 68 Ill. 545; C. & E. Ill. R. Co. v. Gearry, 110 Ill. 383.

[2] Indianapolis & St. Louis R. R. Co. v. Morgenstern, 106 Ill. 216; C., B. & Q. R. R. Co. v. Bell, 112 Ill. 360; C. & A. R. R. Co. v. Kelly, 127 Ill. 637; Wabash, St. L. & P. Ry. Co. v. Deardorff, 14 Ill. App. 401; C. & A. Ry. Co. v. Hay, 16 Ill. App. 237; Wabash, St. L. & P. Co. v. Mahaffee, 16 Ill. App. 290; C. & A. R. R. Co. v. Kelly, 25 Ill. App. 17; Joliet Steel Co. v. Shields, 32 Ill. App. 598; Toledo, Wabash & Western Ry. Co. v. Moore, 77 Ill. 217.

[3] Chicago & Eastern Ill. v. Kneirim, 152 Ill. 458.

[4] Jones v. Roberts, 57 Ill. App. 56; C., B. & Q. R. R. Co. v. Eggman, 59 Ill. App. 680.

[5] St. L. & T. H. R. R. Co. v. Eggman, 60 Ill. App. 291. Affirmed, 161 Ill. 155.

[6] Chicago & E. Ill. R. R. Co. v. Kneirim, 152 Ill. 458.

failure to perform an assumed duty, by which an injury results to one in the exercise of due care, creates a liability at common law.[1] Nor of a hazard known to the master, and of which the servant had no knowledge. When a master calls a servant from a place of safety and commands him to work in a place of danger, without warning him of the increased hazard, it can not be said that the danger is an obvious one or hazard voluntarily assumed.[2]

SEC. 245. A servant is not bound to investigate and find out at his peril whether the common master has used reasonable care in the selection of those employed in the same branch of service, but on the contrary he is warranted in assuming his employer has discharged his duty in that respect, and until notice to the contrary is brought home to him he can act upon this assumption. The risk as to the negligence of a fellow-servant is subject to the qualifications that the master is not knowingly to employ or retain incompetent co-servants.

The extra hazard resulting from the master's failure to perform this duty to his employe does not come within the risks the latter assumes.[3] The master impliedly undertakes to exercise ordinary and reasonable care to select and employ careful and competent fellow-servants and to employ and retain none other.[4] This means such care as a reasonably prudent person would exercise in view of the consequences that might reasonably be expected to result if an incompetent, careless or reckless servant was employed for the particular duty. *Id.*

SEC. 246. The master impliedly undertakes, in providing the servant with appliances for use in his employment, to exercise reasonable care to provide such as the servant may use with reasonable safety.[5] And he undertakes to continue to exercise such care to replace and repair as such care may

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[1] Consolidated Coal Co. v. Scheiber, 65 Ill. App. 304.

[2] Lottie F. Banks, Adm. v. City of Effingham, 63 Ill. App. 221.

[3] Pope Glucose Co. v. Byrne, 60 Ill. App. 17.

[4] Western Stone Co. v. John Whalen, 151 Ill. 472.

[5] Penn. Coal Co. v. Kelly, 54 Ill. App. 622; same case affirmed, 156 Ill. 9; Ill. Cent. R. Co. v. Barslow, 55 Ill. App. 203; C. & A. Ry. Co. v. Du Bois, 56 Ill. App. 181; Ombros v. Augus, 61 Ill. App. 304; C. & Gt. W. Ry. Co. v. Armstrong, 62 Ill. App. 228.

require, and thus to exercise reasonable diligence in supervision and inspection.[1]

A reasonably safe method of construction means one safe according to the usages, habits and ordinary risks of the business.[2]

SEC. 247. It is the duty of the employer to use ordinary care and prudence in furnishing to his employe a reasonably safe place in which to work, and use all reasonable precautions to maintain and keep such place in a reasonably safe condition. A laborer was a moulder working in an iron foundry. The oven was a place provided for the laborer to enter; consequently its interior a place which the employer was bound to have used ordinary care and prudence to make and keep reasonably safe for the employe to enter.[3]

SEC. 248. A foreman in charge of workmen and clothed with the power of superintendence is bound to take proper precautions for the safety of the men at work under him. Where he puts men at work alongside of a pile of ore, which must be shattered with dynamite in order to loosen its component parts, it is his duty to observe carefully the condition of its material as to looseness or compactness, and all other features of its structure, so that he may be enabled to determine what should be done to prevent such injuries as those inflicted upon employe (Schymanowski). The jury might well believe that if he had exercised proper skill and foresight the accident would not have happened. Whether he (S.) was in the exercise of ordinary care was a question of fact for the jury. It was no part of his duty to study the condition affecting the stability of the ore at the sides of the pile or do anything, except to work as well as he could under the directions of the boss. * * * The duty of the master to use reason-

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[1] Chicago & Eastern Ill. R. Co. v. Kneirim, 152 Ill. 458; Ill. Cent. Ry. Co. v. Barslow, 55 Ill. App. 203; C. & A. Ry. Co. v. Du Bois, 56 Ill. App. 181.

[2] C. & Gt. W. Ry. Co. v. Armstrong, 62 Ill. App. 228.

[3] Cribben v. Callaghan, 57 Ill. App. 544, affirmed 156 Ill. 549; Wood on Master & Servant, Sec. 329.*

* NOTE.—The laborer entered the oven for a ladle, and while in there the roof of the oven fell in, partially, and a quantity of heated sand which was on the roof was thrown upon him, burning him about the head and face, arm and ankle. Jury assessed damages at $1,250.

able diligence in seeing that the place where the work of his servant is to be performed is safe for that purpose, extends not only to such risks as are known to him, but to such as he ought to know in the exercise of due diligence.[1]

SEC. 249. *The right to labor and employ labor is a property right.*—The privilege of contracting is both a liberty and property right. (Frorer v. The People, 141 Ill. 171.) Liberty includes the right to acquire property and means and includes the right to make and enforce contracts. (The State v. Loomis, 115 Mo. 307.) The right to use, buy and sell property and contract in respect thereto is protected by the constitution. Labor is property, and the laborer has the same right to sell his labor and to contract with reference thereto as has any other property owner. In this country the legislature has no power to prevent persons who are *sui juris* from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer. The right to labor or employ labor and make contracts in respect thereto, upon such terms as may be agreed upon between the parties, is included in the constitutional guaranty that "no person shall be deprived of life, liberty or property without due process of law." (Sec. 2, Art. 2, of the Constitution of Illinois; Braceville Coal Co. v. The People, 147 Ill. 66.) The protection of property is one of the objects for which free governments are instituted among men. (Const. Ill., Art. 2, Sec. 1.) The right to acquire, possess and protect property includes the right to make reasonable contracts. (Commonwealth v. Perry, 155 Mass. 117.) And when an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property within the meaning of the constitution. The fundamental rights of Englishmen, brought to this country by its original settlers, and wrested, from time to time in the progress of history, from the sovereigns of the English nation, have been reduced by Blackstone to three principal or primary articles: (1) the right of personal security; (2) the right of personal liberty; (3) and the right of private property. (Blacks. Com., Marg. page 129.) The right to contract is the only way by which a person can rightfully acquire property by

[1] Ill. Steel Co. v. Schymanowski, 163 Ill. 447; Consolidated Coal Co. v. Haenni, 146 Ill. 614.

his own labor. Of all the rights of persons it is the most essential to human happiness.

The act of the Illinois legislature of 1893 prohibiting the employment of females in any factory or workshop for more than eight hours a day is unconstitutional, as being partial and discriminating in its character, whether applying only to manufacturers of wearing apparel or to manufacturers generally. Such a statute is also unconstitutional as an arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties, and a substitution of the legislative judgment for that of the employer and employe in a matter about which they are competent to agree with each other.

The statute providing that no female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week, prohibits both the employer and the employe from contracting with each other with reference to the hours of labor.[1]

SEC. 250. The servant can recover for an injury caused by defective appliances furnished by the master for the use of the servant only when the master had knowledge of the defect, or by the exercise of reasonable diligence, might have had such knowledge.[2]

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[1] Ritchie v. The People, 155 Ill. 98.*

[2] C. & A. R. R. Co. v. Du Bois, 56 App. 181; Myers v. Amer. Steel Barge Co., 64 Ill. App. 181.†

* NOTE.—A warrant was issued by a justice of the peace of Cook county against plaintiff in error, and, upon his appearance and waiver in writing of jury trial, a trial was had resulting in a finding of guilty and a fine of five dollars and costs. The complaint charged that plaintiff in error employed a certain adult female of the age of more than eighteen years to work in a factory for more than eight hours a day. The plaintiff in error took an appeal to the Criminal Court of Cook County, and waived a jury, and upon trial in that court before the judge without a jury, he was convicted and fined. The case was taken to the supreme court by writ of error for the purpose of reviewing such judgment of the criminal court. The prosecution was for violation of section 5 "Of an act to regulate the manufacture of clothing" etc., of June 17, 1893. The said section reads as follows: "No female shall be employed in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week." Cause remanded with instructions to *dismiss the prosecution.*

† NOTE.—Du Bois, a locomotive engineer, was killed while in the employ

SEC. 251. It is the duty of the master to see that the person in charge of work is capable of appreciating obvious dangers.[1] The duty of the master is to take reasonable care to furnish safe appliances, as well as to inform the servant of special danger; when the servant is not informed, the master can not delegate to another in such manner as to relieve him-

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of the C. & A. R. R. Co., by the explosion of the boiler of the locomotive engine, which he was operating on its railroad. The engineer, fireman and head brakeman were on the engine at the time and all of them were killed. Judgment in the sum of $5,000 was rendered against the railroad company.

Plaintiff charged that the servants of the company negligently built the inside sides of the fire-box of the boiler of the engine out of damaged sheets of steel; thin and rusted and unfit for purpose; had become cracked; were repaired by plugging; and (2) that the stay bolts had become broken. Railroad company insisted that the explosion was caused by failure of deceased to do his duty as engineer and keep boiler properly supplied with water, and the explosion was caused by superheated steam generated in consequence of such neglect. Expert testimony called by company as to cause testified that in their opinion, from examination of fragments of boiler, that the explosion occurred because the boiler was insufficiently supplied with water. Plaintiff attempted to prove poor construction, etc. There was much conflicting testimony. Defendant showed due care exercised in the construction by workmen in the shop; that said workmen were competent, experienced, skilled and careful. The case was reversed, retried with the same result as at first, and by appeal went again to appellate court. That court reviewed the testimony and made the finding, that "The court, upon consideration hereof, doth find that the evidence herein fails to show the company was guilty of the negligence alleged in the declaration in respect of the construction and keeping in repair said locomotive engine boiler, but that said appellant company used due care in that behalf." The evidence fails to disclose what was the cause of the explosion of the boiler of said locomotive and the cause is unknown. And this result was also reached in each of the cases of the fireman and brakeman, Grant Hastings and Henry Brandon. All were in the cab together at the time the explosion occurred. The opinion on the second appeal in Du Bois' case concludes as follows: "The operation of locomotive engines is necessarily attended with danger to those who take employment to manage and control them. The law does not make railway companies insurers against such danger, but the obligation of the company is that reasonable care and skill shall be exercised to make and keep the engine safe. Unless it is made to appear by proof that this obligation has not been kept, liability to respond in damages does not attach, however serious and sad the calamity or great the affliction and loss of those who suffer from it."[2]

[1] Illinois Steel Co. v. Schymanowski, 59 App. 32.

[2] C. & A. R. R. Co. v. Du Bois, 65 App. 142; C. & A. R. R. Co. v. Minnie Brandon, 65 App. 150; C. & A. R. R. Co. v. Belle Hastings, 65 App. 150.

self from the responsibility where that duty is not performed.[1] The rule is the same as to the duty of the master in the supervision and inspection of appliances; the person entrusted must perform the duty as the rule requires the master to perform it. The delegation of that duty to an employe does not relieve the master from liability because of the negligence of that employe in the discharge of that duty.[2]

Neither can the master, by delegation, relieve himself of the duty to exercise reasonable care that the place furnished for the servant to work is reasonably safe; this is a positive obligation toward the servant, and the master is responsible for any failure to perform that duty, whether he undertakes its performance personally or through another servant.[3]

SEC. 252. A servant assumes the hazard of all the ordinary parts of the service, or takes upon himself the risks incident to the undertaking. (Clark v. C., B. & Q. R. R. Co., 92 Ill. 45; Herdman-Harrison Co. v. Spehr, 145 Ill. 329.) But not those

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[1] Norton v. Volzke, 158 Ill. 402.

[2] Chicago & E. Ill. R. R. Co. v. Kneirim, 152 Ill. 458; C., B. & Q. R. R. Co. v. Avery, 109 Ill. 314, C. & N. W. Ry. Co. v. Jackson, 55 Ill. 492.

[3] Isaac Hess v. Rosenthal, 160 Ill. 621.*

*NOTE.—Alter Uchineck was given a job salting hides at he slaughterhouse of defendants on Sunday, July 10, 1892. He was kept at that until Tuesday morning following, when he was set to work at raking or cleaning out a kettle. There were three set side by side which drained into a vat. Into the kettle at which deceased was set to work were put the refuse, offal and paunches of cattle slaughtered. After putting this material into the kettle it was boiled and drained into a vat by its side, and the contents were then raked from the kettle upon the cover of the vat. Deceased was placed upon this cover and directed to rake the filth and refuse upon the spot where he stood. The kettle next to the one he was cleaning was used for grease, which ran from the kettle into a vat below at his side. This vat had a cover, which was either entirely off or not properly and safely adjusted. No information or instruction was given to him as to any dangers or risks. He commenced the work, and in a very short time a splash and scream were heard, and he was found in the tank of hot grease. The evidence on the part of the plaintiff was that the cover on which deceased was standing was slippery on account of lard being spattered on it, while the evidence for defendants was that it was wet, but not greasy. The evidence tended to establish the charges of negligence in the declaration, in failing to provide for the deceased a reasonable safe and suitable place to work, and not properly covering on the vat of boiling grease. Judgment recovered, $5,000.

which are extraordinary (Lebby v. Scherman, 146 Ill. 553). The same rule applies to a minor, who has the intelligence and experience to understand and appreciate the danger. (C. A. P. B. v. Reinneiger, 140 Ill. 334; Hinckley v. Horazdowsky, 133 Ill. 359.) The machinery is not required to be absolutely safe. If it is reasonably safe the law is satisfied. (Weber Wagon Co. v. Kehl, 139 Ill. 644; Camp Point Mfg. Co. v. Ballou, 71 Ill. 417.) It must not, however, be so constructed that the slightest indiscretion on the part of the servant will prove fatal. (T. W. & W. Ry. Co. v. Fredericks, 71 Ill. 296.) Nor must the master, who knows the dangerous character of an act, order the servant to perform it in a manner that is dangerous (Drop Forge & Foundry Co. v. Van Dam, 149 Ill. 341; C. A. P. B. Co. v. Sobkowiak, 34 Ill. App. 319), especially if the servant is inexperienced in that matter (Consolidated Coal Co. v. Haenni, 140 Ill. 626) or the risk is not patent, without warning him. (Consolidated Coal Co. v. Wambaker, 134 Ill. 66; Harris v. Shebek, 151 Ill. 287.[1])

SEC. 254. A servant has a right to assume, there being nothing to put him upon inquiry, that the master will perform

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[1] Nelson Mfg. Co. v. Otto Stollzenburg, by his next friend, 59 Ill. App. 528.*

* NOTE.—The appellant had manufactured a new machine, with six circular saws, instead of three saws, for the purpose of cutting wood into narrow strips. This machine, upon which appellee was injured, was set up in the department while appellee was workiug, and within about twenty feet of his bench. The machine had been operated there for several hours the day before the accident, for the purpose of testing it before sending it out. It worked satisfactorily in dry wood, but with wet wood it choked and the belts flew off. When the belt slipped off, the superintendent called appellee from his place to put on the belt while the machine was in motion driving the saw. It was a belt on the pulley close to the saws (within three and three-eighths inches). While appellee was attempting to comply, his left hand came in contact with the saws and was cut off. The negligence charged is, (1) in improper construction of the machine in placing the pulley so near the saws; (2) directing appellee, who was a minor, and inexperienced in such work, to put on the belt while the machine was in motion, when it was so near the saws, without giving him instructions or warning him of the danger; (3) in the superintendent throwing, at the same time, a belt from the top of another pulley in such an improper manner as to cause the pulley at which appellee was working to revolve suddenly and unexpectedly, which caused him to throw his hand against the teeth of the saws.

the duties imposed on him by law, by furnishing him a reasonably safe place to work, and to act upon that assumption, using reasonable care for his own safety.[1]

SEC. 255. The master is bound to use reasonable care in providing safe machinery, appliances, surroundings, etc., and the servant, in the absence of notice that the machinery, appliances, surroundings, etc., are unsafe or defective, has a right to rely upon the discharge by the master of his duty in respect to these things. The servant is bound to take notice of what is before him and obvious to his senses.[2]

SEC. 256. That the unsafe condition, where an employe is set to work, is but temporary, will not relieve the employer from liability for the death of such employe when the place is unsafe at the time he is brought there to work and no warning is given him of the peril. There was no evidence tending to show that there was any change in the condition of the tank into which deceased fell while he was there. There was no brief or temporary displacement of it in its use during his employment at that place. If the tank was unsafe when he fell into it, it was unsafe when he was brought there to work. The charge which the proof tended to show was, that defendants set an unskilled man to work in a dangerous place, and without informing him of the perils surrounding him. It made no difference, as between the parties, that the place was dangerous only at that time, if it was dangerous

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[1] National Syrup Co. v. Carlson, 155 Ill. 210.

[2] Ambrose v. Angus, 61 Ill. App. 304; Ashley Wire Co. v. Mercier, 61 Ill. App. 485; Penn. Coal Co. v. Kelly, 54 Ill. App. 622; Penn. Coal Co. v. Kelly, affirmed, 156 Ill. 9.*

*NOTE.—Coal in the hold of a vessel was to be unloaded. Kelly, with three others, went into the hold to fill the buckets as they were placed there for filling. They were taken up by a hoisting apparatus (steam power) and carried to a hopper in the yard, one at a time, and in the absence of one bucket another was filled. After the work had thus been going on about an hour, while one of the tubs was rising, it turned over, emptied its contents upon Kelly, and caused the injury complained of, breaking his leg.

The negligence charged was, that a certain clasp or fastening for automatically dumping or emptying the bucket was worn, out of order and defective, of which defendant had notice, and by reason of which plaintiff was injured.

when he was set to work and when he was injured.[1] It makes no difference that the unsafe condition was not known to the master personally, it being known to the employe who has charge and who sets the servant at work. *Id.*

SEC. 257. It is the duty of an employer to instruct and warn an employe of tender years, who is ignorant and inexperienced, of all dangers incident to his employment.[2]

Where the work is specially hazardous, it is the duty of the master to see that the servant is properly instructed and properly guarded against danger.[3]

A young and inexperienced workman has no greater rights of action for an injury received by him than older and more experienced persons would have under the same circumstances, if the danger and his duty were justly known to him. The end in view to be accomplished by instructions from the master is, to make the servant aware of the danger of the employment and the means of avoiding it.

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[1] Hess v. Rosenthal, Adm'r, 160 Ill. 621.

[2] Harris v. Shebeck, 151 Ill. 287.*

[3] Illinois Cent. R. R. Co. v. Reardon, 56 Ill. App. 542, affirmed, 157 Ill. 372.†

* NOTE.—Shebeck was a boy fifteen years old. He began work for Harris, February 18, 1891, and on the 20th of the same month was so injured that the four fingers of his left hand were amputated. For this injury he sued and recovered a judgment of $2,000.

Harris had a factory in which was machinery. Along the north side of a large room on the third floor was a clear space by which the workmen passed to and fro between the stairs on the west side of the room and the door into a smaller room to the east. South of and near to this room was a machine having cog-wheels extending southward along the east side of the large room. Shebeck, on the morning of the 20th, being at work in the smaller room, was ordered by the foreman to the larger room. The foreman went first and called to S., when he was at the door, to hurry, that the light was dim, and in obeying the order S. fell over a pile of castings left on the floor, and putting out his left hand as he was falling, it was caught by the cogs of the machine. The court says: "It is a matter of common knowledge, that heavy machinery with revolving cylinders and wheels connected by belting or cogs to the main power, propelled by steam, is, when in motion, hazardous."

† NOTE.—Frank Reardon, barely nineteen years old, was killed August 15, 1892, while coupling cars in defendant's yards at Freeport, Ill. Recovery $2,300. Switch yard contains eleven tracks, built on descending grade of twenty feet to mile, so that the several cars running from one end to the

SEC. 258. If the servant has sufficient capacity to appreciate the danger, or has acquired the knowledge otherwise than by instruction from the master, and is as fully aware of the danger as if instructed and advised as to it, he is, under the general rule, held to have assumed the peril as incident to the employment. (Brick Co. v. Reinnieger, 140 Ill. 334.) In order to take her case out of the general rule, which held her to have assumed the danger incident to the employment, it was incumbent upon the plaintiff to show that she was ignorant of the peril to which she was exposed and the means of avoiding it. (Herdman-Harrison Co. v. Spehr, 145 Ill. 329.[1])

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other of yard attain considerable speed from own weight. Prior to August 13, 1892, two engines and crews, consisting of foreman and two helpers, attended in switching yard. Crews were reduced that day to foreman and one helper, and for that reason the foreman of each crew refused to go out. A brother of deceased was one of helpers and joined in refusal and he and his foreman were discharged from service. The foreman of other engine was then given full crew, and Frank Reardon made one of said crew. He worked that night and the following one, and while in performance of his duty on third night was killed.

A car loaded with assorted timbers came in the yard and so loaded that the same shifted so as to extend over one end of the caboose to which the car was attached. It was reloaded, but the timber not secured from shifting, and returned into service, and the timbers shifted again and extended over the end of the car so as to make coupling extremely dangerous. Deceased attempted to couple it to a car *kicked* up against it. He was on the car kicked against it and when approaching the car so loaded with lumber he jumped off and ran ahead to make the coupling, and while attempting to couple the cars together was caught by the projecting lumber and killed. The negligence charged was (1) loading the car in careless and dangerous manner and attempting to transport timber in that condition; (2) employing deceased, a minor unfamiliar with dangers surrounding; (3) failing to instruct him as to unusual danger of the work he was thus employed to do.

[1] Jane Jones v. Roberts, 57 Ill. App. 56.*

* NOTE.—Jane Jones was sixteen years of age and at work in a laundry. This action was to recover damages from defendant for an injury to her left hand which was caught and crushed between the rolls or cylinders of a machine called a *mangle* which she was operating in the laundry. The machinery was not defective, but the sole ground for recovery was that the plaintiff was young and inexperienced and that defendant negligently failed to advise her of the danger which attended the operation of the machine, or to instruct her as to the means of avoiding such danger. The plaintiff was, at the time of the injury, engaged in putting or feeding goods that had been washed into the cylinder in order that they might pass between them and be pressed and dried. The danger to be apprehended and avoided

SEC. 259. A boy of eighteen, employed several months at a machine and charged with the duty of oiling it, can not be regarded as needing any special warning of the danger of reaching with his arm through an opening in the wheel, where, if the machine is started, his arm must be crushed. The danger to a boy eighteen years old is obvious.[1]

SEC. 260. Where the master is negligent in employing a negligent or incompetent servant he is liable to another servant injured in consequence.[2] The master is liable on the ground of negligence in employing or retaining such fellow-servant only where the fellow-servant is incompetent, and of this the master has notice, actual or implied. (C., C. & I. C. Ry. Co. v. Troesch, 68 Ill. 545; C., E. & I. Ry. Co. v. Geary, 110 Ill.

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was that while putting the goods in position to be drawn between the rollers and smoothing any wrinkles that might be found, the hand of the operator might be drawn into and crushed and burned between the revolving rollers. The cylinders were open and uncovered, and the iron one was kept heated. The danger of injury was apparent to any one of ordinary intelligence and experience, and was incident to the employment, and as such, according to the familiar general rule, was assumed by the servant as one of the ordinary risks of the service. This rule does not apply to employes who from youth are unable to appreciate and realize the danger to which they are exposed. As to such employes it is the duty of the master to put them in possession of that knowledge.

It appears from plaintiff's testimony that she was in her sixteenth year and had been working in the laundry about two weeks when she was injured. She had worked about ten days receiving goods as they came through the cylinders, and for three or four days before she was hurt had been feeding or putting them into the cylinders. Her hand was caught while she was smoothing out the wrinkles in a pillow-slip which was passing through the rollers. How or why she did not know. She testified that she knew the iron cylinder was hot and if her hand got in there it would be burned; that she knew if she got her hand between the rollers it would be hurt. She said she was cautioned when she began work on the feeding side to be careful, but was not informed the machine was dangerous, or told that her hand might be caught and hurt between the rollers.

The trial judge, at the close of the evidence on her behalf, directed the jury to return a verdict for the defendant. This ruling is held to be right.

The only means of avoiding the danger was to be careful that the hands did not come in contact with the rolls, and of this she was not ignorant.

[1] St. Louis Pressed Brick Co. v. Kenyon, 57 App. 640.

[2] Charles Pope Glucose Co. v. Byrne, 60 App. 17; St. L. P. B. Co. v. Kenyon, 57 App. 640.

383.) In such case the burden of proof to show negligence in selecting or retaining incompetent servants is on the plaintiff.[1]

SEC. 260*a*. The right of a servant to recover for injuries will not be defeated by some knowledge of attendant danger, if, in obeying the order of the master to perform the work, he acts with the degree of diligence which an ordinarily prudent man would exercise under the circumstances. A servant ordered to perform a particular work by the master has the right to assume that he will not be exposed to unnecessary perils and to rest upon the implied assurance that there is no danger.

SEC. 261. The rule that the master is bound to use reasonable care to furnish a reasonably safe place for the servant to work, and to use reasonable care to protect him from dangerous machinery and hazardous methods of conducting business, is qualified by the other rule, that if the master fails in such respects, and the servant, being fully advised of the dangers, continues without objection and voluntarily to work in the unsafe place, or in proximity to the dangerous machinery, or under the hazardous conditions of conducting the business, he himself takes the chance of the obvious and known danger.[2] This applies where the servant, a helper in a shop, is called on to pass to and fro near a cutting block where steel bars are being trimmed with a cold-chisel, and whence chips of steel fly with force in various directions, according to the position of the person cutting. *Id.*

SEC. 261*a*. Where the dangers of a new employment to which an employe is temporarily called are so open and apparent that a person in the exercise of ordinary diligence must have apprehended them, such person is in law charged with having accepted the hazards of the situation.

When an employe is temporarily invited to assist in doing a work not in the line of his employment, and accepts the invitation without objection, absolute knowledge of the risks and dangers of such work is unnecessary. If such risks and dangers are so open and manifest that an ordinary man, under the same circumstances, would have ascertained them by reason-

[1] Illinois Steel Co. v. Schymanowski, 59 App. 32; affirmed, 162 Ill. 447.
[2] William Graver Tank Wks. v. McGee, 58 Ill. App. 250.

able diligence, such employe occupies in law the same position as he would if originally employed to do the work.[1]

SEC. 262. When the master calls a servant from a place of safety and commands him to work in a place of danger, without warning him of the increased hazard, and the danger is not an obvious one, the risk incidental to the work can not be said to be voluntarily assumed by the servant.[2]

SEC. 263. It is negligence in the master, for which he is liable to a servant injured through the negligence and want of skill of a fellow-servant, not to make reasonable investigation, in employing the fellow-servant, into his character, skill and habits. And the master impliedly contracts with each servant that he has and will discharge that duty, and the servant may, without sufficient appearing to put him upon notice to the contrary, rely upon the due and reasonable performance of it by the master.[3]

Evidence of general reputation is admissible to prove the unfitness of a fellow-servant, and ignorance of such general reputation on the part of the master may of itself, when it is his imperative duty to know the fitness of his servant, and where inquiry would have led to the knowledge, be such negligence as to charge the master. *Id.*

SEC. 264. Where the duties of a servant require him to work at night, a failure on the part of the master to furnish light sufficient to enable him to do so with reasonable safety may be regarded as negligence.[4]

SEC. 265. A shaft in a factory was revolving three hundred times a minute with no protection about it. A barrel containing pumice was standing about two feet from it; access to the barrel was partially obstructed by a box, standing by it on

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[1] East St. L. Ice & Cold Storage Co. v. Scully, 63 App. 147.

[2] Banks v. Effingham, 63 App. 221.*

[3] Western Stone Co. v. Whalen, 151 Ill. 472.

[4] National Syrup Co. v. Carlson, 155 Ill. 210; Chicago & N. W. Ry. Co. v. Taylor, 69 Ill. 461.

* NOTE.—In this case the servant was at work digging a ditch or trench and was set at work many feet below the surface, with no supports to prevent the earth from caving in, the master knowing the need of supports but saying nothing about it. There were pockets of quicksand near the bottom, of which the master had knowledge and of which the servant knew nothing. Banks was killed by the caving in of the walls.

the side opposite to the shaft. It was the duty of a boy, twelve years and three months old, to take pumice from the barrel and put it into another box. In so doing he went between the barrel and shaft; his overalls were caught by a pin on the shaft and he was whirled around the shaft and killed. It was held by the court that the proprietor of the factory was guilty of negligence. Judgment $5,000. (Widowed mother has same rights father would have had if living.[1])

SEC. 266. Where a servant is about to do an act which, if done without notice to a fellow-servant, is to himself highly dangerous, it is negligence to do the act without giving notice.[2] This was where he was about to oil a machine, which could be oiled only while the machine was at a stand-still, and the fellow-servant is charged with the duty of stopping and starting the machine, and if not notified might start it any moment. *Id.* A servant injured by stepping into a large hole in the deck of a barge, while unloading, can not be regarded as free from negligence, where it appears that the hole was clearly apparent and that the servant had been working near it for hours, although he testified that he did not know it was there.[3]

A servant employed at a rolling-mill in handling ladles used for carrying molten metal on railway tracks, may be regarded as negligent where he stands with one foot on the rail near the truck wheels, knowing that the truck may be moved at any moment by an engine coupling to trucks on that track, there being a safe place in which he could stand while performing his work.[4]

SEC. 267. An employe acting under the orders of a foreman to perform a certain piece of work with help selected by himself is thereby placed in authority over such help, and for the consequences of obedience to any orders given by such employe the master is responsible.[5] (Chicago & Alton Ry. Co. v. May, 108 Ill. 288.)

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[1] Bradley v. Sattler, 54 Ill. App. 504; Bradley v. Sattler, affirmed, 156 Ill. 603.

[2] St. L. P. B. Co. v. Kenyon, 57 Ill. App. 640.

[3] East St. L. Ice and Cold Storage Co. v. Crow, 155 Ill. 74.

[4] Work v. Illinois Steel Company, 154 Ill. 427.

[5] Fraser & Chalmers v. Schroeder, 60 App. 519, affirmed, 163 Ill. 459; Hale El. Co. v. Trude, 41 App. 253.

SEC. 268. Where a foreman or other superior servant is negligent in the discharge of those duties which the master owes to a servant the master is liable. He stands in the place of the master, and his negligence in the discharge of such a duty is the negligence of the master.[1] This rule applies to the furnishing of appliances with which the servant is to work. If the foreman, or other superior servant, is negligent therein, the negligence is that of the master. *Id.* But the mere fact that one servant occupies a superior position, or has supervision of the work, or has power to control the actions of another, does not render the master liable for his negligence as for that of a vice-principal.[2] The master is only liable for the consequences of the negligent or wrongful exercise of the authority conferred; the injury must arise out of and result from the exercise of the delegated power.[3] *Id.*

When a foreman, or other superior servant, is negligent in the discharge of these duties which the *master owes to a servant*, the master is liable; he stands in the place of the master, and his negligence, in the discharge of such duties, is the negligence of the master.[4]

SEC. 269. The master may be regarded as chargeable with notice of a defect in an appliance, although the servant is not regarded as so chargeable, although they have equal opportunities for inspection, where the defect is such that the master, with his knowledge and experience, might perceive it, and the servant without such knowledge might not. The servant is bound to take notice of what is before him and obvious to his senses.[5] While he is chargeable with notice of apparent defects in appliances furnished for his use, he is not necessarily chargeable with notice that the defects are dangerous. *Id.* He is chargeable with such knowledge of the character of what is thus apparent, as by his employment he assumes to have, or from his education and experience he has in fact. *Id.* Where the servant is a common laborer, and the appliance

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[1] Goldie v. Werner, 151 Ill. 557.

[2] Clay v. C., B. & Q. R. R. Co., 56 Ill. App. 235; Ill. Cent. Ry. Co. v. Swisher, 61 Ill. App. 611.

[3] C. & A. R. R. Co. v. May, 108 Ill. 288.

[4] Goldie v. Werner, 151 Ill. 551.

[5] Penna. Coal Co. v. John Kelly, 54 App. 622.

operates upon scientific principles that are not obvious, he is not chargeable with notice of the principles of operation. *Id.*

SEC. 270. It is a general rule that where an employe knowingly and intentionally disobeys a reasonable rule or regulation of his employer, established for his safety, and is injured in consequence thereof, he can not recover. (Gardner v. M. C. R. Co., 58 Michigan, 485; G. R. R. & B. Co. v. Rhodes, 56 Ga. 645; I. C. R. R. Co. v. Patterson, 93 Ill. 290.) But the law seems to be otherwise where an injury to an employe results from a breach of rule or regulation of the employer, which has grown to be habitual, to the knowledge of the employer. Ordinarily, disobedience of a rule would be negligence; but if the defendant prosecuted the work in a manner that rendered a violation of the rule necessary or probable, or if it suffered or approved its habitual disregard, the rule is inoperative.[1]

SEC. 271. The master, in an action by the servant for wages may set off damages, sustained by him through the negligence of the plaintiff, in his employment, and may have judgment for a balance due him. The fact that damages are unliquidated is no obstacle to setting them off when they accrue out of the same subject-matter as the demand against which they are offered.[2]

SEC. 272. A servant discharged for cause is entitled to his wages until discharged, although the cause was of an earlier date, the defense of good cause for discharge is admissible under the general issue.[3] An agreement to serve another for twelve months is an entire contract and a substantial performance of it must be shown before a recovery can be had upon it.[4]

SEC. 273. A servant is not entitled to recover wages where he has refused to obey the proper orders of his employer. The plaintiff chose to be governed by the behest of the "Union," rather than the orders of his employer, the Exposition Company. He is not entitled to be paid for services he

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[1] Chicago & W. I. R. R. Co. v. Flynn, 154 Ill. 448.

[2] South Chicago City Ry. Co. v. Workman, for the use of Jennie Moore, 64 App. 383.

[3] Hoffman v. World's Columbian Exposition, 55 App. 290.

[4] American Pub. House v. Wilson, 63 App. 413.

has not rendered.[1] Where a servant is wrongfully discharged he may recover what he would have earned, less what, with diligence, he is able to earn during the rest of the contract period.[2]

SEC. 274. It is the duty of the servant to obey the instructions of the master, but his disobedience does not exonerate the master from liability to respond for any actual damages to another occasioned thereby.[3]

SEC. 275. *Master and servant.*—A contract which contains mutual engagements, on the one part to employ, and on the other to serve, is a contract of hiring and service, and creates the relation of master and servant.[4]

SEC. 276. A railroad company must furnish a track, within switching limits, reasonably safe for the performance of the work required, and its servants, in the absence of knowledge to the contrary, may presume that the company has discharged its duty in that regard.[5] The law does not require

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[1] World's Columbian Exposition v. Adolph Liesegang, 57 App. 594.

[2] Hessel v. Thompson, 65 App. 44; Leyenberger v. Rebanks, 55 Ill. App. 441.

[3] Frank B. Layton v. Mary Deck, 63 App. 553.*

[4] Sands v. Potter, 59 App. 206; Sands v. Potter, affirmed, 165 Ill. 397.

[5] Ill. C. R. R. Co. v. Sanders, 166 Ill. 270.†

* NOTE.—This was an action to recover damages under the provisions of the "dram-shop" act—damages occasioned to plaintiff's means of support by the intoxication of her husband, and as alleged in one count, by his death in consequence of such intoxication. Defendant kept a drug store, and the evidence tended to show, and satisfied the jury, he sold John Deck, husband of the plaintiff, alcohol, which caused him to become intoxicated and to neglect his business, waste his time and money. The evidence also tended to show that said Deck came to his death from the effects of laudanum, taken in excessive quantity, while under the influence of alcohol procured from the defendant. Verdict, $500. Evidence tended to show on behalf of defendant that his employers were under strict orders not to sell him alcohol under any circumstances. Other testimony tended to show that his prescription clerk had sold such liquor to said Deck. It was the duty of the prescription clerk to sell alcohol compounded with other drugs—that he should not sell it otherwise. It was his duty to obey such instructions, but his disobedience would not relieve the master from liability. Keedy v. Howe, 72 Ill. 133.

† NOTE.—Sanders was a brakeman, and while endeavoring to couple cars in the company's yard, had his foot caught between the ties (space not being filled in), and was thrown down and fell on the rail, and the

that a railroad brakeman should know absolutely all the defects of construction and all obstructions which may exist along the company's line. *Id.* In the absence of notice of defects a servant owes no primary duty to test the machinery furnished by the master for the performance of his duties, as, to investigate the surroundings connected therewith, where such performance requires his constant attention to other matters. *Id.*

SEC. 277. A master who voluntarily assumes a duty toward his servant and undertakes to perform the same, must do so in a proper manner, and if, by reason of his careless performance thereof, the servant is injured while exercising due care for his personal safety, the master is liable.[1]

SEC. 278. A servant may go where his duty requires, and he is under no obligation to keep out of the range of unknown and unexpected danger. He may rely upon the safety of the machinery furnished by the master.[2]

The negligence charged was the insecure fastening of the guy rod.

SEC. 279. Where an accident results from a negligent and

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wheels of one car passed over his right leg, whereby he was injured. The company's negligence consisted in leaving the track in this unsafe condition where coupling cars had to be done.

[1] Consolidated Coal Co. v. Scheiber, 167 Ill. 539.*

[2] Ashley Wire Co. v. McFadden, Adm'r, 66 App. 26.†

* NOTE.—Scheiber, a boy of sixteen years, was employed by defendant as driver in its coal mine driving coal to the opening at the bottom of the pit, and after being so employed about five months was injured in his left leg by slate falling upon it from the roof of the mine. Limb was amputated above knee. He recovered judgment for $7,566.35 on account of the injury. It was alleged to be the duty of defendant to make and keep the places where the plaintiff was required to go in performance of his duty reasonably safe; that defendant had notice that the roof in the mine where plaintiff worked was liable to fall, and defendant undertook to secure it so it would not fall and failed to do so; that a part of the roof fell on plaintiff and crushed him while doing his duty.

† NOTE.—William Maxwell, a laborer in defendant's factory, was killed by the falling of a derrick used to lower and draw out stems from annealing pots in a furnace. The derrick fell because a guy rod connecting it with the factory wall gave way and pulled through the wall. When it fell the boom struck and killed Maxwell and injured Frank Mercier, co-laborer, who sued defendant and recovered $7,000 damages. (61 Ill. App. 485.)

unskillful exercise of the power of a superintendent over men under his charge, the master will be liable.[1]

If machinery or premises are obviously defective, but not apparently dangerous, the master may be liable for failure to take action to ascertain whether they were or were not in fact safe.[2]

SEC. 280. A servant, though having knowledge of the defective condition of machinery, yet has the right to assume, in the absence of notice to the contrary, that it is reasonably safe for him to follow the command of his master in regard to the use of such machinery. His knowledge of the defective condition does not necessarily charge him with knowledge of the dangers arising therefrom. Facts in regard to a defective condition of machinery which do not necessarily operate to charge a servant with notice arising from such condition, may operate to charge the master with such notice. The obligation upon each arising from mere knowledge of the defective condition is not alike. If machinery or premises are obviously defective, but not apparently dangerous, the master may be liable for failure to take action to ascertain and make safe. *Id.*

SEC. 281. It is the master's duty to exercise reasonable care to furnish reasonably safe appliances and surroundings for his servants. A servant may, in the absence of notice, rely upon the presumption that the master has done his duty in the furnishing of reasonably safe surroundings.[3]

SEC. 282. An instruction which permits a recovery where

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[1] Fraser & Chalmers v. Collier, 75 App. 194; * Offutt v. World's Fair Columbian Exposition Co. (Not yet published.)

[2] Union Show Case v. Blindauer, 75 Ill. App. 358.

[3] Swift & Company v. Wyatt, 75 App. 348; C. & E. I. R. Co. v. Hines, 132 Ill. 161; Penna. Coal Co. v. Kelly, 156 Ill. 9; Ill. C. Ry. Co. v. Sanders, 166 Ill. 270.

* NOTE.—The plaintiff was injured while at work under the direction of a foreman sinking an iron tank into the ground. While settling it into place it snagged and had to be lifted and canted, and two tackles were improvised for the purpose. The beam hitched to gave way and the tackle fell on plaintiff and he was injured thereby. Verdict for plaintiff, $1,000. The accident resulted as is said in C. & A. R. R. Co. v. May, 108 Ill. 300, from a negligent and unskillful exercise of power of the superintendent over the men. Hale Elevator Co. v. Trude, 41 App. 253; Consolidated Coal Co. v. Haenni, 146 Ill. 614.

the plaintiff's evidence slightly preponderates is not erroneous, a clear preponderance not being required in civil cases.[1]

Where the master, on being notified by the servant of defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of a promise in that regard, without being guilty of negligence, and if an injury results therefrom he may recover, unless the danger is so imminent that no prudent person would undertake to perform the service.[2] (Missouri Furnace Co. v. Abend, 107 Ill. 51; Swift & Co. v. Madden, 165 Ill. 47.)

Sec. 283. The proximate cause of the plaintiff's injuries was the assurance of the superintendent that the mine in room No. 10 was safe, when in fact it was not, and in promising to look after the roof of the room and neglecting to do so. It was his duty to furnish the plaintiff with a reasonably safe place to work, and this he failed and neglected to do. The plaintiff, in obeying the commands of the superintendent (Rhodes) acted with that degree of prudence that an ordinarily prudent man would have done under like circumstances, and he (Rhodes), as mine inspector, mine manager and night pit boss, stood in his relation to plaintiff as master or vice-principal. They were not fellow-servants.[3]

Sec. 284. There is no absolute rule that failure to look where one is stepping is negligence as matter of law, and where, under the circumstances of a particular case, reasonable minds might reach different conclusions on that question, it must be submitted to the jury for determination.[4]

Sec. 285. An employe of a common master may at the same time sustain toward another servant both the relation of

[1] W. C. St. R. R. Co. v. Leokadia Marzalkiewiecz, 75 App. 240.

[2] Donley v. Dougherty, 75 Ill. App. 379.

[3] Westville Coal Co. v. Schwartz, 75 App. 468.*

[4] Pullman Palace Car Co. v. Connell, 74 App. 447.

* Note.—The plaintiff was employed by defendant in operating an electric machine in mining coal for defendant. On being sent into room No. 10 to run the machine there, and being assured the room was safe, went to work, his whole attention being given to the machine. While so doing a large stone fell from the roof of the mine upon him and severely injured him.

fellow-servant and of vice-principal. There are certain duties which the law imposes on the master, among which is the instruction of an inexperienced and uninformed servant to warn him of the dangers of his situation and advise him of the proper means of escaping injury; and whoever, with the consent of the master, undertakes the performance of these duties is, while so performing, a vice-principal.[1]

SEC. 286. A freight train was standing upon the track at a station, and one of the brakemen employed upon it, in an attempt to turn a switch, so as to allow a passenger train to pass by, wrongfully turned the same so as to send the passenger train upon the same track where the freight train was standing, in consequence of which a collision occurred, in which the engineer of the passenger train was killed and the fireman seriously injured. It was held that the brakeman of the freight train who turned the switch, and the engineer and fireman of the passenger train were *fellow-servants* within the meaning of the law. It was one of the duties of the brakeman of the freight train, at the station in question, to turn the switch to enable both trains to safely pass, and (the court says) that the engineer and fireman of the passenger train and the brakeman of the freight train, who turned the switch, were directly co-operating with each other in the particular business then in hand, namely, the passing of the two trains, and in the same line of employment, namely, the running of trains upon appellant's road.[2] Held, that the plaintiff could not recover.

SEC. 287. *Death from negligent act claimed.*—The train was running at the rate of fifteen to twenty miles per hour. There was no ordinance regulating the speed of trains in Momence. The signals of the train required by law to be given, the blowing of whistle and ringing of bell, were given by defendant. The flag signals were disregarded by the deceased, and the order of the flagman to *stop* when within fifteen feet of the track was also disregarded by the deceased. But deceased whipped up his horse and attempted to beat the train over the crossing. In such case the law affords no remedy; there was lack of ordinary care.[3]

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[1] Alton P. & F. B. Co. v. Hudson, 74 App. 612.

[2] Ill. Cent. R. R. Co. v. Swisher, 74 Ill. App. 164.

[3] Chicago & E. I. R. Co. v. Nichols, 74 App. 197.

SEC. 288. When the fact is shown that a railroad company, at the time of an accident, was running its trains at a rate of speed prohibited by law, a *prima facie* liability is established, and in the absence of proof rebutting the statutory presumption, it becomes conclusive.[1]

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[1] C. B. & Q. R. R. Co. v. Anna Gunderson, 74 App. 356.*

* NOTE.—The deceased was killed by a passenger train of defendant (appellant) at the crossing on Main street, in the village of Leland, about eight o'clock on the evening of September 11, 1893. He started from the store, about ten rods north of the railroad, and on the west side of Main street, to go to his home in the village, and to do this was required to cross the railroad's double tracks. When he started from the store a freight train was passing on south track, going east over the crossing; deceased was seen to approach the crossing and stand on the sidewalk while the freight train was passing, and just as the caboose, the last car of the train, reached the crossing, a fast passenger train from the east on the north track struck the crossing. No eye witness saw the passenger train strike the deceased; the last seen of him alive being while he was standing on the sidewalk when the freight train was passing; his dead body was found soon after, nearly ninety feet west of the crossing, lying between the tracks. At this time the ordinance of the village of Leland prohibited a greater rate of speed than ten miles an hour for trains in the village, and the passenger train was running at a far greater speed when the accident occurred. The deceased was killed by the west-bound passenger train while he was attempting to cross the tracks, just as the freight, in the opposite direction, was clearing the crossing. Section 24 of the Railroad Act, by which the ordinance in question was authorized, provides, in substance, that whenever any railroad corporation shall run any train at a greater rate of speed in the incorporated limits of any village than is permitted by ordinance of such village, the corporation shall be liable to the person aggrieved for all damages done to the person by such train, and the same shall be presumed to have been done by the negligence of the corporation or its agents. The unlawful speed of the train and the injury being established by the evidence, raised the *prima facie* liability of the appellant for the death of the appellee's intestate, and in the absence of any rebutting proof of that statutory presumption, it would become conclusive. The evidence falls short of overcoming this presumption.

The burden of proof to show ordinary care on the part of the deceased was upon the plaintiff. The crossing being a public highway the deceased had a right to be upon any part of it. He had a right to suppose the appellant would run its train at no greater speed than the ordinance permitted. He must be held to the exercise of ordinary care for his own safety. He evidently noticed the freight train pass and misjudged as to rate of speed (which was about thirty miles per hour) of the passenger train coming, and concluded he had time to cross before the arrival of that train. Had it been running at a lawful rate of speed the deceased would probably have had time to pass. The jury were at liberty to infer ordinary care on his part under the circumstances.

SEC. 289. The legislature could formulate a complete code of rules so particular and minute in their character as to cover all common law rights with reference to any particular business (referring to mining coal), and in that event there would be a complete supersedure of the common law, but unless that is done, all common law rights not at variance with some provision of the enactment continue in force.[1]

SEC. 290. When a boiler inspector saw and knew the conditions that surrounded him when making an inspection, and from his knowledge and experience knew as well or better than the owner of the boiler or its engines whether those conditions were such that he could safely make the inspection, he must be held to have assumed the risks involved as incident to the employment (boiler inspector) in which he was engaged.[2]

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[1] Consolidated Coal Company of St. Louis v. Frank Bokamp, 75 Ill. App. 605.*

[2] Westville Coal Co. v. Milka, 75 App. 638.

* NOTE.—The negligence charged, (1) allowing certain props, cross-beams and supports, which held up the roof of the mine, to become cracked, broken and unsafe, and so to remain after promise to repair; (2) failure to furnish plaintiff a reasonably safe place to work, whereby plaintiff was injured. Verdict, $5,150.

CHAPTER V.

NEGLIGENCE CAUSING DEATH.

By an act of the Illinois legislature, approved and in force February 12, 1853, entitled, "An act requiring compensation for causing death by wrongful act, neglect or default," it is provided as follows:

"Sec. 1. Whenever the death of any person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of $5,000; provided, that every such action shall be commenced within two years after the death of such person."[1]

SECTION 291. This is a new cause of action given by this statute and unknown to the common law, and should not be extended beyond the import of the language used; but this it

[1] Starr & Curtis' Annotated Stat., Chap. 70, Par. 2; our statute is substantially a copy of first two sections of 9th and 10th Vic., Ch. 93 (1846), and same as New York State.

would be difficult to do, for the language is very broad and comprehensive, embracing, in its direct and positive terms, all cases where, if death had not ensued, the injured party could have maintained an action for the injury. This would seem to leave no room for construction, but refers at once to the inquiry, whether an action could have been maintained by the child for the injury had he survived it. The act says, "then, and in every such case," the action shall be maintained. To give further limitation than this would be, not to construe the statute, but to expunge or disregard a portion of it.

The second section provides that the action shall be brought in the names of the personal representatives of the deceased person, and further provides that the amount recovered "shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed among next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate."

This, it is contended, impliedly limits the action to cases where the person leaves a widow and next of kin; in other words, where the deceased was, at the time of his death, a married man; for the presumption of law is, that every deceased person leaves heirs who are capable of inheriting as next of kin. * * * The sole object of the first section was to create the right of action and to specify in what cases or for what wrongs it might be brought. The purposes of the second section are two, but distinct from and entirely independent of the first section, which, so far as its object was concerned, was complete; that is, it had created a right of action, and specified in what cases, or for what wrongs it might be brought. The two purposes distinct from this, to accomplish which the second section was framed, were, *first*, to determine by whom or in whose name the action should be brought; and, *second*, to declare for whose benefit the action should be brought, or how the money recovered should be disposed of or distributed. The action is to be brought by the personal representatives; that is, by the executors or administrators. * * * The supreme court holds that the sole object of this provision was to provide for the disposition of the judgment to be recovered in those cases, while the first section had given a cause of action. The legislature intended

that the money recovered should not be treated as a part of the estate of the deceased. The personal representative brings the action, not in right of the estate, but as trustee for those who had a more or less direct pecuniary interest in the continuance of the life of the deceased, and who had some claims, at least, upon his or her natural love and affection. The legislature intended that the fruits of the judgment should be distributed among those to whom his personal estate would descend, after the payment of debts, and in the absence of a will. * * * Had it been the design of the legislature to limit the action to cases where the deceased leaves a widow, they certainly would have said so in the appropriate place, in the first section of the act, instead of giving the action in all cases where the injured party, if death had not ensued, could have maintained an action for the injury. * * * The court holds that this case (death of child four years of age) was within both language and policy of the law, and it is the court's duty to give effect to the intention of the legislature thus plainly declared.[1]

SEC. 292. Before a recovery can be had in such a case it is necessary to prove, *first*, that the accident was occasioned by the wrongful act, neglect or default of defendant; and, *second*, that the party injured was in the exercise of due and proper care, and that the injury was not the result of his own negligence and want of proper precaution.[2]

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[1] City of Chicago v. Major, 18 Ill. 349.

[2] C., B. & Q. Ry. Co. v. Elizabeth Gregory, 58 Ill. 272.*

* NOTE.—This action was brought under the act of 1853, *supra*, to recover damages for the death of Charles M. Bennett, whose death, as alleged, was caused by the wrongful act and negligence of the railway company. Deceased was a fireman on the locomotive and in the employ of the company. It is alleged that the railway company negligently permitted the mail catcher to stand in close proximity to the track, thereby greatly and unnecessarily endangering the lives and safety of the employes of the company while in discharge of their duties, and that by reason of such carelessness and negligence, Bennett, while in the discharge of his duties as fireman, and in the exercise of due care and caution, was brought in sudden and violent contact therewith, and from the collision received the injuries from which he died. * * * There is no doubt that B. was killed by a collision with the mail catcher. The attending circumstances leave no rational doubt on the mind as to the cause of his death. * * * No one saw the fatal accident, and consequently there was no one to detail the particulars. The evidence is of

SEC. 293. The general rule is, that it must affirmatively appear that the injured party was in the exercise of due care and caution. This material fact may be made to appear by circumstantial as well as by direct evidence. It is immaterial how the proof is made, so that the fact is made to distinctly appear. In this case the evidence is circumstantial, and consists of facts and circumstances developed to warrant the conclusion that deceased was in the exercise of due care. C., B. & Q. Ry. v. Gregory, 58 Ill. 272.

SEC. 294. The material allegation of negligence on the part of the defendant (dangerous proximity of the mail catcher to the track) must be supported by evidence, otherwise the case must fail. It is true that no witness states in express terms it was dangerous—some give it as their *opinion* that it was entirely safe, with due care on the part of the operatives; but there are facts and circumstances in evidence from which its dangerous character may be inferred. Such evidence may have all the force of direct testimony to produce conviction.[1] Two men had been injured by it prior to the injury to B. Another fact—after the happening of the casualty, the mail catcher was moved back from four to six inches, and there has been no injury there since.[2]

SEC. 295. The law creating a right of action against a railroad company for causing the death of a person by wrongful act or negligence, is purely local to the state in which the right is created, although it may be otherwise in case of actions under the statute against individuals. Corporations being local to the state which creates them, the right of action against them must be local to the same state and can not be enforced beyond its territorial jurisdiction.[3]

SEC. 296. A person was killed in the night time by cars in

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a circumstantial character, but it is *none the less convincing for that reason.* The accident occurred in the darkness of the night. There was nothing that could give B. warning of danger approaching. But a moment before he was at his post in the discharge of his proper duties, looking for signals on left side of locomotive where the mail-catcher stood. The conclusion is that the fatal collision occurred while B. was looking out of the side window, or gangway, for signals, in the discharge of his duty.

[1] C., B. & Q. Ry. Co. v. Gregory, 58 Ill. 272.

[2] Ill. C. Ry. Co. v. Craigin, 71 Ill. 177.

[3] Ill. C. Ry. Co. v. Craigin, Adm'r, 71 Ill. 177.

motion. There was no eye witness of the injury. The proof showed that about midnight the deceased left a store a few blocks distant from the accident, and started on the sidewalk in the direction of his home, and was then sober, and that the place where he was killed was on his direct route home, and that the accident must have happened very soon after he was last seen that night. In an action to recover for his death it was held by the court that the circumstances were such as might justify an inference that the deceased used due care, and that direct proof on this point was not necessary. Also held that, under the circumstances, it should have been submitted to the jury to say whether there was not negligence in pushing the cars across Fifty-first street without taking more precaution than appears to have been done in this case.[1]

SEC. 297. The plaintiff recovered judgment for $2,000. The death was caused by the explosion of the boiler of the locomotive while the train, to which deceased as brakeman belonged, was in motion. The negligence charged was that the boiler was unsafe and was known to be so by the defendant. The evidence upon this point was conflicting and was resolved by the jury in favor of the plaintiff.

The court says: "The testimony of plaintiff's witnesses, as to the insecurity of the boiler, receives some support from the fact that the boiler did finally explode, killing not only the brakeman, for whose death this suit is brought, but the engineer." * * *

The deceased, Joseph W. Shannon, was over twenty-one years of age, left no widow or children, nor descendants in any degree, and it was claimed by defendant that there was no

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[1] Chicago & Atlantic Ry. Co. v. Carey, 115 Ill. 115.*

* NOTE.—About night a gravel train came in from the south and stopped at Fifty-first street. The train was there opened enough to make a cut at the street crossing, and was so left cut in two for awhile. Twelve or fifteen cars were pulled over the street to the north side, and the others left on the south side. A short time afterward the train was moved north to Forty-ninth street, by another engine, and put on a side track, where the cars were to be unloaded. In doing this, the engineer testified that near midnight he coupled on the cars of the train which stood north of Fifty-first street—twelve or fifteen—pushed them across Fifty-first street, against those standing on the south side, coupled them and pulled them north over Fifty-first street.

one who had any legal interest in his life and that the plaintiff could not recover. The court says that the statute upon this subject (*supra*) authorizes the suit to be brought for the exclusive use of the widow and next of kin. We do not perceive how the conclusion is to be avoided, that wherever there are next of kin the action will lie for the recovery of at least nominal damages. We know of no principle by which we are authorized to say that "*the next of kin*" must be within certain degrees of consanguinity. Any rule or limitation of that character which we should endeavor to lay down would be purely arbitrary, and mere judicial legislation. The phrase "next of kin," used in the statute, is a technical phrase, and we must suppose it to have been used by the legislature in its technical sense. It means here what it means elsewhere.[1]

SEC. 298. Such next of kin as have suffered pecuniary injury from the death of deceased may recover pecuniary compensatory damages under this statute. How this pecuniary damage is to be measured, in other words, what is to be the amount of the verdict, must be largely left (within the limits of the statute) to the discretion of the jury. The legislature has used language which seems to recognize this difficulty of exact measurement, and commits the question especially to the finding of the jury. The law provides that "they are to give such damages as they shall deem a fair and just compensation." What the life of one person is worth, in a pecuniary sense, to another, is a question incapable, from its nature, of exact determination. Although the wealth or poverty of the deceased may be important elements, they are not the only ones that enter into the problem. If the deceased was poor, the loss may consist in the fact that his personal exertions can no longer support those dependent upon him. If rich, the loss may be nearly as great, in the deprivation of the care and management of his business or estate. In creating this right of action the legislature have confided to the *jury* a subject that does not lie within the limits of exact proof. But, in this, as in all other actions, the court must so far supervise the verdict as to see that it is not the result of unreasoning prejudice or passion. In the case at bar (Shannon's) it is in proof that the father

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[1] Chicago & A. Ry. Co. v. Shannon, 43 Ill. 338.

of the deceased was fifty years old, and had little property besides his homestead; that the deceased lived at his father's when not on the road, and contributed to the support of the family, and that his father had an insurance policy on his (father's) life, for the benefit of the mother of the deceased, the premium upon which ($118) the deceased had paid, and promised to keep paid. The verdict was for $2,000, and we do not feel authorized to say it was too large.[1]

SEC. 299. Max Werner came to his death by drowning in a ditch filled with water in a street immediately in front of the residence of his parents. Deceased was less than four years old, and while his mother was engaged with her ordinary labor he left the house and, in some manner not explained, fell into the ditch and was not rescued until life was extinct. No negligence is to be imputed to the deceased or his parents. The child was too young to observe any care for its personal safety, and his parents omitted no reasonable care for its protection. The parents of the child are laboring people and had to be constantly employed. When the accident occurred the father was at work in a lumber yard not far distant, and the mother was engaged in her usual domestic affairs. The law has not required that persons in this station in life shall keep a constant watch over their children, nor can the want of such care be imputed to them as negligent conduct.[2]

SEC. 300. This ditch was in the street, bordering on the sidewalk, which was very narrow; was in front of the residence of deceased; was filled with water to the depth of near five feet, and was without guards of any kind whatever to prevent children or other persons from falling into it. It was situated in the midst of a dense population and had been there so long the city officers must have been perfectly familiar with its location and existence. Unless protected by suitable guards it was a most dangerous place. It was gross negligence in the city to permit the existence of anything so dangerous in a public street much frequented, where the slightest indiscretion on the part of a child would expose it to imminent peril, if not

[1] Chicago & Alton Ry. Co. v. Shannon, 43 Ill. 338.

[2] Chicago v. Hessing, Adm'r, 83 Ill. 204; Chicago & Alton Ry. Co. v. Gregory, 58 *Id.* 226; Chicago v. Major, 18 Ill. 349.

death. There is no excuse shown for the conduct of the city authorities. It was a plain and palpable omission of duty.[1]

Sec. 301. Only pecuniary damages can be recovered in such actions as this. Nothing can be given as solace or for bereavement suffered. Under instructions declaring the true rule for estimating damages, the jury found for the plaintiff in the sum of $800, but one of the errors assigned is that the amount found is excessive. As a matter of law the court can not so declare, and as a matter of fact, how can the court know the amount is in excess of the pecuniary damages sustained? When proof is made of the age and relationship of the deceased to next of kin, the jury may estimate the pecuniary damages from the facts proven, in connection with their own knowledge and experiences in relation to matters of common observation. It is not indispensable that there should be proof of actual services of pecuniary value rendered to next of kin, nor that any witness should express an opinion as to the value of services that may have been or might have been rendered. Where the deceased was a minor and left a father who would have been entitled to his services had he lived, the law implies a pecuniary loss, for which compensation under the statute may be given.

As was said in Chicago & Alton Ry. Co. v. Shannon, 43 Ill. 349, what the life of one person is worth, in a pecuniary sense, is a question incapable, in its nature, of exact determination. How this pecuniary damage is to be measured, and what shall be the amount, must be left largely to the discretion of the jury. The rule declared has been adhered to in recent cases. It can not be said the verdict ($800) is excessive.[2]

Sec. 302. The intestate (Michael Keefe), a lad of ten and a half years of age, while rolling his hoop down a sidewalk of Butterfield street, stepped on the end of a loose board, which flew up and struck his knee and thereby caused him to fall down with some violence. In falling his eye came in contact with the end of the stick with which he had been propelling his hoop. The force of the fall caused the stick to penetrate the eye and destroy it and break off some of the adjacent bone. He died from the effects of the injury two months

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[1] Chicago v. Hessing, Adm'r, 83 Ill. 204; Chicago v. Major, 18 Ill. 349.

[2] Chicago v. Hessing, 83 Ill. 204.

afterward. The sidewalk where this fall occurred was badly out of repair; stringers were gone and boards were loose and rotten, and it had been in this condition some time. The plaintiff is the father of the deceased, and the suit is brought under the statute, for the benefit of the next of kin, who are the father, mother, four brothers and four sisters. Verdict was returned for plaintiff, assessing damages at $2,500.

There is no limitation in the statute that the streets shall be kept in repair "for travelers." They are to be kept in repair as streets, and, by necessary implication, for all the purposes to which streets may lawfully be devoted. The court assumes as self-evident, that streets are open to the use of the entire public as highways, without regard to what may be the lawful motives and objects of those traversing them; that those using them for recreation, for pleasure, or through mere idle curiosity, so that they do not impinge upon the rights of others to use them, are equally within the protection of the law while using them, and hence equally entitled to have them in a reasonably safe condition with those who are passing along them as travelers, or in pursuit of their daily avocations. In crowded cities their use for pleasure, and sometimes even for the promotion of health, may be regarded as a public necessity. On like principle, why may they not be used by children in play and amusement, so long as the rights of others being on or passing along the street shall not be prejudiced thereby? The court can perceive no reason. Such use is certainly the universal custom. * * * Whether the child was guilty of contributory negligence was a question of fact, to be determined by the jury from all the evidence in the case, and not a question of law to be determined by the court from the circumstance that he was rolling a hoop. The law neither infers negligence nor its absence, because he was rolling a hoop, since, as matter of fact, he may have rolled a hoop along the sidewalk, and yet have observed the highest degree of care in passing along. The question of law is simply, what is the *degree* of care he should have observed to entitle his administrator to recover. Whether, his conduct all considered, he observed that degree of care, was the question of fact.[1]

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[1] City of Chicago v. Keefe, 114 Ill. 222.

SEC. 303. When a minor loses his life through the negligence, default or wrongful act of another, the statute giving an action to his personal representatives, does not limit the right of recovery to his father, or for his benefit, merely because he may have been entitled to his services and earnings. The statute does not so limit the right of recovery. The jury may give in such cases "such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased." The question is, in its nature, incapable of exact determination, and the jury should therefore calculate the damages in reference to a reasonable expectation of benefit as of right or otherwise from the continuance of life.

Parents, and even brothers and sisters, might reasonably expect, in many ways, to derive pecuniary benefit from the continued life of the intestate, as of grace and favor, if not of right, at any age of life, and our statute imposes the duty of support, in the event of their becoming paupers, of the parent by the child, and of one brother or sister by another brother or sister.[1]

SEC. 304. The administrator of Frank O. Wangelin, deceased, recovered a judgment for $2,000 damages against the Ohio & M. Ry. Co. for negligently causing the death of the deceased. The deceased was twenty-two years old at the time he was killed. He had been working for wages since he was seventeen years old, was earning $50 per month, and had contributed to his sister's support, whom he left surviving him. It was objected that no evidence having been introduced from which it could be ascertained, with any reasonable degree of certainty, to what extent the decedent's sister had suffered pecuniary loss by reason of the killing of her brother, the verdict should be only for nominal damages. As to this, the court said it is not required that the evidence shall afford *data* from which the extent of the pecuniary loss can be ascertained with a reasonable degree of certainty. The statute says that the jury may give such damages as they shall deem a fair and just compensation. (Chap. 70, Sec. 2.) In C. & A. Ry. Co. v. Shannon, 43 Ill. 338, this court said: "How this pecun-

[1] City of Chicago v. Keefe, 114 Ill. 222.

iary damage is to be measured—in other words, what is to be the amount of the verdict—must be largely left (within the limits of the statute) to the discretion of the jury. The legislature has used language which seems to recognize the difficulty of exact measurement, and commits the question especially to the finding of the jury." And similar language has been used in numerous subsequent cases. In City of Chicago v. Hessing, 83 Ill. 204, it was said: "When proof is made of the age and relationship of the deceased to next of kin, the jury may estimate the pecuniary damages from the facts proven, in connection with their own knowledge and experiences in relation to matters of common observation." And in City of Chicago v. Keefe, 114 Ill. 230, this language was used: "The question is, in its nature, incapable of exact determination, and the jury should therefore calculate the damages in reference to a reasonable expectation of benefit, as of right, or otherwise, from the continuance of the life." It is true that in City of Chicago v. Scholten, 75 Ill. 468, and in a number of other cases, this court has said, that when the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him, proof of such relationship would warrant a recovery of nominal damages only. But such is not the case here. The evidence is, that the sister of the deceased has no father or mother or sister living, and that the deceased was her only brother; that she is partially earning her own living, and that the dead brother was twenty-two years old when killed, was earning $50 per month, and had contributed to his sister's support.[1]

SEC. 305. An action was brought by the administrator to recover damages resulting to the next of kin, for causing the death of Berend Scholten, which was caused by the negligent conduct of the city, it is alleged, in not keeping a sidewalk in repair, over which deceased was about to pass. That the sidewalk was out of repair, and in a most dangerous condition, at the point where Berend was killed, does not admit of doubt. The deceased was only twelve years of age; and while he and his younger brother were quietly passing along the sidewalk, it suddenly gave way, precipitating them to the bottom of the

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[1] O. & M. Ry. Co. v. Wangelin, 152 Ill. 138.

vault, injuring the younger and causing the instant death of the older brother. But whether the city had notice, or could, by the exercise of reasonable diligence, have known of the unsafe and insecure condition of the sidewalk in time to have caused it to be repaired before the happening of the accident, is purely a question of fact, to be found by the jury.[1]

SEC. 306. Where there is any evidence, however slight, it is sufficient to sustain an instruction upon the hypothetical case it tends to prove. The child, in Chicago v. Major, *supra*, was too young to have rendered any service to its parents or next of kin, and all that was proven was the age and relationship. It was said the jury was authorized to estimate the pecuniary damages from the facts proven, in connection with their own knowledge and experience. The doctrine of this case has been adhered to in subsequent cases.

In the case at bar (Scholten) proof was made of the age of the deceased, the names of the next of kin, and that his parents were laboring people. These facts alone were sufficient on which to base an instruction, involving the principle of Chicago v. Major. It was not indispensable there should be proof of actual services of pecuniary value rendered to the next of kin, nor that any witness should express an opinion as to the value of such services, before a recovery could be had.[2]

SEC. 307. Where the deceased is a minor and leaves a father entitled to his services, the law presumes there has been a pecuniary loss, for which compensation under the statute may be given. In such cases the pecuniary loss may be estimated from the facts proven, in connection with the knowledge and experience possessed by the persons in relation to matters of common observation. No doubt the damages could be greatly enhanced by proof of the personal characteristics of the deceased. Evidence of his mental and physical capacity to be of service to his father in his business, his habits of industry and sobriety, where deceased is old enough to have established a character, are all elements to be considered in assessing the pecuniary loss sustained.[3]

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[1] City of Chicago v. Scholten, 75 Ill. 468; C. & R. I. Ry. Co. v. Morris, 26 Ill. 400; C. & A. Ry. Co. v. Shannon, 43 Ill. 346.

[2] Chicago v. Scholton, 75 Ill. 468.

[3] C. City Ry. Co. v. Wilcox, 138 Ill. 370.

SEC. 308. The rule is well settled in this state (Illinois) that in an action brought by the parents or personal representative, the negligence of a parent of a child of tender years which contributes to an injury is imputable to the child, and, if established, will prevent a recovery; and this is especially true where the parent is present with the child at the time of the injury, and the negligence consists of some act or omission on the part of the parent.[1] The question of contributory negligence of the parent is one of fact as much as though it had been to the adult and he was the plaintiff in the suit. * * * A court would have no hesitancy in saying that it would be negligence *per se* for a person of mature years to sit on a railroad track in front of a rapidly approaching train, but no such negligence could be imputed to a child of only twenty-one months of age. It is a disputed and contested question as to whether immediately preceding the accident (in this case) the engineer of appellant was giving proper attention to the control and management of his engine, whether the proper signals were given, whether the life of the child could have been saved. It is sufficient to say that a careful examination of the record shows that there was such evidence tending to show these facts, that the question should have been submitted to the jury for their finding.

On the question of contributory negligence of the parents, it appears that the mother had left the child in the kitchen of the house for a period of two or three minutes, while she passed into an adjoining room to give attention to another child. While thus engaged the child wandered from the room and sat down on the track. The mother at once started in search of the child, but discovered it too late to save its life. Under the former decision of this court (City of Chicago v. Major, 18 Ill. 349, and C. & A. Ry. Co. v. Gregory, 58 Ill. 226), it can not be said as a question of law, that the parents were guilty of contributory negligence. The question was one of fact for the jury.[2]

SEC. 309. The general rule is well settled, that the private owner or occupant of land is under no obligation to strangers

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[1] O. & M. Ry. Co. v. Stratton, 78 Ill. 88; T. W. & W. Ry. Co. v. Grabble, 88 Ill. 441.

[2] C. & A. Ry. Co. v. Logue, 158 Ill. 621.

to place guards around excavations upon his land. The law does not require him to keep his premises in safe condition for the benefit of trespassers, or those who come upon him without invitation either express or implied, and merely to seek their own pleasure or gratify their own curiosity. An exception to this general rule exists in favor of children. Although a child of tender years, who meets with an injury upon the premises of a private owner, may be a technical trespasser, yet the owner may be liable, if the things causing the injury have been left exposed and unguarded, and are of such a character as to be an attraction to the child, appealing to his childish curiosity and instincts. Unguarded premises which are thus supplied with dangerous attractions are regarded as holding out implied invitations to such children. The owner of land, where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in safe condition; for they being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers and mere licensees. In such case, the owner should reasonably anticipate the injury which has happened. There is a conflict in the decisions of different states upon this subject, some courts holding in favor of the liability of the private owner, and others ruling against it. * * * It is true as a general rule that a party guilty of negligence is not liable if he does not owe the duty, which he has neglected, to the person claiming the damages. (Williams v. C. & A. Ry. Co., 135 Ill. 491.) But, though the private owner may owe no duty to an adult under the facts stated, the cases known as the "turn-table" cases, hold that such duty is due from him, to a child of tender years. The leading one of the turn-table cases is R. R. Co. v. Stout, 17 Wall. 657; there the company was held liable in an action by a child about six years old, who had injured his foot while playing with a turn-table belonging to the company, although it was contended that he was a trespasser, and had received the injury because of his own negligence, and that the company owed him no duty; it appearing that the turn-table was located upon the private grounds of the company, in a settlement from 100 to 150 persons, about 80 rods from the depot, near two traveled roads, and was a dangerous machine, and

was not guarded or fastened, and that a servant of the company previously had seen boys playing there and had forbidden them to do so; it was further held that the care and caution required of a child is according to his maturity and capacity, and is to be determined by the circumstances of each case; that the fact of the child's being a technical trespasser made no difference in his right of recovery; that the question of the defendant's negligence was one for the jury to determine; and that the jury were justified in believing that children would probably resort to the turn-table, and the defendant should have anticipated their resort to it, from the fact that several boys were at play there on other occasions within the observation and to the knowledge of defendant's employes. * * * The doctrine of the turn-table cases is, that the child can not be regarded as a voluntary trespasser, because he is induced to come upon the turn-table by the defendant's own conduct. "What an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years."

The court said: "We are unable to see any substantial difference between the turn-table cases and the case at bar. Here was a half block of ground in a populous city, bounded on two sides by public streets and on the third side by a public alley; with an opening of some forty feet in the fence upon the street on the south side, and an opening of equal dimensions in the fence upon the alley on the north side; with a causeway running from one opening to the other diagonally across the premises, inviting approach, and actually used for passage of men and teams. Upon this half block was a dangerous pond or pit, in which the water was always five or six feet deep and sometimes fourteen feet deep. Logs and timbers floated about in this pond; and boys had been for some time in the habit of playing upon them in the water. The city authorities had been notified of its attractions to children, and of its dangerous character. They not only suffered the pond to remain undrained, but the fences around it to be broken down in some places and to be actually removed in others. The deceased boy, Frank McMahon, is proven to have entered the premises at the opening in the fence on the alley. The place where he was seen playing in the water was only a few feet from this opening. The love of motion which attracts a child

to play on a revolving turn-table, will also attract him to experiment with a floating plank or log which he finds in a pond within his easy reach.

"There are very respectable authorities upon the other side of the question here under consideration (100 Pa. St. 144; 25 Mich. 1; 68 Wis. 271; 90 Mo. 284; 108 Ind. 530; 83 Va. 355; 62 N. H. 577). * * * It was submitted whether the deceased or his parents were guilty of contributory negligence. In answer to special interrogatories, submitted by the city, the jury found specially, that the deceased, Frank McMahon, at the time of his death was not of sufficient age and ability to exercise ordinary care and discretion in taking care of himself, and was without fault on his part, and did not, at that time, have discretion, intelligence, information and knowledge sufficient to enable him to know that it was dangerous for him to play in the water on the premises and to be at the place of drowning; that he necessarily and unavoidaby fell into the pit and was drowned; that the premises were not sufficiently fenced to warn him of his danger in entering thereon; and that his parents at the time of his drowning, were without fault in respect to the same." [1]

SEC. 310. The verdict and judgment are for $5,000. The deceased left a widow and two children, aged nine and twelve respectively. He was a laboring man and earned $1.50 per day. What the exact measure of compensation is has never been fixed, and probably never can be. The legislature has wisely (?) fixed a limit beyond which juries may not go, but within that limit the discretion of the jury can seldom be declared to be so disproportioned to the actual pecuniary loss to the surviving widow and children as to warrant a reversal on that ground. It would require the whole amount of the judgment to be invested at a higher rate of interest than is lawful by the laws of this state to produce an income equal to the annual earnings of the deceased, if regularly employed on the secular days of the year. Moreover, there are other elements than the mere probable earnings or wages of a man, that are entitled to be considered in arriving at the full pecuniary compensation, viz., the value of his services in the superintendence,

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[1] City of Pekin v. McMahon, 154 Ill. 147.

attention to, and care of his family and the education of his children, of which they have been deprived by his death.[1] In the case of Gunderson the court was of opinion that a verdict of $5,000 was excessive. The deceased was a shoemaker, had been between thirty-five and forty years, and was sixty-five years of age, and his income could not have been large.[2]

SEC. 311. The amount of damages sustained by the plaintiff in an action at law is a question of fact, which is not open for consideration in the supreme court, under the statute.[3] It is also claimed that the affirmance of a judgment by the appellate court for the amount of the judgment, remaining after the entry of a remittitur by that court, is error. The supreme court holds that the appellate court is authorized to allow a remittitur, and that, in so doing, and entering judgment for the remainder, there is no error.[4]

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[1] B. & O. Ry. Co. v. Stanley, 54 Ill. App. 215; B. & O. Ry. Co. v. Wightman, 29 Grattan, 431; Tilley v. Hudson R. Ry. Co., 29 N. Y. 252.

[2] C., B. & Q. Ry. Co. v. Gunderson, 65 App. 638.

[3] West Chicago St. Ry. Co. v. Bode, 150 Ill. 396.

[4] North Chicago St. Ry. Co. v. Wrixon, 150 Ill. 532; Chicago, M. & St. P. Ry. Co. v. Walsh, 157 Ill. 672.

CHAPTER VI.

CITIES, VILLAGES, STREETS AND BRIDGES.

SECTION 312. In theory, damages are given as compensation for the injury, and the allowance of punitive damages is a departure from the rule which once obtained both in England and in this country, yet it has become by repeated decisions a settled principle in the law, and there is no corrective but the legislature. To justify punitive damages, the act must be willful, or the negligence must amount to a reckless disregard of the safety of persons or property. The doctrine of the Supreme Court of Missouri (Kennedy v. North Mo. R. R. Co., 36 Mo. 351) is preferred, that "to authorize the giving of exemplary or vindictive damages, either malice, violence, oppression or wanton recklessness must mingle in the controversy. The act complained of must partake of a criminal or wanton nature, else the amount sought to be recovered must be confined to compensation." Damages must be measured by the loss of time during the cure and the expense incurred in respect of it, the pain and suffering undergone by the plaintiff, and any permanent injury, especially when it causes a disability for further exertion and consequent pecuniary loss.[1]

It is scarcely conceivable that a case could be made against a municipal corporation justifying punitive damages. The city is not a spoliator, and should not be visited with vindictive damages. Where aggression and malice are absent, the damages can not exceed compensation for the injury done; in other words, can not be punitive.[2]

A mere failure to repair a defective street or sidewalk, of the defect of which the city has no notice, can not be deemed wilful.[3]

SEC. 313. The damages to be assessed against a city where the plaintiff received a fall upon the sidewalk, in consequence

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[1] City of Chicago v. Martin and wife, 49 Ill. 241; Hunt v. Hoyt, 20 Ill. 544.

[2] Toledo, P. & W. Ry. Co. v. Arnold, 43 Ill. 418.

[3] Decatur v. Fisher, 53 Ill. 407.

of the negligence of the city authorities to keep the same in repair, must be such as to afford compensation—must be commensurate with the injury.[1] (In this case verdict of $3,200 was sustained.)

Sec. 314. The damages must be such as the plaintiff has sustained, and the evidence confined to proof of such damages. It becomes of the first importance that the jury, in estimating the damages plaintiff has sustained from the permanent character of her injuries, and her disability to labor in consequence, should know her previous physical condition and ability to labor or follow the avocation in which she was engaged. If they found her injuries permanent, and her ability to labor diminished in consequence, compensate her for the loss thus sustained.[2] A verdict for $4,000 sustained in Chicago v. Kelly, 69 Ill. 475; so a verdict for $3,000, in Decatur v. Fisher, 53 Ill. 407; and also a verdict for $4,750 in Chicago v. Langlass, 52 Ill. 256. A verdict for $2,000, for injuries caused by a defective street crossing, where there was a fracture of a leg, permanent defect, etc., was not considered excessive in Peru v. French, 55 Ill. 317, nor was a $3,200 verdict, in Ottawa v. Sweely, 65 Ill. 434, resulting in impaired use of an arm.*

Sec. 315. The rule is well established that a plaintiff may maintain several actions against a number of persons who commit a trespass, or other tort, jointly, and may recover several judgments, but can have but one satisfaction. If a number of persons jointly commit a tort, they are liable either jointly or severally, because the tort is considered the act of each person engaged in its perpetration, and the plaintiff may elect to sue jointly or severally.[3] If the defendant was guilty of neglect of duty in failing to keep the latch-door in proper repair and in a safe condition, he was liable to plaintiff for injuries resulting from his negligence. But in such case, it being the duty of the city to keep the streets and sidewalks

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[1] City of Ottawa v. Sweely et al., 65 Ill. 434; City of Chicago v. Elira Jones, 66 Ill. 349; City of Chicago v. Kelly, 69 Ill. 475; Joliet v. Conway, 119 Ill. 489.

[2] Joliet v. Conway, 119 Ill. 489.

[3] Chicago v. Babcock, 143 Ill. 358.

* Note.—As to other verdicts, see Chicago v. Elzeman, 71 Ill. 131; Aurora v. Hillman, 90 Ill. 61; Hyde Park v. Robinson, 18 Ill. App. 494; Bushnell v. Metz, *Id.* 84.

in good repair and safe condition, it was also liable to plaintiff for a neglect of duty.[1] A judgment for the defendant in an action against the city is not necessarily a bar to an action against the owner. The duties of the city and owner are different. *Id.**

SEC. 316. Where one is injured by reason of a defect in the street, he is bound, in an action therefor, to show negligence in the corporation, and the absence of contributory negligence on his own part.[2] The person injured has the burden of proving, by direct evidence, that he was in the exercise of due care, where it does not sufficiently appear from all the circumstances.[3]

SEC. 317. *Title in streets.*—A proprietor of land, who lays out the same under the statute into town or city lots, vests the legal title to the land intended to be for streets, alleys, ways, commons, or other public uses, in the corporation of the town or city, for the use and benefit of the public. The acknowledgment and recording of the plat has all the force and effect of an express grant. It operates by way of estoppel, and precludes the former owner, and all claiming title through or under him, from asserting title. It is a solemn dedication of the ground to the corporation, to be held in trust for the uses and purposes of the public. On the recording of the plat, the fee in the streets, *eo instanti*, passes to the corporation. A purchaser of a town lot only acquires a title to the land included within the actual limits of the lot, as designated on the plat. He takes no interest in the street, except in common with the public—the right of passage over it. He is estopped by the solemn act of his grantor from claiming title to the center of the street.[4]

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[1] Severin v. Eddy, 52 Ill. 189.

[2] Chicago v. Major, 18 Ill. 349.

[3] Mendota v. Fay, 1 Ill. App. 418; Chicago v. Watson, 6 Ill. App. 344; Hoopeston v. Eads, 32 Ill. App. 75; Abingdon v. McGrew, 42 Ill. App. 109.

[4] Ill. & Mich. Canal v. Haven, 11 Ill. 554; City of La Salle v. M. & H. Zinc Co., 16 App. 69, affirmed, 117 Ill. 411; Snell v. Chicago, 133 Ill. 413; Waugh v. Leech, 28 Ill. 488; City of Chicago v. McGinn, 51 Ill. 266; Carter v. Chicago, 57 Ill. 283; St. John v. Quitzrow, 72 Ill. 334; Gebhardt v. Reeves, 75 Ill. 301; Chicago v. Wright, 69 Ill. 318; Quincy v. Jones, 76 Ill. 231.

* NOTE.—Plaintiff's wife fell down through trap door on sidewalk and was injured, and first sued the city, then the owner of the premises.

SEC. 317*a*. Where streets are dedicated by plat, unless they are lawfully reclaimed by the person who platted them, they forever remain, though not used, to the use of the public.[1] Provided, of course, that the same is not vacated by proper authority, when the title reverts to the dedicator.[2]

SEC. 318. A plat or map, to become operative under the statutes of 1845, as a conveyance in fee of the streets and alleys of a city or town, must be made out, certified and acknowledged in substance as provided by said statute.[3] The plat, duly certified, acknowledged, and recorded as required by statute, operates, upon acceptance by a municipality, as a conveyance in fee of the streets and alleys therein described.[4]

SEC. 319. The general incorporation law gives to cities and villages the absolute control of the streets, bridges, etc., within their corporate limits. Of this power, and the resulting duty to keep its streets and bridges in reasonable repair, so that the public may pass over them in safety, such cities and villages can not divest themselves.[5] While a municipal corporation can not be required to make improvements or repairs, the cost of which will be in excess of its corporate power to raise money for such purposes, yet, having exclusive control, it is required by law to maintain its bridges kept open for the use of the public in reasonably safe condition and repair; and if, for any reason, as, that the cost of repair will be more than the fund at the disposal of the municipality, or which it might, by exercise of its corporate powers, command, the repair is impossible, the street or bridge, if known to be unsafe, should not be held out to the public as safe for its use. The duty of the corporate authorities would be to close the bridge against the public, and warn them of the danger of passage over it until put in proper repair. The public have no means, other than appears on the surface, of determining the safety of

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[1] Waugh v. Leech, 28 Ill. 488.

[2] Gebhardt v. Reeves, 75 Ill. 301.

[3] Auburn v. Goodwin, 128 Ill. 57; First Evangelical Church v. Walsh, 57 Ill. 363; Thomas v. Eckard, 88 Ill. 593; Gebhardt v. Reeves, 75 Ill. 301.

[4] Jordan v. City of Chenoa, 166 Ill. 530; Smith v. Young, 160 Ill. 163.

[5] Carney v. Village of Marseilles, 136 Ill. 401; Shields v. Ross, 158 Ill. 214; Mount Vernon v. Cochran, 59 Ill. App. 540.

bridges forming part of public thoroughfares, and may rely, as common experience shows they do, upon a reasonable discharge of the duty by the municipality. Any one finding a bridge connected with and forming part of one of the streets of a village open for use and traveled by the general public would, in the absence of anything to apprise him of danger, drive upon it, relying upon its safety, and would be justified in so doing. *Id.*

SEC. 320. The municipality holds the streets and alleys of the city in trust for the general public, and by the statute is given power to vacate the same whenever the public interest or convenience, in the exercise of reasonable discretion, shall seem to such authority to require it.[1] A city may vacate a strip on each side of a street so as to narrow it, where the purpose of narrowing is not to benefit private owners, but simply to relieve from public use a portion of the street not needed for that purpose.[2]

The city is looked upon as the representative of the state, with respect to the control of streets and highways and bridges within the city limits. The general act for the incorporation of cities and villages (adopted by the city of Chicago May, 1875) contains the following provisions: Article 5, section 1, clause 7, gives the city council power to lay out, establish and alter streets, etc., and "vacate the same." Clause 9 to "regulate the use of the same." Clause 25 "to provide for and change the location, grade and crossings of any railroad." Clause 28 "to construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof." Article 5, section 10: "The city or village government shall have jurisdiction upon all waters within or bordering upon the same, to the extent of three miles beyond the limits of the city or village, but not to exceed the limit of the state."[3]

SEC. 321. While the best evidence of the condition of the sidewalk at the time of the accident is proof of its condition immediately before, evidence is admissible to show its condition a few days before the accident and a few days after, as

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[1] Parker v. Catholic Bishop, 146 Ill. 158; West Chicago Park Commissioners v. McMullen, 134 Ill. 170.

[2] Mount Carmel v. Shaw, 155 Ill. 37; Mount Carmel v. Bell, 155 Ill. 44.

[3] McCartney v. V., C. & E. Ry. Co., 112 Ill. 611.

tending to establish its condition at the time of the accident.[1] It is not essential to a recovery in a case of this character that the evidence should show actual notice to the city of the defective condition of the sidewalk. It is the duty of the city to keep its streets and sidewalks in a reasonably safe condition for persons to travel over, and when a sidewalk on a public street gets out of repair, so that it is unsafe to travel upon, and so remains for a considerable time, notice of the defective condition of the walk will be presumed.[2]

SEC. 322. A bridge over a stream which crosses a street within the limits of a city is a part of the street. Persons travel over it as they do over other portions of a street, subject, it may be, to some delay that may be occasioned in opening and closing a draw. It is in, and must be a part of, the street. It is under the control of the city and kept in repair and attended by the city authorities, and it was as much their duty to light it as any other portion of the street.[3]

SEC. 323. In an action against the city to recover damages resulting from the death of a person who stepped off the approach of a bridge in the night, while the bridge was swinging round to enable a vessel to pass, it is held permissible for plaintiff to prove that another person had fallen through the same bridge, under similar circumstances, as tending to show a knowledge on the part of the city that there was inattention on the part of their agents having charge of the bridge, and that they had failed to provide further means for the protection of persons crossing on the bridge.[4]

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[1] City of Chicago v. Christiana Dalle, 115 Ill. 386.

[2] City of Springfield v. Doyle, 76 Ill. 202; City of Chicago v. Christiana Dalle, 115 Ill. 386.

[3] City of Chicago v. Powers, Adm'x, 42 Ill. 169.*

[4] Chicago v. Powers, Adm'x, 42 Ill. 169.

* NOTE.—Action to recover damages for negligence of city, which produced the death of Mary Powers. The city maintained a bridge, with its appurtenances, across the Chicago river at South Clark street. It was so constructed as to swing on its center, so as to permit the passage of vessels navigating the river. On the night of the 18th day of October, 1865, deceased, in attempting to pass over the bridge, while near the north approach, the bridge being on the swing, stepped or fell through the opening into the river and was drowned. It was claimed by the plaintiff (appellee) that the night was dark and that the lights on the bridge, which had been furnished

SEC. 324. Where the charter gives the authorities of the city the power to cause sidewalks to be built and kept in repair and makes provision for adequate means to that end, the exercise of the power follows as a duty.[1] The charter undertakes to impose upon lot owners the costs and charges of making and keeping in repair sidewalks, and the duty of keeping them in safe condition; and the charter does not undertake to exempt the city from liability in this respect. So far from it being the intent of the charter that this duty should be exclusively upon the lot owners, it recognizes the existence of the city's liability in providing that if the city shall at any time be subjected to any damages in consequence of any defect in any sidewalk, or its being out of repair, the owner of the adjacent premises shall be liable therefor, and the same may be recovered by a suit.[2]

It is a duty resting on cities to keep their streets and sidewalks in a safe condition for persons passing along and over them, but they are not bound to keep them absolutely safe, so as to preclude the possibility of accident or injury; but they are bound to exercise ordinary care and diligence to keep them reasonably safe.[3]

SEC. 325. It is not error to permit the ordinances of a city to be read in evidence in a suit for injury resulting from neglect in keeping the sidewalks in a safe condition, as they tended to show that the sidewalks were constructed under its authority, and that the city had taken them and its streets under its control.[4]

If the sidewalk where the accident occurred, and all of the streets, were unusually icy, and it was more than usually difficult to walk on them, and the accident occurred in the night time, it was the duty of the plaintiff to use a higher degree of care and caution than he would under ordinary circum-

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by the city, were insufficient, and in consequence thereof deceased came to her death by falling from the bridge and being drowned. Verdict for plaintiff.

[1] City of Bloomington v. Bay, 42 Ill. 503; Browning v. City of Springfield, 17 Ill. 143.

[2] City of Rockford v. Hildebrand, 61 Ill. 155.

[3] City of Rockford v. Hildebrand, 61 Ill. 155.

[4] Champaign v. Patterson, 50 Ill. 61; Joliet v. Verley, 35 Ill. 59.

stances. The question whether due care and caution have been exercised is one of fact, and not of law, and to be left to the jury.[1] Where the sidewalk had been in the condition it was when the accident occurred for one year and nine months, notice thereof, actual or constructive, to the city, will be implied. *Id.*

SEC. 326. Whether a defect has existed in a street or sidewalk sufficiently long that the city should be regarded as having notice thereof, is a matter for the jury, according to the circumstances of the case. It must depend upon the nature of the defect, its situation, the degree of exposure to ordinary obstruction, and various other circumstances, which in no two cases are alike; and therefore it is impossible to fix, as a matter of law, upon any precise time which would be sufficient to warrant a jury in presuming notice.[2]

Where the defects in a sidewalk are defects of age and general decay, the corporation may be assumed to have notice of them.[3]

SEC. 327. A city or incorporated town or village is liable for damages sustained by reason of defective streets, alleys, roads and bridges within its limits, when the duty has been imposed and the power conferred to employ the necessary means to keep them in repair.[4] The rule as to bridges does not require that they be so constructed as to render accidents in using them impossible. The municipal officers are bound to exercise in that regard the care and prudence and judgment of careful and prudent men, in view of the dangers involved.[5] The corporation is not bound to construct a draw-

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[1] Rockford v. Hildebrand, 61 Ill. 155; Mendota v. Fay, 1 Ill. App. 418; Clayton v. Brooks, 31 Ill. App. 62.

[2] La Salle v. Porterfield. 138 Ill. 114; City of Chicago v. McCullough, 10 Ill. App. 459; City of Chicago v. Dignan, 14 Ill. App. 128; City of Springfield v. Doyle, 76 Ill. 202; Ottawa v. Stricklin, 45 Ill. App. 288.

[3] Joliet v. Fitzgerald, 38 Ill. App. 483.

[4] Mechanicsburg v. Meredith, 54 Ill. 84; Marseilles v. Howland, 23 Ill. App. 101; Marseilles v. Howland, affirmed, 124 Ill. 547; Chicago v. Powers, 42 Ill. 169; Gavin v. Chicago, 97 Ill. 66; Browning v. City of Springfield, 17 Ill. 143.

[5] Chicago v. Gavin, 1 Ill. App. 302; Gavin v. Chicago, 97 Ill. 66: Johnson v. Chicago, 24 Ill. App. 26; La Salle v. Porterfield, 138 Ill. 114; Chicago v. Apel, 50 Ill. App. 132.

bridge in such manner as to make it safe for children to play about and upon it, or to place such guards and mechanical contrivances about it as shall keep children away from it. *Id.* When a child is injured while playing about or upon such a bridge, though without fault of the parents, the city is not liable, the bridge being reasonably safe for a person using ordinary care, and being handled with proper care and skill. *Id.*

SEC. 328. The duty to keep bridges in repair is confined to such as are constructed by municipal authority, or are subject to municipal control.[1]

When the corporation has accepted a street burdened with a mill-race, over which there is a bridge, it must be held to have assumed the duty of keeping the bridge in repair.[2] A bridge built by a railway company over a navigable stream within the limits of the city, for the use of the railway, under an ordinance granting permission and declaring the manner in which it shall be built, may be regarded as built by the city, and as within its power to construct, repair, and regulate the use.[3]

SEC. 329. It is the duty of municipal officers to use ordinary care in keeping its bridges, culverts, etc., in a safe condition for public travel, and this involves the anticipation of defects that are the natural and ordinary result of use and climatic influences; and so, wherever there is neglect on the part of the proper officer to make a sufficiently frequent examination of a particular structure, a municipality will not be relieved from liability, although the defect may not be open and notorious.[4]

SEC. 330. The municipality having exclusive control over streets may appropriate them to any use not incompatible with the object for which they were established.[5] A city has no right to so obstruct public streets as to deprive the public and adjacent property holders of their use as such. The primary object is for ordinary passage and travel, and the

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[1] Joliet v. Verley, 35 Ill. 58.

[2] Hord v. Montgomery, 26 Ill. App. 41.

[3] McCartney v. Chicago & Evanston R. R. Co., 112 Ill. 611.

[4] Stebbins v. Keene, 55 Mich. 552; Fairbury v. Rogers, 98 Ill. 557; Stirling v. Merrill, 124 Ill. 522; La Salle v. Porterfield, 138 Ill. 114.

[5] Barrows v. City of Sycamore, 150 Ill. 588; Mt. Carmel v. Shaw, 155 Ill. 37.

public and individuals can not be rightfully deprived of such use. *Id.*

SEC. 331. The space under, as well as above, the surface of streets and alleys, is held by the municipality for the benefit of the public, and is to be devoted to such uses as the public may require.[1] It has no power to grant to private persons rights or easements in a street that may, in any manner, interfere with the duty of preserving them for the public use;[2] has no power to devote a street to an exclusive use for which the corporation has no authority to lay out, open or improve a street.[3]

SEC. 332. It is no defense to an action against the owner of abutting property for an injury caused by a defective sidewalk that the municipality is liable, as the owner, in case of an action against the municipality, is liable over to the municipality.[4]

The municipality is liable to an action for damages where the injury is the result of a defective street and accident, where, had there been no defect, the injury would not have happened.[5]

SEC. 333. If the corporation negligently constructs a walk upon such a plan that it is not reasonably safe, and leaves the place unlighted at night, it is liable to a person thereby injured.[6] Where a traveler is injured by reason of a defect in a street, the result of negligence, he has his action on the case for redress, there having been no contributory negligence on his part.[7]

A city can not exempt itself from liability for injuries resulting from an unsafe condition of its streets, or any part of them, and can not delegate to others authority to make them so, for although such occupation of a street may not be a nuisance, yet, the owner, or person creating the obstruction, or using it, and the city, after notice, will be liable for negli-

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[1] Gregsten v. Chicago, 40 Ill. App. 607; Gregsten v. Chicago, 145 Ill. 451.

[2] Smith v. McDowell, 148 Ill. 51.

[3] Ligare v. Chicago, 139 Ill. 46; Field v. Barling, 149 Ill. 556.

[4] McDaneld v. Logi, 143 Ill. 487.

[5] Joliet v. Shufeldt, 144 Ill. 403; Murphysboro v. Woolsey, 47 Ill. App. 447.

[6] Pfeifer v. Lake. 37 Ill. App. 367.

[7] Sterling v. Schiffmacher, 47 Ill. App. 141.

gence in its construction or maintenance. (Wood on Law of Nuisances, 275.[1])

SEC. 334. Every one is bound to know and take notice of the fact that the street, as well as the sidewalk, in front of new buildings in process of erection, is, to a greater or less extent, obstructed with the building material while grading and excavating. These hindrances and obstructions are unavoidable in cities and towns, and the public must submit to some inconvenience and use a higher degree of care, when going about obstructed places, and using streets and walks which they know to be torn up and unsafe, than they use when going upon walks where no such obstructions are necessary or exist. There is an entire absence of proof that the city or any of its officers were guilty of any want of care or attention to this walk, or that they had knowledge of any unsafe or dangerous obstruction on this walk, or that any obstructions at all were there, for such a length of time as to charge the city with their existence.[2]

SEC. 335. It may be regarded as gross negligence to leave an elevated walk without a guard or railing sufficient to protect travelers who use the walk with ordinary care.[3]

It is necessary, in general, to charge a corporation with liability for a defect in the sidewalk, that it have actual notice of this defect, or that the defect has existed so long that, in the exercise of ordinary diligence, it ought to have had notice.[4] But this rule has no application when the walk is, to the knowledge of the corporation, composed of material insufficient for the purpose, but is allowed to remain in expectation that by frequent inspection defects may be discovered and made good in time to avoid injury; the corporation can not complain if it is held to make good what it has thus undertaken. *Id.*

SEC. 336. A municipal corporation is liable to respond in damages to persons injured, while in the exercise of ordinary

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[1] Smith v. McDowell, 148 Ill. 51.

[2] Harvard Trustees v. Senger, 34 Ill. App. 223.

[3] Mt. Vernon v. Brooks, 39 Ill. App. 426.

[4] Paxton v. Frew, 52 Ill. App. 393; Murphysboro v. Baker, 34 Ill. App. 657; Nakomis v. Salter, 61 Ill. App. 150; Shelbyville v. Brant, 61 Ill. App. 153; Joliet v. Looney, 56 Ill. App. 502.

care, in consequence of its negligence in permitting dangerous obstructions to remain upon its public streets. Such corporations must use reasonable care to keep their streets and alleys in reasonably safe repair and condition for the use of the public. A failure to perform this duty is negligence, for which an action may be maintained by a person injured thereby, who was exercising ordinary care for his own safety. The question in a given case as to whether an obstruction in a highway was of a character likely to frighten a gentle horse, carefully driven, is one of fact, to be determined by the jury, from a consideration of all the evidence touching the character, location and surroundings of the obstruction at the time of the accident.[1]

SEC. 337. It may be regarded as negligence on the part of a municipality to permit the owner or occupant of abutting premises to make an opening in the sidewalk and permit a trap-door therein to be left open, so that pedestrians may fall therein.[2] It makes no difference as to the liability of the corporation for injuries caused by defective sidewalk who put the walk in position. It is in any case the duty of the corporation to take ordinary care to keep it in a reasonably safe condition.[3]

SEC. 338. A sewer was being repaired and cleaned out under the direction and supervision of the city, and the manhole (almost in line of the sidewalk) was left open three or four days, and no guards or lights to warn persons of danger were placed thereon, and the plaintiff, exercising due care, passing in the dark, fell into it and was injured. Held, to be an act of gross negligence on the part of the city.[4]

SEC. 339. The changing of a grade and filling of a street necessarily and unavoidably affects the use of the street unfavorably for a time, but the act is lawful, and if the work is done with reasonable regard for the interest of the public, there is no liability, for there is no element of wrong in so performing a lawful act. The city was not bound to give plaintiff notice of a condition of things with which he was

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[1] Vandalia v. Huss, 41 Ill. App. 517.

[2] Chicago v. Babcock, 143 Ill. 358.

[3] Mt. Carmel v. Blackburn, 53 Ill. App. 658.

[4] Kankakee v. Linden, 38 Ill. App. 657.

thoroughly conversant, nor prevent him from putting his property in a position of known danger.[1]

SEC. 340. A pedestrian upon a sidewalk may ordinarily assume that the same is in a reasonably safe condition for travel.[2] He is not absolutely bound to keep his eyes constantly fixed on the sidewalk, in search of possible holes or other defects therein.[3] The fact that a person knows of a defect in the sidewalk, but does not have it in mind at the time of the accident, is not necessarily negligent. She was proceeding at an ordinary pace, was laboring under no excitement, was looking ahead in the usual manner, and, perhaps, failed to see the dangerous place because of the darkness and the imperfect light of the street lamp. A person of ordinary care and prudence might do the same.[4]

SEC. 341. Although a person goes upon a sidewalk knowing it to be out of repair, recovery may be had for an injury received, if ordinary and reasonable care has been used. The plaintiff's knowledge as to the condition of the sidewalk is one of the circumstances to be considered by the jury in determining whether there has been the exercise of ordinary care.[5]

SEC. 342. The mere fact that the traveler is familiar with the road, and knows of the existence of a defect therein, will not impose upon him the duty to use more than ordinary care in avoiding it. Such knowledge is a circumstance, and a strong one, but it should be submitted, with the other facts in the case, to a jury, for them to determine whether, with such knowledge, the plaintiff exercised ordinary care in proceeding on a way known to be dangerous, or, in proceeding, used ordinary care to avoid injury.[6]

SEC. 343. The exposure of person or property to injury, with knowledge of the danger to which the same is exposed, is undoubtedly evidence of negligence as a matter of fact. Therefore, if a person attempts to pass over a sidewalk, bridge

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[1] Rock Island v. Carlin, 44 Ill. App. 610.

[2] Chicago v. Babcock, 143 Ill. 358.

[3] City of East Dubuque v. Burhyte, 173 Ill. 553.

[4] City of Springfield v. Rosenmyer, 52 Ill. App. 304.

[5] Bloomington v. Chamberlin, 104 Ill. 268; Aurora v. Hillman, 90 Ill. 61 (one may exercise due care, with full knowledge of the danger to which he is exposed); City of Flora v. Nancy, 136 Ill. 45; Clayton v. Brooks, 150 Ill. 97.

[6] Clayton v. Brooks, 150 Ill. 97.

or other structure, knowing the same to be in a dangerous condition, and in such attempt receives injury, his knowledge of the danger will presumptively establish contributory negligence. But such presumption is *not conclusive.* It is disputable, and may be rebutted by evidence of ordinary care under the circumstances of the particular case. Contributory negligence is nothing more nor less than negligence on the part of the plaintiff, and the rules of law applicable to negligence of a defendant are applicable thereto. The law is well settled that knowledge of the defect in the sidewalk by the person injured, before he goes upon the same or before the injury, does not, *per se*, establish negligence upon his part. Evans v. Utica, 69 N. Y. 166; Bassett v. Fish, 76 N. Y. 303; Weed v. Ballston Spa, 76 N. Y. 329; Bullock v. New York, 99 N. Y. 654; Aurora v. Dale, 90 Ill. 46; Aurora v. Hillman, 90 Ill. 65; Dwire v. Bailey, 131 Miss. 169; McKenzie v. Northfield, 30 Minn. 456; Kenworth v. Ironton, 41 Wis. 647; Beech on Contributory Negligence, 39, 40.[1]

SEC. 344. A person passing over a sidewalk open to public use is bound, in order to recover for an injury, to the exercise of ordinary care for his own safety, and ordinary care only.[2]

SEC. 345. A person knowing a sidewalk to be dangerous has no right to presume it to be safe, and act upon that presumption,[3] but must use greater care.[4] Constructing a sidewalk elevated above the surface of the ground thirty inches, and without guard-rails, is not negligence *per se*, nor conclusive evidence that such sidewalk, where it is so constructed, is a place of danger.[5]

Plaintiff had testified that he knew the sewer was being laid in the street, and there was other evidence tending to charge him with notice of the condition of things in the street in the locality. It is manifest that one who knows that a condition

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[1] Chicago v. Fitzgerald, 75 Ill. App. 174; Clayton v. Brooks, 150 Ill. 97; Sandwich v. Dolan, 133 Ill. 177.

[2] Chicago v. McLean, 133 Ill. 148; Chicago v. Babcock, 143 Ill. 358; Sandwich v. Dolan, 34 Ill. App. 199; Sandwich v. Dolan, 133 Ill. 177; Mt. Carmel v. Blackburn, 53 App. 658.

[3] Sumner v. Ellen Scaggs, 52 App, 551.

[4] Village of Noble v. Hanna, 74 App. 564.

[5] Smith v. City of Gilman, 38 Ill. App. 394.

exists can not rightfully act upon the assumption that it does not exist—has no right, as a matter of law, to presume a condition of things against his own knowledge of a different condition, nor is there any requirement to give notice of a fact to one already cognizant of that fact.[1]

SEC. 346. A traveler by street or sidewalk has, in general, a right to assume that it is in a condition that he may safely use it, and to proceed accordingly.[2] A stranger observing people traveling along a street in the night time has a right to assume that it is reasonably safe, and, accordingly, he may proceed to make use of it, exercising ordinary care for his own safety.[3] Whether the exercise of ordinary care required a city to erect barriers about an excavation in a street, made for the purpose of laying pipes, is a question for the jury.[4]

SEC. 347. What is reasonable care in the use of a street for the purpose of travel is a question of fact for the jury, in view of all the circumstances.[5] Whether a person exercised ordinary care in walking over a defective sidewalk is a question for the jury upon all the evidence.[6] Whether a person traveling along a street was in the exercise of ordinary care is also a question for the jury under all the evidence.[7]

SEC. 348. Whether the corporation has performed its duty in keeping the streets in repair is a question for the jury under all the circumstances.[8]

Whether a street in process of repair, being left unfinished over night, and also obstructed, is sufficiently lighted by the electric street lights, is a question of fact for the jury.[9] It can not be so held as a matter of law.[10]

Whether a person injured by driving over a pile of frozen

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[1] City of Galesburg v. Hall, 45 Ill. App. 290.

[2] Chicago v. Babcock, 143 Ill. 358.

[3] Vieths v. Skinner, 47 Ill. App. 325.

[4] Peoria v. Walker, 47 Ill. App. 182.

[5] Lind v. Beck, 37 Ill. App. 430.

[6] Sandwich v. Dolan, 133 Ill. 177; Springfield v. Coe, 69 Ill. App. 277.

[7] Evanston v. Fitzgerald, 37 Ill. App. 86; Vieths v. Skinner, 47 Ill. App. 325; Springfield v. Burns, 51 Ill. App. 595; Springfield v. Rosenmeyer, 52 Ill. App. 301; Peoria v. Amelia Gerber, 68 Ill. App. 255.

[8] Vandalia v. Ropp, 39 Ill. App. 344.

[9] Aurora v. Rockabrand, 47 Ill. App. 106.

[10] Aurora v. Rockabrand, 149 Ill. 399.

mud in the street is guilty of negligence is a question of fact for the jury.[1]

Whether a person, knowing a street or sidewalk to be out of repair, is guilty of negligence in using it, is a question of fact for the jury.[2]

SEC. 349. If a town or its officers are guilty of no negligence in regard to the sidewalk, and the sidewalk is in a reasonably safe condition for people to pass over, no recovery can be had. Conceding that plaintiff was injured, and conceding she exercised ordinary care, still she could not recover unless the town or its officers were guilty of negligence or want of care in the construction or maintenance of the sidewalk.[3]

The city is bound to exercise reasonable care for the discovery of want of repair of its sidewalks.[4] The city, having a right to make excavations in a street for the laying of sewers, gas pipes, meter pipes and the like, is bound to the exercise of ordinary care only to notify the public of the condition of the street in which such work is in progress.[5]

If ordinary prudence requires it, a municipality must construct barriers against teams and wagons falling into ditches being excavated in its streets, and it is a matter of fact for the jury in a given case to determine whether ordinary care required the city to construct such barriers. *Id.*

SEC. 350. A person is bound to make a reasonable use of his faculties when walking along the sidewalk in order to avoid danger, but what is such reasonable use is a question of fact to be determined by the jury under all the circumstances disclosed by the evidence.[6]

SEC. 351. It is the duty of the municipality to exercise reasonable care and diligence in keeping its streets in a reasonably safe condition for public travel. Whether it has done so in a given case must depend for solution upon a consideration of the evidence. Whether a party injured has been negligent or failed to exercise ordinary care for his own safety depends

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[1] Champaign v. Jones, 132 Ill. 304.
[2] Sandwich v. Dolan, 141 Ill. 430.
[3] Senger v. Town of Harvard, 147 Ill. 304.
[4] Joliet v. McCraney, 49 Ill. App. 381.
[5] Peoria v. Walker, 47 Ill. App. 182.
[6] City of Chicago v. McLean, 133 Ill. 148.

upon the circumstances proved, and hence is for the jury to determine.[1]

SEC. 352. *Sewer inlet catch-basin.*—While it can not be denied that the city had the right to make the opening (catch-basin) into which the plaintiff fell and was injured, the duty ensued upon the city to reasonably guard it when made, so that persons, lawfully and with due care traversing the street, might not be exposed to unnecessary and unreasonable danger.[2]

SEC. 353. A city will be liable for damages where it constructs a sewer to carry off surface water if the sewer is wholly insufficient, and the fact might have been known to the municipal authorities by the exercise of reasonable care and judgment. When undertaking a public improvement, a munic-

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[1] Champaign v. Jones, 132 Ill. 304; Flora v. Nancy, 136 Ill. 45; Carney v. Marseilles, 136 Ill. 401; C., B. & Q. R. R. Co. v. Quincy, 136 Ill. 563; Sandwich v. Dolan, 141 Ill. 430; Rockford v. Hollenbeck, 34 Ill. App. 40; Murphysboro v. O'Riley, 36 Ill. App. 157; Smith v. Gilman, 38 Ill. App. 393; Brownlee v. Alexis, 39 Ill. App. 135; Vandalia v. Ropp, 39 Ill. App. 344; Olney v. Riley, 39 Ill. App. 401; Mt. Vernon v. Brooks, 39 Ill. App. 426; Vandalia v. Huss, 41 Ill. App. 517; Bunker Hill v. Pearson, 46 Ill. App. 47; Stirling v. Schiffmacher, 47 Ill. App. 141; Murphysboro v. Woolsey, 47 Ill. App. 447; Rockford City Ry. Co. v. Matthews, 50 Ill. App. 267; Springfield v. Burns, 51 Ill. App. 595; Cullom v. Justice, 59 Ill. App. 304; Rock Falls v. Wells, 59 Ill. App. 155; City of Springfield v. Purdy, 61 Ill. App. 114; City of Pana v. Taylor, 56 Ill. App. 60; Village of Scotia v. Norton, 63 Ill. App. 530; City of Rock Falls v. Maggie Wells, 65 Ill. App. 557; City of Chicago v. Ellen McCarty, 61 Ill. App. 300; City of Virginia v. Plummer, 65 Ill. App. 419; City of La Salle v. Wright, 56 Ill. App. 294; City of Streator v. Hamilton, 61 Ill. App. 509; City of Carmi v. Ervin, 59 Ill. App. 555; Village of Cullom v. Justice, 161 Ill. 372; St. Charles v. Harmon, 56 Ill. App. 515; City of Nokomis v. Salter, 61 Ill. App. 150; Mt. Vernon v. Cockrum, 59 Ill. App. 540; Pana v. Taylor, 56 Ill. App. 60; City of Chicago v. Hogan. 59 Ill. App. 446; Harper v. Ill. Cent. R. R. Co., 74 Ill. App. 148; City of Dixon v. Ruth Scott, 74 Ill. App. 277; C., B. & Q. R. R. Co. v. Gunderson, 74 Ill. App. 356; City of E. St. Louis v. Dougherty, 74 Ill. App. 490; City of Belleville v. Hoffman, 74 Ill. App. 503; City of Chicago v. Fitzgerald, 75 Ill. App. 174; City of Chicago v. Richardson, 75 Ill. App. 198; City of Mt. Sterling v. Nellie Crummy, 73 Ill. App. 572; Heiman v. Kennare, 73 Ill. App. 184; City of Decatur v. Henry Beston, 69 Ill. App. 410; City of Peoria v. Gerber, 68 Ill. App. 255.

[2] City of Chicago v. Seben, 62 App. 248; City of Chicago v. Gallagher, 44 Ill. 295.

ipality is bound to exercise the same degree of care and prudence that a cautious individual would do if the whole loss or risk were his own; and it is liable, like an individual, for damages resulting from negligence or omission of duty.[1]

SEC. 354. The negligence of the driver of a vehicle over a dangerous road can not be imputed to a person riding with him by invitation and ignorant of the surrounding circumstances.[2]

SEC. 355. A city is not bound to construct its sidewalks so that when rendered slippery with snow and ice it would be impossible for one passing over it to slip and fall. It must exercise reasonable care so that such sidewalk shall be reasonably safe at all times to one in the exercise of reasonable care and caution. City of Chicago v. Bixby, 84 Ill. 82; City of Macomb v. Smithers, 6 Brad. 470; City of Aurora v. Parks, 21 Ill. App. 459; City of Chicago v. McGiven, 78 Ill. 347.[3]

Appellant (plaintiff) had passed over this incline frequently before the accident; says she had been apprehensive of danger to herself in passing over it at other times when there was no snow there. She saw that the snow was "hard, crusty-like and slippery" when about to pass over it the day the accident occurred. Under the circumstances, and with full knowledge of the situation, she chose to take the chances of a fall. A party has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable caution. (Lovenguth v. City of Bloomington, 71 Ill. 238.) There is no evidence of any special precaution having been taken by appellant, such as her knowledge of the danger would reasonably require. If a person knows the way to be dangerous when he enters upon it, he can not, in the exercise of ordinary prudence, proceed and take his chance, and, if he shall actually sustain injury, look to the town for indemnity. (Wilson v. Charleston, 8 Allen, 137; Sandwich v. Dolan, 133 Ill. 181.) Ordinary care is a question of fact for the jury.[4]

SEC. 356. The city of Canton was grading and paving one

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[1] City of Peoria v. Eisler, 62 App. 26; Dixon v. Baker, 65 Ill. 518.

[2] City of Carmi v. Ervin, 59 App. 55.

[3] City of Chicago v. Richardson, 75 App. 198.

[4] City of Chicago v. Richardson, 75 App. 198.

of its principal streets (North Main street), and lowered its grade between two and three feet at its intersection with West Spruce street, leaving the grade of the sidewalk unchanged. The old crossing had been removed, and a trench two feet deep had been dug for the setting of the curb-stone. Into the trench the curb-stone had been placed, extending several inches above it, so that one passing over that line of travel would have to step over the curb. The spaces between the curb-stone and the sides of the trench had been partially filled.

The plaintiff, Sophie B. Dewey, while attempting to make the crossing in the night time, had her feet caught between the side of the trench and the curb-stone, and was thereby thrown forward with such violence as to break her leg below the knee. The place was not barricaded; no signal lights were placed out to give warning to pedestrians of its dangerous character. The evidence shows a clear case of negligence on the part of the city. The judgment for $1,000 damages for plaintiff affirmed.[1]

SEC. 357. Returning from market about seven o'clock in the evening, Louis Muller, when passing along the north side of West Graham street in the city of Bloomington, stepped into a hole in the sidewalk, opposite the alley in the middle of the block. His foot caught in the hole and he fell against the fence corner, sustaining personal injuries. Two of his ribs were broken and his lungs injured, from which he suffered much pain. Some time elapsed before he could do any work because of the injury. It was dark when he was injured, and the street lamp, about one hundred and fifty feet from this hole, was not burning. This sidewalk, at the place of the hole, had been out of repair to a considerable extent for about a month before this occurrence. The piece of board that was rotted off and made the hole was not entirely out during all of said month, but it first broke off at one end and dropped down, and afterward broke loose at the other end and dropped into the hole. It was entirely out and lying in the street for four or five days prior to the injury. Trial by jury; defendant found guilty, and plaintiff's damages assessed at $500. Judgment affirmed.[2]

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[1] City of Canton v. Dewey, 71 App. 346.
[2] City of Bloomington v. Muller, 71 App. 268.

CHAPTER VII.

STREET RAILWAYS.

SECTION 358. By the 27th clause of section 62, article 5 of the act of 1872, to incorporate cities and villages, the whole subject of the control of railroads in streets is committed to the local government of such cities and villages. Power is given to enforce police regulations as to the running of trains to secure protection to persons and property, and to compel such railroad companies to raise or lower their tracks so as to conform to any grade which may at any time be established, and when such tracks run lengthwise of any street, alley or highway, to keep the tracks on a level with the street surface, so that such tracks may be crossed at any place on such streets. Besides this general grant of power from the general assembly, the city in this case reserved to itself, in express terms, the right it no doubt would have had without any reservation, to impose regulations, and enforce the same by appropriate penalties, as to the use of the tracks in such manner as will restrict the speed of cars thereon to a safe and reasonable rate, and prevent the storage of cars and maintenance of other permanent obstructions upon such tracks, and as will generally protect the public in the safe and convenient use of the street.[1]

This power is subject to the limitation imposed by the 90th clause of section 1 of article 5 of the general incorporation act of 1872, which declares, "The city council or board of trustees shall have no power to grant the use of, or the right to lay down, any railroad tracks in any street of the city to any steam or horse railroad company, except upon the petition of the owners of the land representing more than one-half of

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[1] Cairo & Vincennes Ry. Co. v. People, 92 Ill. 170; Dock & Canal Co. v. Garrity, 115 Ill. 155; Cook County v. Great Western R. R. Co., 119 Ill. 218; Ottawa v. Walker, 21 Ill. 605; Highway Commissioners v. Bumgarten, 41 Ill. 254; Chicago & N. W. Ry. Co. v. People, 91 Ill. 251; People v. La Salle County Supervisors, 111 Ill. 527; People v. Chicago & N. W. Ry. Co., 118 Ill. 520.

the frontage of the street, or so much thereof as is sought to be used for railroad purposes.[1]

Sec. 359. The fee of the street where the railroad company was permitted to construct the road was in the city of Olney. The legislature had authorized the railroad company to construct its road through the town of Olney. Therefore it was a duty resting upon the city council of Olney, upon the application of the railroad company, to designate a street upon which the road might be constructed. The city authorized the construction of the railroad in the center of Camp avenue, a street eighty feet wide. The ordinance required the railroad company to grade and drain the street, and plank the cross-ties with plank two inches thick, so that the public travel on the street might not be hindered or obstructed; and that the railroad company should be subject to such police regulations as might be enacted by the city of Olney, and if at any time the railroad company failed or refused to perform its several duties under the ordinance, then the right to use the street for railroad purposes should cease and determine. "It is the settled law (says Murphy v. City of Chicago, 29 Ill. 286) that it is a legitimate use of a street or highway to allow a railroad track to be laid down on it; and for doing so the city is not liable for any damages which may accrue to individuals." Our public streets in our cities are designed for travel, but the travel over or upon them is not confined to any one mode of conveyance. They may be used for the wagon, the carriage, or cars propelled by horse power or steam. Each and all may be regarded as a legitimate use of the street by the public. Here the city authorized the construction and operation of the railroad upon a public street, as it had the right to do. All the safeguards were thrown around the power conferred which the nature of the transaction seemed to demand, and if appellee or any other lot owner on the street has been damaged by the construction or operation of the railroad the city is in no manner liable, but the liability for all damages sustained must fall upon the railroad company. The city of Olney has com-

[1] Cairo & Vincennes R. R. Co. v. People, 92 Ill. 170; Hunt v. Horse & Dummy R. R. Co., 121 Ill. 638.

mitted no wrong, nor has it been guilty of any act of negligence.[1]

SEC. 360. By the act of 1872, relating to cities and villages, incorporated cities and villages are vested with exclusive authority over the matter of railroad crossings over streets and highways within their limits, and this excludes the jurisdiction of the county or town authorities.[2]

SEC. 361. A franchise is a privilege emanating from the government or sovereign power, and owes its existence to a grant, or, as at common law, to prescription, which presupposes a grant, and is vested in an individual or body politic. When a company is incorporated by the legislature, with power to construct, maintain and operate a railway in a city in such manner and upon such conditions as the city may impose, and the city, by ordinance, grants the privilege of constructing and operating the same upon a certain street, the grant by the city is a mere license, and not a franchise. The *franchise* emanates from the state.[3]

SEC. 362. If the grant by the city of the privilege to a street railway company to lay tracks be upon adequate consideration, and is accepted by the grantee, then the ordinance ceases to be a mere license and becomes a valid and binding contract; and the same result is reached where, prior to its revocation, the license is acted upon in some substantial manner.[4]

SEC. 363. That the right and privilege to construct and operate a horse railroad in the streets of a city for the purpose of carrying passengers for hire is property, is unquestioned and unquestionable, if the road is constructed and completed in accordance with the terms imposed.[5] Whether a street railway company shall pay for paving between its tracks, or more

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[1] City of Olney v. Wharf, 115 Ill. 519.

[2] County of Cook v. Great Western R. R. Co., 119 Ill. 218.

[3] City of Belleville v. Citizens' Horse Ry. Co., 152 Ill. 171; Chicago City Ry. Co. v. People ex rel. Story, 73 Ill. 541; Board of Trade v. People ex rel., 91 Ill. 80; Chicago & West. I. R. R. Co. v. Dunbar, 95 Ill. 571; Quincy v. Bull, 106 Ill. 337; Chicago G. L. Co. v. Lake, 130 Ill. 42.

[4] Belleville v. Citizens' Horse Ry. Co., 152 Ill. 171; Chicago Municipal G. L. Co. v. Town of Lake, 130 Ill. 42,

[5] Citizens' Horse Ry. Co. v. Belleville, 47 Ill. App. 388.

or less, or whether it shall pay a portion or share of the whole cost, is a matter which rests in the sound discretion of the authorities.[1]

SEC. 364. If a corporation accepts a grant from a city of the right to use the street in a special manner, and the grant is burdened with a duty, which it neglects, the corporation would, no doubt, be responsible for the consequences of neglect of that duty.[2] Permission to a street railway company to lay its tracks in a public street is not a grant of an additional easement in the soil of the street, such road being merely a modification of the existing public use, adding thereto an additional mode of conveyance, and inflicting no damage upon the owner of the fee. A railroad company which, by city ordinance, has acquired a permanent easement in streets crossed by its tracks, holds such easement in subordination to the right of the public to use such street, and is not entitled to compensation for the crossing of such tracks by a street railway laid along the street under permission from the city.[3] Where the city council of Chicago, in pursuance of the power conferred by the city charter "to provide for the location of any railroad," fixes, by ordinance, the location and limits of the right of way of an elevated railroad, its ordinance has the force of statute law, and is a limitation upon the power of the railway company.[4] And an elevated railroad company which has accepted the provisions of a city ordinance, which the city was authorized to pass, limiting the right of way to a designated width, and providing that it shall be immediately adjacent to and parallel with an alley between designated streets, can not condemn land of a greater width than that specified, part of which lies outside of the limits prescribed by the ordinance.[5]

SEC. 365. For the purposes of a right of way, one railway company may condemn the property of another, such company not already having devoted it to the same use. But the

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[1] Lightner v. Peoria, 150 Ill. 80.

[2] Rockford City Ry. Co. v. Matthews, 50 Ill. App. 267.

[3] Chicago, Burlington & Quincy R. R. Co. v. West Chicago Street Ry. Co., 156 Ill. 255; Pittsburgh, C., C. & St. L. R. R. Co. v. West Chicago Street Ry. Co., 156 Ill. 385.

[4] Tudor v. Chicago & S. S. R. T. R. R. Co., 154 Ill. 129.

[5] Tudor v. Chicago & S. S. R. T. R. R. Co., 154 Ill. 129.

rule is otherwise where the taking would result in a change of ownership, without affecting the use of the property. The street railroad had never used the property as a right of way, or for the purpose of running cars over it, nor, so far as appears, was it necessary for the company to use it for that purpose. During the past three years it had been used but little as a horse barn. The question presented resolves itself into this: Whether one railway company can acquire property and hold it, *not as a right of way*, but for some other purpose, and thus prevent some other railway company from condemning it for a different use?[1] The same question arose and was answered in Chicago & N. W. Ry. Co. v. Chicago & E. Ry. Co., 112 Ill. 589; see also E. St. L. C. Ry. Co. v. East St. L. U. Ry. Co., 108 Ill. 265; Chicago R. I. & P. Ry. Co. v. Town of Lake, 71 Ill. 333; Lake S. & M. S. Ry. Co. v. Chicago & W. I. R. R. Co., 97 Ill. 506.

SEC. 366. The statute provides that the city council or board of trustees shall have no power to grant the use of, or right to lay down, any railroad tracks in any street of the city to any steam or horse railroad company, except upon a petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes. It is for the city council itself to determine whether a petition authorizing it to grant the use of a street has been presented.[2]

The fact that the signatures of property owners to a petition to a city council to grant a company the right to lay tracks in a street are affixed by agents whose written authority to sign does not appear, will not render an ordinance in pursuance of such petition void.[3]

SEC. 367. A contract to purchase the consent of a property owner to the laying down of a street railway in a street upon which his property abuts, for money or other consideration inuring to his exclusive benefit, is illegal and void.

The city council would not be faithful to its trust if it granted the use of the public streets to a street railway com-

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[1] West D. Ry. Co. v. Elevated Ry. Co., 152 Ill. 519.

[2] Tibbitts v. West & South Town Street Ry. Co., 54 Ill. App. 180.

[3] Tibbitts v. West & South Town Street Ry. Co., 153 Ill. 147.

pany without being satisfied that such use would be a public benefit, by facilitating public travel and promoting the public convenience. The law makes the petition of the abutting property owners evidence to some extent that the public will be benefited by the proposed laying of the tracks. Such evidence, being at the foundation of legislative action, must be fairly and honestly given, and not purchased by considerations moving to the signers of the petition.[1]

SEC. 368. Where the street railway company fails to perform a condition subsequent in the ordinance under which it is permitted to lay its tracks, the city may avoid the contract, power to do so having been reserved in the ordinance. And this may be done by repealing the ordinance and requiring the company to remove its tracks, which can be done without any previous judicial determination.[2]

SEC. 369. Under an ordinance of the city a railway company laid its tracks and operated its cars and the same contained the terms to which the company agreed when it accepted the ordinance.

It is immaterial whether said accepted ordinance be treated as contract or license. By accepting the ordinance so burdened with terms the railway company became bound to pay the license fee so long as it enjoys the privilege conferred by the ordinance.[3]

SEC. 370. The right given to a street railway company to operate its cars over the tracks of another street railway company was upon such terms and conditions by lease or contract as might be agreed upon between the companies owning said tracks or otherwise. No right to use such track without consent is here given.

The right, in consideration of services rendered the public, to lay tracks in a public street and to operate cars thereon is a valuable property and is, therefore, a property right.

Being property held under certain conditions it may be forfeited, but it can not, either in whole or in part, be, by the mere will of the legislative body, taken from its owners, either for public or private use.

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[1] Doane v. Chicago City Ry. Co., 160 Ill. 22.

[2] Belleville v. Citizens' Horse Ry. Co., 152 Ill. 171.

[3] Byrne v. Chicago Gen. Ry. Co., 63 Ill. App. 438.

If it is to be taken for public use its owners are entitled to just compensation, and that compensation must be ascertained by a jury.[1]

Where there has been given to two companies the right to place rails in and use the same street, each is bound to place its rails and to use the street in such manner that the public may have the benefit which can be derived from such joint use. Neither can be permitted to unnecessarily interfere with the right of the other. Where a company is obstructed in the construction of its road over a right of way duly acquired, by the laying of track by another company, equity will interfere to restrain such obstruction. The relief sought is the removal of obstructions.[2]

The interest of a street railway company in the street upon which its tracks are laid, although a valuable one, is part of the public easement in the street accessory to the existing right in the public.

SEC. 371. An injunction will not lie at the suit of an abutting owner to restrain the laying of a street railway in a street, the fee of which is in the city, as the damages he may suffer are merely consequential, and the remedy is by action at law. *Id.*[3]

SEC. 372. One horse railway company has no right, by proceedings of condemnation, to take for its joint use a part of a previously constructed railway of another company, in successful operation, and the most valuable part of it, and thus destroy, in effect and usefulness and value, the remaining fragment, and if such an attempt is made, a court of equity will enjoin the same.[4]

The statute authorizing the condemnation of property by horse and dummy railroads contemplates private property alone and not property used and accepted by the public. *Id.*

SEC. 373. In an action on the case against a city railway company to recover damages for personal injury resulting from being ejected and thrown from a street car by the servants of

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[1] Chicago Gen. Ry. Co. v. Chicago City Ry. Co., 62 Ill. App. 502.

[2] Chicago Gen. Ry. Co. v. West Chicago St. Ry. Co., 63 Ill. App. 464.

[3] Tibbetts v. West & South T. St. Ry. Co., 54 Ill. App. 180, affirmed, 153 Ill. 147; Kirchman v. West & South T. St. Ry. Co., 58 Ill. App. 515.

[4] Central City Horse Ry. Co. v. Ft. Clark Horse Ry. Co., 81 Ill. 523.

the company, it appeared that the plaintiff got up immediately after he was thrown upon the ground, pursued and overtook the car, and walked a considerable distance the same evening, went to work the next day as usual, and when examined some days afterward there was found no abrasion, contusion or external injury; and the whole evidence failed to show that he had received any serious and permanent injury; and it further appeared that at the time of the trial he had recovered to a considerable extent; and even if the injury received was permanent, that it was not so serious as to disqualify him from business or earning a livelihood. The jury returned a verdict for $1,200 damages. Held, that the damages were so grossly and glaringly excessive that a new trial should have been granted. On the trial the court received evidence of the pecuniary ability of the company in aggravation of damages. The admission of this evidence was improper, as the conductor was liable for the judgment, and the evidence as to him was highly prejudicial. Judgment reversed.[1]

SEC. 374. Where a person on the street car told the driver the place where he desired to go, and was notified by the driver that they had reached that place, and when he was in the act of stepping off, the car started up with a sudden jerk which threw him upon the ground, inflicting a serious injury, it was held that this was a clear act of negligence on the part of the railway company; that it was the duty of the company to have stopped the car a sufficient time to allow the passenger to step off, and that if the car was stopped at the proper place it was negligence to start it with a "sudden jerk," without the exercise of any precaution for the safety of those who might be getting off or on the car. The damages were assessed at $5,000. It is claimed they were excessive. The injury received was serious. The thigh bone was fractured, which rendered the plaintiff a cripple for life and he was otherwise injured. The judgment is not so excessive as to justify a new trial and is affirmed.[2]

SEC. 375. Where street car tracks are in close proximity, to run a car or train of cars in one direction, at rapid speed, and

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[1] Chicago City Ry. Co. v. Henry, 62 Ill. 142.

[2] Chicago City Ry. Co. v. Mumford, 97 Ill. 560.

without signal or warning, over a sidewalk crossing, while a car or train bound in the opposite direction is discharging passengers at such crossing, and where, as in this case, the view of the approaching train is obstructed by the standing car from which the person injured has just alighted, is surely conduct which fairly tends to prove culpable negligence, even though the rate of speed of such approaching train does not exceed that which is permitted by ordinance, and it can not be said, as matter of law, that such conduct is not negligence. In the case where the conduct of an infant would not be negligence, in an adult the question of imputable negligence is immaterial.[1]

The fact that a person passing over a sidewalk crossing in a city, steps on the track of a street railroad, where the cars accustomed to run thereon are horse cars or grip cars, without first stopping to look and see whether a car is approaching or not, as matter of law, and without regard to surrounding circumstances, is not negligence and a want of ordinary care. The question of negligence and a want of ordinary care is, in such case, a question of fact for the jury, in the light of the attendant circumstances.

An instruction in an action to recover for the death of a child six years old by negligence of the defendant, based upon the fact that the child itself was in the exercise of ordinary care when he was killed, need not contain any reference to the care or negligence on the part of the parent.[2]

SEC. 376. Where a question of contributary negligence arises in connection with the personal injury of the plaintiff, who was standing on or near the street car tracks, all the attending circumstances are pertinent to the inquiry, both before and after he saw his danger. The negligence with which the evidence tends to charge him is to be found mainly in his conduct before he saw his danger. It consisted in standing where he did without looking or listening or taking any other precaution to ascertain whether danger was approaching. He testifies that he was not thinking of danger until it was

[1] Chicago City Ry. Co. v. Robinson, 127 Ill. 9.

[2] Chicago City Ry. Co. v. Robinson, 27 Ill. App. 26; Chicago City Ry. Co. v. Robinson 127 Ill. 9.

too near for him to escape. He heard the voice of the car driver warning him to get out of the way. He then turned his head, and seeing the horses very near him, attempted to get away, as he says, by running in front of the horses over to the southerly side of the track, and, in so doing, was struck on his left hip by the southerly horse and thrown down and injured. The fact that plaintiff was an old man (over seventy years of age), and, presumably, laboring under the infirmities of age, was a material circumstance to be considered by the jury. The verdict of $10,000 for plaintiff was excessive. The court below erred in refusing to give or even to examine any of the instructions asked on behalf of the defendant. It is the practice settled by a long line of judicial decisions, to give the jury such instructions as may be submitted by the respective counsel, provided they are based upon the evidence and announce correct propositions of law, applicable to the case, in clear, concise and intelligible language, and are not argumentative nor misleading, nor a repetition of other instructions given. Where instructions of this character are asked, it is the legal duty of the court to give them. Their number may be unnecessarily multiplied, thus imposing upon the judge a useless burden, if he undertakes to examine them all, and confusing rather then aiding the jury, if they are given. But the fact that too many are asked does not exempt the judge from the duty of examining any of them. He may, perhaps, after duly considering a reasonable number, decline to proceed further, but he should pass upon and give or refuse as many instructions as the party asking them is reasonably entitled. Judgment reversed.[1]

SEC. 377. The plaintiff, the Chicago West Division Railway Company, was in lawful possession and use of its car upon its horse railway in the street (Randolph) of the city of Chicago as a common carrier of passengers, when the defendants wilfully and wrongfully drove their wagon into and upon said car, whereby one Daniel D. Cornell, then a passenger for hire, riding on said car, was greatly injured; that had it not been for the said wrongful negligence of said defendants the plaintiff could and would have safely carried said Cornell over

[1] Chicago W. D. Ry. Co. v. Haviland, 12 Ill. App. 561.

its said line of railway; that said Cornell sued plaintiff for said injury and recovered therefor judgment in the sum of $4,000 (the defendant having notice), which judgment plaintiff had paid. The driving of said wagon into and upon said car by the defendants was a wrongful invasion of the plaintiff's rights, for which the law awards nominal damages at least. Where an injury is inflicted to a plaintiff's right by a wilful act of force, it constitutes a trespass. (1 Chit. Pl. 128; Percival v. Hickey, 18 Johns. 257; Wilson v. Smith, 10 Wend. 324; Calwell v. Farrell, 28 Ill. 438.) From this view it is clear that the special damage arising from the recovery by Cornell of a judgment against plaintiff for damages received by him as a passenger on plaintiff's car at the time in question, is not a necessary element of the cause of action.[1]

SEC. 378. Where the relation of master and servant exists between a city railway company and a person whose act may be the cause of an injury to another, the company will not be liable, if the servant, in causing the injury, is not acting within the scope of his employment, but the master will be responsible, when the servant acts within the general scope of his employment, for acts done while engaged in his master's business, with a view to the furtherance of that business, by which injury is caused to another, whether negligently or wantonly committed.

The conductor had charge of the car. One of his duties was to collect fares from persons who might enter the car. While engaged in the discharge of this duty he came to the plaintiff, who a short time before had entered the car, and, as the evidence introduced on the part of the plaintiff tended to prove, he pushed the plaintiff off the car. Whether the plaintiff was a trespasser on the car, or was unlawfully riding on the car without the payment of fare, was a matter of no moment. If plaintiff had no right on the car, and the conductor, in the discharge of his duty as manager of the car, undertook to put him off, the law required him to act in a prudent manner and exercise due care for the safety of the plaintiff, and if he failed to do so, and in consequence the plaintiff was injured, the defendant was liable.[2] Although the conductor of a street car

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[1] Chicago W. D. Ry. Co. v. Rend, 6 Brad. 243.
[2] North Chicago City Ry. Co. v. Gastka, 128 Ill. 613.

has implied authority to keep trespassers off the car under his control, he is bound to have due regard to life and limb. His employer will be held to a strict accountability for any reckless or wanton abuse of his authority.[1]

SEC. 379. The act of 12th February, 1855 (special laws 304), in terms applies to all railroads organized or incorporated under, or which may be incorporated or organized under, the authority of the laws of this State; and it provides that they shall have the power to make such contracts and arrangements with each other for leasing or running their roads, or any part thereof, also the right of connecting with each other on such terms as shall be mutually agreed upon by the companies interested. This language is sufficiently comprehensive to embrace horse railroads as well as railroads whose cars are propelled by steam or other power. The language of the enactment embraces all roads then organized as well as those which might afterward become so, and the act makes no distinction or reservation as to the character of the railroad. Horse city railways unquestionably fall within the description of the class of subjects on which they were legislating. They are, in every sense of the term, railroads; they are incorporated under the laws of the state and are embraced within the language of the statute.[2]

SEC. 380. If the driver of the car knew that passengers were getting off, as it seems from the evidence he did, it was his duty not to start the car until they had sufficient time to get off. Where a driver stops a car at a place where passengers are in the habit of getting off, he must not start it again until he knows that he can do so in safety to his passengers. People can get off when and where they please, provided the car is stopped when they attempt to do so; but even if the driver had been expressly notified by plaintiff that she did not intend to get off, when he saw passengers getting off it was still his duty to wait until they had reasonable time to leave the car before starting. The car was started while one foot of the passenger was on the side platform and the other foot was stepping down, and it threw her down, breaking her thigh

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[1] North Chicago City Ry. Co. v. Gastka, 27 Ill. App. 518.

[2] City of Chicago v. Evans et al., 24 Ill. 52.

bone and injured her. She says: "The car must have started; suddenly I felt a jerk and seemed to feel a whirl, and fell. The car stopped to let passengers off, I took it. Did not attempt to get off while the car was moving."[1]

SEC. 381. It is the duty of a street railway company to carry their passengers safely. If the death of a passenger results from the carelessness of its servants in the management of the car, or from a defective track, or from an overloaded car, or from all combined, then the company is liable.[2] Trying to board a train while in rapid motion is negligence on the part of the plaintiff and no negligence is to be attributed to the defendant.[3]

SEC. 382. Railway companies are not conservators of the public or private morals. They may and should, in all cases, adopt and enforce such reasonable rules as will protect their passengers from injury, insult, disturbance and annoyance. Naturally, such rules for the protection of passengers from the results of the conduct of others, fall into two classes—those which relate to the safety of the passenger and those which pertain to his comfort and convenience; unquestionably any conduct or any violation of a reasonable police regulation of the road, which tends to endanger the life or limb of a passenger, or in anywise put him or his property in jeopardy, may be met with such prompt action as the necessity of the case seems to require to prevent threatened harm. The servants of the company would in such case not be required to wait, or be justified in waiting, until injury is inflicted. In respect of regulations relating to the comfort and convenience of the passenger a different rule prevails. However strongly the use of indecent language in a public conveyance should be condemned, it is apparent that the use of such language, attracting a few persons on the rear platform or seat, might create neither annoyance nor disturbance, while the same language used at other times, in the presence of others, or under different circumstances, would be highly offensive, and justly subject the passenger who persists in using the same to ejection from the car. In such case the right of the company arises from its

[1] Chicago West Div. Ry. Co. v. Mills, 105 Ill. 63.
[2] Chicago City Ry. Co. v. Young, Adm'r, 62 Ill. 238.
[3] Chicago City Ry. Co. v. Delcourt, 33 App. 430.

duty to protect its passengers from annoyance and discomfort, and undoubtedly the use of profane, vulgar and indecent language, having naturally the tendency to offend and annoy other passengers upon the car, would form sufficient justification for the conductor to stop his car and require the person offending to leave, and upon his refusal to cease its use or leave the car, to eject him. While a conductor is justified in expelling a passenger, as stated, the law would not justify such unreasonable and excessive force, as to permit his removal from the car at a place or under circumstances dangerous to his life or limb.[1]

SEC. 383. It is the duty of every person to use reasonable and ordinary care to foresee danger and avoid injury, but the precise course of conduct which this rule enjoins must ordinarily, from the very nature of things, depend upon the particular circumstances of each case. Whether the plaintiff was negligent in standing on the step or platform, must depend, among other things, upon whether there was a vacant seat in the car, of which the plaintiff was aware, and which he might have taken, and whether standing on the platform was more dangerous than occupying the seat. There was evidence tending to establish both these facts, and, if proved, it is very clear that it was the duty of the plaintiff to occupy the seat as the place of the least danger; and the fact that the conductor knew that he was occupying the more hazardous position, or that it was customary for others to do the same thing, will not exculpate him from the charge of negligence. The court should have instructed the jury as to the degree of care which the plaintiff was bound to exercise, and then left it for them to determine whether, under all the facts proved, he was guilty of contributory negligence.[2] If the plaintiff did not use ordinary care to prevent the injury in question, and such want of ordinary care produces said injury, he can not recover even though the defendant was guilty of gross negligence, unless the injury was wilfully inflicted. *Id.*

Damages arising from negligent acts of a defendant are either general or special. General damages are such as natur-

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[1] Chicago City Ry. Co. v. Pelletier, 33 Ill. App. 455, affirmed 134 Ill. 120.

[2] Chicago & W. D. Ry. Co. v. Klauber, 8 Ill. App. 613.

ally and necessarily arise, or, in other words, such as the law implies or presumes to have occurred, from the wrong complained of. Special damages are such as really took place, but are not implied by law and do not necessarily flow from the injurious acts of the defendant.[1] Whenever the damages sustained have not necessarily occurred from the act complained of, and consequently are not implied by law, then in order to prevent the surprise on the defendant, which might otherwise ensue on the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it. *Id.*

SEC. 384. *Injury to a child of tender years.*—The plaintiff was an infant not quite seventeen months old. On Indiana street, where Armour street crosses Indiana, in the city of Chicago, the plaintiff was struck and knocked down by one of appellant's street cars, drawn by horses. His feet were caught under the car wheels, and one of them was so badly crushed that it was amputated a few hours after the injury. The child was so young that it was incapable of exercising care, and can not be charged with negligence.

It is claimed that no recovery can be had against the defendant, unless the plaintiff's parents, or the custodian in whose charge they had placed the child, exercised reasonable and ordinary care for his safety. All instructions to this effect asked by defendant were refused. The question in this case is whether the driver of the car could have avoided the injury to the plaintiff, after the latter had been discovered to be in a position of danger, even though the plaintiff had come into such position through the negligence of those having him in charge. The defendant's servants, who had control of the car, were bound to use reasonable care in avoiding an injury to the plaintiff, if they saw, or, by the exercise of ordinary prudence might have seen, plaintiff's peril. In such cases, where the person in danger of being injured is an adult, the defendant will only be liable for wilful injury or gross negligence, on the ground that the adult will be presumed to have the capacity of making some effort to remove himself

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[1] Chit. Plead. 396; Dumont v. Smith, 4 Denio, 319; Olmstead v. Burke, 25 Ill. 74.

out of the way of the threatened peril; but in the case of a child of tender years, the defendant will be liable for the want of ordinary care.[1] The driver of the car admits that he saw the plaintiff upon the crossing before the accident occurred. One witness says that the child was on the track. Other testimony is to the effect that he was a short distance south of the track. The horses attached to the car were going along in an ordinary trot. The driver did not stop his horses nor slacken their pace to a walk. Under all the circumstances it was for the jury to say whether he did or did not use ordinary care and prudence in trying to avoid the injury after he discovered the danger.

The parents of the child were persons in humble circumstances—had no servants. On this day, when the accident occurred, the mother was ironing and the father chopping wood. The baby was strapped in its baby-carriage and taken out for an airing by a brother fifteen years old. He had wheeled the child to the corner of Indiana and Armour streets, and while he was looking at a moving building the child slipped out of the carriage and crept and toddled to the place of danger. It is unnecessary to discuss the negligence of the older brother, or whether it can be imputed to the infant in this suit by the infant himself. It is immaterial. Judgment is affirmed.[2]

SEC. 385. A street car company, legally operating a street railway, is entitled to the track on meeting foot-passengers or other vehicles, as against any person, carriage, etc., put, driven or being thereon with a view to delay, hinder or embarrass the progress of the cars.

An absolute right of way over its track against all foot-travelers and vehicles, without regard to circumstances, is denied.[3]

SEC. 386. *Right of the road.*—There is evidence in the case tending to the conclusion that the driver of the car and the driver of the wagon were both at fault; each seemed desirous of reaching the place in the rear of the line of vehicles in advance of the other, and both started for that point at about

[1] Phil. & Reading R. R. Co. v. Spearem, 47 Penn. St. 300.
[2] Chicago W. D. Ry. Co. v. Ryan, 131 Ill. 474.
[3] Chicago W. D. Ry. Co. v. Ryan, 31 Ill. App. 621.

the same instant. The wagon, though much nearer to the line, was directed by the policeman on duty to wait, and it appears that, under the circumstances disclosed by the evidence, the ordinance of the city of Chicago gave the car the right to pass first; on the other hand, the driver of the car saw that the wagon was actually moving forward with the apparent determination to get in ahead, and that it was so far in advance of the car that if the attempt was persisted in the car must yield and allow the wagon to pass first in order to avoid a collision. To press forward under the circumstances, at the peril of the safety of the passengers of the car, was inexcusable negligence.

The fact that the car has the prior right of way was no sufficient excuse. Even though the driver of the wagon may have been in the act of violating an ordinance of the city, the car driver was not justified in asserting his rights by force. It was his duty to manage his car, in view of all the circumstances, so as to avoid, so far as reasonably within his power, a collision with other vehicles passing on the street. The remedy for a violation of the ordinance was by enforcing the penalty which the ordinance prescribes.[1]

SEC. 387. *Expulsion from a street car.*—He was twice within a minute or two, expelled from the same car—the first time without injury, the second time with only such injury as, from his own testimony, appears to have been the necessary result of such force as was essential to loosen his grasp upon a rod, which was part of the car, and to which he was holding with all his strength. That grasp was so firm, that, in loosening it, the conductor broke one of the fingers of the plaintiff, and the jury awarded him $2,500, for which judgment was entered. This is not a case of negligent or wanton injury, as in C., M. & St. P. Ry. v. West, 125 Ill. 320, North C. C. Ry. v. Gastka, 27 Ill. App. 518, and C. City Ry. v. Pelletier, 134 Ill. 120, but the plaintiff brought the injury upon himself by resistance.

Having been once put off, he knew that the conductor of that car would not let him ride. He says he was angry. For

[1] Rend v. Chicago W. D. Ry. Co., 8 Ill. App. 517.

refusal to carry him, if unjustifiable, he has his action, but he had no legal right to use force to compel the company to carry him. The license implied by law for persons to get upon a street car, had been, as to him, and that car, revoked. In attempting to compel the company to carry him he was himself a trespasser. Burton v. Scherpf, 1 Allen, 133; McCrea v. Marsh, 12 Gray, 211; Wood v. Ledbitter, 13 M. & W. 838; Commonwealth v. Power, 7 Metc. 596; Harris v. Stevens, 31 Vermont, 79.

The plaintiff had no right of property or interest in that car; that, and the authority to control it, belonged to the company. They owed a duty to the public, a refusal to perform which would subject them to an action. Out of that duty sprang a license to every person, having no notice to keep off, to go upon the cars; but with such a notice the license was withdrawn; whether rightly or wrongly withdrawn, it can not be enforced *vi et armis*. The remedy of any person aggrieved was by action, if the revocation was unjustifiable. The language of the supreme court in C., B. & Q. R. R. Co. v. Griffin, 68 Ill. 499, is applicable here. The conductor must necessarily have the supervision and control of the train, otherwise there would be no protection to the lives or comfort of the public travel. If he abuses his trust, or for any gross misconduct on the part of himself or other employe toward passengers, the company will be responsible. The law requires the highest degree of care on the part of the railroad employes on passenger trains, for the comfort and safety of the passengers. It is incumbent on them to be civil and decorous in their conduct toward them. But like responsibilities rest upon passengers. They must observe proper decorum and be submissive to all reasonable rules established by the company. The law will not permit a passenger to interpose resistance to every trivial imposition to which he may really feel, or imagine himself exposed, by the employes, that must be overcome by counter force in order to preserve subordination. It is due to good order and the comfort of the other passengers that he should submit for the time being, and redress his grievances, whatever they may be, by a civil action. The defense of the company (in this case), supported by much, if not preponderating evidence, was that the plaintiff was *drunk*. The jury

answered the question as to whether he was drunk as follows: "No, not objectionably so," which goes far to show that he was in a condition to be a very undesirable next neighbor in a public conveyance. Judgment reversed, and cause remanded.[1]

SEC. 388. In an action for damages for an injury, causing death, growing out of a collision between a grip-car and a horse-car (the grip or cable cars having run into the horse-car upon which deceased was riding), it was competent to show, as bearing upon the question of negligence, that the grip-car was not so near the point where the horse-car was crossing the cable track, as to make it impossible to stop it before it should come in contact with the horse-car. A witness who testified as to the possibility of stopping within a stated distance, could answer as to the source and basis of his knowledge. The witnesses referred to had been in the service of the street-car companies, and a reference to previous experience and observation was not improper because it tended to show that they were qualified to give evidence as to the distance within which it was possible to stop such car.[2]

SEC. 389. *Prima facie case—Presumption—Practice.*—It was shown by the evidence that plaintiff was a passenger on a street car of defendant, run by cable, and at the time of the accident was standing on the rear platform of the rear car, when it was run into from behind by another car of defendant following on the same track, while going through the La Salle street tunnel; that he was crushed between the colliding cars, his artificial leg split and rendered worthless and the flesh of the stump of his leg torn and lacerated. This was all that plaintiff was called on to prove to make out a cause of action under the first count of his declaration. From this evidence a *prima facie* case of negligence was made out against the company, and the burden was placed upon it to show that the accident resulted from some cause for which it was not responsible.

The nature of the accident, as proved, was such as to raise a presumption of negligence on the defendant's (appellant's) part, and the company could not defeat a recovery by the plaintiff, unless it showed how the accident happened, and

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[1] North Chicago St. Ry. Co. v. Olds, 40 Ill. App. 421.

[2] Chicago C. Ry. Co. v. McLaughlin, 146 Ill. 353.

that it could not have been prevented by the exercise of the greatest degree of diligence practicable under all the circumstances of the case. (G. V. C. W. R. R. Co. v. Yarwood, 17 Ill. 509; P. C. & St. L. Ry. Co. v. Thompson, 56 Ill. 138; P. P. & J. R. R. Co. v. Reynolds, 88 Ill. 418; Eagle Packet Co. v. Defries, 94 Ill. 598; Curtis v. R.V. S. R. R. Co., 18 N. Y. 534.) Under the allegation of the first count, that defendant negligently ran and operated its road and the cars propelled thereon and that by reason thereof, etc., etc., the plaintiff was entitled to prove any negligence in the running or operating of the road or the cars propelled thereon, and did prove that the road was operated without sand boxes on the grip-cars. But evidence of particular negligence was unnecessary on the part of the plaintiff. He was not called upon for any such proof, and he would have been more wise and skillful in the trial of his case had he omitted it.[1]

SEC. 390. *Not negligence per se.*—Whether the plaintiff, in getting upon the horse car while it was in motion, was or was not in the exercise of due care, was a matter for the determination of a jury under all the circumstances of the case. (City of Chicago v. McLean, 133 Ill. 148; Schacherl v. St. Paul City Ry. Co., 42 Minn. 42.) A stricter rule than that which is applicable to horse cars must be held to apply to steam cars, whose movements are more rapid and whose propelling power is more dangerous.[2] Where a railroad company places its track so near an obstruction which it is necessary for its car to pass, that its passengers, in getting on and off the cars and while upon them, are in danger of being injured by contact with such obstruction, it is a fair question for the jury whether the company is or is not guilty of negligence. *Id.*

There was posted in the cars of the company the following notice: "Passengers will not be allowed to get on and off this car while in motion." Plaintiff swore that he never knew of any such rule; knew of one which forbade passengers to get on and off the front platform. The conductor was standing upon the back platform and saw plaintiff before he stepped upon the car, and was looking at the plaintiff as he boarded

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[1] North Chicago St. Ry. Co. v. Cotton, 41 Ill. App. 311; same case affirmed, 140 Ill. 486.

[2] North Chicago St. R. R. Co. v. Williams, 140 Ill. 275.

the car, and continued to look at him until he was knocked off by a telegraph pole, and shouted to him "to look out," just before he was struck by the pole. He did not warn the plaintiff not to get upon the car while it was in motion, but suffered him to step upon the platform without objection. It was a fair question for the jury whether, under all the circumstances, the plaintiff was not invited to get on the car. If he was invited then he was a passenger. Though a passenger may have been upon the car in violation of the rules of the railroad company, yet if it appears to the jury that the rules have been waived or revoked in his favor he will nevertheless be entitled to his action for his injuries suffered from any want of care on the part of the company. (Huelsenkamp v. Citizens' Ry. Co., 37 Mo. 537.) It is not held that a party is a trespasser after he gets on a horse car, even though no fare has been collected of him before he meets with an injury, simply because he violated a rule of the company as to the mode of getting on. It is not necessary that there be an express contract in order to constitute the relation of carrier and passenger, nor that there should be a consummated contract. The contract may be implied from slight circumstances and need not be consummated by the payment of fare or entry into the car or boat of the carrier. The whole matter seems to depend upon the intention of the person at the time he enters the boat or cars. (Butler v. Glen Falls & C. R. Co., 21 New York, 112.) The evidence shows that the plaintiff took the car "for the purpose of being conveyed as a passenger for hire," as alleged. The mere fact of riding on a platform of a street car is not conclusive proof of negligence. It was for the plaintiff to show by a preponderance of evidence, that he was in the exercise of ordinary care and that the defendant was guilty of such negligence as caused the injury.[1]

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[1] North Chicago St. Ry. Co. v. Williams, 40 Ill. App. 590; North Chicago St. Ry. Co. v. Williams, affirmed, 140 Ill. 275.*

* NOTE.—The defendant was changing its street horse car line over into a cable system, and to do this, placed its temporary track near the curb of the street. Outside of the curb stood a telegraph pole, leaning somewhat to the street. The east rail of the track was two feet from the bottom of said pole, and when an open car was passing, there was from nine to twelve inches between the telegraph pole and the east end of the seats, and if a man stood on the rail or platform running along the east side of the open car, passing that point, the distance between his shoulders and the pole would

SEC. 391. *Failure to stop street car where requested.*—For whatever damages a passenger may sustain from a failure to stop a street car at a proper place when properly requested, such failure being the proximate cause of the injury, a recovery might be had. But, if between the negligence of the driver and the injury to plaintiff's intestate, another cause intervened, without which the accident would not have happened, that intervening cause is to be considered the proximate cause of the injury. In law the immediate and not the remote cause of the event is regarded. The defendant, being a common carrier of passengers, is bound to exercise the highest diligence for the safety of its passengers, while riding, getting on and getting off its cars. In the providing of appliances for the safety of its passengers, it is bound to make use of such well known and approved means as are reasonably consistent with its condition, the business it is doing, and its duty to the public. (Smith v. N. Y. & Harlem Ry. Co., 19 N. Y. 127; Toledo & C. Ry. Co. v. Conroy, 68 Ill. 560.) Whether the deceased was in the exercise of ordinary care in getting off the car while it was in motion, and whether there were well known and approved appliances (guards) which, if in use, would have prevented the injury to the plaintiff, and whether the use of such guards was reasonably consistent with the condition of the defendant, the business it was doing, and its duty to the public, were questions for the jury. It is the duty of common carriers to be diligent in providing for the safety of their passengers, and it is *prima facie* liable for injuries happening to them on account of any negligence, they being at the time of such injury in the exercise of ordinary care.[1]

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vary from two to five inches in different cars. The plaintiff (Dr. Williams) boarded one of the defendant's open cars; while it was in motion he stepped upon the rail or platform, and, before he stepped from the platform into a seat, he was brought in contact with the telegraph pole and was knocked off the car, and falling upon the ground, was severely injured. The negligence charged against the defendant company was that it placed the said temporary track too near the curb line of the street and the telegraph poles upon the east side thereof.

Verdict for plaintiff.

[1] North Chicago St. Ry. Co. v. Wrixon, 51 App. 311; North Chicago St. Ry. Co. v. Wrixon, 150 Ill. 532.*

* NOTE.—William Wrixon, a boy about ten years of age, was a passen-

SEC. 392. *Right to expel passengers for violating rules.*—The plaintiff took passage on one of the defendant's electric cars, at a time when all the seats inside were occupied, but there was plenty of standing room within and the aisle was clear. He, with three others, took position on the rear platform, when they were requested by the conductor to go inside. It was against the rules of the company to allow passengers to ride on the rear platform. The others passed in, but the plaintiff refused. He was several times requested by the conductor, but each time refused and persisted in standing on the platform. At length the conductor told him he must either go inside the car or get off, and refused to go further with the car until plaintiff should comply. The plaintiff then left the car—no violence being used toward him. The conductor did not lay hands on him or offer to do so. The plaintiff is not entitled to damages. The rule, which he refused to comply with, and because of the enforcement of which he was denied passage on the car, was established for the safety of passengers and the convenience of employes operating the car. It was a reasonable and proper rule. He saw fit to stand out in defiance of it, evidently from sheer stubbornness, or to invite an assault from the conductor. A street car company has the right to require of passengers the observance of all reasonable rules tending to promote the safety and convenience of passengers and the successful conduct of its business. So long as a passenger observes such rules, the company is bound to carry him; but when he wantonly refuses to obey them the company has the right to at once expel him, using no more force than may be necessary for that purpose. The conductor should have control of his car with the right to enforce all needed regulations, and reasonable requests made by him with that end in view should be obeyed by passengers. Judgment reversed. Plaintiff has no cause of action.[1]

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ger on one of defendant's cars. The car was proceeding southward on Evanston avenue; just as it arrived at the Addison avenue crossing the deceased said to the conductor, "Let me off at the church."

The church was about seventy-five feet south of Addison avenue. The car did not stop and the defendant jumped, swung or stepped off; in doing so he slipped and fell so that the car passed over his leg, inflicting injuries from which he died.

[1] Fort Clark St. R. R. Co. v. Ebaugh, 49 App. 582.

SEC. 393. *Injury while trying to board street car.*—Defendant's car had stopped. The stopping of the car was an invitation to any person who desired to become a passenger to get on board, and it became the duty of appellant to afford such persons a reasonable opportunity to do so. Defendant is bound to exercise the greatest diligence to enable parties so invited, to get on, to ride in, and get off its cars without injury. When this car stopped and the plaintiff, having hold of the hand-rail, was about to step up, for the car to start before he had a reasonable opportunity to get safely on, was presumptively negligence upon the part of the defendant. What is a reasonable time for a person to get upon a car depends to some extent upon the age and agility of the party endeavoring to do so. Defendant being bound to exercise the greatest diligence to enable plaintiff to enter its car without being injured in his attempt to do so, it can not plead the attention of its servants to other matters as an excuse for this want of care for his safety. All that human foresight and skill could do for the protection of the plaintiff it was bound to do, and the evidence does not show that it exhausted the practical resources of ingenuity, care and skill in providing for the safety of this old man.[1]

SEC. 394. *Opportunity to safely mount street car.*—Where a street car had stopped at a point usual for taking on passengers, the duty devolving upon those in charge of the car of giving ample opportunity for safely mounting, is not limited

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This suit was brought by an administrator and a verdict of $5,000 rendered. The appellate court reduced the verdict to $2,500, and affirmed the judgment.

[1] North Chicago St. Ry. Co. v. Cook, 43 Ill. App. 634; North Chicago St. Ry. Co. v. Cook, affirmed, 145 Ill. 551.*

* NOTE.—Plaintiff, an old and infirm man, signaled one of defendant's cars to stop and let him on. The car passed him a short distance and stopped to let a woman off. Plaintiff being beckoned by passengers to come on, hobbled along and caught hold of the hand-rail; he was not very active, and before he could step up, some one, a passenger apparently (conductor denies he did it), gave a signal to go on, in consequence of which the car started, pulling the plaintiff off his feet and leaving him lying on the street. The car stopped, the conductor and passengers ran back, and it was found that the plaintiff had sustained a serious injury—a broken arm. Verdict and judgment for plaintiff, $1,625. Affirmed.

to the person or persons who may have signaled the car. It is their duty to stop a sufficient time for others, desiring to take passage, to do so safely. If they do not and the car suddenly starts, while one is in the act of getting on, and he is thereby injured, the street car company is guilty of negligence.[1]

SEC. 395. *Newsboy, mere licensee, can not recover.*—A newsboy plying his trade, injured while upon the front platform of a street car, by the car running off the track, is not entitled to recover therefor, as the evidence failed to show that the street car company or its employes were guilty of gross negligence, and the boy took no care for his own safety, and was not a passenger, but was a mere licensee.[2]

SEC. 396. *Street car—Attempt to mount— Where not invited.*—The street railway company did not stop its cars to take on passengers. The plaintiff ran after one and attempted to get on the front platform; the gate was there and prevented him

[1] Joliet Street Ry. Co. v. Mary Duggan, 45 Ill. App. 450.*

[2] North Chicago St. Ry. Co. v. Thurston, 43 Ill. App. 587.†

* NOTE.—The car was in charge of a motorman alone. It had stopped to take on a passenger at a point in Jefferson street. It had been signaled by another lady, plaintiff following closely in the rear. The car was standing still when she attempted to mount it; she says that just as she had one foot upon the step and her hand upon the hand-rail the car started suddenly and she was thereby dragged several feet and thrown to the ground. Two eye witnesses corroborate her. It was the duty of the motorman to exercise the care and caution, in allowing passengers opportunity to safely mount and alight, as is required of a conductor and motorman on a car so manned. It was his duty before starting his car to see whether any person other than the one who had signaled was in the act of taking passage. Verdict and judgment for $2,000 affirmed.

† NOTE.—The plaintiff, a newsboy, ran along the side of a car, heard some one whistle and jumped on the front platform; he was about to serve a passenger with a paper when his hand was caught between the railing of the car and the standard of the bridge; he was holding to the railing with his left hand and trying to get a paper from underneath his arm with the other hand. The car was ten or fifteen feet from the bridge when the boy jumped on. When near the bridge the car appears to have run off the track. The boy who drove the third horse says "that it flew the track" where the plank approach to the bridge begins, and that it moved about twenty or twenty-five feet after it got off. There was a rule of the company, enforced to some extent, directing conductors not to permit newsboys on the front platform of the cars. Verdict for plaintiff for $3,000. Reversed and case remanded.

from getting a firm hold, and he fell, and there being no fender about the wheels to push him away, the wheels ran over him. The court directed the jury to find for the defendant, and the plaintiff appealed. The direction was right. The failure or refusal to stop cars for passengers might entitle a person aggrieved to an action, but cuts no figure in this case. The plaintiff had not become a passenger. No relation had been established between the parties; the plaintiff had rushed into danger, and the defendant company could only be made liable, not for simple negligence, but for such gross negligence as implied a wilful or wanton injury. Nothing of that kind appears.[1]

SEC. 397. Upon the trial of a suit for damages against a street railway company, for negligence in running a car over the plaintiff, a lad of about seven years, the statements of the driver of the car, just after the car was stopped, and while the plaintiff was under it, are proper to be shown in the evidence as a part of the *res gestæ*.[2]

SEC. 398. The law imposes upon those controlling vehicles in public streets the duty of exercising ordinary care not to injure other people, but what particular acts or course of conduct are or is consistent with the discharge of this duty, is not a matter of judicial knowledge, but for the jury to decide.[3] Where street cars of different lines have equal rights at a crossing of their tracks, the fact that the hind end of the car upon one of them is struck by the front end of the other while passing over such crossing, of itself and without explanation, raises the presumption that the colliding car was carelessly managed. Where in such case a given car has the crossing, the person in control of an approaching car is bound to so govern the movements thereof as that, whether the first car goes fast or slow, and even if it comes to a dead stop with the rear end still in the cable track, he can stop his car before striking it.[4]

SEC. 399. A person struck and injured by a street car, held, not entitled to recover damages therefor, because it does not

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[1] Basch v. North C. St. Ry. Co., 40 Ill. App. 583.
[2] Quincy Horse Ry. v. Gnuse, 137 Ill. 264.
[3] West Chicago St. Ry. Co. v. Coit, 50 App. 640.
[4] Chicago City Ry. Co. v. McLaughlin, 40 Ill. App. 496.

appear from the evidence that he was in the exercise of ordinary care to avoid the injury.[1]

Stringent as are the obligations of carriers of passengers toward their passengers, their obligations toward others rest upon grounds of humanity and respect for the rights of others, and require them to so perform the transportation service as not wantonly or carelessly to be an aggressor toward third persons, whether such persons be on or off the vehicle. (C., B. & Q. Ry. Co. v. Mehlsack, 131 Ill. 61.) A boy, in this case, ran toward the car, and (unseen by the gripman) caught the rear platform of the grip. To what extent he then got upon the step or got hold of any support, is in doubt, but at that instant there was a sudden acceleration of speed, a "jump," the witness called it, and the boy fell and was run over and killed by the wheels of the trailer. Whatever may be the duty of the company toward passengers, it owed none of protection against the consequences of his own acts toward this unfortunate boy. "There can be no negligence without the failure to observe some duty." (Moran, J.)[2]

Sec. 400. Without an ordinance, negligence can not be predicated of any particular rate of speed of a street car, as matter of law, but it might be as matter of fact. A limitation of the rate by ordinance is not authority to run up to the limit regardless of existing circumstances and conditions. It is competent for a plaintiff to allege in the same count negligence in law as to the rate of speed by exceeding the limit so prescribed, or, in fact, by reason of the circumstances and conditions existing, and apparent at the time; and proof of either would sustain a finding for the plaintiff, upon the issue of negligence. Negligence, or want of due care as to the speed, is the gravamen of the charge, and is proved by showing either.[3] The company (Quincy Horse Ry. Co.) has no exclusive right of possession of the city streets. They are intended for the use of children as well as vehicles, not merely as ways by which to go to school, or upon errands of business, but as places in which to play, consistently with the rights of others, and subject to risks for want of due care on their part. The plaintiff (Ed-

[1] North Chicago St. R. R. Co. v. Martin, 51 Ill. App. 247.

[2] West C. St. Ry. v. Binder, 51 App. 420.

[3] Quincy Horse Ry. Co. v. Gnuse, 38 App. 212.

ward F. Gnuse) had the right to use Eighth street, and to go upon and across defendant's tracks thereon, for the purpose then in his mind. The way was clear before him. It is the duty of drivers of all vehicles on streets to keep a reasonable lookout ahead, and their teams so well in hand as to be able to slow and stop promptly, to avoid injury to others coming suddenly in their way. Pedestrians on the streets may well rely, to some extent, on the performance of this duty by the drivers of vehicles behind them. In this respect the case of the Quincy Horse Railway Company and its servants in charge of its cars, differs materially from that of the locomotive railway companies and their train men, And that of the plaintiff is materially different from that of one who, seeing or otherwise knowing that a car is coming, and is or may be dangerously near, knowingly takes the risk of an attempt to cross its track in advance of it. The court knows of no precedent upon which it could hold as law, or find as fact, that in failing to look around, or back, for the car by which he was injured, if he did so fail before he went on the track, plaintiff (a child of seven years) showed a want of ordinary care for his own safety. It was a question of fact for the jury. Three juries have agreed in a finding and the evidence does not justify a reversal. *Id.*

SEC. 401. *Alighting from a street car.*—The jury was instructed in substance, that if the plaintiff (Mrs. Dinsmore), a passenger on defendant's car, notified the conductor of her desire to alight at a given point (cor. of Forty-fourth and State street) it was the duty of defendant to bring the car to a full stop so as to enable plaintiff to safely step from said car to the ground, and to give said plaintiff a sufficient length of time to alight; and if the jury believed from the evidence that said car did come to a stop at the corner of Forty-fourth and State streets, and, while the car was at a stop, the plaintiff used ordinary care and diligence in endeavoring then and there to alight from the car, and also further believed, from the evidence, that the car was suddenly started while plaintiff was in the act of alighting, and that she was injured thereby, then the plaintiff is entitled to recover. This instruction is held erroneous, as it told the jury, as matter of law, that if the facts therein set forth were true, the plaintiff should recover,

whereas the plaintiff was not entitled to recover unless the defendant had been guilty of negligence, and the acts of defendant mentioned did not necessarily constitute negligence. Whether or not the defendant was negligent was questioned for the jury to determine.[1]

SEC. 402. On the trial of an action against a railroad by a passenger for an injury received through a collision of the trains, a *prima facie* presumption arises against the carrier company. (N. C. St. Ry. Co. v. Cotton, 140 Ill. 486; Hutchinson on Carriers, Sec. 800; Iron R. R. Co. v. Mawry, 36 Ohio, 418.) In Central Passenger Co. v. Kuhn and L. V. N. R. R. Co. v. Kuhn, 86 Ky. 578, the plaintiff was a passenger on a street car, which, while passing a railroad crossing at night, was run into by a train and the plaintiff injured, and it was held that the burden of the proof was on the street car company to show, if such was the case, that the injury did not result from its want of diligence, but from the negligence of the railroad company, and that the burden was on the plaintiff to prove negligence on the part of the railroad company, if he desired to recover from each. (See also Pittsburg, C. St. L. Ry. Co. v. Thompson, 56 Ill. 138.)

But the plaintiff in this case did not proceed upon the theory of presumptive negligence. He charged specific acts of negligence against both defendants (West C. St. Ry. Co. and Chicago N. W. Ry. Co.), and introduced evidence to prove them. While the rule of law[2] invoked was correct, it was not applicable, hence should not have been given.

SEC. 403. *Degree of care required of a passenger on a street car.*—All the care required of a passenger on a street car is ordinary care, which is such a degree of care as ordinarily careful persons would exercise under similar circumstances. (Chicago & Alton Ry. Co. v. Fisher, 141 Ill. 614.) It can not be said as a matter of law, that for a passenger to stand and ride upon the footboard of a car, holding on to the railing, where the cars are crowded, is negligence. So long as carriers of passengers in a crowded city tolerate and encourage such methods of transportation of persons upon the street cars, the rule of law which demands the highest degree of diligence

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[1] Chicago City Ry. Co. v. Dinsmore, 162 Ill. 658.

[2] West Chicago St. Ry. Co. v. Martin, 154 Ill. 523.

on the part of the carrier must not be relaxed. It is a question of fact for the jury to determine whether the plaintiff himself was guilty of contributory negligence, either in riding where he did, or in his conduct after the peril became known to him. And so it was also a question of fact for the jury, whether the defendant negligently managed its train in the presence of the danger known to its agents to exist, from the apparent drunkenness of the driver of the wagon, and in the crowded condition of the street. The plaintiff had a right to assume that the train would be so managed as to make it safe for him to stay on it even though he had noticed the circumstances of the peculiar driving of the team. It was a matter the gripman had full observance of, and it behooved him in the proper discharge of his duty to so manage the train that the wagon should be passed in safety to the passengers. Whether the train was managed negligently or not, and whether the plaintiff was guilty of contributory negligence or not, were questions for the jury to decide.[1]

SEC. 404. *Passengers entitled to safe place to alight.*—It is as much the duty of a carrier of passengers to provide them with a reasonably safe place to alight as it is to carry them in safety to their stopping place. C. & A. Ry. Co. v. Wilson, 63 Ill. 167; C. & N. W. Ry. Co. v. Drake, 33 App. 114; Mavwick v. Eighth Ave. R. R. Co., 36 N. Y. 378.[2]

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[1] West Chicago St. R. R. Co. v. McNulty, 64 App. 549; West Chicago St. R. R. Co. v. McNulty, affirmed, 166 Ill. 203.*

[2] West Chicago St. Ry. & N. C. St. Ry. v. Cahill, 64 Ill. App. 539.†

* NOTE.—From the time the plaintiff boarded the car until the accident happened, he stood and rode upon the footboard that ran lengthwise upon the right-hand side of the car, in the direction it was moving: so stood and rode a distance of about four blocks. The train was composed of two cars, called trailers, and a grip-car, and the plaintiff was standing upon the footboard near the rear end of one of the trailers. The train overtook a team and wagon going in the same direction, and driven, as the gripman testified, by one who seemed to be intoxicated, and who kept zigzagging in and out of the track just ahead of the train. Finally the wagon pulled out, and as the train was passing, the hub of one of the wagon wheels scraped along the footboard, and the plaintiff was struck by it and injured. One of his legs was broken and he received other injuries. The train was crowded, all the seats were occupied, and the isle between the seats and the platforms were crowded. If there was a safe position on the train for plaintiff, no one pointed it out to him.

† NOTE.—This was an action against the two street railway companies

SEC. 405. For a wilful trespass by the servant, the carrier is responsible where the person injured is a passenger. (Chicago & E. I. v. Flexman, 103 Ill. 546, 9 App. 250.) But the responsibility of a carrier of passengers for the conduct of its servants toward other persons upon the car, exists only when such others are passengers, or when its servants are discharging some duty they owe to their master.

When a person is on a car, ready to pay fare, it is held sufficient to show that he is a passenger, and, as such, lawfully upon the car.

In order to charge a street railway company for personal injury, growing out of an assault by one of its servants, the declaration must allege that the plaintiff was a passenger, and set out a state of facts that would make the carrier responsible for the alleged wrongful acts of its servant.[1]

SEC. 406. The plaintiff was without fault. She was a passenger for hire, entitled to be safely transported, and the presumption is that the overturning of the car resulted from the defective condition of the track or the mismanagement of the car, or both combined, and the *onus* was upon the company to show that the accident resulted from a cause for which it was not responsible. (P., C. & St. L. R. R. Co. v. Thompson, 56

[1] William Barger v. North C. St. R. R. Co., 54 App. 284.*

named, for personal injuries sustained by reason of their joint negligence. It appears that during the change being effected by one of them from horse to cable-car, temporarily their tracks were laid so close together on the Sixteenth street viaduct that when the cars of the two companies passed each other, there was less that a foot between the guard-rails of the cars. Plaintiff was invited by the conductor to alight at the same end of the viaduct, and as she did so, the car of the West Chicago Street Railway company came along, and she was caught and crushed between its car and the car from which she had just alighted.

Verdict for plaintiff, $2,000. The two companies were sued jointly.

* NOTE.—The plaintiff, Barger, testified that he got upon the front platform of a horse-car of the defendant, by invitation of the driver, and by his direction stood at his right hand; that he had a nickel in his pocket, but the conductor did not come or ask for fare; that the driver struck him, plaintiff, and knocked him off the car, and the wheels ran over his leg, injuring it so that it was amputated. Two witnesses corroborated him, as to being pushed from the car. No count in the declaration alleges in terms that the plaintiff was a passenger, nor in any way sets out facts that would make the defendant company responsible for the alleged acts of the car driver. The declaration does not state a cause of action.

Ill. 138; P., P. & J. R. R. Co. v. Reynolds, 88 Ill. 418; Eagle Packet Co. v. Defries, 94 Ill. 598.) The jury were of the opinion that the accident was caused by the bad condition of the track coupled with the speed of the train.[1]

SEC. 407. *Question of defendant's negligence is for jury.*—An instruction that a street car company should bring its car to a full stop long enough to enable a lady passenger, desiring to alight, to safely step to the ground, and that if while she was, with ordinary care, alighting, during such stop the car was suddenly started and the passenger thereby injured, she is entitled to recover, is erroneous, as the acts set forth do not, as a matter of law, necessarily constitute negligence. This instruction told the jury, as matter of law, that if the facts therein set forth were true, the plaintiff should recover; whereas the plaintiff was not entitled to recover unless the defendant had been guilty of negligence, and the acts of the defendant mentioned did not necessarily constitute negligence. Whether or not the defendant was negligent was a question for the jury to determine.[2]

SEC. 408. *In presence of imminent peril.*—Plaintiff being a passenger on a street railway, the defendant company was bound to exercise the highest degree of care and skill to insure his safety; and if to avoid an imminent peril caused by the conduct of the defendant, he, in the exercise of ordinary care

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[1] Elgin City Ry. Co. v. Mary Salisbury, 60 Ill. App. 173; Elgin City Ry. Co. v. Addie M. Wilson, 56 Ill. App. 364.*

[2] Chicago City Ry. Co. v. Dinsmore, 162 Ill. 658.

*NOTE.—Two actions for injuries sustained by each plaintiff in said causes while passengers on an electric street car which, while moving at a rapid rate of speed upon a down grade and around a curve, left the track and was precipitated over a high embankment. There was a recovery in the case of Mary Salisbury of $7,275, which by a remittitur was reduced to $4,000, and affirmed; in the case of Addie Wilson a verdict of $7,000, but for error in *orally* instructing the jury, which was erroneous, the case was reversed and remanded. Both plaintiffs were in the same accident, and testimony was same in both cases. In this case the court refused the second, third and fourth interrogatories to the jury for special findings offered by the defendant, because they related to evidentiary facts. (C. & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132.) The negligence charged in the declaration was, running at a dangerous rate of speed over a road-bed of an uneven grade and defective rails. The fact found in response to either one of the interrogatories would not be a controlling one in the case.

and prudence for his own safety, stepped off the car, and in so doing was injured, the defendant is liable.[1]

SEC. 409. *Burden of proof—Presumptions.*—Where the injury to a passenger on a street car occurs by reason of any defect in the machinery, or cars, or apparatus, or track of the carrier, or where there is anything improper or unskillful or negligent in the conduct of its servants, or unsafe in the appliances of transportation, the presumption then arises in favor of the negligence of the carrier, and the burden of rebutting this presumption is thrown upon it. But if the plaintiff's own evidence shows that the accident was due to a cause beyond the control of the carrier, as the presence of the *vis major*, or the tortious act of a stranger, tending to produce the accident, no such *prima facie* case is made out as will throw the burden upon the carrier of showing that it was not guilty of the negligence. The presumption in question comes from the nature of the accident and the circumstances surrounding it, rather than from the mere fact of the accident itself. These circumstances must be such as tend to connect the carrier with the cause of the injury. If the circumstances surrounding the accident are such as to indicate that it would not probably have occurred if the company had been in the use of suitable machinery or safe apparatus, or if it had employed proper or competent servants to manage such machinery or apparatus, then the burden of proof will be shifted to the carrier. Such presumption of negligence has been held to exist against the carrier in cases of the overturning of a stage

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[1] West Chicago St. Ry. Co. v. Lyon, 57 App. 536.*

* NOTE.—Plaintiff, Lyon, was riding as a passenger on one of defendant's street cars proceeding eastward, and having crossed Harrison street viaduct, as it reached the incline leading down to the bridge, slid upon the rails and could not be stopped by the brake, thus being in danger of colliding with a wagon in front. The plaintiff was then standing upon the front platform, and, according to his testimony, the driver swung his horses to one side, they being thus thrown down. The driver was drawn along by the lines, and reached out and clutched hold of plaintiff, dragging him off the car, so that he fell upon the pavement and was injured. By the testimony of other witnesses it appears that plaintiff, alarmed at the threatened collision, voluntarily stepped off the car, fell and was injured. The court believed it more probable that the injury was caused in the last mentioned manner.

coach, or of the derailment of a car, or the sudden jerk of a train, or a collision between two trains belonging to the same carrier, or of the breaking down of a bridge upon the line of railway. It is reasonable that a presumption of negligence should arise against the carrier in cases where the cause of the accident is under its control, because it has in its possession the almost exclusive means of knowing what occasioned the injury and of explaining how it occurred, while the injured party is generally ignorant of the facts. But where the cause of the accident is outside of and beyond any of the instrumentalities under the control of the carrier, its means of knowledge may not be and are not necessarily better than those of the passenger. In the case of Rood, the car in which he was riding was traveling along the public street of a city, which the owners of other vehicles had as much right to use as the owners of the cable cars. Plaintiff's own testimony showed that he was injured by a wagon traveling along the public street, and passing the car in which he was riding. The accident may have been due, so far as plaintiff's evidence showed, to careless driving on the part of the driver of the wagon, and was equally consistent with the absence as with the existence of negligence on the part of the defendant. At any rate, such evidence left it doubtful whether appellant was guilty of negligence or not, and the presumption that the accident was unavoidable was as reasonable as that it was due to appellant's negligence. Under such circumstances the nature of the accident was not such as to throw the burden of proof upon the defendant. * * * Where the accident is one which would not in all probability happen if the person causing it was using due care, or the instrumentality causing the accident is solely under the management of the defendant, then the occurrence of the accident, together with proof of the exercise of due care on the part of the plaintiff, is sufficient *prima facie* proof of negligence to impose upon the defendant the *onus* of rebutting it.[1]

SEC. 410. *Diligence of carrier in starting car.*—A common

[1] Chicago City Ry. Co. v. Rood, 163 Ill. 477.*

* NOTE.—The plaintiff (Rood) was on the grip-car of a north-bound train, on the second seat from the front, and on the west side of the car. The side of the car was open, and the plaintiff sat with his arm around a

carrier of passengers for hire is bound to exercise the highest degree of diligence for the safety of his passengers.[1]

SEC. 411. *Safety of passengers on boarding car.*—Common carriers of passengers, while not insurers of safety, are, so far as human care and foresight can go in ways consistent with the nature of the business to be done, to provide for the safety of the passengers.[2]

SEC. 412. *Presumption of negligence by collision of company's trains on same track.*—Without any proof of the cause, the jury may justly find that a collision on the same track, of two cars or trains of a passenger carrier, is due to the negligence of the carrier.[3]

SEC. 413. *Motorman not at his post, negligence.*—A motorman should be at his post all the time, and it should be no part of his duty to collect fares. An electric car moving at the usual rate of speed along the street of a city should be under the constant guidance and control of the motorman, who should be always at his post to slacken speed and give warning whenever necessary. No doubt the accident in this case might have been avoided if the car had been so handled and

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post supporting the roof, at the end of the seat, and his right foot crossed over his left, and thus both his arm and his right foot extended—how much is not clear—beyond any protection which the frame-work of the car afforded to his person. The principle upon which the case was tried was, that under such circumstances as to the relation of the parties (passenger and carrier), the burden was on the railway company to explain why the plaintiff was brushed and his right foot caught by a passing team and wagon and he hurt. This ruling (62 App. 550) reversed.

[1] West Chicago St. Ry. Co. v. Nash, 64 App. 548.*

[2] West Chicago Street Ry. Co. v. Malvina Craig, 57 App. 411.†

[3] North Chicago St. R. R. Co. v. Caroline Boyd, 57 App. 535.

* NOTE.—The plaintiff took passage on defendant's street car, stepping on the rear platform of the trailer, a closed car, with seats along the sides. Before she had gone very far along the aisle, the car (she says) started up suddenly and she was thereby thrown and stumbled and fell over a satchel standing in the aisle, and was thereby injured. Jury returned verdict for plaintiff with $1,500 damages.

† NOTE.—Mrs. Craig, plaintiff, with a two year old baby and bundle in her arms boarded a Madison street cable car going west, at Madison and Jefferson streets. She was well inside the car, which was a closed one, with seats running along the side, and was about to sit down, when the car started and she was thrown down on the floor, striking her left hip and head, and sustaining, as she alleges, serious internal injuries. Verdict for plaintiff affirmed.

managed. There is no doubt that the proof shows a clear case of negligence.[1]

SEC. 414. *Fallen electric wire—Prima facie negligence.*—It is established as a rule of law in this state, that proof of an injury occurring as the proximate result of an act which, under ordinary circumstances, would not, if done with due care, have injured any one, is enough to make out a presumption of negligence, and this is held to be the rule even where no special relation, like that of passenger and carrier, exists between the parties. (North Chicago St. Ry. Co. v. Cotton, 140 Ill. 486.) In the case of the use of a highly dangerous agent, like electricity, for the propelling of street cars for the carrying of passengers, the law requires a high degree of care, commensurate with the danger. If a wire highly charged with electricity is allowed to hang loose in the street, as in this case, where people are traveling, the result to pedestrians or horses coming in contact with it is instant death. Therefore a party who employs such agency should use the highest degree of care to avoid exposing the public to such danger. If such care had been exercised, either this wire would not have been broken by the trolley pole, or if broken, the conductor would have discovered it and the wire been instantly removed.[2]

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[1] City Electric Railway Co. v. Jones, 61 App. 183.*

[2] Larson v. Central City Ry. Co., 56 App. 263.†

*NOTE.—As the plaintiff (Christiana Jones) was walking across Water street, city of Decatur, a car in charge of a servant of defendant ran upon her, injuring her. Plaintiff might have seen the approach of the car had she been looking; she was not looking in that direction, but her attention was attracted by a runaway team which dashed across the street and struck a post, upsetting the vehicle. She was watching this, and then the car struck her. She was carrying a basket of clothes and wore a sunbonnet which projected past her face. She did not see or hear the car. It was moving at the rate of ten miles an hour, no signal being given—the motorman at the time being inside *collecting fares.* The plaintiff's peril was discovered and brought to his attention by some of the passengers. He ran to his brake as quickly as possible but was too late. No doubt he was running faster than allowed by ordinance when he left his brake, and the car was running without guidance or control.

†NOTE.—Charles Larson, son of plaintiff, was driving his father's horse attached to a delivery wagon, and the horse stepped on an electric wire and dropped dead. The defendant company had power by ordinance of the city of Peoria to operate an electric railway in the streets of that city. The wire on which the plaintiff's horse stepped rested on the trolley wire directly over the track and car. Before it was broken the wire was fastened to a pole at

SEC. 415. *Care for persons on street.*—A gripman is not required to slacken his usual speed on seeing children standing in the street near the curb, and upon seeing them start to run across the track, if he stops as soon as possible, the company is not chargeable with negligence in the absence of any claim that the train was not properly supplied with brakes.[1]

SEC. 416. *A street railway a common carrier.*—A street railway company is a common carrier of passengers for hire. (C. C. Ry. Co. v. Engel, 35 App. 491; N. C. St. Ry. Co. v. Williams, 140 Ill. 275; N. C. St. Ry. Co. v. Wrixon, 51 App. 308; N. C. St. Ry. Co. v. Coit, 50 App. 640; N. C. St. Ry. Co. v. Cook, 145 Ill. 551.) June 26, 1890, the city council passed an ordinance, which is still in force, section 1 of which is as follows: "That the rate of fare to be charged by any person, firm, company or corporation, owning, leasing, running or operating street cars or other vehicles for conveyance of passengers on any street railway within the limits of the city of Chicago, for any distance within the city limits, shall not exceed

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the corner of Washington and Main streets toward the bank, and diagonally across the street. The driver did not see the wire until the horse was down; it was hanging down on the track and in the middle of the street. This wire had been hanging above the defendant's trolley wire for two years. While the electric car was coming up Main street the trolley pole slipped off the trolley wire, on which it ran, and flew up and against the suspension wire and broke it, so it fell down, when it was stepped on by the horse. It had been down three or four minutes before it was stepped on. The conductor did not know that the trolley was off until called to by a bystander. The trolley was out of place, no one giving any attention and no heed as to whether it had done any damage when off at a place where a wire that might be broken was known to be. *Prima facie* the accident was due to the negligence of the defendant, and it offered no evidence to rebut such proof. The value of the horse was $150.

[1] Rack v. Chicago City Ry. Co., 173 Ill. 289.*

* NOTE.—The accident in the case occurred August 8, 1893, west of the crossing of Fifty-fifth street and Kimbark avenue, in Chicago. Plaintiff (Hermanns Rack), a boy of four years and seven months of age, then had one of his feet so crushed and lacerated that it became neccessary to take off all the toes. Plaintiff and another small boy were first seen by the gripman of the cable train, then coming from the east, standing in the roadway of Fifty-fifth street south of the east-bound cable track, two or three feet from the curbstone. The gripman was then about 150 feet away and running at the rate of about ten miles per hour. The distance of the curbstone from the east-bound cable track was about twelve feet. When the gripcar was

five cents for each passenger over twelve years old," etc. The legislature has power to regulate the charges of common carriers. (Munn v. Illinois, 4 Otto, 113; C., B. & Q. Ry. Co. v. Iowa, 4 Otto, 156; Ruggles v. People, 91 Ill. 256; same, 108 U. S. 526. As to limitations upon this power see Chicago, M. & St. Paul Ry. Co. v. Minnesota, U. S. Sup. Ct. 1890.) By clause 42 of Sec. 1, Art. 5, Chap. 24, Revised Statutes, the city council is given power "to license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen and all others pursuing like occupations, and to prescribe their compensation. In Farwell v. Chicago, 71 Ill. 269, the supreme court, speaking of this statute says: "It is designed to operate upon those who hold themselves out as common carriers in the city for hire, and to so regulate them as to prevent extortion, imposition and wrong to strangers and others compelled to employ them, in having their property or persons carried from one part of the city to another."

Defendant had no right to lay railway tracks in the streets of the city, or to operate cars thereon except by permission of the city. In giving such permission the city could prescribe such conditions as to rates of fare as it saw fit.

The railroad and warehouse act is not regarded as applying to the operations of street railways within the limits of one city. Dean v. Chicago Gen'l Ry. Co., 64 Ill. App. 165.

SEC. 417. *Getting on a moving car.*—To get on or off a moving street car is not necessarily a failure to exercise ordinary care.[1]

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about thirty or forty feet away the elder boy started to run north across the street, and when he had gone about fifteen feet the plaintiff also started to run across, directly in front of the approaching train. The gripman shouted as soon as the elder boy started, and also at plaintiff when he started. He put on the brake and reversed the lever when the first boy started, but could not stop in time to save the smaller boy. After striking the child the train ran the length of the next car or about thirty-five feet and stopped. There is no evidence to show defendant guilty of negligence.

[1] West C. St. Ry. Co. v. Dudzik, 67 App. 681.*

* NOTE.—The plaintiff (Dudzik) alleged that the defendant company, after having stopped its car for plaintiff to board, started while the plaintiff was attempting to do so, thereby throwing him to the ground; that defendant so negligently handled its train while the plaintiff was attempting to board it, that he was thereby thrown to the ground. The accident occurred on the northwest crossing of Tell court and Milwaukee avenue. The plaint-

SEC. 418. *Care to be exercised at crossings.*—Street car companies should exercise great care at crossings, more especially when trains, moving in opposite directions, arrive at a crossing at about the same time. (Chicago City Ry. Co. v. Jennings, 157 Ill. 274.) The questions of whether the plaintiff exercised ordinary care, and whether the defendant was negligent, were submitted to the jury upon the evidence, for its determination, and it found for the plaintiff.[1]

SEC. 419. *Street car companies must give time for passengers to safely alight.*—A street car company is bound to afford a passenger a reasonable opportunity to alight with safety, and the crowded condition of a car is no excuse for lack of attention to a request of a passenger, that a car stop for him to get off. The failure of a conductor to hold a car until a passenger has a reasonable opportunity to get off at a place and in a manner that would not subject him to injury by a passing team drawing another car, is negligence.[2]

SEC. 420. *Sudden starting of car, etc.*—The plaintiff attempted to get off the car, upon which she had been riding, while the car *was moving* toward a stand-still, but it does not appear that any servant of the defendant company knew of her movement. She had signaled the car to stop, and this it was proceeding to do, when she, without waiting for it to come to a stand-still, attempted to get off from the foot-board to the ground. Unless some agent of the company knew that she was so doing, the

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iff having attempted to board the train just at the time, or immediately after it had picked up the new cable, the accident was caused by the accelerated speed of the train on the application of the grip to the new rope. The jury found defendant guilty of negligence and rendered a verdict of $482.

[1] West Chicago St. Ry. Co. v. Mary McCallum, 67 App. 645.*

[2] West C. St. R. Co. v. Wanita, 68 App. 481.†

* NOTE.—In this case the plaintiff, attempting to cross the street just behind one train, drove her buggy in front of another train going in the opposite direction, not seeing or hearing it till it was almost onto her. It struck her buggy and upset it, broke spokes in hind wheel and threw her out, injuring her. Damages assessed at $2,000.

† NOTE.—The accident happened to a small boy, a passenger, while endeavoring to alight from one of defendant's cars. The deceased was out with his mother, who, in charge of several children, having ridden on the car to her destination, attempted to get off. The car stopped, the mother with a babe in her arms got off safely; the deceased, five years of age,

sudden jerk of the car, if it took place, can not be said to have been a negligent act. C. W. Division Ry. Co. v. Mills, 91 Ill. 39; Nichols v. Middlesex Ry. Co., 106 Mass. 463; North C. St. Ry. Co. v. Lotz, 44 App. 78.

Her injury was the result of what she was then, without notice to the company, doing; for the signal to stop was not notice that she would *attempt to get off* without waiting for the car to stop.[1]

SEC. 421. *Notice by passenger of desire to alight.*—If one of the conductors or gripmen, or both, had notice from the *conduct* of the plaintiff, a passenger in their immediate presence and sight, that he wished to alight from the gripcar as soon as it came to the stop, which a would-be passenger had signaled the train to make, then such notice was as good as if given by express warning or notification.[2]

SEC. 421*a*. A plaintiff brought suit for personal injuries against a street railway company operating a double track railroad, and showed that he came near the track as a car was approaching; that he waited for it to go by and then undertook to go on his way, passing behind it, and was knocked down and hurt by a car on the other track going the other way, of which car he had no warning. Held, that a verdict of the jury, finding the defendant guilty of negligence and the plaintiff in the exercise of ordinary care, must stand. It was

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attempted to follow his mother, but was prevented by the crowded state of the car from keeping close to her, and got off from the opposite side of the car. In so doing he was struck by a team of horses, drawing one of defendant's cars in a direction opposite to that which the car upon which deceased had ridden, was going. It is probable that the conductor did not, in the crowd, notice that the deceased was trying to get off, as the car seems to have started and gone some distance before he jumped. The boy was killed, or injured so he died, and the verdict of the jury was for $3,000 damages against the company, which was affirmed by the appellate court.

[1] Chicago City Ry. Co. v. Minnie Gregg, 69 App. 77.*

[2] West Chicago St. Ry. Co. v. David S. Stiver, 69 App. 625.†

* NOTE.—The jury found a verdict against the defendant and assessed plaintiff's damages at $7,500, of which $2,500 was remitted and judgment entered for $5,000. The facts, as fully as reported, appear in the ruling of the court above. The judgment was reversed and the cause remanded by the appellate court.

† NOTE.—The plaintiff (Stiver) was a passenger on the gripcar of defendant about eleven o'clock in the evening in the month of May. Finding it too cold to ride on the open gripcar he determined to change his seat and

the duty of the plaintiff to exercise such care as a reasonably prudent and cautious person would do under like circumstances.[1]

SEC. 422. *Falling from platform of street car.*—It appears from the record that the trial court held that plaintiff was guilty of contributory negligence while riding on the platform of the street car, in not holding on to the rods of the platform. It is not negligence *per se* for a passenger riding on the platform of the street car to omit to avail himself of the platform bar to prevent falling. Ginna v. Second Ave. R. R. Co., 67 N. Y. 596.[2]

SEC. 423. *How and when one becomes a passenger on a street car.*—When a person enters a car in an open, orderly manner, conducts himself or herself as a passenger and is conveyed as such, with other passengers, from the place of boarding to destination, when an attempt is made to alight, the inference is inevitable (in the obscure testimony questioning it) that such person is a passenger. Express affirmative proof of

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go into the trailer, a closed car. To do so he stepped down on the footboard that ran lengthwise of the gripcar. At a street crossing the gripman was signaled by a man who wished to get on board. The speed of the train was slackened, if not stopped entirely, and the man got aboard. As soon as he did so the train was quickly started up, either from a complete standstill or from a very slow speed. The plaintiff was either thrown from the foot-board by the sudden starting up of the train, or having stepped to the ground in safety, was thrown as he attempted to get upon the platform of the trailer while the train was in rapid motion. One of his legs was broken in two places, and for his injuries the jury gave a verdict of $700, upon which judgment was entered against the defendant. The testimony in the case rendered the facts uncertain and the findings are involved in doubt. But in such case the jury settled (?) them in favor of the plaintiff.

[1] West Chicago St. Ry. Co. v. Nilson, 70 App. 171.

[2] Kean v. West Chicago St. R. Co., 75 App. 38.*

* NOTE.—Plaintiff was riding as a passenger on the front platform of the street car—was smoking a cigar. Observing the time, asked the driver what time he was due at Center avenue. The car was going rather slower than he thought it should. The driver answered by striking him in the face with the lines, knocking the cigar out of his mouth. The horses gave a sudden jerk and the plaintiff fell off and the wheels of the car crushed his feet—it was the sudden starting and jolting of the car that threw him off. Upon the trial, and at the close of the testimony, the circuit judge directed the jury to find a verdict for the defendant. This was error. There is ample evidence that plaintiff was injured as alleged in the declaration. The rule is, that if the evidence, with all legitimate inferences

the payment of fare is not essential to warrant regarding the party as a passenger.[1]

Whenever a street car is stopped at or near a crossing of streets, before the car is again put in motion it is the duty of those in charge of the car to exercise proper and reasonable care for the safety of the passengers.

If a car is brought to a stop at or near such crossings it is not unreasonable to charge the conductor and gripman in control of the car with notice that passengers may avail themselves of the opportunity thus presented for leaving the car, and also with the duty of exercising reasonable care before putting the car again in motion to see that passengers again seeking ingress into or egress from the car are not in such positions as to be endangered by putting the car again in motion. *Id.*

If a car approaching a street crossing comes to a stop at the nearest walk, passengers who have reached their destination may not unreasonably regard it as an invitation to alight, and other persons desiring to become passengers may, without any necessary imputation of negligence, endeavor to enter the car. Conductors, car drivers or others in charge of the movement of the car or train, after having brought the car to a stop, can not be permitted, because of the ordinance (at a street intersection, to stop at the further walk thereof), to ignore the fact that passengers, or those who desire to become such, may be imperiled by putting the car again in motion without notice or warning. *Id.*

There is no presumption of law that passengers know that the proper places to alight from street cars are at the further crossing of street intersections. If such a presumption exists, it is one of fact for the jury to determine, not to be declared by the court as a matter of law. When the car stopped at the nearest street walk, the passengers might well

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which may be deduced from it, tends to support the plaintiff's case, then the case can not legally be taken from the jury, but they must be allowed to pass upon it. Chicago & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132; Pullman Pal. Car Co. v. Laack, 143 Ill. 242; Lake Shore & M. S. Ry. Co. v. Richards, 152 Ill. 59; Wenona Coal Co. v. Holmquist, 152 Ill. 581; Jansen v. Siddal, 41 App. 279.

[1] West C. St. R. Co. v. Manning, 170 Ill. 417.

assume that such stopping was to enable them to leave the car at such walk. *Id.*

Where circumstances are such that an ordinarily prudent person would exercise a greater degree of care than under less threatening circumstances, such greater degree of care is but ordinary care under the particular circumstances. *Id.**

SEC. 424. *Evidence tending to prove negligence in collision between wagon and car.*—A bystander saw the danger of the collision and attempted to warn the driver of the car by calling out to him. The testimony also showed the position of the tracks, the car and the wagon, at and immediately before the collision. It is a fair and reasonable inference from this testimony, that if this driver had exercised proper care he might have foreseen the danger, as did the bystander, and avoided the accident by stopping the car. It can not be said in such case that the evidence, with all its reasonable inferences and intendments, wholly failed to prove the negligence charged, and peremptory instruction in such case to find for defendant is improper.[1]

SEC. 425. *Declarations of pain and suffering—How far evidence, etc.*—Exclamations of pain so immediately connected with the injury as to come within the rule making them a part of the transaction are competent evidence because they are the natural expressions of bodily agony and suffering, and are, in a sense, evidence of acts expressed in words. It is not so much what the sufferer says, as the fact of giving audible expression to suffering. A groan, a sigh, a scream, or other involuntary audible exhibition of pain, conveys to the mind the same impression as contortion of the features, writhing, struggling or other physical manifestations of agony. Therefore,

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[1] West Chicago Ry. Co. v. Carr, 170 Ill. 478.

* NOTE.—The plaintiff having come from the west to the east side of the city, the train stopped in Washington street, at or near the intersection with Fifth avenue, and such intersection being the place where she and her companion desired to alight, following her companion, who stepped off in safety, rose from her seat while the train was at a stand-still and stepped down upon the foot-board of the car in the act of stepping to the ground, when the train, without warning to her, was suddenly started up, causing her to fall to the ground, and caused the injuries suffered by her. She does not claim to have given any signal or word of her wish to get off at that point except such as was implied by her act of rising from her seat and stepping down in the manner stated.

any competent witness to such exclamations or exhibitions of pain and suffering may certainly be allowed to testify to them without injury to the opposing party, and, of course, as part of the *res gestae*, statements as to the manner of inflicting the injury, the location of the injury, and the pain and suffering are also proper to be proved by any competent witness. The rule should not be carried so far as to permit either physicians or others to testify to declarations made so long after the infliction of the injury as to be no part of the *res gestae*, not during treatment or attendance upon the injured party, or not upon an examination by a physician for the purpose of determining the nature, character and extent of the injury. To permit this would be to afford an opportunity to a party to manufacture evidence in his own behalf, and which, in at least most instances, could not be refuted or overcome. The adoption of such a rule could only be justified upon the ground of necessity, as against all the general rules as to the competency of testimony, and, in the absence of the statute making parties competent to testify, no such necessity appears to exist. The question put to an attending physician, whether she (plaintiff) then (just before a trial) suffered pain, was unobjectionable, but the answer, "She tells me she suffers pain," was incompetent, was not responsive to the question, and was hearsay, pure and simple.[1]

In an action for damages for personal injuries to a married woman residing with her husband, it is competent to prove the charges of the physician for treating her for the injury, as she might be liable therefor as well as her husband. *Id.* The fact of being a married woman does not exclude from consideration of the jury, as elements of damage, her loss of time and expense of medical attendance during her disability. *Id.*

SEC. 426. *Res gestae.*—In a personal injury case on trial, upon the question before the jury, as to how or in what manner the plaintiff was injured, it is competent, as a part of the *res gestae*, to show all that occurred, although in doing so it should appear that others were injured also. The injuries to others are a part and parcel of the same injury received by plaintiff, and in describing the manner in which

[1] West Chicago St. Ry. Co. v. Carr, 170 Ill. 478.

plaintiff was injured, the injuries received by the others being so closely connected, it would be almost impossible, in an intelligent manner, to give an account of one injury without at the same time disclosing the others.[1]

Statements of pain and suffering, past and present, when not made to a physician or medical expert for the purpose of enabling him to form an opinion with a view to treatment, or other legitimate purpose, unless made at the time of the injury, so as to constitute a part of the *res gestae*, are inadmissible. The rule, however, is different where statements have been made to a physician called upon to treat a person who may have received an injury. A physician (in Illinois C. Ry. Co. v. Sutton, 42 Ill. 438), when asked to give his opinion as to the cause of the patient's condition at a particular time, must necessarily, in forming his opinion, be to some extent guided by what the sick person may have told him in detailing his pains and suffering. This is unavoidable, and not only the opinion of the expert, founded in part on such data, is receivable in evidence, but he may state what his patient said in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and give it the character of *res gestae*. *Id.*

The same rule is declared in Quaife v. Chicago & Northwestern R. Rd. Co., 48 Wis. 524; Barker v. Merriman, 11 Allen, 322; and West Chicago St. Railroad Co. v. Carr, 170 Ill. 478.*

SEC. 427. An abutting lot owner has no right to invoke the aid of a court of equity to prevent the construction of a street railroad. He has no standing in equity on account of

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[1] The West Chicago St. Ry. Co. v. Mary Kennely, 170 Ill. 508.

* NOTE.—In said action for personal injury to Mary Kennely to recover damages sustained by reason of the negligence of the West Chicago St. R. R. Co., she alleged that she was a passenger on one of defendant's cars which ran through a certain tunnel under Chicago river, commonly known as the Van Buren street tunnel; that the defendant negligently permitted the train to run rapidly down the incline in said tunnel, and then caused the train to be suddenly stopped, in consequence of which the plaintiff was thrown with great force and violence against one of the seats of the car, thereby causing the injury complained of. On the trial the jury returned a verdict in favor of the plaintiff and assessed her damages at $2,000.

public injury or for the purpose of inflicting punishment upon the defendant for its wrongful acts. His injury is for a depreciation of property, which is capable of being estimated in money, and recoverable in an action at law; therefore a court of equity will not interfere by injunction.

Where injuries are consequential merely, a court of equity is not the proper jurisdiction to enforce a remedy, as a court of law is the proper tribunal for the determination of such questions between individuals and corporations, or between corporations.

Equity may go behind the nominal parties to the record to see who are the real parties prosecuting the proceeding—and this may be done even where the proceeding is in the name of the attorney-general. If the proceeding is prosecuted and carried on for the exclusive benefit of an individual or corporation, the court may order an information in such case to be dismissed.[1]

SEC. 428. The city of Rockford has power to regulate, by ordinance, the speed of street cars within the city, and perhaps other wholesome police regulations might be adopted in regard to the management and running of cars; but the city is not clothed with power to determine when or under what circumstances a street car company would be guilty of negligence, upon which a recovery might be predicated by a person who had been injured. The ordinance was improperly admitted in

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[1] The People ex rel. Moloney, Attorney-General, v. General Electric Railway Co. et al., 172 Ill. 129.*

* NOTE.—As to the facts in this case the court said: "From the evidence in this record we can not escape the conclusion that the inception of this information, its progress in the court below, and *what has been done here*, are in the interest of these rival companies. This information does not appear to have been filed to preserve a public right or benefit. It is, if sustained, preventative of a healthy competition in the interest of the people resident in that part of the territory of Chicago where the road is proposed to be constructed. It is to the advantage only of the corporations, which the chancellor found were the only parties in interest aiding in this proceeding. The complaint made on this information is not for the public welfare. No public good is here involved. No public policy is subserved by the filing of this information, if it rests alone on the complaint of two rival corporations, upon which we are constrained to find, from the evidence in this record, it alone rests. The chancellor who heard this case properly dismissed the information.

evidence, but it probably did no harm, as the court properly instructed the jury upon the law involved in the case.[1]

Sec. 429. On trial of an action for damages suffered from a personal injury caused by defendant's negligence, the court may, in exercise of its discretion, permit an injury to be shown to the jury. It was contended that there was an abuse of discretion in this case, because the "existence of the rupture, and the nature and extent of it," were not controverted by the defendant, and this was stated to the court when it proposed to make the exhibition. It is questionable whether the exhibition was proper under the circumstances, and whether its only effect would not be to excite feeling rather than to aid in settling any disputed question; but the court does not feel prepared to say that there was a clear abuse of the discretion confided to the court.[2]

It is not sufficient that a declaration in an action for negligence alleges it was defendant's duty to do certain things, but it must state facts from which the law will raise the duty. *Id.*

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[1] Rockford City Ry. Co. v. Blake, 173 Ill. 354.*

[2] Chicago & Alton Ry. Co. v. Clausen, 173 Ill. 100.

* Note.—Louis Blake (brother of the plaintiff) was riding a pony on the streets of Rockford. He came near where the plaintiff (a boy of twelve years old) and another boy were sitting, and got off his pony. The pony seemed to be afraid of something and commenced to back onto the street car track, and Louis called his brother Mason (plaintiff) to help him hold the animal. Mason took hold of the bridle and his fingers became fastened in the martingale ring, and as the street cars approached he was thrown under one of them and received the injury complained of. Whether the plaintiff was in the exercise of ordinary care at the time of the injury, and whether the street car company was guilty of negligence which resulted in the injury, as charged in the declaration, are questions of fact settled by the appellate court in favor of the plaintiff. It is claimed that the trial court erred in admitting as evidence section 8 of an ordinance of the city in force at the time, which reads as follows: "All conductors, motoneers, drivers and persons employed upon street cars shall use reasonable and proper care and diligence to prevent injury or damage to persons, teams or vehicles, and upon the appearance of danger to any such person, team or vehicle upon or near the track, the car shall be stopped, when by so doing such injury or damage may be averted."

CHAPTER VIII.

RAILWAYS.

NOTE.—The following statutory provisions of the State of Illinois, upon the subject of "Incorporation of Railroad Companies," are taken from the third volume of Starr & Curtis' second edition of "Annotated Statutes of the State of Illinois," 1896. [The section number of the statute is preserved in parentheses.]

SECTION (1) 430. *Who may own and operate a railway.*—That any number of persons, not less than five, may become an incorporated company for the purpose of constructing and operating any railroad in this state, and that any and all railroads or transportation companies authorized to be incorporated and transact business in this state by virtue of this act, shall be and they are hereby authorized and empowered to purchase, own, operate and maintain any railroad sold or transferred under order or powers of sale or decree of, or sale under foreclosure of mortgage, or deed of trust; and corporations heretofore organized under the provisions of the act hereby amended, their successors or assigns, shall have and possess all the powers and privileges conferred by this act.

SEC. (2) 431. *Articles of incorporation.*—Such persons shall organize by adopting and signing articles of incorporation, which shall be recorded in the office of the recorder of deeds in each county through or into which such railway is proposed to be run, and in the office of the secretary of state.

SEC. (3) 432. Such articles shall contain:

First. The name of the proposed corporation.

Second. The place from and to which it is intended to construct the proposed railway.

Third. The place at which shall be established and maintained the principal business office of such proposed corporation.

Fourth. The time of the commencement and the period of the continuance of such proposed corporation.

Fifth. The amount of the capital stock of such corporation.

Sixth. The names and places of residence of the several persons forming the association for incorporation.

Seventh. The names of the members of the first board of directors, and in what officers or persons the government of the proposed corporation and the management of its affairs shall be vested.

Eighth. The number and amount of shares in the capital stock of such proposed corporation.

SEC. (4) 433. *Corporate powers, seal, etc.*—When the articles shall have been filed and recorded as aforesaid, the persons named as corporators therein shall thereupon become and be deemed a body corporate and shall thereupon be authorized to proceed to carry into effect the objects set forth in such articles, in accordance with the provisions of this act. As such body corporate they shall have succession, and in their corporate name sue and be sued, plead and be impleaded. The said corporation may have and use a common seal, which it may alter at pleasure; may declare the interests of its stockholders transferable; establish by-laws, and make all rules and regulations deemed necessary for the management of its affairs in accordance with law. A copy of any articles of incorporation filed and recorded in pursuance with this act, or of the record thereof, and certified to be a copy by the secretary of state, or his deputy, shall be presumptive evidence of the incorporation of such company, and of the facts therein stated.

SEC. (5) 434. *Fifty years' limit of charter renewal.*—No such corporation shall be formed to continue more than fifty years in the first instance, but such corporation may be renewed from time to time, in such manner as may be provided by law for periods not longer than fifty years; provided, that three-fourths of the votes cast at any regular election for that purpose shall be in favor of such renewal, and those desiring a renewal shall purchase the stock of those opposed thereto at its current value.

SEC. (6) 435. *By-laws to be recorded.*—A copy of the by-laws of the corporation, duly certified, shall be recorded as provided for the recording of the articles of association in section two of this act; and all the amendments and conditions thereto duly certified, shall also be recorded as herein provided within ninety days after the adoption thereof.

SEC. (7) 436. *Office and books in this state.*—Every such corporation organized under the provisions of this act shall have and maintain a public office or place in this state for transaction of its business, where transfers of all its stock shall be made and in which shall be kept, for public inspection, books wherein shall be recorded the amount of capital stock subscribed and by whom, the names of the owners of its stock, the number of shares held by each person and the number by which each of said shares is respectively designated, and the amounts owned by them respectively, the amount of stock paid in, and by whom, the transfers of said stock, the amount of its assets and liabilities, and the names and places of residence of all its officers.

SEC. (8) 437. *Directors—Powers—Election and classification — Vacancy.*—All the corporate powers of every such corporation shall be vested in and be exercised by a board of directors, who shall be stockholders of the corporation, and shall be elected at the annual meetings of the stockholders at the public office of such corporation within the state. The number of such directors, the manner of their election, and the mode of filling vacancies, shall be specified in the by-laws, and shall not be changed except at the annual meetings of the stockholders. The first board of directors shall classify themselves by lot in such manner that there shall be, as nearly as practicable, three directors in each class. Those belonging to the first class shall go out of office at the end of one year, those of the second class shall go out of office at the expiration of a number of years corresponding to the number of its class; and all the vacancies occurring by reason of expiration of term shall be filled by election for a term of years equal to the number of classes.

SEC. (9) 438. *Called meeting.*—A meeting may be called at any time during the interval between such annual meetings, by the directors, or by the stockholders owning not less than one-fourth of the stock, by giving thirty days' public notice of time and place of such meeting in some newspaper published in each county through or into which the said railway shall run, or be intended to run, provided there be a newspaper published in each of the counties aforesaid; and if, at any such special meetings so called, a majority in value of the stockholders

equal to two-thirds of the stock of such corporation, shall not be represented in person or by proxy, such meeting shall be adjourned from day to day not exceeding three days, without transacting any business; and if, within said three days, two-thirds in value of such stock shall not be represented at such meeting, then the meeting shall be adjourned and a new call may be given and notified as hereinbefore provided.

SEC. (10) 439. *Annual and other statements.*—At the regular annual meeting of the stockholders of any corporation organized under the provisions of this act, it shall be the duty of the president and directors to exhibit a full, distinct and accurate statement of the affairs of the said corporation; and at any meeting of the stockholders, or a majority of those present (in person or by proxy), may require similar statements from the president and directors, whose duty it shall be to furnish such statements when required in the manner aforesaid.

Rate of interest—Loans.—And at all general meetings of the stockholders, a majority in value of the stockholders of any such corporation may fix the rates of interest which shall be paid by the corporation for loans for the construction of such railway and its appendages, and the amount of such loans.

Removal of officers.—At any special meeting, by a two-thirds vote in value of all the stock, such stockholders may remove any president, director or other officer of such corporation and elect others instead of those so removed.

Access to books.—All stockholders shall, at all reasonable hours, have access to and may examine all the books, records and papers of such corporation.

SEC. (11) 440. *Omission of election on appointed day.*—In case it shall happen, at any time, that an election of directors shall not be made on the day designated by the by-laws of such corporation for that purpose, the corporation, for such cause, shall not be dissolved if, within ninety days thereafter, the stockholders shall meet and hold an election for directors in such manner as shall be provided by the by-laws of such corporation; provided, that it shall require a majority in value of the stock of such corporation to elect any member of such board of directors, and a majority of such board of directors shall be citizens and residents of this state.

SEC. (12) 440*a*. *Officers—Their duties.*—There shall be a president of such corporation who shall be chosen by and from the board of directors, and such other subordinate officers as such corporation, by its by-laws, may designate, who may be elected or appointed, and shall perform such duties and be required to give such security for the faithful performance thereof, as such corporation, by its by-laws, shall require; provided, that it shall require a majority of the directors to elect or appoint any officer.

SEC. (13) 441. *Subscriptions to capital stock—Payment—Forfeiture.*—The directors of such corporation may require the subscribers to the capital stock of such corporation to pay the amount by them respectively subscribed, in such manner and in such installments as they may deem proper. If any stockholder shall neglect to pay any installment as required by a resolution or order of such board of directors, the said board shall be authorized to declare such stock and all previous payments thereon forfeited for the use of the corporation; but the said board of directors shall not declare such stock so forfeited until they shall have caused a notice in writing to be served on such stockholder personally, or by depositing the same in a postoffice, properly directed to the postoffice address of such stockholder, or if he be dead, to his legal representatives, with necessary postage for its transmittal, properly prepaid, stating therein that in accordance with such resolution, or order, he is requested to make such payment at a time and place and in the manner to be specified in such notice, and that if he fails to make the same in the manner requested, his stock and all previous payments thereon will be forfeited for the use of such corporation; and thereafter such corporation, should default in payment be made, may sell the same and issue new certificates of stock therefor; provided, that the notice as aforesaid shall be personally served or duly deposited as above required, at least sixty days previous to the day on which such payment is required to be made.

SEC. (14) 442. *Capital stock to be personalty—Transfer—Use of funds—Railroad may hold stock of connecting lines in other states.*—The stock of such corporation shall be deemed personal estate, and shall be transferable in the manner prescribed by the by-laws of such corporation. But no shares shall be

transferable until all previous calls thereon shall have been paid; and it shall not be lawful for such corporation to use any of the funds thereof in the purchase of its own stock, or that of any other corporation, or to loan any of its funds to any director or other officer thereof, or to permit them or any of them to use the same for other than the legitimate purposes of such corporation; *provided, however*, that any railroad company incorporated and organized or that may hereafter be incorporated and organized under any general or special law of this state, and operating a railroad which now connects or hereafter may connect at any point with any railroad of any other state, shall have power, acting by itself, or jointly with another company or companies, to own and hold the stock and securities of the corporation owning said connecting road, or any part thereof; such ownership or holding to comprise at least two-thirds in amount of the stock of such corporation; but in case of the purchase of stock the company or companies so purchasing shall take and pay for all the shares of the company whose stock is so purchased that may be offered, and the terms of purchase of all shares shall be the same to all stockholders.

SEC. (15) 443. *Increase of capital stock—Special meetings—Other business—Record.*—In case the capital stock of any such corporation shall be fonnd insufficient for constructing and operating its road, such corporation may, with the concurrence of two-thirds in value of all its stock, increase its capital stock from time to time, to any amount required for the purpose aforesaid. Such increase shall be sanctioned by a vote, in person or by proxy, of two-thirds in amount of all the stock of such corporation, at a meeting of such stockholders called by the directors of the corporation for such purpose, by giving notice in writing to each stockholder, to be served personally or by depositing the same in a postoffice, directed to the postoffice address of each of said stockholders severally, with necessary postage for the transmittal of the same, prepaid, at least sixty days prior to the day appointed for such meeting, and by advertising the same in some newspaper published in each county through or into which the said road shall run or be intended to run (if any newspaper shall be published therein), at least sixty days prior to the day

appointed for such meeting. Such notice shall state the time and place of the meeting, the object thereof, and the amount to which it is proposed to increase such capital stock; and at such meeting the corporate stock of such corporation may be so increased, by a vote of two-thirds in amount of the corporate stock of such corporation, to an amount not exceeding the amount mentioned in the notices so given. Should the directors of any such corporation desire at any time to call a special meeting of the stockholders, for any other necessary purpose, the same may be done in the manner in this section provided, and if such meeting be attended by the owners of two-thirds in amount of the stock, in person or by proxy, any other necessary business of such corporation may be then transacted, except the altering, amending or adding to the by-laws of such corporation; provided, that such business shall have been specified in the notices given. And the proceedings of any such meeting shall be entered on the journal of the proceedings of such corporation. Every order or resolution increasing the capital stock of any such corporation shall be duly recorded as required in section 2 of this act.

SEC. (16) 443*a*. *Liability of executor and representative.*—No person holding stock in such corporation as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholders of such corporation; but the person pledging the stock shall be considered as holding the same, and shall be liable as a stockholder accordingly.

SEC. (17) 444. *Individual liability of stockholders.*—Each stockholder of any corporation formed under the provisions of this act shall be held individually liable to the creditors of such corporation to an amount not exceeding the amount unpaid on the stock held by him, for any and all debts and liabilities of such corporation, until the whole amount of the capital stock of such corporation so held by him shall have been paid.

SEC. (18) 445. *Eminent domain.*—If any such corporation shall be unable to agree with the owner for the purchase of any real estate required for the purposes of its incorporation, or the transaction of its business, or for its depots, station buildings, machine and repair shops, or for right of way or for any other lawful purpose connected with or necessary to the building,

operating or running of said road, such corporation may acquire such title in the manner that may be now or hereafter provided for by any law of eminent domain.

SEC. (19) 446. *Eminent domain—Acquiring material for construction.*—Any such corporation may, by their agents and employes, enter upon and take from any land adjacent to its road, earth, gravel, stone or other materials, except fuel and wood necessary for the construction of such railway, paying, if the owner of said land and the said corporation can agree thereto, the value of such material taken and the amount of damage occasioned thereby to any such land or its appurtenances; and if such owner and corporation can not agree, then the value of such material, and the damage occasioned to such real estate, may be ascertained, determined and paid in the manner that may now or hereafter be provided by any law of eminent domain, but the value of such materials and the damage of such real estate, shall be ascertained, determined and paid for before such corporation can enter upon and take the same.

SEC. (20) 447. *Laying out, constructing and using roads.*—This section provides in substance that every corporation, formed under this act, shall have power to cause a survey to be made for its proposed railway; to take and hold such voluntary grants of real estate and other property as shall be made to it in aid of the construction and use of its railway; to purchase, hold and use all such real estate and other property as may be necessary for the construction and use of its railway, and the stations and the other accommodations necessary; to lay out its road, not exceeding one hundred feet in width, and to construct the same; and, for the purpose of cuttings and embankments, to take as much more land as may be necessary, cut down standing trees, etc.; to construct its railway across, along or upon any stream of water, water-course, street, highway, plank road, turnpike or canal, which the route of such railway shall intersect or touch; but such corporation shall restore the stream, water-course, street, highway, plank road and turnpike thus intersected or touched, to its former state, or to such state as not unnecessarily to have impaired its usefulness, and keep such crossing in repair; provided, that in no case shall any railway company construct a road-bed without first construct-

ing the necessary culvert or sluices, as the natural lay of the land requires for the necessary drainage thereof. No bridge is to be constructed to interfere with navigation of stream by steamboat, and no construction of any railroad upon or across any street in any city, or incorporated town or village, without the assent of the corporation of such city, town or village; nor along highways, plank roads, turnpikes or canals without first obtaining the consent of the lawful authorities having control of the same, or condemning the same under the provisions of the law of eminent domain; to cross, intersect, join and unite its railways with any other railways before constructed, at any point in its route, and upon grounds of such other company; to receive and convey persons and property on its railway; to erect and maintain necessary buildings; to regulate time and manner in which passengers and property shall be transported and the compensation to be paid therefor, subject, nevertheless, to the provisions of any law that may now or hereafter be enacted; also to borrow such sums of money as may be necessary for completing, finishing, improving or operating any such railway, and to issue and dispose of its bonds for any amount so borrowed and to mortgage its corporate property and franchises to secure the payment of any debt contracted by such corporation for the purpose aforesaid. * * *

SEC. (68) 448. *Fencing track—Cattle-guards—Damages—Attorney's fees.*—That every railroad corporation shall, within six months after any part of its line is open for use, erect and thereafter maintain fences on both sides of its road or so much thereof as is open for use, suitable and sufficient to prevent cattle, horses, sheep, hogs or other stock from getting on such railroad, except at the crossings of public roads and highways, and within such portion of cities and incorporated towns and villages as are or may be hereafter laid out and platted into lots and blocks; with gates or bars at the farm crossings of such railroad, which farm crossings shall be constructed by such corporation when and where the same may become necessary, for the use of the proprietors of the land adjoining such railroad; and shall also construct, where the same has not already been done, and thereafter maintain, at all road crossings now existing or hereafter established, cattle-guards,

suitable and sufficient to prevent cattle, horses, sheep, hogs and other stock from getting on the tracks of such railroad; and when such fences or cattle-guards are not made as aforesaid, or when such fences or cattle-guards are not kept in good repair, such railroad corporation shall be liable for all damages which may be done by the agents, engines or cars of such corporation, to such cattle, horses, sheep, hogs or other stock thereon, and reasonable attorney's fees, in any court wherein suit is brought for such damages, or to which the same may be appealed; but where such fences and guards have been duly made and kept in good repair, such railroad corporation shall not be liable for any such damages, unless negligently or wilfully done.

NOTE.—This is Section 1 of Act in force July 1, 1874, as amended to date.

SEC. (69) 449. *Right of way clear of combustibles.*—It shall be the duty of all railroad corporations to keep their right of way clear from all dead grass, dry weeds, or other dangerous combustible material, and for neglect shall be liable to the penalties named in section 1.

NOTE.—This is Section 1½ of Act of July 1, 1874.

SEC. (70) 450. *Allowing animal on right of way—Breaking fence.*—If any person shall ride, lead or drive any horse or other animal upon the track or lands of such railroad corporation, and within such fences or guards (except to cross at farm or road crossings), without the consent of the corporation; or shall tear down, or otherwise render insufficient to exclude stock, any part of such fence, guards, gates or bars—or shall leave the gates or bars at farm crossings open or down, or shall leave horses or other animals standing upon farm or road crossings, he shall be liable to a penalty of not less than $10, nor more than $100, to be recovered in an action of debt, before any court having competent jurisdiction thereof, in the name of such railroad corporation, and for the use of the school fund in the county, and shall pay all damages which shall be sustained thereby to the party aggrieved.

SEC. (74) 451. *Bell and whistle—Crossings.*—Every railroad corporation shall cause a bell of at least thirty pounds weight, and a steam whistle, to be placed and kept on each locomotive engine, and shall cause the same to be rung or whistled by the engineer or fireman, at the distance of at least eighty rods from

the place where the railroad crosses or intersects any public highway, and shall be kept ringing or whistling until such highway is reached.

SEC. (75) 452. *Engineer—Killing stock—Frightening team—Penalty.*—Any engineer or person having charge of and running any railroad engine or locomotive, who shall wilfully or maliciously kill, wound or disfigure any horse, cow, mule, hog, sheep or other useful animal, shall, upon conviction, be fined in the sum of not less than the value of the property so killed, wounded, or disfigured, or confined in the county jail for a period not less than ten days; and any such engineer or fireman, or other person, who shall wantonly or unnecessarily blow the engine whistle, so as to frighten any team, shall be liable to a fine of not less than $10 nor more than $50.

SEC. (76) 453. *Starting train without signal.*—If any engineer on any railroad shall start his train at any station, or within any city, incorporated town or village, without ringing the bell or sounding the whistle a reasonable time before starting, he shall forfeit a sum of not less than $10, nor more than $100, to be recovered in an action of debt in the name of the People of the State of Illinois, and such corporation shall also forfeit a like sum, to be recovered in the same manner.

SEC. (77) 454. *Approaches at crossings.*—Hereafter at all the railroad crossings of highways and streets of this state, the several railroad corporations in this state shall construct and maintain said crossings, and the approaches thereto, within their respective rights of way, so that at all times they shall be safe as to persons and property.

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SEC. (90) 455. *Adequate provision of cars—Stations, etc.*—Every railroad corporation in this state shall furnish, start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroads and at the junction of other railroads, and at such stopping places as may be established for receiving and discharging way passengers and freights; and shall take, receive, transport and discharge such passengers and property, at, from and to such stations, junctions and places, on and from all trains advertised to stop at the same for passengers and freight, respectively,

upon due payment, or tender of payment of tolls, freight, or fare legally authorized therefor, if payment shall be demanded, and such railroad companies shall at all junctions with other railroads, and at all depots where said railroad companies stop their trains regularly to receive and discharge passengers in cities and villages, for at least one-half hour before the arrival of, and one-half hour after the arrival of, any passenger train, cause their respective depots to be open for passengers; said depots to be kept well lighted and warmed for the space of time aforesaid.

SEC. (91) 456. *Cars—Stations—Damages.*—In case of the refusal of such corporation or railroad company or its agents, to take, receive and transport any person or property, or to deliver the same within a reasonable time, at their regular or appointed time and place, or to keep their said depots open, lighted and warmed, according to the provisions of the preceding section (90) of this act, such corporation or railroad company shall pay to the party aggrieved treble the amount of damages sustained thereby, with costs of suit; and in addition thereto said corporation or railroad company shall forfeit a sum of not less than $25, nor more than $1,000, for each offense, to be recovered in an action of debt in the name of the People of the State of Illinois; the treble damages for the use of the party aggrieved, and the forfeiture for the use of the school fund of the county in which the offense is committed.

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SEC. (93) 457. *Speed through cities—Damages.*—Whenever any railroad corporation shall, by itself or agents, run any train, locomotive engine, or car, at a greater rate of speed in or through the incorporated limits of any city, town or village, than is permitted by any ordinance of such city, town or village, such corporation shall be liable to the person aggrieved for all damages done to the person or property by such train, locomotive engine or car; and the same shall be presumed to have been done by the negligence of said corporation, or their agents; and in addition to such penalties as may be provided by such city, town or village, the person aggrieved by the violation of any of the provisions of this section, shall have an action against such corporation, so violating any of the provisions, to recover a penalty of not less than one hundred ($100)

dollars, nor more than two hundred ($200) dollars, to be recovered in any court of competent jurisdiction; said action to be an action of debt, in the name of the People of the State of Illinois for the use of the person aggrieved; but the court or jury trying the case may reduce said penalty to any sum, not less, however, than fifty ($50) dollars, where the offense committed by such violation may appear not to be malicious or wilful; *provided*, that no such ordinance shall limit the rate of speed, in case of passenger trains to less than ten miles per hour, nor in any other case to less than six miles per hour.

Sec. (94) 458. This section provides that trains shall stop at each station, advertised as a place for receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety.

Sec. (95) 459. This section provides, in substance, that no railroad corporation shall run or permit to be run upon its railroad any train of cars for passengers without a brakeman for every two cars, unless the brakes are operated by power from the engine.

Sec. (96) 460. This section provides for brakemen on freight cars, unless brakes are operated by power from the engine.

Sec. (97) 461. Provides penalties for violation of the three preceding sections.

Sec. (98) 462. This section provides, in substance, that every railroad corporation, when requested, shall give checks or receipts to passengers for their ordinary baggage, when delivered for transportation on any passenger train, which baggage shall in no case exceed one hundred pounds in weight for each passenger, and shall deliver such baggage to any passenger upon the surrender of such checks or receipts. For wilfully refusing, a penalty of not less than $10 or more than $100 is attached.

Sec. (99) 463. Provides a penalty for wilfully, carelessly or negligently breaking, injuring or destroying any baggage.

Sec. (100) 464. This section provides for the ejection by the conductor of a passenger for refusal to pay his lawful fare, or for using abusive, threatening, vulgar, obscene or profane language thereon, or so conducting himself as to make his presence offensive or unsafe to passengers—to use sufficient force for the purpose—be liable for unreasonable force or violence.

SEC. (101) 465. Provides that conductors, baggage-masters, brakemen and other servants of the corporation, employed on passenger trains, shall wear badges to indicate their office.

SEC. (102) 466. *Common law liability not to be limited in receipt.*—That whenever any property is received by any railroad corporation, to be transported from one place to another within or without this state, it shall not be lawful for such corporation to limit its common law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for the safe delivery of such property. * * *

SEC. (123) 467. *Fires by locomotives.*—That in all actions against any person or incorporated company for the recovery of damages on account of any injury to any property, whether real or personal, occasioned by fire communicated by any locomotive engine while upon or passing along any railroad in this state, the fact that such fire was so communicated shall be taken as full *prima facie* evidence to charge with negligence the corporation, or person or persons who shall, at the time of such injury by fire, be in the use and occupation of such railroad, either as owners, lessees or mortgagees, and also those who shall at such time have the care and management of such engine; and it shall not, in any case, be considered as negligence on the part of the owner, or occupant of the property injured, that he has used the same in the manner, or permitted the same to be used or remain in the condition it would have been used or remained had no railroad passed through or near the property so injured, except in cases of injury to personal property which shall be at the time upon the property occupied by such railroad.

SEC. 468. *Charter of railroad corporations construed.*—It is a rule of interpretation that grants made by the government are to be liberally construed in favor of the public. In other words, when such a grant is made, while the grantee takes the things granted, with all reasonable and proper means of its enjoyment, yet nothing else passes by implication. When a charter of this description is granted, the corporators take, as an incident, the right to employ all reasonable, necessary and proper means for the accomplishment of the end of their organization, unless limited by the charter, or

reasonably controlled in its exercise by the legislature, and in these, as well as in the express grants and exemptions, they acquire a vested right, subordinate only to the general welfare of security. In granting a charter the legislature has not in terms surrendered the right to subject the company to general police regulations. If such a result has ensued it is by implication. But in the absence of express language, such an exemption can not be inferred. When these bodies are created, although they are artificial persons, intangible, and only existing in legal contemplation, they are held to be subordinate to and under the control of the government to the same extent as individuals. They have at all times been required to conform to the general laws of the state, precisely as if they were real and not artificial persons. To hold otherwise would be to say that the legislature might create an *imperium in imperio*—a government existing within another government. When such bodies accept their charters, it is upon the implied condition that they are to exercise their rights, subject to the power of the state to regulate their actions, as it may individuals. When brought into being, in contemplation of law, such a body becomes, for most purposes, a person and a subject of the state. It follows that the act of the legislature of 1855, requiring railway companies to fence their right of way, is not prohibited by the constitution, and is valid and binding on the company.[1]

SEC. 469. When railroad companies have erected and maintained sufficient fences and cattle-guards, to recover for stock injured, the owner thereof must show that such injury resulted from the negligent or wilful act of the agents or servants of the company. When they have failed to comply with the requirements of the statute, the owner has only to show the omission, and the injury; and the law imposes the liability as a penalty, for failure or refusal to submit to its requirements.

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[1] Ohio & Miss. R. R. Co. v. Samuel McClelland, 25 Ill. 123.*

* NOTE.—Action in case brought to recover damages for stock killed, the declaration being framed in reference to the act of 1855, requiring railway companies to fence their right of way. The defendant pleaded the general issue and special pleas, denying any liability under the statute on the ground that it was no part of its charter, and it was not bound to fence its road. The plaintiff recovered the value of stock killed and defendant appealed.

The act is designated as a police regulation, as well to protect the traveling public as to compensate the owner for his loss. This liability is imposed upon the company to constrain them to do that which the public safety requires, rather than for the benefit of the owner.[1]

SEC. 470. It was the duty of the defendant (Toledo, Peoria and Warsaw R. R. Co.) to have fenced its road, and the public safety demands that they shall be held liable for all damages resulting from the neglect to fence it. And the same policy would require that the Illinois Central R. R. Co. should be held responsible for presuming to use the road of another company fenceless and unprotected. Either company would be liable for the injury. This question was decided in Illinois Central R. R. Co. v. Kanouse, 39 Ill. 272.[2]

SEC. 471. Railroads are public highways, and in their relations as such to the public, are subject to legislative supervision, though the interests of their shareholders are private property. Every railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right of way. (C. & A. R. R. Co. v. J., L. & A. Ry. Co., 105 Ill. 388.) If railroads, so far as they are public highways, are, like other highways, subject to legislative supervision, then railroad companies, in their relation to highways and streets which intersect their rights of way, are subject to the control of the *police* power of the State—that power of which the supreme court has said that it may be assumed that it is a power co-extensive with self-protection, and is not inaptly termed "the law of overruling necessity." (Lake View v. Rose Hill Cemetery Co., 70 Ill. 191.) The requirement embodied in section 8 of "An act in relation to fencing and operating railroads," in force July 1, 1874, that railroad

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[1] Galena & Chicago U. R. R. Co. v. Crawford, 25 Ill. 435; Cairo & St. Louis R. R. Co. v. Warrington, 92 Ill. 157.

[2] Toledo, Peoria & Warsaw R. Co. v. Rumbold, 40 Ill. 143; East St. L. & C. Ry. Co. v. Gerber, 82 Ill. 632.*

* NOTE.—Case, to recover damages for killing mare and two colts by a locomotive and train on the track of defendant company. The animals were killed by a train probably belonging to the Illinois Central Railroad Co., operated upon the defendant company's track by permission of defendant. Verdict for plaintiff $250.

companies shall construct and maintain the highway and street crossings, and approaches thereto, within their respective rights of way, is nothing more than a police regulation. It is proper that the portion of the street or highway which is within the limits of the railroad right of way should be constructed by the railroad company and maintained by it, because of the dangers attending the operation of its road. It should control the making and repairing of the crossing for the protection of those passing along the street and of those riding on the cars. Section 8 recites that the railroad companies shall construct and maintain the crossings, "so that at all times they shall be safe as to persons and property." Safety of persons and property is the object of the requirement.[1]

SEC. 472. The mere fact that stock is running at large in violation of the statute, does not relieve railroad companies from liability for stock injured, when the company fails to fence as required by statute. (Ewing v. C. & A. & St. L. Ry. Co., 72 Ill. 25.) It is difficult to conceive any good to be accomplished by having the railroad fenced, unless it be to prevent roaming domestic animals from receiving injury. The ground of recovery, under this statute, is the fault of the railroad company in failing to build the fences required; no other fault, in such case, need be shown.[2]

SEC. 473. *Building fence by land owner.*—Where a railway company neglects or refuses to build a fence along its right of way, so as to prevent stock from getting upon its track, after notice of the owner of adjoining land, the owner or occupant of such adjoining land may build the fence, and bring his action to recover double the value thereof, against either the corporation owning the road, or any other party actually occupying or using such railroad, at his election. The fact that the property of the railroad company may be temporarily in the hands of a receiver does not relieve a corporation from the operation of this statute; it must be obeyed.[3]

SEC. 474. In an action against a railroad company for injury to stock, it is held, upon motion for a new trial and in arrest of judgment, it was not material that the plaintiff, in order to

[1] Chicago & N. W. Ry. Co. v. City of Chicago, 140 Ill. 309.
[2] Cairo & St. L. R. R. Co. v. Murray, 82 Ill. 76.
[3] O. & M. Ry. Co. v. Russell, 115 Ill. 52.

maintain his action, should have proven that the injury was done within the jurisdiction of the court.[1]

SEC. 475. The owner of animals, killed or injured by a railroad, in order to recover against the company, must, by proper averments in his declaration, show, not only that the company were required to fence their track and had failed to do so, but must negative the various exceptions in the enacting clause of the statute, and aver that the animals were not injured at a point on the road within these exceptions, and also that the road had been opened for use six months before the occurrence of the accident.[2]

SEC. 476. Where a railroad has been operating trains over its road for more than six months, and has failed to fence its track, and while passing through the plaintiff's farm with its train, kills plaintiff's stock upon the track, the company will be liable to the plaintiff for the value of such stock.[3]

SEC. 477. In an action by a passenger against a railway company to recover for a personal injury on the ground of neglect to fence its track, there was evidence tending to show that the railroad was not fenced for some distance south of the village, and that there were no cattle-guards sufficient to

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[1] Toledo, Peoria and Warsaw Ry. Co. v. Webster, 55 Ill. 338.*

[2] Galena & C. U. Railroad Co. v. Sumner, 24 Ill. 632.†

[3] Toledo, Peoria & W. Ry. Co. v. Crane, 68 Ill. 355.

* NOTE.—Action in case under the statute entitled "An act to regulate the duties and liabilities of railroad companies," for killing stock. Verdict $225. For defects in the declaration judgment was reversed with leave to amend.

† NOTE.—This was an action by Webster against the railroad company to recover the value of a colt and some hogs, alleged to have been killed on defendant's road, by reason of its neglect to erect and keep in repair fences and cattle-guards along the track. The plaintiff, to maintain his action, testified in substance, as follows: the colt had been running out on the open prairie; found it in the ditch by the railroad, with one leg broken and hip out of place; was dead; found marks where it had been shoved off the road into the ditch; was worth $70. Had four hogs injured by the railroad; two died; were worth before injured ten dollars apiece; after injured were worth only two or three dollars apiece. Road had been in operation eight years; was no town or city within two miles of where the accident happened, and was no fence or highway at that point; was necessary that a fence should have been built to keep off stock. Saw train knock the hogs off the track and saw the colt three or four days after killed. Verdict for plaintiff $100.

keep cattle off the track. The evidence showed that a cow and a calf went on the track near the depot at the village (Lamont), and ran down the track to the place where the cow was struck and the train was thrown from the track, and it appeared that if the road had been fenced and a suitable cattle-guard placed on the south end of the village the cow would not have followed the track beyond the limits of the village, and the accident would not have occurred; it was held that there was ample evidence tending to show negligence on the part of the defendant. A., T. & Santa Fe R. R. Co. v. Elder, 149 Ill. 173.

In such case it was contended that the defendant was not bound to fence its track where the cow entered upon the same. The cow entered upon the defendant's track near the depot, within the corporate limits of the village; but at the southern limits of the village the cattle-guard was insufficient to prevent stock from passing down the track, and from that point to the place where the accident occurred the track was not fenced, so that there was nothing preventing stock from going upon the track where the defendant was bound to fence, and the mere fact that the cow first entered upon the track within the corporate limits of the village did not relieve the defendant from the liability arising from the failure to fence the track. *Id.**

SEC. 478. A railroad company is not required to fence its track within the limits of a village, but when an animal is killed near a village by a train of cars of the company, the presumption is that the houses compose the village, and if the place where the animal is killed is beyond them, it is beyond the village, or if the town extends beyond the houses, the railroad company must prove it in order to relieve itself of the necessity of fencing its road at such a point.

Where a railroad company fails to fence its track, as required by law, it is sufficient to fix its liability if the plaintiff's stock,

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* NOTE.—A cow and calf strayed onto defendant's railway at a point near the village of Lamont and south thereof, and not within the corporate limits thereof, and not on any public or highway crossing of said railway, and while said cow and calf were on the track, defendant's train, running at an excessive and dangerous rate of speed, struck them and became wrecked, and plaintiff was ruptured, crippled, etc. Verdict, $2,500 for plaintiff.

in *consequence thereof*, and without any *contributory negligence* on his part, goes upon the track of the railroad company, and is there killed or injured by the company's locomotive or train. The fact that the owner of stock permits it to run at large, in violation of the act prohibiting domestic animals from running at large, does not relieve the railroad companies from their duty to fence their roads, or their liability for stock injured in consequence of their failure to do so. The act of February 14, 1855, relating to the duties and liabilities of railroad companies (Laws of 1855, p. 173, S. I.) declares, in express terms, that railroad companies failing to erect and maintain fences, as therein required, shall be liable for all damages which shall be done by the agents or engines of such companies to any cattle, etc., upon its road; and it has uniformly been held by the Supreme Court of Illinois, in the absence of evidence of contributory negligence on the part of the plaintiff, that it is sufficient to fix the liability of the defendant railroad company, to prove its failure to erect and maintain the necessary fences, that the plaintiff's animals, in consequence, went upon its road and they were killed or injured by defendant's locomotive or train. It may be conceded that the violation of the statute preventing domestic animals from running at large is evidence of negligence, considered only as an abstract question, but the negligence of the plaintiff, of which the defendant can avail in a suit for damages, must be contributive, that is, such that the natural and consequent act tended to produce the injury complained of. It is not sufficient to say that the act of permitting the cow to run at large directly contributed to the act, merely because, if she had been kept within an inclosure, she could not have got upon the track, for the same logic would prove the plaintiff guilty of contributive negligence by the simple act of owning the cow. It is the proximate and not the remote cause that is to be considered. It is then a mere question of fact, to be determined by the jury from all the evidence, whether the plaintiff was guilty of contributive negligence. Ewing v. C. & A. R. Co., 72 Ill. 25.

SEC. 479. Where the railroad company has not had its road open for use six months, and the statutory liability for injury to stock by reason of non-liability to fence has not attached, the plaintiff, in order to recover for injury to stock, must make

affirmative proof of the negligence of the railroad company, resulting in the injury complained of.[1]

SEC. 480. When a railroad is inclosed by a sufficient fence and a casual breach occurs therein without the knowledge or fault of the company, and through such breach stock get upon the track and are injured, the company are not liable unless they have had a reasonable time to discover such breach, or have been notified and failed to repair before the injury occurred.[2]

SEC. 481. The plaintiff has his election, according to the facts of his case, to base his action upon the statute of 1855 or upon common law grounds. The statute makes it the duty of railroad companies, within six months after their respective roads are open for use, to erect and thereafter maintain fences on the sides of their roads, or the parts thereof so open for use, sufficient to prevent cattle, horses, etc., from getting on such railroads, except at the crossings of public roads, etc. The statute then declares: "And so long as such fences and cattle-guards shall not be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and cattle-guards are not in good repair, such railroad corporation and its agents shall be liable for all damages which shall be done by the agents or engines of such corporation to any cattle, horses, etc., thereon. And when such fences and guards shall have been duly made and shall be kept in good repair, such railroad corporation shall not be liable for any such damages unless negligently or wilfully done." To recover under

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[1] Gilman, Clinton & Springfield R. R. Co. v. Spencer, 76 Ill. 192; Rockford, R. I. & St. L. v. Connell, 67 Ill. 216; C. & A. R. R. Co. v. McNorrow, 67 Ill. 218.

[2] Ind. & St. L. R. R. Co. v. Hall, 88 Ill. 368.*

* NOTE.—The case shows the killing of a cow and heifer of the value of fifty-five dollars, property of plaintiff, at a railroad crossing where the company was not required to build a fence. The cattle were killed *upon the crossing* and there was no proof of any negligence on the part of the company, and that everything was done that could be to avoid the accident. On the evening of Sunday an employe of the company passed along the road and examined this fence, and found it in good repair. On the next Monday morning these cattle were found to be killed, the fence having the appearance of having been torn down or pushed down by some object striking it. Ill. Cent. R. R. Co. v. Swearingen, 47 Ill. 206.

this statute, the declaration must state facts which bring the case substantially within the provisions of the statute, and the plaintiff is not bound to show that there was negligence in the management of the locomotive or train which was the immediate cause of the injury. At common law it was sufficient to allege that the defendant was the owner of the railroad, and operating it by running locomotives and trains thereon; that plaintiff's horse strayed and got upon the defendant's railroad, and the defendant, by its servants, so carelessly, negligently and improperly ran, conducted and directed the locomotive and train of the defendant as that said locomotive struck plaintiff's horse with great force and violence and killed it.[1]

In case of neglect of statutory duty it is not necessary to show negligent management of train.

SEC. 482. The statute makes it the duty of railroad companies to erect and maintain fences suitable and sufficient to prevent cattle, horses, sheep and hogs from getting onto such railroad. Where the proof shows that the fence of the railroad company, where the plaintiff's mare got upon the railroad, and was killed, was not such as required by the statute, the defendant will be liable.[2]

SEC. 483. *Railroad companies must fence where running along a public highway.*—The object to be obtained by the law requiring railroad tracks to be fenced, is to protect persons and property upon the railroad, and animals running at large, from being injured. In a case where, for a mile and a half, the highway and railroad ran side by side, but a few feet apart, exposing persons passing along the highway with teams to the danger of collision with passing trains when such teams should become frightened and unmanageable, the ordinary dangers are greatly increased. When the authorities surrendered such portion of the highway and the company accepted it, it must be presumed that both parties intended that the law should be complied with by inclosing that portion, so sur-

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[1] Rockford, R. I. & St. L. R. R. Co. v. Phillips, 66 Ill. 548.

[2] Chicago & Alton R. R. Co. v. Umphenour, 69 Ill. 198.*

* NOTE.—This was an action on the case by Samuel Umphenour against the C. & A. R. Co., to recover damages for the killing of plaintiff's mare, which had got upon the defendant's track through the insufficient fence of defendant. The plaintiff recovered a verdict and judgment therefor.

rendered, with a fence, and thereby give the protection to both the company and the public that the fencing law was intended to supply. The statute requires the company to fence its road, except at the crossing of public roads and highways, and within such portions of cities and incorporated towns and villages as are platted into lots and blocks, etc. The place described is not within the letter or spirit of the exceptions.[1]

SEC. 484. *Failure to fence depot grounds.*—The plaintiff's horse was struck and killed by a freight train at Fair Grange, a small unincorporated village on the line of defendant's road, at which it had a station house, and stopped its trains to receive and discharge passengers. The plaintiff, George W. Pleasants, claimed that the horse got upon the track through the neglect of the railroad company to fence its road at that point in violation of the statute, and brought this action for damages and obtained a verdict and judgment for $65. The village, consisting of half a dozen dwellings and two or three stores, was all east of the railroad grounds. The track, running north and south, crossed at the station a public highway running east

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[1] Ill. Cent. R. R. Co. v. Trowbridge, 31 Ill. App. 190.*

* NOTE.—In October, 1887, and for some years prior thereto, the Ill. Cent. R. R. Co. had a line of railroad extending through the county of DeWitt. When this line was constructed, by the license and permission of the highway authorities, a part of its road-bed was placed along, in and upon the south side of a public highway, commencing at a point about three miles west of the city of Clinton in said DeWitt county and extending about one and one-half miles, which has been since used by such license and permission for railroad purposes, the public continuing to use the remainder of said highway not actually occupied by the railway track for public highway purposes. The railroad track comes onto the public highway from the south, and occupies a part of the south half of the same until it leaves it, not crossing it between the two points, and leaving ample room for public travel throughout the whole distance. There was no fence between the railroad track and the part used by the public as a wagon road. On the 15th of October, 1887. the plaintiff, James A. Trowbridge, driving a team of horses, was passing along this portion of the highway about seven o'clock in the evening, when his team ran away, broke loose from the wagon and ran upon the track and into the trestle or bridge, where about eight o'clock of the same night they were struck and killed by a locomotive on defendant's road. The night was dark, so that the engineer could not see the horses in the bridge until too late to stop, and no negligence is chargeable to him. This action was brought to recover damages alleging negligence in not fencing defendant's road. Verdict and judgment for plaintiff in the sum of $275.

and west--the station being in the southwest corner made by the intersection, west of the track and south of the highway. A side track or switch was laid west of the main track, and was properly fenced on the west side of it. An elevator and a corn crib were on the east side of the main track, north of highway. A private fence inclosed the land of Mr. B., also lying north of the highway and east of the track, the west line of which fenced the track on the east side from a point ninety-one feet north of the north end or side of the elevator; but between the elevator and that point the railroad was open on that side. Nor was there any wing fence from that point to the track, nor any cattle-guard there or at the highway crossing. Thus there was nothing to prevent cattle or horses from going upon the tracks from the east between the elevator and the south end of B.'s west fence, or from passing up the lane formed by that fence and the wire fence on the west side of the tracks, from the opening or from the public highway. There is no reason for leaving this opening or for failing to construct cattle-guards at the highway crossing. The judgment for $65, of the trial court, was affirmed.[1]

SEC. 485. The owner of a horse who voluntarily permits it to run at large contrary to law in force in the county, can not recover of a railway company for killing it by one of its trains, upon the ground that such company has failed to fence its track at the place where the animal is killed. In such a case, where the plaintiff is guilty of contributory negligence, the railway company will not be relieved from its duty to observe all reasonable precautions to prevent injury to plaintiff's property.[2]

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[1] Toledo, St. L. & K. C. R. R. Co. v. Thompson, 48 Ill. App. 36.

[2] Peoria, P. & J. R. Co. v. John R. Champ, 75 Ill. 577.*

* NOTE.—Action to recover value of horse killed by railroad company's engine. At the date that plaintiff's horse was killed it was unlawful for domestic animals to run at large in Peoria county where the accident occurred. (Sess. Laws 1872, p. 116.) Notwithstanding this fact, he turned his horse out upon the commons adjoining his premises, and from thence it escaped over uninclosed lands of other persons to the track of the railroad, where it was struck by a train and killed. No fence had been erected either side of the track, although it was the statutory duty of the company to have erected suitable fences, unless it had been relieved by the agreement of the adjoining proprietors, of which there is no evidence. On this state of facts,

SEC. 486. *Reasonable diligence to keep up its fences.*—It can not be the duty of a railroad company to keep up a patrol all night the whole length of its road to see that the fence is not broken down by breachy cattle, by evil men, or by a whirlwind. If the company use all reasonable diligence to keep up the fence, that is all the law requires, and it is not guilty of negligence in that particular.[1]

SEC. 487. *Leaving bars down.*—Where a cow entered the

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the question arises, whether the company is responsible for the value of the animal killed, if it is shown its servants observed every reasonable precaution to avoid the accident. By the voluntary unlawful act of the plaintiff his horse was trespassing on the right of way of the company, and this fact must be imputed to him as negligent care for the safety of his property. Had the horse escaped from his inclosure against his will, and he had used all reasonable diligence to recapture it, the case would have been within the rule in C. & N. R. R. Co. v. Harris, 54 Ill. 528. In that case it was unlawful, by a local ordinance, for plaintiff to permit his horses to run at large, but the decision is placed on the distinct ground, the escape from his private inclosure was involuntary on his part, and that he made reasonable effort to reclaim them soon after its escape, but was unsuccessful.

Assuming the burden of proof was upon the railroad company, it appears that its employes did everything in their power, after the danger was discovered, to prevent injury to plaintiff's property. The train was within a few hundred yards of the station and moving at a low rate of speed. The horse was grazing quietly near the railroad, until the train was nearly opposite, when it suddenly went upon the track in front of the engine. As soon as it was discovered that the horse was coming upon the track, the engine driver did all he could to stop the train to avoid a collision but was unsuccessful. The horse was partially blind, seemed to become bewildered and ran directly toward the train. The whole thing occurred in an instant.

[1] Ill. Cent. R. R. Co. v. Dickerson, 27 Ill. 55.*

* NOTE.—This was an action to recover the value of three animals killed upon the road of the defendant. The foreman in charge of repairs of the road at that point, whose duty it was also to keep up the fence, first states that he passed down the road about six o'clock the night before, and that the fence at the point where the cattle got in was then up, and at six o'clock the next morning he found it down and put it up. He afterward states that it might have been down the night before, but that he did not see it down, and he thinks it was not. This shows that he depended upon his general observation, and that his attention was not directed to this particular point, nor does he state that his mind was on the subject, and that he expressly examined the fence to see that it was up. The witness Penrod says that he had seen the fence down at that point, but whether before or after the night in question he could not say. But, as Burns says, he put up the fence as soon as he found it down on the morning when the cattle were killed; this tends to fix the time when Penrod saw it down as before that morning. Judgment of the trial court affirmed.

close of another through an insufficient fence upon the highway, and passed from thence through a space made for bars, and used as a farm crossing, upon the railroad track and was killed, and it was proved that the bars had been left down and wholly neglected for a period of three months, it was held that the company was guilty of negligence; that the statute requires the company to "erect and maintain" a sufficient fence, and of this fence the bars were a part.[1] Great Western R. R. Co. v. Helm, 27 Ill. 197.

SEC. 488. *As to railroad's liability for injury to animals caused by fright.*—The statute provides, when the fences it requires shall be erected, are not made as therein required, or when such fences are not kept in good repair, such railroad corporation shall be liable for all damages which may be done by the "agents, engines or cars" of such corporations, to cattle, horses, or other stock. On the hypothesis that plaintiff's horse got on the track of defendant's road for *want of such fence as the law requires it to erect and maintain to inclose its track and right of way*, and while on the track the horse was frightened, either by the approaching train, or the sound of the bell or whistle, or all of them combined, and in its flight was injured, either by jumping a cattle-guard, or by coming in contact with a wire fence, or both, and that no negligence or wilful misconduct can be imputed to the agents of defendant in charge of the train at the time, and that no injury was done to the horse by any actual collision or contact with the engine or cars of the train, a *majority* of the supreme court held the defendant railroad company not liable.[2]

SEC. 489. The plaintiff's mare was struck by an excursion train on defendant's road and so injured that she had to be killed, for which in the trial court he recovered a verdict and judgment for $946.66. It is conceded, that, as soon as the

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[1] Ill. Cent. R. R. Co. v. Arnold, 47 Ill. 173.

[2] Joseph Schertz v. Indianapolis B. & W. Ry. Co., 107 Ill. 577.*

* NOTE.—It would seem from this decision that after a horse is invited, by a poor fence or no fence at all, upon a right of way of a railroad company, it makes an important difference whether he is killed by being frightened by the engine into a bridge, culvert, or wire fence, or whether he is knocked over by an actual blow of the engine pilot. If killed by the latter method the company is responsible, if by the former, not.

engineer saw her, he used all means in his power to stop the train and avoid the injury, and the only charge of neglect on his part is, was his failure to see her soon enough. The accident occurred at a late hour of an uncommonly bright moonlight night in April, 1888. The track was level and straight for half a mile east of where the accident occurred, except a slight curve to the south near that point, and the view unobstructed. The right of way along there was thirty feet wide and properly fenced. From the tracks made by the horses it appeared that the mare in question and another came on to the right of way through a gate at a farm crossing, jumped a cattle-guard and fled along the railroad, west, about 150 yards, when they turned and ran back along the south side of the track about half way to the cattle-guard, when they got upon the track and kept on it until they reached the cattle-guard. The other jumped it, but the mare in question failed in the attempt, got her legs caught in the bars, and was there overtaken and struck by the train. The evidence tended to show that the horse could be easily seen on that night at the distance of a quarter of a mile. It was by the court held to be a question for the jury to determine, from the evidence, whether the engineer's failure to see the horses sooner was or was not due to a want of ordinary care on his part, and whether or not the injury to the plaintiff's property was caused by it. Judgment affirmed.[1]

SEC. 490. *Where stock owner is guilty of contributory negligence he can not recover.*—Some time before the injury happened the plaintiff's own cattle had broken down a portion of the fence between the railroad track and his pasture. Without notifying the defendant railroad company, or any of its agents, he undertook to repair it, and, in doing so, seems to have knowingly made and left it insufficient. He testified that the board he put in was a bad one, though it looked well enough; that he only tacked up the boards temporarily, and it was insufficient at this place to turn stock. With this knowledge, he permitted his stock to run where they were continually exposed to the danger of getting upon the track by means of this defective portion of the fence. The law will

[1] O. & M. Ry. Co. v. Stribling, 38 Ill. App. 17.

not permit a man to set a snare for his own cattle, voluntarily expose them to it, and then to recover of somebody else for the injury thus received. It was the duty of the plaintiff to notify, or make reasonable efforts to notify, the railroad company of the defect in its fence occasioned by his cattle breaking down a portion of it, unless he was prepared to show that the defect was known to some agent of the company, whose duty it was to communicate information of the fact to the officers having charge of such matters. Judgment reversed.[1]

SEC. 491. A person owning pasture lands along the track of a railroad is not required to keep his stock out of such pasture because of the failure of the company to keep its fences in repair makes it probable that such cattle may get upon the track. Contributory negligence of the plaintiff is a question for the jury to determine, where there is evidence before them tending to prove it.

Was the plaintiff chargeable with want of ordinary care for his stock and culpable negligence contributory to the injury that followed? How could he have avoided it? No way has been suggested but that of taking and keeping them out until the fence should be made sufficient. But it was his *pasture*, and the only lot on his farm of 140 acres from which his stock could get grass and water. The only other way was to keep guard over them night and day—a measure of extraordinary care, unreasonable and impracticable. Judgment affirmed.[2]

SEC. 492. In an action against a railway company to recover for the killing of stock where the plaintiff declares upon the statutory liability growing out of a neglect to fence the road within six months after the same is opened and used, no recovery can be had unless the company was bound to fence its road. In such case it is sufficient for the plaintiff to prove the killing of his stock by the trains of the company and its neglect to fence. Such proof makes a *prima facie* case of liability.[3]

The statute imposes a duty upon railroads to fence their tracks within a given time; but where, in the proceedings to

[1] C. B. & Q. R. R. Co. v. Seirer, 60 Ill. 295.

[2] I. & H. & I. R. R. Co. v. McCord, 56 Ill. App. 173 (1894).

[3] Rockford, R. I. & St. L. R. Co. v. Lynch, 67 Ill. 149.

acquire the right of way, damages are assessed against the company for fencing the road, and the assessment is formal and regular and is made a matter of record, then the land is thereafter charged with the fencing, and the company and its legal successors are discharged from the duty. *Id.* Parol evidence upon this question is not admissible.

SEC. 493. Where a railroad is enclosed with a sufficient fence, and a casual breach occurs therein, without the knowledge or fault of the company, and through such breach stock get upon the track and are injured, the company is not liable unless it has had a reasonable time to discover such breach, or has been notified and fails to repair before the injury occurred.[1]

SEC. 494. Where stock is killed by a railroad company at a place where the statute requires the road to be fenced, and where it has not been fenced, or the fence, although built, has not been kept up in proper repair, the railroad company will be liable for all damages sustained by the killing of stock, regardless of whether the stock was killed through the negligence of the company or not. Where, however, stock is killed within the limits of an incorporated town or city, or place where the law does not require the company to fence the road, then a different rule prevails, and, before a recovery can be had, the party seeking a recovery must prove the killing of the stock was caused through the negligence of the railroad company. (Ohio & Miss. R. R. Co. v. Brown, 23 Ill. 93.)[2]

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[1] Ind. & St. L. R. R. Co. v. David Hall, 88 Ill. 368.*

[2] Ill. Cent. R. R. Co. v. John Bull, 72 Ill. 537; Ill. Cent. R. R. Co. v. William Phelps, 29 Ill. 447; Ill. Cent. R. R. Co. v. Josiah Goodwin, 30 Ill. 117; Great Western R. R. Co. v. Samuel Mortland, 30 Ill. 451.†

* NOTE.—In this case, John Bull's horse was killed within the limits of the city of DuQuoin, an incorporated city of 3000 inhabitants. It followed, of course then, that, Bull having failed to make a case, according to the rule announced, was not entitled to recover. Judgment was reversed and cause remanded.

† NOTE.—There was proof that the fence separating the field was examined the evening before the accident and found to be in good condition. The next morning the fence was found down and the cattle lying inside of the fence dead. There was evidence tending to show the parts were rotten, but the evidence supports the idea that the place on the evening before the accident was in good repair. This was *due diligence* on the part of the company, according to the decision of the supreme court in Illinois Central

SEC. 495. *Liability of a railroad company for killing stock.*—The proof shows that the mules were on the track near the culvert; that the engine driver saw them before he reached the culvert, and whistled to frighten them from the track; that they ran north on the road into the cut, two of them having been overtaken and killed before the train reached the cut, and that the others were killed in the cut and along the track to the road crossing north of the cut. The train could have been stopped before the cut was reached, if not before the two mules were killed. It was, therefore, culpable negligence not to do so. But it is said the plaintiff was also negligent, and that his negligence contributed to the injury. This can not be denied; he was incautious in penning the mules at the place he did (beside the railroad right-of-way fence), but that gave the defendant no right, with their powerful machine, to run over them and destroy them, if proper care on their part would have prevented it. This the driver of defendant's engine could have done, but he chose rather to run recklessly into the herd, regardless of consequences. With the patent brake in general use, a passenger train, as this was, running at the rate of thirty or forty miles an hour can be "broke up" and brought to a stop in one hundred and fifty or seventy-five yards, and such a crowd of animals can be seen much farther than that. It is carelessness for a man to lie down and go to sleep in a public road, but if he does so, a driver of a team, seeing him in that position, has no right to run over him, and kill or maim him. The idea is not tolerable that an injury may be inflicted which, by ordinary care and diligence, could have been avoided. There would be no safety in daily intercourse, if such were the law. Judgment affirmed.[1]

R. R. Co. v. Swearingen, 47 Ill. 206. The judgment in favor of the plaintiff in the Circuit Court is reversed and the cause remanded.

[1] Ill. Cent. R. R. Co. v. Middlesworth, 46 Ill. 494; Toledo, etc., R. Co. v. Bray, 57 Ill. 514; Toledo, Wabash W. R. R. Co. v. McGinnis, 71 Ill. 346.*

* NOTE.—This was an action on the case against the Ill. Cent. R. R. Co. for negligence in so running its railroad train that twenty-one mules of the plaintiff were killed. There was a verdict and judgment for the plaintiff for the value of the mules. The facts in substance are stated in the text. The following charge to the jury is approved by the court: "If the jury

SEC. 496. *Fencing railway tracks.*—Under the police power the state has the undoubted right to require all railway corporations to enclose their roads with a suitable and sufficient fence. Section 1 of the act of 1874, in relation to "fencing and operating railroads," as amended by act of 1879, makes it the duty of every railway company, within six months after any part of its line is open for use, to erect, and thereafter maintain fences on both sides of its road, or so much thereof as is open for use, suitable and sufficient to prevent ordinary farm stock from getting on such railroad, "except at crossings of public roads and highways, and within such portions of cities and incorporated towns and villages as are, or may hereafter be, laid out and platted into lots and blocks." Provisions are made for gates or bars at farm crossings, and it is also made the duty of such corporations, where the same has not been done, to construct and thereafter maintain suitable and sufficient cattle-guards at all road crossings. Any failure to comply with the provisions of the statute in this respect will subject the company to the payment of all damages which may be done by the "agents, engines or cars of such corporation to cattle, horses, sheep, hogs or other stock." Now, the question is made whether the plaintiff's cow was killed at a point or place where it was the duty of the defendant railway company to enclose its track with a suitable or sufficient fence to prevent stock from getting on it.

The plaintiff's cow was killed eighty rods east of a station on defendant's road called Dumser, but west of the east end of a switch station. It is admitted "Dumser" is not an incorporated city, village or town, and has never been laid out and platted into lots and blocks, and neither is it a city or village

believe from the evidence, that the engine driver, by the use of ordinary skill and prudence, could have seen the mules, and that he might without danger have stopped the train before striking the mules, and did not, this would be negligence on the part of the railroad company." The supreme court, in sustaining this ruling of the circuit court, expressly overruled a contrary doctrine, held in the following cases: The Central Military Tract R. R. Co. v. Rockefellow, 17 Ill. 541; Great Western R. R. Co. v. Thompson, 17 Ill. 131; Ill. Cent. R. R. Co. v. Reedy, *Id.* 580; and Chicago & Miss. R. R. Co. v. Patchin, 16 Ill. 198. The doctrine which these cases distinctly laid down, was, that a railroad company was not liable for *want of ordinary care* and diligence in running its trains, whereby stock upon the road is killed, but only for wanton, wilful or gross negligence.

in fact; but defendant has a station house at that point, and stops its trains there for receiving and discharging freight and passengers. There is a switch at this point about two thousand feet long, and extends on both sides of the station house, about one-third on west and two-thirds on east side of the station. It is not claimed that the point where the cow was killed is one of the excepted places mentioned in the statute where the company is not required to fence its track. The suggestion is, that as the company had a station at the place where the injury was done, a public necessity exists for keeping the grounds adjacent to the depot open, and for that reason it could not have been the intention of the legislature that the company should fence its track at that place. The legislature has seen fit in absolute terms to limit the exceptions to the statutory requirement that all railway companies shall enclose their tracks with a suitable and sufficient fence to the "crossings of public roads and highways," and to such portions of cities and villages as have been, or shall hereafter be, laid out and platted into "lots and blocks," and the supreme court would be reluctant to enlarge by construction the number of excepted places—most certainly, unless where the literal application of the statute would work such great public inconvenience it would be held the legislature could not have intended it should apply. Such does not appear in this case. There is nothing in the evidence in this case that shows any reason, arising from public convenience or otherwise, that requires the track either east or west of this station-house should be left unfenced. That necessity, if it existed at all, should be made to appear from the evidence by the defendant corporation seeking to be relieved from a duty imposed by a public statute. The cow was killed about eighty rods east of the depot, and the defendant had no fence on either side of the track at that point which was within the switch limits. The fact that a switch may extend that far can make no difference. That could be enclosed by a suitable fence as well as the main track.[1]

SEC. 497. *Liability for stock killed where road is not fenced.* —The fact that the owner of stock permits it to run at large,

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[1] Chicago, M. & St. P. R. R. Co. v. Dumser, 109 Ill. 402.

in violation of the act prohibiting domestic animals from running at large, does not relieve railroad companies from their duty to fence their roads, or their liability for stock injured in consequence of their failure to do so.[1] In a suit against a railroad company for stock killed or injured in consequence of the neglect of the company to fence its road, where it appears such stock was permitted to run at large in violation of law, the question whether the owner has been guilty of contributory negligence in permitting them to run at large, is one of fact, to be determined by the jury from the circumstances of the case, and that it is not sufficient to charge a plaintiff with contributory negligence, in a suit against a railroad company for injury to stock, to simply show that the owner permitted the stock to run at large in violation of law, but it must appear that he did so under such circumstances that the natural and probable consequence of doing so was that the stock would go upon the railroad and be injured. *Id.*

SEC. 498. *Contributory negligence—Failure to fence track.*—Where a railroad company fails to fence its road, and stock is killed by its trains in a county where it is lawful for stock to run at large, the question of contributory negligence in the owner permitting his stock to run at large can not arise; the company is liable.[2]

SEC. 499. *Failure to maintain fence—Agreement with adjacent owner to do it.*—The plaintiff (Washburn) was a tenant of Miller, and as such was in possession of a farm adjoining the railroad of defendant. Miller, in 1873, contracted with the railroad company to construct a good and sufficient fence along the line between his land and the strip of land on which the track lay, and to maintain the same for ten years. He built a fence, apparently good and sufficient. In the latter part of 1874 Miller let his farm to plaintiff. In the spring of 1875, the plaintiff (as was his duty as tenant, having knowledge of his landlord's undertaking) repaired this fence. In August, 1875, plaintiff, with full knowledge of the condition of the fence, turned his horses and mules into a pasture adjoin-

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[1] Cairo & St. L. R. R. Co. v. James Woolsey, 85 Ill. 370; Ewing v. C. & A. Ry. Co., 72 Ill. 25.

[2] Ohio & Miss. R. Co. v. Fowler, 85 Ill. 21; Toledo, Wabash & W. R. Co. v. Furguson, 42 Ill. 449.

ing the railroad land, and separated from it by this fence. One horse was breachy. During the night this breachy horse and two mules escaped from the pasture into the inclosure of the railroad track, through a breach in the fence not shown to have been there before, and by a passing train the mules were killed and the horse was injured. This statute (to recover double the amount of actual damages) is highly penal. No recovery can be had under it without clear proof of clear omission of duty. The fence was apparently good. Instead of the proof showing clearly that these animals escaped by reason of a defective fence, the weight of proof tends to show that they escaped by reason of the fault of the breachy horse. Be this as it may, the landlord having built the fence and taken upon himself to maintain it, as between himself and those holding under him with knowledge of his duty on the one part, and the railroad company on the other, the duty of maintaining and repairing the fence did not rest on the railroad company. Neither Miller nor his tenant (Washburn) can complain that the fence was not such as it should have been.[1]

SEC. 500. Where third persons make a breach in the fence of the railroad company's right of way without the company's fault, and stock enters and is killed by the company's engine without negligence of defendant's servants operating its train, the plaintiff can not recover.[2]

SEC. 501. The fact that the owner of stock allowed the same to run at large, contrary to law, and it is injured by a railroad train upon an unfenced right of way, the law requiring the same to be fenced, will not prevent a recovery where the railway company's servants failed to use reasonable care and caution, under all the circumstances of the case, to avoid injury.[3]

SEC. 502. *When not required to fence track and make cattle-guards.*—A railroad company is not bound to fence its track or make cattle-guards within the limits of a village; and a place where there is a station-house, a warehouse, a store, a blacksmith shop, a postoffice and five or six dwelling houses,

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[1] St. Louis, Vandalia & T. H. R. Co. v. Washburn, 97 Ill. 253.

[2] C. & A. R. R. Co. v. Saunders, 85 Ill. 288.

[3] Louisville, E. & St. L. Consol. R. Co. v. Dulaney, 43 App. 297.

whether they are situated upon regularly laid out streets and alleys or not, comes fully up to the definition of a village, for the purpose of excusing a railroad company from fencing its track within the limits thereof. This road crossing being within the limits of a *village*, the company were not required to fence their track or have cattle-guards there, and are not consequently chargeable with neglect in that respect.[1]

SEC. 503. *As to fencing railroad track at stations.*—The statute of this state requiring railway companies to fence each side of their roads to prevent cattle from getting on the same, except at public road crossings and within cities and villages, and out into lots and blocks, and making them liable for injury to stock for a failure to do so, is not intended to apply to public stations or depot grounds, although such stations or depot grounds may not be within the limits of a village, town or city, or a highway crossing. But side tracks not at stations or depots, and such parts of side tracks as do not constitute a part of the depot may well be held to be within the meaning of the statute. It is made the duty of railway companies to establish depots, and so operate their roads as to afford the public reasonable safety and dispatch in the transaction of business, and to effect this, it is necessary that they should, at all reasonable times, provide a ready and convenient means of access to their stations and depots.[2]

SEC. 504. *Negligence—Fencing railroads—Duty and liability of railroad company.*—The statute requires that every railroad that has been in operation six months shall be fenced by the railroad company suitably to prevent, etc., from getting on the railroad, except at the crossing of public roads and highways, and within such portions of cities and incorporated towns as are platted into lots, with gates or bars at farm crossings, etc. (Sec. 1, Act 1874.) The place where the plaintiff's colt went through the defective gate upon the railroad track, was not one of those mentioned in the statute

[1] Toledo, W. & W. Ry. Co. v. Spangler, 71 Ill. 568.

[2] Chicago, B. & Q. Ry. Co. v. Peter Hans, 111 Ill. 114.*

* NOTE.—This ruling modifies, somewhat, the opinion expressed in the case of Chicago, Milwaukee & St. Paul v. Dumser, 109 Ill. 402, *supra*, in so far as it intimates that the company was derelict in failing to fence its road at its depot grounds.

relieving the company of that duty—in other words, it was not one of the *excepted* places. *Prima facie*, then, it was the duty of the company to keep the fence and gate in repair at this point so as to prevent the escape of stock, and this duty they undertook to and did discharge for a number of years, but of late have neglected to do so. It now claims that it should be excused from the performance of this statutory duty because of the counter and higher duty it owes to the public to keep its depot grounds open for the use and convenience of those having business with the road, in accordance with the principle announced in the case of Chicago, Burlington & Quincy R. R. Co. v. Hans, 111 Ill. 114. Whether the railroad company could not transact its business and operate its cars with safety to its employes, or the convenience of the public be as well served, with or without this fence or gate remaining as it was originally erected, were questions of fact which the company ought to be estopped from controverting so long as it permits it to stand and be used and relied upon by others as a fence which the statute by its plain reading *prima facie* requires it to build and keep in repair—certainly so until they have given notice to parties interested, to the contrary, and thus given them a reasonable opportunity to build their own fence.[1]

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[1] Chicago & E. I. Ry. Co. v. Guertin, 115 Ill. 466.*

* NOTE.—The plaintiff (Guertin) brought action to recover for three acres of timothy meadow, alleged to have been burned, caused by defendant's locomotive having set fire to its right of way, which communicated with and destroyed the timothy stubble; and the killing of two steers by defendant's train on the crossing at Guertin street; and for the killing of two head of cattle and a stallion colt, which is alleged to have occurred in consequence of the railroad company having suffered its gates and bars to get out of repair, and by means whereof they strayed upon the track and were struck by defendant's locomotive and killed. The jury found defendant guilty and assessed damages at $50, being much less than the amount the evidence tended to show. It is presumed this was for the colt killed. The colt had been running in plaintiff's pasture east of the railroad track and grounds. It escaped therefrom by a defective gate in the fence, and got upon defendant's track and was struck by its locomotive and killed. The defendant insisted that it should not be held responsible, because the fence was not on *the line of its right of way*, and that it was not bound to fence the road at that point. It is true, this fence was a few feet from the line and upon the ground of the plaintiff, but the defendant had erected the fence and gate through which the colt had escaped, kept it in repair

SEC. 505. *Failure to fence tracks at station.*—No negligence is imputed to the defendant railroad company except the failure to fence its track and station grounds at the place where the injury occurred. The evidence shows that land was laid off into lots and blocks that comprised land lying along the switch and extending beyond the switch and depot grounds both east and west. Ellery is a station at which defendant's trains stop to receive and discharge passengers and freight, and the evidence shows that the place where the injury occurred was used by the railroad company and the public in receiving and discharging freight. The fact that Ellery is not an incorporated town, village or city can not affect the question. The railroad company is not bound to fence its roads at a station.[1]

SEC. 506. *Removal of farm crossings—Damages.*—Sec. 1, Chap. 114, Ill. Stat., provides that "Every railroad corporation shall erect and thereafter maintain fences, * * * suitable and sufficient to prevent cattle or other stock from getting on such railroad, * * * with gates or bars at the farm crossings of such railroad, which farm crossings shall be constructed by such corporation when and where the same may become necessary for the use of the proprietors of the lands adjoining such railroads; and shall also construct * * * and thereafter maintain at all road crossings now existing or hereafter established, cattle-guards * * * sufficient to prevent cattle * * * and other stock from getting on such railroad; and when such fences or cattle-guards are not made as aforesaid, or when such fences or cattle-guards are not kept in good repair, such railroad corporation shall be liable for all damages which may be done by the agents, engines or cars of such corporation to such cattle * * * or other stock thereon, and reasonable attorneys' fees." It is to be observed that while a specific liability attaches to failure to do most of the things

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a number of years, and then neglected it. It had treated this fence and gate as part of that which the law required it to build along its right of way, and having done so, the plaintiff had a right to rely upon its maintaining it and keeping it in repair, and it was its duty to do so until it had given him formal notice that it considered itself absolved therefrom, and should no longer maintain or repair the same.

[1] Louisville, Evansville & St. L. Consolidated Co. v. William Scott, 34 Ill. App. 635.

required, that no liability is declared by this section for a failure to construct or maintain for the use of the proprietors of the land adjoining such railroad farm crossings. It merely imposes the duty. But the rule is fundamental, that every statute imposing a duty on one person for the benefit of another, implies the existence of a liability and a remedy, though none is specifically provided where an injury results from the failure to perform such duty. Sedgwick on Statutory and Constitutional Law, p. 92, and authorities cited.

Doubtless, it is true, primarily, that until the proprietor has given notice where he wants the crossing located, or it is determined where it is reasonably convenient, as the word "necessary" is interpreted to mean in Talcroft v. L. E. & St. L. E. Co., 113 Ill. 86, no consequential damages can be said to arise. But after the crossing is actually put in, and is *thereafter removed by the company*, and not replaced, so that the proprietor can not cross the railroad at any place reasonably convenient, then an action at common law based upon the statutory duty, will lie for damages sustained thereby. The burden is on the plaintiff to show what amount of damages was caused by such act. He could not sit down and let his corn in the field rot merely because the most convenient way of access to it had been removed by defendant. It was his duty—affirmative duty—to proceed in the most practicable way remaining to gather his corn. The removal of the crossing did not cause the injury, except in so far as it made the removal of the corn to the south side more inconvenient and expensive. The act of removal of the crossing was not malicious, and the injury occasioned by the rains setting in earlier than usual, or falling in unusual abundance, was not the natural result of the misconduct which could have reasonably been foreseen or expected.[1]

SEC. 507. *Railroad—Negligence—Failure to fence.*—The right of recovery in this case is based on the alleged failure to fence its tracks. The principal defense is that the railroad was not required to fence its tracks at that point. The facts are that Carrier Mills is a station on the line of the appellant's road where it has a side track, depot and cattle pens, as conven-

[1] Phillip v. Dickerson, 85 Ill. 11; Ohio & Miss. R. R. Co. v. McGehee, 47 Ill. App. 348.

iences for the transaction of business for the public. There is also a warehouse near its side track from which grain is loaded into its cars. The village is unincorporated, but it is laid out into lots, blocks and streets. The tracks run through the village from northeast to southwest, on each side of which there are buildings; the usual business of a country village is represented in its makeup. The station is situated in a rich agricultural and timber country which supplies large shipments, and, as the evidence fairly shows, requires substantially all the space along the side track for the proper and convenient landing of products brought to that station for transportation.

The plaintiff's hog was killed by the defendant's engine. It was near the warehouse, probably eating grain that had fallen to the ground in loading it from the warehouse to defendant's cars. It was there killed. There is no evidence to indicate where it got on the track of the defendant. The burden of proof is on the plaintiff to show that the hog got on the right of way at a place where the defendant was required to fence its road. This the plaintiff failed to prove, and as no common law negligence is shown, the plaintiff is not entitled to recover. The defendant was not required to fence its track along the line of its switch, where, as the evidence shows, the space was substantially all used by the public in its transaction of business with the railroad company. This doctrine seems now well established in this state.[1]

SEC. 508. *Railroads—Duty to maintain fences.*—The law prohibiting domestic animals to run at large does not relieve the defendant company from its duty under the statute to erect and maintain fences along the side of its right of way, nor from liability if stock be killed or injured in consequence of its failure to observe that duty.[2]

The statutory duty of the company to maintain such fences includes the duty of using reasonable diligence to keep gates at farm crossings closed.[3]

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[1] Cleveland, Cincinnati, C. & St. L. R. Co. v. Myers, 43 App. 251.

[2] Ewing v. Chicago & Alton R. R. Co., 72 Ill. 25; Rockford, Rock Island & St. Louis R. R. Co. v. Irish, 72 Ill. 404; Cairo & St. Louis R. R. Co. v. Woolsey, 82 Ill. 370.

[3] Ill. Cen. R. R. Co. v. Arnold, 47 Ill. 173; Chicago & N. W. R. R. Co. v. Harris, 54 Ill. 528.

The company could not, as against the plaintiff, exempt itself from the consequences of a failure to observe that legal duty of keeping the gate closed by showing that it supposed a third person might or would perform it. The duty of the company as to the fence is not affected or relaxed because the field into which the gate in question opened was devoted to growing crops. The statute makes no such exception. It is held in some jurisdictions that railway fence laws are exclusively for the benefit of the owners of lands adjoining the right of way of the road, but such is not the prevailing doctrine. The rule in the State of Illinois is, that such laws are for the benefit of all owners of stock and that the railway company is liable if stock is injured by reason of its failure to observe the law, unless the owner of the stock is guilty of contributory negligence, and that it is not sufficient to charge the owner with contributory negligence to show that he knowingly permitted the stock to be at large in violation of the law, but that it must appear that he did so under such circumstances that the natural and probable consequences of his so doing was that the stock would go upon the railroad track and be injured.[1]

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[1] Cairo & St. Louis R. R. Co. v. Woolsey; Wabash R. R. Co. v. Henry Berbex, 57 M. App. 62.*

*Note.—During the night of June 14, 1893, a herd of cattle belonging to Henry Berbex (plaintiff) escaped from his premises into the adjoining field, which belonged to William Shoney, from thence meandered through an open gate into premises belonging to William Brownlow, passed therefrom through a gap in the fence into a field in possession of one Jerry Griffin, and strayed out of that field onto the right of way of the Wabash Railroad Company (defendant) by means of an open farm crossing gate in the fence of the company. The cattle were run upon by one of defendant's trains, three of them killed and one injured. The plaintiff recovered judgment in the sum of $100 damages. It appeared clearly from the evidence that the gate in defendant's fence had been much open, if not all the time, for two months prior to the night in question, and further, that the foreman of defendant's force of section men saw it standing open at six o'clock in the evening of the day in question and allowed it to remain open. It is not contended in this case that the plaintiff knowingly permitted his cattle to be at large but that he negligently omitted to keep his fence in good and sufficient repair to restrain them upon his premises. The natural and probable consequences of his neglect in this respect was that his cattle would trespass upon the adjoining field of William Shoney. Proof that plaintiff had not a sufficient fence did not, under the circumstances proven,

SEC. 509. *Railroad—Negligence—Cattle-guard.*—The statute requires that railroad companies shall construct cattle-guards that shall be reasonably sufficient and will turn ordinary stock.[1]

SEC. 510. *Railway company—Duty to erect gates.*—The statute makes it the duty of the railway companies to erect

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tend to charge him with contributory negligence. The defendant company stood charged with the statutory duty of keeping its tracks inclosed by a good and sufficient fence, so that domestic animals named in the statute could not wander into places made dangerous by the operation of the trains. It failed to discharge this duty, and was properly held liable for the consequences. The judgment was affirmed.

[1] C., B. & Q. R. R. Co. v. Evans, 45 Ill. App. 79.*

* NOTE.—Action to recover the value of four horses killed upon the track of the C., B. & Q. R. R. Co. by its engine and cars. The defendant's negligence was alleged to be failure to construct and maintain a cattle-guard suitable and sufficient to prevent horses from getting on the right of way from the public road. There was a recovery for $2,150. The evidence shows that after breaking through different fences from the pasture where they were kept before reaching the highway the horses jumped or passed over the cattle-guard onto the right of way. This cattle-guard was eight feet nine inches long north and south, parallel with the rails, fourteen feet wide across the track, and two feet and two inches deep. A pit was first dug in which was placed a box made of two-inch planks, its inside measurement being seven feet ten inches parallel with the rails, and fourteen feet wide across the track, which rested on twelve by twelve timbers. Across this box were placed two stringers ten by twelve inches, which carried the iron rails of the track. Between those rails were five oak slats, three and a half to four inches square, placed edgewise, and from four to five inches apart, so that the sharp corners were on the surface, leaving about five inches of space between the slats as laid with four similar ones outside of each rail, all set in notches cut in the box or frame. They were all spiked to the frame and extended over the sides of the box five inches on each side, which would make the cattle-guard from nine feet to nine feet four inches across, parallel with the track. It was in good condition and suitable for the purposes for which it was constructed. It was the standard cattle-guard in general use and sufficient to turn all ordinary horses. The statute imposes no such duty upon railroad companies as that the structure shall be sufficient to turn any kind of a horse. All that it requires is that it shall be reasonably sufficient.[2]

These horses were evidently very breachy, else they could not have escaped from this enclosure through three fences and over a cattle-guard of the kind described. The judgment of the lower court was reversed and the case not remanded, as the court held there was no cause of action.

[2] Scott v. Breech, 85 Ill. 334; C., B. & Q. Ry. Co. v. Farrely, 3 Ill. App. 60; C., B. & Q. Ry. Co. v. Kennedy, 22 Ill. App. 308; C. & A. R. R. Co. v. Buck, 14 Ill. App. 394.

and maintain a suitable and sufficient fence both sides of their right of way; and where a gate is a part of the fence the same duty applies to the gate as to any other part of the fence. The plaintiff had a right to rely upon the company to perform this duty; and to expect that it would exercise such vigilance as might be necessary to discover that the gate was getting out of repair and becoming unsafe.[1]

SEC. 511. *Railroads—Insufficient cattle-guards—Attorney's fee.*—In an action to recover damages for the killing of horses on a railroad, through alleged insufficiency of a cattle-guard, testimony of a witness that he had seen cattle and colts cross another cattle-guard on defendant's road (in the vicinity of the one complained of) was properly admitted, evidence having been introduced to show that the guards were alike, and one of the defendant's witnesses having testified that the guard complained of was the best known and was in general use; but if cattle and colts would freely cross it, it would not be sufficient.[2]

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[1] Chicago & Alton R. R. Co. v. Morton, 55 Ill. App. 144.*

[2] Lake Erie & Western R. R. Co. v. Helmericks, 38 Ill. App. 141.†

* NOTE.—Action against railroad company for killing horses. The plaintiffs recovered judgment in the circuit court for $4,800 damages against the C. & A. R. R. Co. for the killing of seven horses belonging to plaintiffs, by an engine and train of cars passing over defendant's road. The declaration alleged:

1st. That the defendant neglected to provide suitable and sufficient fence to prevent horses getting on the road, whereby the horses strayed upon the track and were killed.

2d. That the train was negligently and recklessly handled and managed whereby, etc.

3d. Averred neglect to fence properly, and that the locomotive was negligently and wilfully driven upon the stock.

The jury found specially that there was no negligence in the management of the train, and that the fence was not suitable and sufficient to prevent horses from getting on the track. On this point the proof was that there was a gate for a farm crossing opening from the right of way to the pasture of the plaintiff, through which the stock went onto the track. This gate, as evidence shows, was not sufficiently safe; was rotten at the joints where the hinges were placed, and that the stake which had been driven down to keep the head of the gate from passing the head-post, had rotted off; and that although the fastening, consisting of a chain and hook, was fairly good, yet the gate would play back and forth, with nothing but the chain to hold it.

† NOTE.—This was an action to recover the value of two horses killed on defendant's road, by reason, as charged, of an insufficient cattle-guard.

The amount of the attorney's fee was properly submitted to the jury, and it was not necessary for plaintiff to show by evidence what he had paid or was to pay, but evidence as to what was a reasonable fee, was competent. *Id.*

SEC. 512. *Fencing tracks—Cattle-guards.*—Where railroad companies are exempt from the duty of fencing their tracks at street crossings, the law requires them to provide cattle-guards, to prevent the passage of animals from the street to their right of way, and if they neglect to perform their duty in that regard, liability follows under the statute.[1]

It is a question of fact whether the convenience of the public requires that a railroad track in a particular place should be left unfenced, to be determined by the jury from the evidence in the case. *Id.*

The declaration charged that two of the plaintiff's horses got upon defendant's road over an insufficient cattle-guard, at the side of a highway crossed by the railroad, and were struck and killed by defendant's engines. Declaration also claimed attorney's fee. The trial resulted in a verdict by the jury of $310, value of the horses, and $50 for attorney's fee, and a judgment of $360. It was proved by one witness that he had seen cattle and colts cross another cattle-guard on defendant's road in the vicinity of the one in question. The defendant called its claim agent (Bennett) who testified to the jury fully as to the form and construction of the guard in question; that it was the best one known and was in general use by railroads, and was, in his opinion, sufficient to prevent stock from getting over the track. Upon cross-examination he stated that if cattle and horses would walk freely over such a cattle-guard it would not be good and sufficient, but that he had never known them to do so. Had seen them go up to such guards, look at them, turn around and go back. Plaintiff's witness (Helmericks) testified that he knew the guards in question; knew one further west on defendant's road of same kind and make and size, and that he had seen cattle and colts pass freely over it. The question to be answered by the jury was: "Do cattle-guards of the size and construction of the one in controversy reasonably serve the purpose for which they are intended?" And the evidence tended to answer it. As to submitting the question of the amount of the attorney's fee to the jury, and directing them to find and allow the same, it was the correct practice. The plaintiff had as much right to have a jury determine what was a reasonable attorney's fee as to assess damages for the injury.

[1] Cleveland, C., C. & St. L. R. R. Co. v. Green, 65 Ill. App. 414.*

* NOTE.—Action for damages for killing plaintiff's cow. The cow came upon the defendant's track at the crossing at Grandview street, in the unincorporated town or village of Dudley. The east side of Grandview street is the eastern limit of Dudley. Cattle-guards had not been provided on either

SEC. 513. *Railroads—Liability for stock killed at a place not fenced.*—The failure to inclose 171 feet of a railroad occupied by a main track between the village limits and a railroad bridge, as required by statute, is not excused because the absence of such fence with the necessary cattle-guard would tend to a greater convenience for the company, as well as safety to its employes while engaged in switching.

Failure to fence its right of way between the village limits and a bridge of the road near by renders the company liable for a horse which got upon the track at such uninclosed place and was killed on the bridge.[1]

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side of the crossing, and the jury were warranted by the evidence in finding that the cow passed from the street crossing northward, westwardly along the railroad track a distance of from sixty to eighty feet, and was there struck and killed by the train. Notwithstanding the fact that the animal came upon the track at a public crossing where the company was not bound to fence, yet, unless the company was exempt from the duty of fencing the track west of the street crossing, the statute requires that it should provide cattle-guards to prevent the passage of cattle from the street westwardly, and if it neglected to perform its duty in that regard, liability under the statute would follow.

The defendant company maintains a depot about 900 feet west of Grandview street, and the contention was that it was necessary that the intervening grounds should not be inclosed with a fence in order that the public could have ready and convenient means of access to the station and depot grounds, and further, the cattle-guards at the street crossings would be a source of danger to brakemen and switchmen when engaged in coupling and uncoupling cars. It was a question of fact whether the convenience of the public required that the track west of Grandview street should be left unfenced, and the jury found against the defendant on this issue.[2]

[1] T. & S. F. R. R. Co. v. Elder, 149 Ill. 173.

[2] Toledo, St. L. & K. City R. R. Co. v. Franklin, 159 Ill. 99.*

* NOTE.—Case against said railroad company for the value of horse struck and killed by its train upon its track upon a bridge. Ramsy is an incorporated town through which the railroad of defendant company runs. The horse entered upon defendant's right of way west of the depot, and continued on the same on the south side and along said railway until within about forty feet of the west end of the bridge, when it strayed upon the railway track, thence upon said bridge to the point at which it was struck and killed. It was 1,900 feet from the east end of defendant's depot in Ramsy to the east line of the corporate limits. The east corporate limit line crossed the defendant's road 171 feet west of the bridge. Said road had been open for several years. The horse got upon defendant's track beyond the corporate limits. There was no fence or cattle-guard to prevent it from passing along the right of way east, over the east line of the town, and getting upon defendant's track as it did.

SEC. 514. *Fencing right of way—Failure—Right of land owner.*—On the failure of a railroad company to build or repair fences, as required by law, the owner of the adjoining land, after notice, may do so, and recover therefor double the value thereof.[1]

SEC. 515. *Railroad company — Duty as to trespassing animals.*—On the night of August 1, 1890, five of the plaintiff's horses got on the defendant's right of way and were struck by one of the defendant's locomotive engines propelling one of its freight trains and were all killed. The evidence renders it probable that said horses got on the right of way by passing through one of the gates, but there is no evidence tending to show by whose fault the gate was opened, nor what care, if any, had been taken by the plaintiff (Noble) to prevent his horses from getting upon the railroad. It seems, however, to have been conceded at the trial that the gate was not left open through the fault of the defendant, as the plaintiff's counsel expressly declared in open court that he was not seeking to recover because the gate was left open.

The night seems to have been a moonlight night, and the negligence on the part of the employes in charge of the engine, upon which the plaintiff bases his right to recover, consists of their failure to exercise *proper diligence* in discovering that the horses were on the track, in time to so check the speed of the train as to prevent a collision. The testimony of the employes in charge of the train tends to show that they did not and could not see the horses until so near them that a collision could not be avoided, the testimony of the engineer being to the effect that the horses stepped on the track only a few feet in front of the engine, and that he then did everything in his power to avoid colliding with them. Other witnesses, however, testified as to the appearance of the tracks of the horses as seen on the railroad track after the collision,

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[1] Terre Haute & I. R. R. Co. v. Susannah, 60 Ill. App. 111; Lake Erie & Western R. R. Co. v. John Deutsch, 60 Ill. App. 144.*

* NOTE.—Judgment against defendant company, $100.70. The notice to the company was to repair a fence at the place in question, and the action was to recover double the cost thereof under the statute. The company had a fence at the place. It was torn down and rebuilt by plaintiff, the necessary material being added. Judgment affirmed.

from which the inference is sought to be drawn that the horses went upon the track at such a distance in front of the engine, that the engineer, in the exercise of ordinary care, might have discovered them in time to prevent the accident.

The jury, at the instance of the plaintiff, were instructed by the trial court, in substance, that if from all the circumstances and evidence they believed that by the exercise of reasonable care and caution the horses could have been seen by those in charge of the train, after they were on the defendant's track, in time to have stopped said train, or reduced its speed, so as not to have injured said horses, by reasonable diligence, then it was their duty to have done so, and if they did not do so, the defendant is liable and the plaintiff is entitled to recover what said horses were worth. At the instance of the defendant, the court further instructed the jury (somewhat modifying that proposed) as follows: "Unless the plaintiff has proved, by a preponderance of the evidence, that after the horses were, *or by the exercise of reasonable care could have been*, seen approaching the track, *or on* the track, the train men might, by the exercise of ordinary care, have prevented the train from striking the horses, you should find the defendant not guilty."

It is presumed that the word "*reasonable*" in said instructions, was used in the sense or as equivalent to "ordinary," so that reasonable care meant "ordinary care." The question is, then, whether the defendants servants were bound to exercise ordinary care and caution to see said horses and discover their presence on the defendant's right of way.

The plaintiff's horses, at the time they were killed, were on defendant's railroad track without right; mere trespassers. The defendant seems to have performed its entire statutory duty in respect to erecting and maintaining fences on the sides of its road, with gates at the plaintiff's farm crossing, and no negligence in that respect is insisted upon. While it is probable that the horses got on the railroad through one of said gates, it is not claimed that such gate was left open through the defendant's negligence. The defendant having performed its entire legal duty in the matter of fencing its road, was entitled to the enjoyment of its right of way, free from the incursions of the domestic animals of adjoining proprietors.

The evidence further tends to show that defendant's employes in charge of its train, had no actual knowledge or notice of the presence of plaintiff's horses on defendant's right of way, until the engineer saw them as they were on the track, or just stepping on the track, the instant before they were struck by the engine. The controversy, so far as the facts are concerned, is, whether said employes, if they had been in the exercise of ordinary care and caution to discover, if possible, trespassers on said right of way, would have discovered said horses in time to avoid injuring them. What duty, then, as to care and caution, so far as it relates to the *mere discovery* of the fact that domestic animals are trespassing on a railroad track, does the railway company and its employes owe to the owners of such animals? The court is not prepared to hold it the duty of a railroad company to run its trains with a view to the constant probability of trespassers upon its track. Precaution is a duty only so far as there is reason for apprehension, and no one can complain of a want of care in another, when such care is rendered necessary by his own wrongful act. The doctrine announced by the decisions, that where the persons or animals exposed to injury are mere trespassers the duty to exercise care arises only upon discovery of their presence on the railway, seems to be strictly in accordance with the general current of authority. (T. W. & W. Ry. Co. v. Barlow, 71 Ill. 640; I. C. R. R. Co. v. Godfrey, 71 Ill. 500; 1 Redfield on Railways, Sec. 126.) The duty of care and vigilance is the same whether the trespasser is a human being or a domestic animal—that is, the duty to be on the lookout for the latter can be no greater than for the former. The view here taken is not considered to be out of harmony with the view taken in the case of I. C. R. R. Co. v. Middlesworth, 46 Ill. 494, *supra*. In that case, as matter of fact, it was considered that the engineer saw the mules a sufficient time before they were killed, by ordinary care, to have stopped his train and avoided striking them.[1]

SEC. 516. *Trespassing animals.*—To enable a party to recover of a railroad company for stock killed while trespassing upon its right of way and track, he must show that its

[1] I. C. R. R. Co. v. Noble, 142 Ill. 578.

servants in some way were notified that the stock were in fact on the track or likely to be on, and that they, by the exercise of proper care and prudence, could have prevented the injury.[1]

SEC. 517. *Liability of railroad company for stock killed by failure to fence.*—A mare and colt escaped from the owner's barn in the night time and entered upon the right of way and track of the railroad company south of the highway. Wandering from there to the north they were killed at a point 800 feet north of the highway. At the point where the stock first went upon the track the railroad company was exempt from fencing. It was at a place used by the public in receiving and loading freight. That fact would not exempt the railroad company from liability, however, if they were killed at a point not exempted, and had reached there because of said company's failure to erect suitable fence and put in proper cattle-guard. (Wabash R. Co. v. Pickerell, 72 App. 601.) Taking the most favorable view for the company possible, it is apparent that had it performed its duty in erecting a fence and cattle-guard the mare and colt would not have gone to the point where they were killed.[2]

SEC. 518. *Act requiring fences and cattle-guards is for protection of all needing protection.*—The act on the fencing and operating of railroads (Rev. Stat. 1874, p. 807), which requires railroad companies to erect and maintain fences and cattle-guards as therein provided, is not intended merely for the protection of property, but for the protection of railroad employes and passengers, by keeping the track clear of obstructions.

The said act imposes on railroad companies an absolute duty to erect and maintain fences and cattle-guards as therein provided, and the company is liable to an employe, who, while exercising due care, receives an injury because of the company's failure to perform such duty. It is true that the statute contains a provision that if such fences or cattle-guards are not made or kept in good repair such railroad corporation shall be liable for all damages which may be done by the agents, engines, or cars of such corporation to cattle, horses, sheep, hogs or other stock thereon; but this provision can not

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[1] Pierce, Receiver, v. Wright, 73 Ill. App. 512.

[2] Chicago & E. I. R. R. Co. v. Blair, 75 Ill. App. 659.

be held to exclude all other liability which may arise from a failure of the railroad company to fence and put in cattle-guards, as required by law. It may be that the statute was primarily intended for the benefit of the owners of stock when their stock was killed on the railroad track, but at the same time the statute was doubtless intended for the benefit of all classes of persons who might need protection. The person whose business requires that he should take passage as a passenger on a train has a deeper interest in having the track protected from obstructions of every character than the owner of stock. So also the employe of a railroad train has a deep interest. The lives of the passenger and employe are alike at stake when the railroad is not properly protected from obstructions which are likely to be upon the track when it is not properly fenced. It is, therefore, unreasonable to suppose that the legislature would provide a law for the protection of property and make no provision whatever for the protection of life. Donnegan v. Ehrhard, 119 N. Y. 472; A., T. & S. F. R. R. Co. v. Busman, 60 Fed. Rep. 370; Dickinson v. O. & St. L. R. R. Co., 124 Mo. 140.

It is clear that a fair and reasonable construction of the statute requires the railroad company to fence its tracks and construct cattle-guards, and for a failure to do so it is liable to an employe who may have been injured through its failure to perform a duty thus imposed upon it by law. *Id.*

The duties of a railroad engineer are not such as to direct his attention to fences and cattle-guards, and the law does not require that he should have a knowledge of their condition. It is, no doubt, the duty of an engineer, in the management of his train, to look out and look ahead for obstructions or signals, and to look for signals when switching; but, as far as appears, there is nothing in the nature or character of the duties of an engineer which would direct his attention to the fences along the line of the track or the cattle-guards at a highway crossing. It is therefore unreasonable to believe that the engineer had notice of the condition of the fence and cattle-guards at the place where the accident occurred. The duty of fencing the track and constructing cattle-guards at highway crossings was imposed upon the railroad company, and the deceased had the right to believe that the company had discharged its

duty in this regard; hence there was no reason why he should be on the constant watch to learn the condition of the fences and cattle-guards. I. C. R. R. Co. v. Saunders, 166 Ill. 270.

An employe does not assume all the risks of the service in which he may be engaged, but he assumes only ordinary and obvious and known risks. Such risks as are usually incident to the service, and such as he ought to have known were incident thereto, or such as come to his knowledge and of which he does not complain or object to, may fairly be said to have been assumed by him. Wood on Master and Servant p. 385.

A railroad company is liable in damages for the death of an engineer caused by the derailing of his train on striking cattle which strayed on the track at a highway crossing where the company had neglected to erect fences and put in cattle-guards in violation of its duty, if the engineer was not negligent in running his train, and is not shown to have had notice of the absence of such fences and cattle-guards.[1]

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[1] T. H. & I. Ry. Co. v. Williams, Adm'x, 172 Ill 379.*

* NOTE.—This was an action by Cora Williams, administratrix of the estate of James C. Williams (her deceased husband), against the Terre Haute & Indianapolis railway company for negligently causing the death of said James C. Williams. The deceased was employed as a locomotive engineer in the service of the railroad company, and it was alleged that because of the neglect of said company to maintain *fences* and *cattle-guards* cattle came upon the track, and that the locomotive, in charge of said Williams, colliding with the obstruction, was derailed, and thereby his death was occasioned without any fault or negligence on his part. The evidence showed that the cattle went upon the track at a point where there should have been cattle-guards, and that this was the direct and proximate cause of the accident which resulted in the death of the engineer. The railroad company neglected to comply with the statutory requirement in this respect, and the first question to be determined is whether such neglect will create liability for personal injuries sustained by reason of the derailment of a train caused by colliding with animals so coming on the track. The railroad company insists that the fencing statute was not enacted to regulate or change the relations between the railroad company and its employes but that its sole purpose was and is to create a liability for the damages done to stock. This view seems to have been entertained by the court in Wabash Railway Company v. Brown, 5 Brad. 590, and the decision was affirmed in the Supreme Court, 96 Ill. 297, but the main and sufficient ground for that decision was that the claim could not be entertained in a court of equity—that chancery had no jurisdiction. Having so

SEC. 519. *Negligence—Injury by fire from locomotive.*— Where a railroad company suffers a heavy growth of dry grass to remain on its right of way through the plaintiff's premises, and fire is communicated from the locomotive of a freight train to the grass and weeds in the right of way, and from thence is communicated to the fences and grass of the plaintiff, which is destroyed, the company is held guilty of negligence and the plaintiff is entitled to recover the value of the property thus destroyed.[1]

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held, the court might well have stopped, but it did go further and express doubt about the right to recover in such a case, as follows: "We can not say it is a common law duty owed by a railroad company to its employes to keep its road so fenced that cattle may be prevented from straying thereon; and if this be so, even a wilful neglect to fence or keep the road fenced in a proper manner to turn stock would not of itself constitute negligence toward them. Circumstances might possibly be shown where, in the exercise of that care which the company owes to its employes, it might be necessary to fence the road, and a neglect to do so might be culpable negligence, but no such case is made by the bill in this case. It relies wholly upon the neglect of a statutory duty. We can not construe our statute as being an enactment for the protection of the company's employes from harm by reason of stock getting on the track." In the recent case of A., T. & S. F. R. R. Co. v. Elder, 149 Ill. 173, the court held that a passenger injured in a wreck so caused might recover. Judgment in $5,000 for plaintiff affirmed.

[1] Rockford, R. I. & St. L. R. R. Co. v. Rogers, 62 Ill. 346.*

* NOTE.—Action by plaintiff (Rogers) to recover damages to fences and grass burnt by the negligence of the defendant railroad company in failing to keep their right of way through plaintiff's farm free from dry grass and weeds, which took fire from their locomotive and was thereby communicated to plaintiff's fences and grass, which was thereby destroyed. Trial resulted in a verdict and judgment for plaintiff in the sum of $400 damages. There appears to have been meadow both sides of the road up to the track, and that the fire communicated from the passing train was from the engine, and not from fire-crackers thrown by passengers on the train. The evidence shows that the fire caught in the grass on the right of way of the company, and communicated from that to the meadow, owing to the heavy growth of grass. The act of March 29, 1889 (Sess. Laws, 312), declares that when fires shall be communicated from passing trains and locomotives, it shall be taken as full *prima facie* evidence to charge the railroad company with negligence. This law was in full force and applied to this company, and there is no evidence to rebut the presumption of negligence created by the statute; on the contrary, the evidence tends strongly to establish negligence. It should have burned off this dead grass early in the spring. Had this been done, this damage by fire probably would not have occurred.

SEC. 520. *Negligence—In railway company permitting weeds to grow on right of way, so as to obstruct view of highway crossing.*—It is negligence in a railway company to permit or suffer weeds or anything else to grow upon its right of way to such a height as to materially obstruct the view of a highway crossing, and if injury results to stock at such crossing, that might have been avoided but for such obstruction, the company will be liable.[1]

SEC. 521. *Looking and listening by one killed at a crossing.*—Where a person, when approaching a railroad crossing, looks and listens for an approaching train before passing a cornfield which obstructed the view, and, after passing the same, again looks and listens, and no warning is given him by bell or whistle, he will be guilty of no negligence on his part in going upon the track, and the fact that he is told to stop, that the cars are coming, which he does not hear, will not change the rule.

Where a railroad company permits brush and other obstructions on its right of way, so as to prevent the view of approaching trains by travelers on the highway crossing its track, and

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[1] I. & St. L. Ry. Co. v. Smith, 78 Ill. 112.*

* NOTE.—Action on case to recover damages for killing plaintiff's mule by a train of cars at a public crossing. There were three counts, alleging, first, that injury was caused by neglect to ring bell or sound whistle within eighty rods of crossing, as required by law; second, that defendant allowed weeds and vegetation to grow on its right of way, where injury occurred, to such a height and density that defendant's servants could not operate its locomotive and trains of cars with safety to person and property, and that in consequence of the negligence the mule was killed; third, avers generally the plaintiff's mule was killed in consequence of the negligence of defendant in running its trains. Trial resulted in verdict in favor of the plaintiff for the value of his mule. It appears that the mule had just escaped from the owner's inclosure, and was about to pass over the track when it was struck by the engine and killed. At that point the railroad makes a curve, and on account of weeds, which the company had suffered to grow upon its right of way, the view was so obstructed that the mule could not be seen, and was not seen, by the engine driver or fireman approaching the track. Had it been seen in time, it may be that it would have been practicable to have stopped the train or slackened speed, so as to have avoided the accident. The safety of persons and property alike make it necessary the company should keep its right of way free from obstructions, so that persons approaching the crossing may readily ascertain whether there is danger, and their own employes may discover whether there is anything on the track.

neglects to give any signal of danger, either by ringing a bell or sounding a whistle, whereby a party in attempting to cross the track on the public road is killed, the company will be guilty of negligence.[1]

SEC. 522. *Negligence—Not removing combustible matter from right of way.*—Under the statute a railway company in the use of a railroad as lessee, or otherwise, is guilty of negligence if it fails to keep its right of way clear from all dead grass, weeds, etc., and for such neglect is made liable for injuries to others from the escape and transmission of fire from its engines.[2]

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[1] Dimick, Adm'r, v. C. & N. W. Ry. Co., 80 Ill. 338.*

[2] P., C. & St. L. R. R. Co. v. Campbell, 86 Ill. 443.†

* NOTE.—Action by administrator of estate of Gilbert H. Dimick, deceased, against defendant company to recover damages for causing death of the deceased through negligence. The jury found a verdict for plaintiff in the sum of $3,500, but the court set aside the verdict on the ground that the special finding of the jury was inconsistent with the general verdict. The declaration contained three counts: First, negligence in running and managing its engines; second, negligence in allowing trees and brush to be standing and growing on the right of way, so as to hinder and prevent persons from discovering the approach of trains; third, negligence in not ringing a bell or sounding a whistle. Several questions were propounded to the jury, which they answered, and, construing them all together, the court says: "We see nothing in them inconsistent with the general verdict, and no reason appears why they may not stand together. It was mainly insisted that the deceased did not take the usual care for his personal safety in driving upon the railroad track where the fatal collision took place. One of the facts found is that deceased looked and listened for the cars while driving on the right of way, before going upon the railroad track at the crossing; another, he looked for the cars while approaching the railroad track, after he had passed the cornfield. What more would any prudent man have done to secure his personal safety? It is said deceased was told to stop; that the cars were coming. The jury found that he was so told, but they also found that he did not hear that warning. What difference could it make, if he was told to stop, if he did not hear it? Notwithstanding he twice listened for signals of danger which the law makes it the imperative duty of the company to give, he heard none, and for the reason that none were given. According to the record, the deceased observed every reasonable precaution for his personal safety." Judgment reversed and case remanded.

† NOTE—On August 19, 1874, fire escaped from an engine either of the defendant or the Chicago, Danville & Vincennes Railroad Company, and spread over the meadow of plaintiff, destroying a large amount of his hay, grass, etc. A train belonging to each company passed about the same

SEC. 523. *Railroads—In case of leasing remain liable for negligence of lessee in operating road.*—A railway company can not absolve itself from the performance of duties imposed upon it by its charter or any general law of the state, or relieve itself from liability for the wrongful acts or omissions of duty of persons operating its road, by transferring its corporate powers to other parties, or by leasing its road to them, except by special statutory authority. To allow it to do so would be contrary to public policy.[1]

SEC. 524. The law requires a railroad company, in operating its trains, to use every possible precaution, by the use of the best and most approved mechanical inventions, to prevent loss from the escape of fire or sparks along the line of its road; and such company will be liable for a loss by fire caused by the neglect of such duty, when the owner of the property destroyed is himself free from negligence.[2] A party who erects

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time and near together, and the fire was discovered in several places on plaintiff's farm immediately after they passed. It is altogether probable that the fire may have been communicated by both, but the jury found that it was by that of the defendant, as that company, as lessor, was liable for the fire that may have been set by its lessee. The evidence tends to show, and the jury were warranted in finding, that the right of way at the place where the fire started was not free from dry weeds, grass and other combustible material. The railroad and warehouse act (Sec. 38) provides that "it shall be the duty of all railroad corporations to keep their right of way clear from all dead grass, dry weeds or other dangerous combustible material, and for neglect shall be liable to the penalties named"—double the amount of damages suffered by non-compliance with its requirements. It is manifest that the defendant and its lessees are, by the statute, to be held *prima facie* negligent—negligent in not removing all combustible material from the right of way—negligent in the use of their engines, and for not having them in a good and safe condition. The defendant (appellant) was the lessee of the road, and permitted the Chicago, Danville & Vincennes Company to use it, and thereby became liable for the negligent acts of the latter company. (O. & M. R. R. Co. v. Dunbar, 20 Ill. 623; I. C. R. R. Co. v. Kanouse, 39 Ill. 272; T., P. & W. Ry. Co. v. Rumbold, 40 Ill. 143.) Judgment of the trial court was affirmed.

[1] Pittsburgh, Cin., C. & St. L. R. R. Co. v. Campbell, 86 Ill. 443.

[2] Chicago & Alton R. R. Co. v. Pennell, 94 Ill. 448.*

* NOTE.—This was an action brought to recover the value of a certain building known as the Normal Hotel, which was destroyed by fire on the night of February 14, 1872. The track of the Chicago & Alton Railroad Company crosses the track of the Illinois Central Railroad Company at the town of Normal. At the crossing of the two roads the defendant erected a

a building on or near a railroad track knows the dangers incident to the use of steam as a motive power, and must be held to assume some of the hazards connected with its use on such thoroughfares. While a party has the right to erect a building near the track and in an exposed position, yet if he does so he is bound to a higher degree of care in providing proper means to prevent his property being destroyed by fire than a person in a less exposed position, and is also required to use all reasonable means to save his property in case fire should occur. *Id.*

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depot building, which was a one-story frame, with a baggage room near by it. The hotel, a frame building four stories high, stood about sixty feet distant from the baggage room. On the night of the fire, and between twelve and one o'clock, a freight train on the defendant's road passed Normal. A short time after the train passed the depot building was discovered to be on fire. After the depot had nearly burned down a fire broke out in the hotel, which in a short time destroyed the entire building. The plaintiff claims that the fire in the depot originated from sparks thrown from defendant's locomotive, and that the hotel caught fire from the burning of the depot.

The first count of the declaration avers that the plaintiff was owner of the large hotel at Normal, and that it was the duty of defendant to have used and kept in repair complete and safe engines only, and provided with the best approved appliances and modern inventions to prevent the escape of sparks and fire; but defendant negligently ran a defective, worn-out and unsafe locomotive engine, without its being provided with the necessary mechanical appliances and modern improvements to prevent the escape of sparks and fire; and in consequence of the neglect of defendant in running said engine, fire was communicated from the engine to the passenger and freight office, and then to the hotel building, whereby said hotel was burned. The second count in the declaration alleges that the engine in use on the road on the night the fire occurred was a coal-burning engine, and it is claimed that wood was used by the fireman, and this is said to be the negligence on the part of the company. The proof upon this question was unsatisfactory, and the court was not satisfied that the evidence was sufficient to establish the fact that the hotel was burned from fire communicated from the depot. The plaintiff erected his building, after the railroad was built, so near the track that it was necessarily exposed to such danger as is incident to the use of steam in the operation of a railroad. While he had the undoubted right to erect his hotel near the track of the railroad, and in an exposed position, if he saw proper, yet when he did so he was bound to use a higher degree of care in providing proper means to protect his property from fire than a person in a less exposed position. Under the instruction given, the plaintiff was required to use no care whatever to save his property. The question of care on his part was entirely ignored. Under the instruction, if the property was destroyed, then all the jury had to do was

SEC. 525. Under the statute, it is the duty of a railroad corporation to keep its right of way clear from all dead grass, dry weeds and other dangerous combustible material, during the winter as well as during the summer. In an action for damages resulting from a fire set by the railroad company's locomotive, in January, evidence that the defendant cut and burned the grass and weeds upon its right of way in September or October previous is not sufficient to show a full compliance with the law.[1]

SEC. 526. A railroad company must not, because of the exigencies of its business, inflict avoidable loss upon the owners of adjacent property. Such company must use every possible precaution, by adopting all the best and most approved mechanical inventions, to prevent loss by fire along the line of its road.[2]

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to bring in a verdict for the amount of the property, regardless of the fact that the plaintiff might, by the exercise of proper care, have saved all or part thereof from destruction. For the errors indicated the judgment was reversed and the cause remanded.

[1] Indiana & Western Railway Company v. Nicewander & Lutz, 21 Ill. App. 305.*

[2] Forest Glen Brick and Tile Company v. Chicago, Milwaukee and St. Paul Railroad Company, 33 Ill. App. 565.†

*NOTE.—On the evening of January 10, 1885, fire escaped from the engine of the defendant company and caught over in some dry grass upon the right of way, or in the stubble of the adjoining field, and thence ran along the ground until it reached and burned three stacks of hay belonging to the plaintiff, standing some forty rods to the north of defendant's track. Liability of the company is asserted under the statute, which provides it shall be the duty of railroad corporations to keep their right of way clear from all dry grass, dead weeds or other dangerous combustible material, and for neglect shall be liable, etc. The defendant offered evidence to show that the grass and weeds upon the right of way had been cut down and burned up during the September or October previous, and insisted that this fact showed the highest diligence and full compliance with the law. The duty of the company is to keep its right of way clear from all dead grass, etc., and if the duty is properly performed during the summer, that is no reason why it may be suspended during the winter. Under the proof, it was for the jury to say whether the defendant was guilty of negligence under the statute.

†NOTE.—Soon after midnight, on the morning of April 23, 1887, house, barns, sheds, etc., of the plaintiffs (appellees), situated upon their premises adjoining the railroad of the defendant, were burned, and, the plaintiff states, by fire kindled by the sparks thrown from the locomotive of the

SEC. 527. In an action against a railroad company to recover from loss by fire, alleged to have been set by one of its locomotives, the court holds that a special finding of the jury setting forth that there was not sufficient proof to enable it to find at which of two places charged the fire originated, was not inconsistent with the general verdict against the defendant, and constitutes no ground for setting aside the same. The omission of the word "dangerous" before the word "combustible," from an instruction upon the duty of the railroad company to keep its right of way clear of dry weeds and combustible material, etc., did not constitute an error.[1]

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defendant. Many trains of the defendant pass the premises of the plaintiffs during the night, but the plaintiffs fix upon locomotive No. 554, passing said premises at 12:02, as the mischief-maker. On coal-burning locomotives the case shows there are two kinds of stacks in use. The earlier kind is known by the name of "Diamond" stack; the later, and as is claimed by the defendant, the safer kind for adjacent property, is a straight stack, with front extension. There was evidence in the case showing that No. 554, which carried the Diamond stack, threw out sparks that caused the fire, and that from such stacks more sparks were thrown than from straight stacks. The size of the sparks that may be thrown from either depends upon the size of the mesh of the netting used, but the straight stacks deposit much of the sparks that would escape from the "Diamond," in a pocket under the stack, from which they are removed when a large quantity has accumulated. The jury found for the plaintiff on the question of fact, whether the fire was caused by the locomotive of the defendant; but although that question is left to the jury by the instructions, it is quite probable that their verdict was based upon their view of the compliance by the defendant with the law as to its duty, laid down by the court in the instructions. With the fact before them as to the superiority of the straight stack, they could not have found that the defendant had discharged its duty "to exercise reasonable care to prevent the escape of sparks and fire," and that in the construction, use and operation of said locomotives the defendant had exercised reasonable and proper care and diligence, except upon the theory that the special circumstances affecting the defendant, the great number of its locomotives, the time and expense required to change all stacks, excused the defendant not having upon its locomotives the safest stacks. If the road exposes the adjacent proprietor to peril from fire, which it might have avoided, it makes that peril its own.

[1] Chicago & Eastern Ill. R. R. Co. v. Goyette, 32 Ill. App. 574.*

*NOTE.—An action to recover for loss occasioned by fire to buildings, grain, meadow and other personal property, which fire was alleged to have escaped from the locomotive engine of the defendant by negligence while operating its railroad. The declaration charges negligence on the part of the defendant in not keeping its right of way free from dead grass, dry

SEC. 528. In an action brought to recover damages for the burning of an elevator through sparks escaping from a locomotive, it is proper to admit upon the part of the plaintiff evidence going to show that as an inducement to rebuild the same the defendant company offered to haul lumber for such purpose at one-half the usual rate.[1] It is only in a case where,

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weeds and other combustible material, by means whereof fire was emitted and thrown from a certain locomotive and ignited the said grass and weeds, and was spread to and upon said lands of the plaintiff, and his property burned. The second count charges the negligence to consist in the defendant allowing the fire to escape and be thrown from its locomotive, by which it fell upon the plaintiff's land, outside the right of way, and ignited the dry grass and weeds, from which fire was communicated to the plaintiff's property and damages sustained. Trial by jury and verdict for the plaintiff in the sum of $1,385. The instruction was drawn on the hypothesis that it was only necessary for the railroad to use the most approved means and methods for the prevention of damages by fire from locomotives. This alone was not sufficient. The means, that is, the appliances, must not only be the most approved, but must be kept in the best of running order, and the methods must be not only the most approved, but manner of running and handling engines must be free from negligence on the part of those in charge. It is seen, then, that the instructions proposed, by omitting these essentials, naturally failed to cover the ground.

[1] T., St. L. & K. C. R. R. Co. v. Maria Oswald, 41 Ill. App. 590.*

* NOTE.—This suit was brought by the plaintiff (appellee) to recover damages for the burning of a grain elevator by sparks and fire emitted from defendant's engine. The jury found the defendant guilty and assessed the plaintiff's damages at $600. The only conclusion of law presented on behalf of defendant (appellant) arises upon a ruling of the trial court in giving an instruction for plaintiff, refusing to instruct the jury to find for defendant, and admitting evidence on behalf of plaintiff to show that the defendant company offered to haul lumber for building elevator for half rates, as an inducement to erect it on the site it occupied when set on fire. No serious objection is perceived to this testimony. It tended to show that the defendant company, as well as the plaintiff, regarded the place selected as reasonably suitable and safe. The court did not err in refusing to instruct jury to find for defendant, but, on the contrary, in view of all the evidence, such an instruction would have been wholly unwarranted. It is only in a case where, giving the plaintiff the benefit of every fact which the evidence on his behalf proves, or tends to prove, no right to recover is shown, that such an instruction is proper. If the jury believed the testimony of plaintiff's witnesses, it furnished ample proof that dry grass and weeds did remain on defendant's right of way contiguous to the elevator; that the weather had been continuously dry and hot for a long time prior to and at the time of the fire; that there had been no fire in or about the elevator during at least one month before it was burned, and it was locked up at the time of the fire; that

giving the plaintiff the benefit of every fact the evidence on his behalf proves or tends to prove, no right to recover is shown, that an instruction to find for the defendant is proper. *Id.*

SEC. 529. By section 1½ of the act in relation to fencing and operating railroads, approved March 31, 1874, it is provided: "It shall be the duty of all railroad corporations to keep their right of way clear from all dead grass, dry weeds or other dangerous combustible material, and for neglect shall be liable to all the penalties named in section 1." Section 1 of the statute required them, in the cases and with the exceptions specified, to erect fences and construct cattle-guards to prevent live stock from getting on the road; and the only penalty named therein for neglect to do so was a liability for double the amount of damages thereby done by their agents, engines or cars to such stock. By an act of May 23, 1877, this act was amended by reducing the liability to actual damages so done; and finally, by an act of May 29, 1879, it was further amended by adding to the liability clause the provision, "and reasonable attorney's fees in any court wherein suit is brought for such damages, or to which the same may be appealed." Section 1½ has never been amended, changed or expressly repealed, but been continued in the authorized revisions and publications of the statutes precisely as originally enacted; and the vindicatory part of section 1 has remained unchanged since the passage of the amendment last above referred to. So, when the act here complained of was committed, the statute relating to it, as published by authority of the legislature, was, and for more than ten years had been, just as it appeared when this suit was brought, and still appears. It is therefore

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about nine o'clock of the night of July 21, 1890, the defendant's engine, attached to freight train behind time, passed plaintiff's elevator, and within a few feet of it, and a great quantity of sparks were thrown from the smokestack, the wind then blowing from the engine toward the elevator, and two witnesses testified the fire appeared to have started at corner of the building, where grass and weeds were thickest on the right of way. On the same night, between ten and eleven o'clock, the elevator was discovered to be burning, and was entirely consumed by two o'clock in the morning. The foregoing facts would justify the finding, no other cause appearing, that sparks from defendant's engine set fire to grass and weeds, negligently permitted to remain on defendant's right of way, and that this fire spread and was communicated to plaintiff's elevator and destroyed it.

clear that if the vindicatory part of section 1½ is in force, it provides as a penalty for neglect to comply with the mandatory part, causing damage, the payment of reasonable attorneys' fees in any suit properly brought to recover such damage; for it prescribes no other, nor even, according to the contention of appellant, any liability for actual damages. The position taken is that when it was enacted, the only penalty named in section 1 being double the amount of the damages done, the legislature must have intended nothing else for a violation of section 1½; that its operation as originally intended can not be diverted or extended by any subsequent amendment of a preceding section which does not expressly or in some way manifest an intention to that effect; and that, by the amendment of 1879, no such intention was manifested. It is a question of legislative intention, but this might be shown otherwise than by the terms of the amendment, and it was shown in this instance. The object of section 1 was the protection of live stock, that being the kind of property peculiarly exposed, and the penalty prescribed for neglect to comply with its requirements was double the amount of damage thereby done to such stock. The object of section 1½ was not so limited, but had reference to combustible property of all kinds, and yet the penalty for neglect in that case was the same. By the strict letter of that section, then, no penalty could be recovered for inanimate property destroyed, or damage through neglect to obey it, but no court would so construe it. The intention of the legislature clearly was to place violations of section 1 and of section 1½ upon a like footing as to penalty, by making it in each case double the amount of damages thereby done to the property exposed, live stock in one, and inanimate property, real or personal, in the other. The court therefore held that ever since 1879 the statute has imposed for the wrong here complained of, as a penalty in addition to the actual damage, a reasonable attorney's fee, and the instruction on that point was right. Judgment affirmed.[1]

SEC. 530. The obligation resting upon railroad companies to construct farm crossings when and where the same may become necessary for the use of the proprietors of adjoining lands, is

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[1] T., St. L. & K. C. R. R. Co. v. Anderson, 48 Ill. App. 130.

purely statutory; where a new right is given by statute, and the relief for its violation specified, the remedy must be enforced in the mode pointed out by the statute. In an action brought to recover from a lessor railroad company for damage to farm lands alleged to have been occasioned from the insufficiency of culverts in its right of way, the supreme court hold, in view of the evidence and the fact that the damages allowed for the plaintiff were grossly excessive, that the judgment in his favor can not stand; and, further, that the true rule of damages in such case was compensation for the loss of the crop for the year, the rental value of the land until restored to fertility, and the labor and expense necessary to restore it.[1]

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[1] C., M. & N. R. R. Co. v. Eichman, 47 Ill. App. 156.*

* NOTE.—In the western part of the track was a dry ravine, draining quite an area of land. Across this ravine the company built its road-bed, with an embankment, putting in three rows of eighteen-inch tile at the bottom, to form an outlet for surface water from the area drained. In March, 1888, it leased its rolling stock and railroad to the Illinois Central Railroad Company for the term of its chartered existence, which latter-named company has since then operated the road under its lease. In June, 1890, during a heavy rain storm, a pond of water accumulated in the ravine above the embankment and overflowed three or four acres of Eichman's land. For the damage thereby occasioned he brought suit against the plaintiff in error and recovered judgment for $300. The court thinks the evidence is sufficient to warrant a recovery on account of insufficient capacity of the culverts. The damages allowed by the jury, however, were grossly excessive. Of the ground overflowed one-half acre was in potatoes, just coming up; one acre in corn about two inches high, and about two acres in grass. There was a total loss of the crop for that year. The water remained but a short time, and the land was not permanently injured. A new culvert, with ample capacity, was constructed the following February, and the only damage allowable was the loss of the crop for 1890, the rental value of the land until restored to fertility, and the labor and expense necessary to restore it. It clearly appears that the estimate of damages by plaintiff's witnesses was fanciful and speculative. The land was not worth over sixty-five dollars or seventy-five dollars per acre, as admitted by a witness on cross-examination, who, in his examination in chief, placed the damage done to plaintiff at $600. The damages allowed by the jury largely exceed the value of the entire land overflowed.

The obligation resting upon railroad corporations to construct farm crossings when and where same may become necessary for the use of proprietors of adjacent lands is purely statutory. If the company neglects or refuses to complete such crossings, the statute points out the mode of redress to the owner of the land (Chapter 114 of the Statute). He can give notice to construct the crossing and, if the company then fails, construct it himself and recover as damages double the cost and expense of the same.

SEC. 531. The statute in relation to fencing and operating railroads, approved March 31, 1874, in section 6, provides that "Every railroad corporation shall cause a bell of at least thirty pounds weight, and a steam whistle, to be placed and kept on each locomotive engine, and shall cause the same to be rung or whistled by the engineer or fireman at the distance of at least eighty rods from the place where the railroad crosses or intersects any public highway, and shall be kept ringing or whistling until such highway is reached." The words "any public highway," as used in said statute, are not limited in their signification to the common public roads in the country, but their meaning is broad enough to include streets and roads in incorporated cities and towns. A common street and public highway are the same, and any way which is common to all the people may be called a highway. It is said in Shearman & Redfield, in their work on the Law of Negligence, Volume 2, Section 333, "The term 'highway' is generic, inclusive of all public ways, and means a public road, which every person, whether an inhabitant or a stranger, has a right to use for passage or traffic. The term will therefore include streets in cities, foot ways or sidewalks, turnpikes, plank roads and bridges." The statement of the text writers is sustained by numerous authorities. Whether a railroad company failed to ring a bell or blow a whistle when approaching a highway crossing, at which place a train collided with the plaintiff's team, or whether the plaintiff was guilty of the want of ordinary care in attempting to pass over the track, are questions of fact for the jury.[1]

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[1] Mobile & Ohio R. R. Co. v. William Davis, 130 Ill. 146.*

* NOTE.—The plaintiff, William Davis, was riding in his wagon, drawn by a pair of mules, along the public highway, and while crossing the railroad track of the defendant where such track crosses the highway in the incorporated town of Columbia, his team was struck by a passing train; plaintiff was thrown from the wagon and received severe bodily injury; wagon was broken and injured so as to be useless; one of the mules was killed and the other had its legs broken. It was claimed that the plaintiff was using all reasonable care and diligence to avoid an accident; that the injuries resulted from the carelessness and negligence of the servants of the defendant in control of the locomotive and train in not ringing a bell or blowing a whistle at a distance of at least eighty rods from the crossing of the highway, and in not continuing such whistling or ringing until the high-

SEC. 532. The liability upon the part of railroad companies for failure to give the statutory signal is not limited to injuries caused upon the crossing alone, but also attaches where the same occurred within a short distance thereof, but still in the highway along which the tracks are laid, and the statute applies to crossings in cities.[1]

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way was reached. It was contended on the part of the defendant that there was no failure to ring a bell or blow a whistle, and it is claimed that the plaintiff was guilty of a want of ordinary care. The defendant also insisted that section 6 of the act in relation to the fencing and operating of railroads does not apply to the crossings of railroads with streets within the corporate limits of a city or town.

[1] Penn. Co v. Peter Backes, 35 Ill. App. 375.*

* NOTE.—On December 17, 1887, plaintiff lost his arm, which, he charged in his declaration to have happened through the defendant's negligence. He was a laborer, in the employ of the Star and Crescent Flour Mills Company. The mill of the company is situated at the southeast corner of Randolph and West Water streets, Chicago, the west line of the building being flush with the east line of West Water street. The structure has on the west a wooden shed, about twelve feet wide, with openings therein to receive wheat and coal from freight cars. Just west of the shed, at a convenient distance for unloading cars, is a switch track, running from Randolph street to a point eighty-seven feet north of the north line of Washington street, and at that point the switch track connects with the main track to the west. In the switch track, opposite the opening in the shed for receiving wheat from the freight cars, was a scale thirty feet long, which was used to weigh the cars of grain. The business of the plaintiff was to assist in moving the freight cars upon the scale, and shoveling the wheat from them into the shed. On the forenoon of the day named when the accident occurred, five cars were standing on the switch track, the north one being empty, the next two loaded with wheat, next one empty, and the next one loaded with coal, but none of them being coupled together. The situation was such that the wheat cars could not be unloaded until the empty cars were switched out, so the foreman told the foreman of defendant's switching crew that they were blocked up, and asked him if he would "make a switch for him—throw out a couple of cars." The engine came up and all five of the cars were coupled, drawn through the switch, the north empty car was detached and left on the main track, and the loaded wheat cars were put in on the switch track. The other empty car was then switched out and left on the main track, and the engine with the coal car run south. While this switching was going on, the plaintiff and two employes were inside the mill, but when the cars had come in upon the switch track the foreman told the men to come out. The plaintiff seems not to have heard the order, but seeing his fellow-workmen go he followed. Before beginning to move the car upon the scale, the plaintiff testified that he looked south and there was no car in sight. In this he was corroborated. Supposing the switching was at an end, the plaintiff

SEC. 533. The plain object of the statute requiring railroad companies to give signals on highway crossings is to protect persons who may be about to cross the track and to obviate danger of collision. Failure to comply with the statute does not render a company liable to a person injured in an adjacent field by reason thereof.[1]

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applied his bar to the northwest wheel of the southernmost wheat car, while his companious were working at the wheels of the other truck. After they had been at work in that way from three to five minutes, the loaded car of coal, weighing fifty to sixty thousand pounds, was uncoupled and thrown upon the switch track (unattended by a brakeman) by a kick from the engine, with such force that it struck the car the plaintiff was trying to move and sent it against the other wheat car. By the collision, the plaintiff's arm was thrown between the cars and crushed so that amputation thereof became necessary. Two points were made in the case by the defendant: first, that the injury to the plaintiff did not happen on the Randolph street crossing; second, that the crossing is made by means of a viaduct, and so the statutory signals are dispensed with. The court held that the liability for failure to give the statutory signals is not limited to injuries caused upon the crossing, and cited the case of Norton v. Eastern Railroad Company, 113 Mass. 366; see also Wakefield v. Conn. & Pass. R. R. Co., 37 Vt. 330.

[1] Williams v. C. & A. R. R. Co., 32 Ill. App. 339.*

* NOTE.—The declaration alleged that the plaintiff was ploughing in a field adjacent to the defendant's railroad track and a short distance from the crossing of the public highway; that the train approached from the northeast and failed to give the statutory signal by sounding a whistle or ringing a bell for the distance of eighty rods before the crossing was reached; that between the point where the plaintiff was at work and said crossing there was a curve in the track, and by reason thereof, and of intervening trees and vegetation, the train was not visible from the plaintiff's standpoint until it had passed the crossing and was quite near him, and because of its sudden appearance and proximity without warning, his horse became frightened, causing him to receive a serious bodily hurt. The liability of the company was predicated upon the assumed duty of the company to give said signal for the warning and protection of the plaintiff under the circumstances stated and upon negligence from the omission to do so. The circuit court sustained a demurrer to the declaration, upon which ruling error is assigned. The demurrer admits the truth of all matters of fact which were well pleaded, and the point here is whether the failure to comply with the statute is negligence with respect to one situated as was the plaintiff. It has uniformly been held that with respect to persons and animals crossing or about to cross the railroad over the highway, the omission to give the signal was negligence, and if it occasioned injury at such crossing an action would lie. In T., W. & W. R. R. Co. v. Ferguson, 42 Ill. 449, recovery was sustained where an animal was killed, not on

SEC. 534. The precaution which the statute requires of a railroad company upon its cars approaching a public crossing is to ring a bell or sound a whistle, and the company does its duty in this regard by ringing a bell without blowing a whistle. It is not the duty of the engine driver on nearing a road crossing to stop his train for the purpose of avoiding a collision with a team he may see approaching the crossing. It is the duty of a person about to cross a railroad track to look about and see if there is danger, and not to go recklessly upon the track; and if a person well acquainted with the locality, and knowing that it is about time for a train to pass a crossing, heedlessly drives upon such crossing without looking to see if there are cars approaching, when by looking he could easily have seen an approaching train, he is guilty of gross negligence, and can not recover for an injury he may receive by reason of a collision with such train.[1]

SEC. 535. A failure to comply with the law touching sig-

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the crossing, but a short distance from it. The court thinks the construction of the statute contended for by plaintiff is strained, unnatural and not within the intention of the legislature, and that the circuit court properly held that no cause of action was disclosed by the declaration, and the judgment was affirmed.

[1] C., B. & Q. R. R. Co. v. Robert Damerell. 81 Ill. 450.*

*NOTE.—Actions by Emanuel and Robert Damerell to recover damages for a collision on the railroad track of defendant. The actions were consolidated. The facts are: On April 7, 1875. about ten o'clock A. M., at the railroad crossing of a public highway between West Point and Stillwell, a passenger train upon defendant's railroad going south came into collision with a team and wagon, killing two horses and a colt, destroying the harness and damaging the wagon, the property belonging to the plaintiffs. The railroad track and highway cross each other at right angles and nearly on the same level. About sixty rods north of the crossing the track enters a cut which extends on north about one hundred rods. The cut is eighteen or twenty feet deep; it decreases in depth toward the south and runs out to level ground at its southern end. A highway runs south from West Point parallel with and about sixty feet east of the railroad track, and intersects a highway running east and west, on which latter is the railroad crossing. There is a hedge on the west side of the highway running south, and on the north side of the highway running east and west, ending sixteen feet east of the railroad track, from six to ten feet high. The witness Henry Damerell, who had charge of and drove the team, lived in that vicinity, was well acquainted with the crossing, and knew that the passenger train going south passed the crossing about that time. As the horses went on the track he looked and saw the train coming, and about twenty-five yards off. He

nals creates a liability for damages caused thereby, and this is so, notwithstanding in the Revision of 1874 there was omitted from Section 6, Chapter 114, R. S., that provision of the law of 1849, declaring a railroad company liable "for all damages sustained by reason of such neglect." In order to recover, the plaintiff must prove in such case that the law was not complied with; it is not a matter of inference, and the proof by one or more witnesses that they did not hear a signal, without showing that they were so situated that they would have been likely to have heard it if sounded, is not sufficient.[1]

struck the horses with the lines, but before he could get the wagon on the track the collision took place, the engine striking the wagon about the double-trees and throwing the team on one side of the track and the wagon on the other. The wind was blowing hard from the southwest and the train was about half an hour behind time and running twenty-eight to thirty miles an hour. The plaintiffs claim that the bell was not rung or whistle sounded before reaching the crossing. Eight witnesses on the part of defendant testified that the bell was rung for the requisite distance. The bell of the engine was rung by a steam attachment, and when started kept on ringing until stopped by shutting off the same. Six witnesses on the part of the plaintiff testified that they did not hear the bell ring. The engine driver testifies that he did not see the team until the engine struck them. The fireman testifies that when he first saw the team the train was just passing out of the cut, and the team was about a horse-length east of the crossing. It is insisted that there was negligence in not stopping the train so as to avoid the collision, but the fireman had reason to suppose that there was time for the team to cross over in advance of the train, or that it would stop before going upon the crossing. The team and train were in full view of each other. But there was negligence on the part of Damerell, the driver of the team, such as to preclude all right of recovery. It was a clear morning. From the time he turned into this wagon road, from his seat in the wagon, he had a clear view of the railroad track from the crossing north to the south end of the cut, a distance of about sixty rods. The hedge was bare of leaves and did not obstruct the view. The evidence shows that had the driver of the team looked he could have seen the train from the time it came out of the cut all the way as it passed from the cut to the crossing, and that he could have seen the smoke and steam of the engine before it emerged from the cut; and he says: "The horses were on the track when I saw the train; was driving along at usual speed; don't know that I looked on either side for the train; did not stop the horses before going on the track; don't know what made me look towards the train—just happened to look. Struck the horses with the lines when I saw the train. Did not look on either side for train upon driving on the crossing."

[1] O. & M. Ry. Co. v. Charles W. Reed, 40 Ill. App. 47.*

* NOTE.—This suit was brought by Reed to recover the value of his

SEC. 536. The legislature has the power, by the enactment of general laws from time to time, as the public exigencies may require, to regulate corporations in the exercise of their franchises so as to provide for the public safety. A general law which requires that a bell or a whistle shall be attached to each locomotive engine upon a railroad, which shall be rung or whistled before crossing any other road, is applicable to and binding on railroad corporations created before the passage of such law; and an omission to give the required signal constitutes a *prima facie* case of negligence.

Railroad companies are not liable for any and all damages a party may sustain when such corporations have omitted to give the required signal, nor is the *onus* thrown upon the corporation until some proof has been given tending to show that the injury complained of resulted from the want of a signal.[1]

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horse, alleged to have been killed at a public crossing in a collision with the engine of defendant, which collision was occasioned, as alleged, by the failure of defendant's servants operating the engine to sound the whistle or ring the bell continuously for the distance of eighty rods before reaching such crossing. In order to recover, it devolved upon the plaintiff to prove these facts. To either sound the whistle or ring the bell is sufficient; the law does not require that both should be sounded. A failure to comply with the law creates a liability for damages caused thereby, and thereby only. There appears to be no proof in this case that the bell was not rung as required by law. No presumption is to be indulged that the bell was not rung. The plaintiff, in order to recover, must prove the failure of the defendant to comply with the law. The mere proof by one or two witnesses that they did not hear the signal, without any proof that they were so situated that they would have been likely to have heard it if it had been given, is not sufficient. If it should be conceded that the statutory crossing signal was not given, what proof is there that such failure caused the injury, or what proof is there tending to show that necessary fact? Until some proof is given tending to show the injury resulted from a failure to ring the bell or blow a whistle, the action must fail.

[1] G. & C. U. R. R. Co. v. Loomis, 13 Ill. 548.*

* NOTE.—This was an action brought to recover for damages sustained by the plaintiff in consequence of the careless and improper management by defendant of its railroad cars and locomotive engine. It appears that in December, 1850, about six o'clock in the evening, the plaintiff was traveling in a wagon drawn by two horses, near the railroad crossing on the turnpike leading west from Chicago; that the locomotive engine and cars were at the same time going toward Chicago, and near the place where the roads cross; that the two roads run nearly parallel for a number of rods before they cross; that the defendant failed to ring a bell or sound a

SEC. 537. The legislature has the power, by the enactment of general laws from time to time as the public exigencies may require, to regulate corporations in the exercise of their franchises so as to provide for the public safety. The provision in question is a mere police regulation, enacted for the protection and safety of the citizens of the country, and in no manner interferes with or limits the powers conferred upon the defendants in their act of incorporation. A part of the instruction in this case was wrong. It implies that railroad corporations are liable, *prima facie*, for any and all damages a party may sustain when they have omitted to give the signal required by law, whether such damages were sustained by reason of such neglect or for any other cause. The party himself may have been guilty of negligence, or the circumstances may be such as to show no probable connection between the injury sustained and the omission to give the requisite signal; and in such case it would be requiring too much to compel the company to prove affirmatively that the damage was not occasioned by such omission. Until some proof is given tending to show that the injury resulted from the failure to ring a bell or blow a whistle, the burden of proving a negative—that is, that it did not arise from such failure—should not be thrown upon the company. See Indianapolis, etc., R. R. Co. v. Blackman, 63 Ill. 117; I. & St. L. R. R. Co. v. Holloway, 63 Ill. 121; C. & A. R. R. Co. v. McDaniels, 63 Ill. 122; C., B. & Q. R. R. Co. v. Van Patten, 64 Ill. 510; C. & A. R. R. Co. v. Henderson, 66 Ill. 494; C., B. & Q. R. R. Co. v. Notzki, 66 Ill. 455; Quincy, etc., R. R. Co. v. Wellhoener, 72 Ill. 60.

SEC. 537*a*. If by the use of ordinary care and diligence, animals on a railroad track can be saved from injury, it is the duty of the railroad company to employ that degree of care. No other rule would afford sufficient protection to animals which are lawfully upon the track, as they are if they get upon it from the range or commons. So, where stock are upon

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whistle as the train of cars approached the crossing; that the plaintiff drove across the railroad track immediately before and within a few feet of the locomotive; that his horses became frightened at the engine and cars, ran into the railroad ditch, upset the wagon, ran off and were lost; that the plaintiff himself was considerably bruised. The jury rendered a verdict of $200 against the defendant, and the plaintiff had judgment.

the track and a train is approaching, though down a slight grade, and the engine driver, instead of stopping his train to drive off the stock, pursues them to a point where, by reason of ditches filled with water on each side of a high embankment, there is little probability that the animals will leave the track, and they are overtaken and killed, the company is guilty of gross negligence, and they will be liable, notwithstanding the fact that the animals got on the track within the limits of the town.[1]

SEC. 538. When the employes of a railroad company, while in the discharge of their duty, act with such negligence as to occasion injury to others who are not in fault, the company must be held liable in damages for the wrong. The well-being of society requires these bodies to employ careful and skillful agents, and that they, in the performance of their duties, shall have due regard to the safety and rights of other persons. They are held to a high degree of caution and skill while exercising and enjoying their franchise. Negligence or want of skill by their agents, producing injury, will create liability. And when they locate their stations and depots in populous cities and on thoroughfares, they must, for the protection of the community, be held to a degree of care commensurate with the greater danger such a situation involves. When located at such places they know the hazard that must ensue, and must be held to an increased degree of care and diligence equal

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[1] I. C. R. R. Co. v. Dennis Baker, 47 Ill. 295.*

* NOTE.—This was an action against the Illinois Central Railroad Company, then using and operating a portion of the Toledo, Peoria & Warsaw Railroad, for killing by negligence a colt of the plaintiff's, of the value of $100. The jury returned a verdict for the value of the colt, for which the court gave judgment. There was some slight conflict in the testimony as to where the colt got upon the track, whether in or outside the limits of the town of New Benton. The jury might have found it either way, and it would not change the aspect of the case, as viewed by the court. The court places it on the ground of great negligence in not stopping the train, then running at a slow rate of speed, so as to have given the animals, for there were two others with the colt, a chance to leave the track. The driver saw them in time to have done so, but did not do it, but rather pursued them a considerable distance, as if with the intent to kill them. The court says: "If by the use of ordinary care and diligence animals on a railroad track can be saved, it is the duty of the company to employ that degree of care. If they do not, they are liable."

to the greater hazard. The life and property of individuals can not be lightly or wantonly placed in jeopardy. If that might be done, then these great instruments of prosperity, and agents in the development of the resources of the country, and promotors of its commerce, instead of a blessing would become a nuisance, if not a curse, to our citizens.

An engineer, while his locomotive was standing near a crossing, at the instant a person was crossing the track in front of his engine, negligently or maliciously caused the steam to escape, whereby the team was made to run off and injury inflicted. Held, that the company was liable.[1]

SEC. 539. Section 6 of the act in relation to fencing and operating railroads, requiring the ringing of the bell or the sounding of the whistle continuously for a distance of eighty rods before a public highway is reached, applies to cases where cars are "kicked" by an engine across a public highway, and

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[1] T. W. & W. Ry. Co. v. Harmon, 47 Ill. 298.*

* NOTE.—In this case there is nothing disclosed by the evidence from which it can be inferred that the plaintiff did not take every precaution which prudence could dictate to avoid injury. He checked up his team before reaching the road crossing, and awaited not only the passage of the engine, but until it came to rest, before he attempted to cross. He says that while thus waiting, the engine driver looked at him as he passed. Having the control of his locomotive and the steam by which it was propelled, he was required to so use and control them as to avoid injury to others acting with prudence and caution. He had no right, after he saw the plaintiff start to cross the track, to then put his engine in motion and run it against plaintiff's wagon and team, nor had he the right to so use the steam from his engine as to frighten the plaintiff's horses. He saw that they were restive and afraid of his locomotive, and must have known that the escape of steam would most probably produce the result that ensued, and it was his duty to have prevented its escape, and avoided the disastrous results that followed from the noise of the escaping steam, which is highly calculated, as all observation teaches, to alarm cattle and horses. Knowing this, he should have been on his guard, and used all necessary precautions to prevent injury. It can make no difference in its results to the plaintiff whether the escape of steam was the effect of negligence, or from wanton and wilful purpose. The engine driver does not pretend that there was any necessity for the escape of steam at that time. He had stopped his locomotive, and there could be no necessity to start it until plaintiff had crossed the track, which could have required at most but a very few seconds. The plaintiff had the legal right to travel this public highway in the pursuit of his business, pleasure, or even from caprice, and the defendant had no right, by its agents, to unnecessarily hinder, obstruct or endanger him or his property while thus exercising his rights.

the failure to ring the bell or sound the whistle in such cases is negligence. It is a question of fact, to be determined by the jury, whether or not in a particular case the lack of ordinary care is negligence.[1]

SEC. 540. While a railroad company has the statutory right of way over a public crossing, it must, in exercising that right, use ordinary and reasonable care to avoid accidents.[2]

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[1] B. & O. S. W. Ry. Co. v. Wheeler, 63 Ill. App. 193.*

[2] Ill. C. R. R. Co. v. Larson, 152 Ill. 326.†

* NOTE.—The defendant railroad company's servants in charge of a freight train undertook to place two freight cars on a side track, and the engine was made to kick the two cars down said track. The plaintiff, with a wagon and team, was crossing the track, on a public highway, when the two cars, detached from the engine, struck and killed the horses and injured the wagon and harness. The bell was not ringing nor the whistle sounding at the time, nor was there given any other warning of the approach of the cars. The accident occurred at nightfall, and a barn interfered to some extent with the plaintiff's view of the track.

Ordinary care means that one is actively using his faculties (doing something) to apprehend danger and avoid injury, and failure to observe ordinary care is negligence; therefore, negligence is a failure to use one's faculties to avoid injury. The plaintiff recovered for the value of his team and the injury to his property.

† NOTE.—This was an action by the plaintiff, a minor, who sued, by his next friend, the railroad company for personal injuries. He recovered a judgment of $2,500 damages. The injuries were received by the plaintiff from the running away of his team of horses, attached to a wagon loaded with slag, while attempting to cross the railroad tracks of the defendant. There were six railway tracks there, and in the center of the street a plank crossing sixteen feet wide. A suburban train, consisting of an engine and four cars, had just arrived at Sixty-seventh street, Chicago, from the north, and the rear end of the rear platform of the rear car of the train as it then stood projected over the crossing, leaving a space of twelve feet of plank crossing, and over this the team in advance of the one driven by plaintiff passed safely. The train was headed south and apparently was headed for some point further south. The plaintiff was about to follow the team that had crossed the track, when one of the defendant's servants stopped him. About the same time the train got under motion, going backward. At that time the horses' heads were across the rails of the railway track. In the meantime a freight train had come up from the south on another track, in the rear of the plaintiff. He swung his horses around as quickly as possible toward the north, so that their heads would clear the rear end of the train. The servant of the defendant, seeing the predicament of the plaintiff with his team, stopped but a moment. The train immediately began to back up again and continued to do so until the cars and locomotive had passed, although they were so close to the horses' heads that they almost struck

SEC. 541. Ordinary care depends upon the circumstances under which such conduct is required. It is the duty of a person approaching a railroad crossing to look out and make use of his senses to determine whether it is safe for him to cross.

There is a distinction as to the nature of railroad crossings. Where one approaches a single track, used only for switching and yard purposes, upon which only a few freight cars are standing, to which no engine is attached, it would be unnatural for him to conclude that to attempt to pass over this crossing, by the end of one of the cars, would be dangerous; and the court can not say that in such case a reasonably prudent man would not assume that to pass over was reasonably safe.

It is the duty of the jury in a case for personal injuries to give the plaintiff such damages as appears from the evidence in the case he has clearly suffered, resulting from the defendant's negligence, although they may not be able to give adequate compensation for the entire injury, when some portion of it, in their judgment, is the result of a failure to adopt reasonable or ordinary measures to lessen or mitigate the result of the injury.[1]

SEC. 542. In actions for personal injuries, controverted facts, such as whether the deceased was struck while on the highway crossing or while trespassing on the right of way, are questions for the jury.

At a place in the suburbs of a populous city (Chicago), where the public street is crossed at a grade by six railroad tracks, used by three great railway systems, it is gross and wanton negligence to operate a railroad without any guard or protection to a traveler whose pleasure or duty might require him to go over the crossing in the night time.

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them. Meantime the noise and proximity of the moving train, ringing of the bell, escaping steam and smoke from the engine, frightened the horses and they began to behave badly, turned their heads west and ran away. The plaintiff was thrown from the wagon and severely injured—thigh bone fractured, head hurt, etc.

[1] Ill. Steel Co. v. Thomas Szutenbach, 64 Ill. App. 642.*

* NOTE.—Action for alleged negligence of the defendant railroad company on account of which the plaintiff received severe injuries and recovered a judgment of $8,500. The issues in this case are mainly questions of fact, and were determined by the jury.

A person was struck by an engine and killed upon the railroad crossing. He left a widow and two children, aged nine and twelve years respectively. He was a laboring man, and it was held that $5,000 was not excessive damages.

In an action to recover damages resulting from death by negligent acts, the value of the services of the deceased in the superintendence, attention to and care of his family, and the education of his children, are proper elements of damages.[1]

SEC. 543. A person approaching a railroad crossing, and about to cross the track, has a right to rely upon the presumption that the company will perform its duty of giving the signal required of it by law when its trains are approaching the crossing of a public highway, and is not guilty of contributory negligence if he fails to look for an approaching train.[2]

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[1] B. & O. R. R. Co. v. Stanley, Adm'r, 54 Ill. App. 215.*

[2] C., C., C. & St. L. R. R. Co. v. Bruce, Adm'r, 63 Ill. App. 233.†

* NOTE.—This action was brought for the killing of Robert Waade, February 28, 1888. The deceased was struck and killed by a locomotive engine belonging to the defendant, while he was attempting to cross the railroad tracks at their crossing of 67th street, Hyde Park. It was testified that he had been on an errand to a point north of 67th street and west of the railroad, and that he was struck by the locomotive in going eastwardly across the railroad, on 67th street, on his way home. It was between ten and eleven o'clock at night. It was made a question in the case as to whether he was struck upon the crossing, or whether he was trespassing upon the right of way some distance from the crossing. The body of the deceased was found on the track, near the switchman's shanty, some seven or eight hundred feet south of 67th street; but it is reasonably certain that his body was carried by the locomotive in that direction, and one of his companions, who was near him, testified that he entered upon the track at the crossing. The jury has determined this question in favor of deceased, that he was struck upon the crossing.

† NOTE.—This suit was brought by the plaintiff as administrator, to recover damages under the provisions of the statute for the death of his intestate, alleged to have been caused by the defendant's servants in operating its locomotive and train, in failing to ring the bell or sound the whistle on the engine, as required by the statute. It is alleged that the board of trustees of the village of Norris City did, in 1884, ordain and pass and publish, among other village laws and ordinances, the following: "Section 1. That no railroad corporation shall, by itself or its agents, run any train, locomotive, engine or car within the limits of the village of Norris City at a greater rate of speed than ten miles per hour;" and that the defendant, in violation of such ordinance, at and within the limits of said village, ran and drove its said locomotive engine at a greater rate of speed than was allowable under said ordinance, to wit, at the rate of thirty miles per hour, and

SEC. 544. Due care on the part of a girl twelve years of age, killed by a train, may be found by the jury, where there is evidence that box cars on the track and a curve in the main track near the street crossing at which she was killed made it difficult or impossible for her to see the train until it was too late, and when train was running at an unlawful rate of speed and without ringing the bell, as required by ordinance.[1]

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was running or driving said engine at that high and dangerous rate of speed at the time said intestate was struck by said engine and thereby then and there killed. The jury found the defendant guilty and assessed the damages at $1,000.

The deceased was going east to his home in the village along the public street, and the view of the approaching engine was obscured by obstructions that would have prevented him from seeing it if he had been looking for it as he approached the track. He was not apprised of its approach by either of the statutory signals, and knew, or is presumed to have known, that the law required defendant to cause the bell to be rung or the whistle to be sounded on the engine; and knowing that to be its duty, he had the right to rely upon its performance. Hearing no signals, the attention of deceased was not attracted to his peril, and the jury had the right to find, in view of all the circumstances in evidence, that the deceased was not guilty of contributory negligence in the respect contended for on behalf of the defendant. (See St. L., V. & T. H. R. R. Co. v. Dunn, 78 Ill. 197; C., C., C. & St. L. R. R. Co. v. Badeley, 150 Ill. 328; C. & A. R. R. Co. v. Sanders, 154 Ill. 531.) The questions of fact were settled by the jury in favor of the deceased.

[1] B. & O. S. W. Ry. Co. v. Then, Adm'r, 159 Ill. 535.*

* NOTE.—The plaintiff, as administrator of the estate of his deceased daughter, brought suit under the statute to recover damages for her death, caused, as averred in the declaration, by the negligence of the defendant's servants in charge of its passenger train in operating the same, in the city of East St. Louis, at a greater rate of speed than ten miles an hour, in violation of the city ordinance, and without causing the bell on the engine to be rung, as required by another ordinance of said city. Trial was had, and the jury found the defendant guilty and assessed damages at $5,000. It was claimed on the part of the defendant that the evidence failed to show that deceased exercised any care to avoid the injury, but her conduct showed she was guilty of gross negligence. This was a question of fact for the jury. The evidence, in cases of this kind, the court said, to establish the fact that the deceased was exercising due care, need not be direct, but such care may be inferred from the circumstances existing at the time of the injury, and other facts in evidence. There were a number of box cars on the side track and a curve in the main track above the street crossing, which would obstruct the view and make it quite difficult, perhaps impossible, for the deceased to see the approaching train until she was on the main track, at the crossing, and too late to escape. She had a right, also, to rely upon the performance of the duty imposed upon the defendant by the city ordinances

SEC. 545. The legislature has conferred upon municipalities the power to require flagmen at railroad crossings of streets, but this is not to be taken as a limitation of their power to require other safeguards, if, in the opinion of the proper authorities, some other means are necessary for the protection of life and property. What is or is not reasonable in the way of police regulations depends upon the circumstances of each particular case. Municipal authorities must act reasonably and upon necessity, at the peril of having this regulation declared invalid by the courts, in case they exceed the proper limits of their authority. The act of a municipality in requiring a railroad company to construct and maintain suitable and proper gates, so as to protect all persons crossing its tracks on certain named street crossings, for the purpose of protecting life and property, is a reasonable exercise of police regulations.[1]

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to warn her of the approach of the train by continuously ringing the bell upon the engine, and not to run said train faster than ten miles an hour within the city, and there was evidence tending strongly to show this duty was not performed. Among other things, the court said, proper for the jury to consider in determining this question of due care, is the instinct prompting the preservation of life and avoidance of danger. (I. C. R. R. Co. v. Nowicki, 148 Ill. 29; T. H. & I. R. R. Co. v. Voelker, 129 Ill. 540.) The court was satisfied with the finding of the jury.

[1] C., B. & Q. R. R. Co. v. City of Ottawa, 65 Ill. App. 631.*

* NOTE.—This was an action brought by the city of Ottawa against the defendant to recover a penalty for failing to erect gates at the crossing of certain streets in the city, which, by a resolution under the ordinances of the plaintiff, it was required to construct and maintain. By stipulation of the parties filed in the case, it is admitted that the city of Ottawa is duly incorporated under the general laws of this State providing for the incorporation of cities and villages. It is further admitted that the city council of said city did, on June 21, 1891, regularly pass an ordinance on the subject of railroads, which was duly published and in force at the time the resolution hereinafter referred to was adopted, section 6 of which said ordinance provides as follows :

" Whenever on any street crossed by the track or tracks of any railroad company, the city council shall deem it necessary to require said railroad company to provide protection against injury to persons and property at such crossings, by the erection and maintenance of gates, guards or other protection. the city council may by resolution so declare, and direct that such railroad company shall, within a certain time to be fixed by the city council, erect, construct and maintain a sufficient safeguard at such crossings, specifying the kind of protection to be erected, constructed and maintained as aforesaid, whether it be a gate or gates or other protection; and it

SEC. 546. Where an engineer sees an object on the track, and can not determine absolutely whether it is a child or some inanimate thing, and sees a woman's frantic demonstrations as she runs toward the object, with a manifest desire to stop the train, and knows that if he waits to ascertain certainly what the object is it will be too late to save the child, if it be a child, and he waits until he knows what the object is before reversing the engine and applying the brakes, a jury will be warranted in finding such a course to be an undervaluation and a reckless disregard of life.

The wife of a station house keeper, who, with his family, lived in the station house, left a child twenty-one months old sitting in one of the rooms, absenting herself for a few minutes to attend to the wants of another child lying sick in an adjoining room. In her absence the child went upon the track, where it was killed by a passing train. Held, by the court, that the parents of the child were not guilty of such negligence as to bar a recovery.

Where the jury answered certain special interrogatories submitted to them at the request of the defendant, to the effect that the engineer did not endeavor to ascertain what an object on the track was as soon as he could, and that after ascertaining what it was he stopped his train as soon as he could, it was held that the finding aided the general verdict by showing that the jury found for the plaintiff on the ground that under the circumstances it was negligence to wait until he

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shall be the duty of the city marshal to serve upon said railroad company named in said resolution a certified copy thereof, within ten days after the passage of such resolution, and at the same time to notify the said railroad company in writing of the time fixed by the city council within which the protection so ordered shall be constructed."

The next section of the ordinance provided a penalty of not less than $100 or more than $200 for a failure to comply with said ordinance. It is further admitted that while said ordinance was in force, a resolution was passed by the said city council requiring the defendant to erect, construct and maintain suitable and proper gates, so as to protect all persons crossing its tracks at street crossings, at both sides of its tracks, at the following named street crossings: One set of gates on Main street, at Madison street, at Jefferson street, at Lafayette street and at First street; said gates to be erected within thirty days of the notice. It is admitted that the proper notices were served, etc.

knew absolutely that the object was a child before endeavoring to stop the train.[1]

SEC. 547. A failure of a railroad company to perform any of the duties required of it on approaching a highway crossing, will render it liable for injuries inflicted and for wrongs resulting from such omission, and such failure can not be made the basis for predicating negligence against the person injured.[2]

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[1] C. & A. R. R. Co. v. Hattie Logue, Adm'x, 58 Ill. App. 142.*

[2] B. & O. S. W. R. R. Co. v. Wetmore, 65 Ill. App. 292.†

* NOTE.—The father of Walter Logue, deceased, had been station agent at Edwardsville for three years, during which time he resided with his family in the depot building, which contained four rooms. The north room was used for the office; the room south of it as a sitting-room for Mr. Logue's family; the third room was used as a bed-room, and the fourth room as a kitchen. Alexander Logue generally remained on duty from seven in the morning until seven in the evening, when he was relieved by the night operator. Having a message to deliver, he got the night operator to take his place, and went to hitch up his horse, leaving Walter in the kitchen with his mother. Another boy, Russell, was very sick with the scarlet fever, and the mother went to the bedroom where the child was lying to render him some attention. She was in the bedroom from one and a half to two minutes, and left Walter sitting on the lower step from the kitchen to the bedroom. Returning to the kitchen, she found Walter gone and hurried into the yard and thence upon the platform in search of him. She saw the child sitting on the track, with his back to the north, about seventy-five feet north of her, and a train coming from the north at the rate of forty-five or fifty miles per hour. The train did not stop at this station unless signaled to do so. The track was level for two miles north of the station, and there was nothing to obstruct the view. There was a conflict of evidence as to the position of the child with reference to the public highway, also whether or not the bell was rung or whistle sounded in conformity with the requirements of the law. The jury might well have answered both of these questions in favor of the plaintiff. The mother called her husband and ran toward her child, screaming and waving her hands, and then sprang across the track in front of the engine, seizing the child by the dress and thinking she had saved it. She had failed, however. The child was killed, and the mother was knocked down and injured. The engineer saw the mother's demonstrations and saw the object on the track, but did not seek to get his train under control until he saw the object move, and was thereby satisfied that it was alive. He practically admits, and the jury were justified in finding, that if he had reversed the engine and applied the emergency brake when he first saw the object and the mother's demonstrations, the mother could have saved the child.

† NOTE.—The plaintiff recovered a judgment of $800 for personal injury, and other injury to property, occasioned by a collision at a street crossing in the village of O'Fallon. The declaration alleged two grounds of negligence: First, that the statutory signals were not given; second, that

To free themselves from liability, the company, in a case of injury, must discharge every duty imposed by law. They must use all reasonable means to prevent injury, and its omission will create liability unless the injured party had by his negligence contributed in some degree to the injury. The duty imposed is easily performed, is not attended with increased expense, and it has been required by the law for wise and salutary purposes, and the courts have no power to dispense with its performance.

The defendant, however, relies on the contributory negligence of the plaintiff, the law being that the imposition of the duty to signal the approach of the train at a crossing did not relieve the plaintiff from the duty to exercise reasonable care on his part.

The evidence shows that the plaintiff, in company with another person, was in a buggy drawn by two horses, driving north with a view of crossing the railroad tracks of the defendant; that he turned off from Front street and drove to the next crossing, during which time he could have seen a train approaching until within a short distance of that crossing, but his back was to the train except for the last one hundred and thirty feet. As he was passing over this crossing the collision occurred which caused the injury. It seems there was a coal train at the station, and the plaintiff thought it was on the main track, and, not expecting a train from the east, did not look or listen for the train from that direction. After looking for a train from the east, his team took him to the other crossing on a trot, which occupied but a very short time—as the evidence would indicate, less than a minute. Had the signals been given no one can say they would not have been heard by plaintiff and the accident avoided; therefore, if the failure of defendant to give them was the proximate cause of the injury, there is liability. *Id.*

SEC. 548. In an action against a railroad company to recover for damages received by a collision with a train at a

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the defendant was running said engine and train at a greater rate of speed than was safe at said crossing, and while passing through the said village. The evidence shows the train was an extra passenger, and was being run very rapidly through the village. The weight of the evidence is that the bell was not rung or whistle sounded, as required by law.

road crossing, the court gave the following instruction for the plaintiff: "If the jury believe from the evidence that the defendants, their agents and servants, omitted to ring a bell or sound a whistle, in the manner required by law, such an omission constitutes a *prima facie* case of negligence, and the defendants are liable to the plaintiff for the loss and damage proved to have been sustained by him by reason of such negligence."

It was held by the supreme court that such instruction did not assume the absolute liability of the company for the omission to comply with the statute, and that the only consideration to be given to it was that the proof must show the damage was occasioned by reason of such negligence to ring the bell or sound the whistle, and therefore it was correct.

Again, in the same case, the court gave the following instruction: "The jury are instructed that if they believe from the evidence that a bell was not rung or a whistle sounded at a distance of eighty rods from the crossing, and kept ringing or whistling until the crossing was reached, and the plaintiff was lulled into security by reason of such neglect on the part of the defendant, then the plaintiff would have the right to recover, even if he was guilty of slight negligence."

The supreme court held that this instruction was not erroneous. Notwithstanding the neglect of a railroad company to give the statutory signal before approaching a road crossing with its train, the traveler must exercise caution and prudence; but without such warning of danger his care would necessarily be less, and any injury to him under such circumstances must naturally be attributed in a great degree to the negligence of the company.[1]

SEC. 549. Where stock is permitted by law to run at large in a town or village through which a railroad runs, and the fact is known to the operators of the road, they will be held to a higher degree of care than where they have the road fenced, and have no reason to expect stock will be found on their track. It is not negligence for the owner of the stock to permit it to run at large in a village through which a railroad runs, if it is not prohibited by law. It is the duty of a railroad company whose road runs through a village, to run their trains, while in the village, at such a rate of speed as to have

[1] C. & A. R. R. Co. v. Elmore, 67 Ill. 176.

them under control, and be able to avoid injury to persons or property, though there is no ordinance of such village on the subject; and if they fail to do so, they are guilty of negligence.[1]

SEC. 550. Where an engineer sees, or can see, in time to slacken the speed of his train, a lot of cattle crossing the railroad track upon the highway, but does not stop the train or slacken its speed. and kills an animal which has escaped from the owner's enclosure, this will show negligence on his part of a high degree, and the railroad company will be liable for the value of the animal so killed. Such a case is not like the cases where the cattle were quietly grazing alongside the track when discovered.[2]

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[1] C. & A. R. R. Co. v. Engle, 84 Ill. 397.*

[2] C. & A. R. R. v. Kellam, 92 Ill. 245.†

* NOTE —Action to recover the value of a horse killed by the negligence of the defendant in running its train at a high rate of speed through the village. The employes of the company knew the track was not fenced through the village. They knew that persons might at any hour of the night be on the track or crossing over it, and they knew the same was true of cattle and horses. Knowing of this danger, it was their duty to run through, or while in the village, at such a rate of speed as to have their train under control, and able to avoid injury to persons or property. But, from the evidence, the train that killed this horse was run at a high rate of speed.

† NOTE.—As the cow was killed on a public road crossing, it is not claimed defendant is liable for the loss sustained unless the killing was wilfully or negligently done. There is no pretense that it was wilfully done, so the case is narrowed to the single issue whether the servants of the defendant in charge were guilty of negligence in the management of the train that did the injury. The animal killed was not feeding on any commons. The herd with which it had been pastured escaped from the enclosure without any fault on the part of the owner, and was next seen on the highway. Exactly what number composed the herd was either not known or was not stated. At all events, the number was great enough to attract attention. The cattle were traveling in a line across the railroad track, on the public highway, and all the herd had passed over except the cow belonging to plaintiff, as the express train was seen approaching from the north. She was a heavy animal, and moved rather slower than the others, and was standing still when discovered by the engine driver. There was nothing to obstruct the view of the engine driver, and he, no doubt, saw the cattle following each other in line as they passed over the highway crossing of the track, and he ought to have slackened the speed of his train so as to give him control of it, when it became apparent that the herd might not all get over it before his train could reach the crossing. The animal killed was a valuable one.

SEC. 551. The statute (chapter 114) requires every railroad corporation to cause a bell of at least thirty pounds weight to be rung, or a steam whistle to be sounded, at the distance of at least eighty rods before a public highway is reached; and when this is done the railroad company has discharged its duty imposed by the statute, whether such signal given is heard or not. The statute does not require the giving of such signals of the approach of a train as to enable others absolutely to ascertain its approach and avoid being injured. If a railway company has such a bell on an engine attached to a train as the statute requires, and it is rung in the manner required, then, so far as giving signals before the train reaches a public highway crossing is concerned, the company is without blame, whether the signal so given is observed or heeded, or not, by one attempting to cross the railroad track on the public highway. Where the evidence is conflicting as to the fact whether a railway company, on the approach of one of its trains to a public road crossing, gave the statutory signals, it is error to state in an instruction, in a suit to recover damages for a personal injury to one while crossing the railroad track on a public highway, that if the defendant failed to give such signals of the approach of his train as to enable the person injured or killed to ascertain its approach and avoid injury, the company is liable.[1]

SEC. 552. It is doubtless a rule of law that a person approaching a railroad crossing is bound in so doing to exercise such care, caution and circumspection to foresee danger and avoid injury as ordinary prudence would require, having in view all the known dangers of the situation; but precisely what such requirements would be must manifestly differ with the ever-varying circumstances under which such approach

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[1] C., B. & Q. R. R. Co. v. Dougherty, Adm'x, 110 Ill. 521.*

* NOTE.—This action was to recover damages for the killing of Bernard Dougherty, killed while attempting to cross the railroad with a team and wagon, at the crossing where Columbus street crosses the railroad track in Ottawa. The negligence of the defendant charged was in not ringing a bell or sounding a whistle, running at too great a rate of speed, and failing to station a flagman at the crossing. Trial resulted in a verdict of $5,000 for the plaintiff. The defendant denied the charges of negligence. Judgment of the Circuit Court was reversed for error in charging the jury.

may be made. No invariable rule, however, can be predicated upon the mere fact of failing to look or listen; but a jury, properly instructed as to the legal duty in respect to care and caution of a person approaching a railway crossing, must draw from such act, in connection with all the attendant circumstances, the proper conclusion as to whether he is guilty of negligence or not. The neglect or failure of a person approaching a railway crossing to look or listen for an approaching train, is mere evidence on the question of contributory negligence, like any other to be submitted to the jury. To omit looking and listening when neither can be of any avail, as, when the track is hidden from sight or other sounds drown the noise of the cars, is not contributory negligence. The omission to take such precautionary steps does not necessarily, and as a question of law, constitute negligence, but is proper to be considered by the jury as evidence bearing on the question, as one of fact.[1]

SEC. 553. In an action against a railroad company to recover for the killing of stock at a highway crossing, the court declines to interfere with the finding of the court below for the plaintiff upon the facts stated.[2]

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[1] T. H. & I. R. R. Co. v. Voelker, 129 Ill. 540.*

[2] J. S. E. R. R. Co. v. Carlsen, 29 Ill. App. 230.†

*NOTE.—Action to recover for the death of Edward Voelker, caused by the alleged negligence of the defendant railroad company. Trial resulted in a verdict of $3,500 for the plaintiff. The deceased, at the time he received the injuries of which he died, was riding with all due care and caution, so alleged. in a wagon drawn by two borses along St. Clair avenue, in the city of East St. Louis, and that at the point where said avenue crosses the track of the defendant's railroad, the wagon in which he was riding was struck by a locomotive engine running on said railroad, and that the deceased thereby received the injuries of which he soon thereafter died. The negligence charged was neglect of defendant to ring a bell or sound a whistle, as required by law, and running at a greater rate of speed than allowed by the ordinance of the city; all of which the defendant denied.

†NOTE.—This was an action to recover damages for the killing of a cow and some hogs belonging to plaintiff by the engines running over the railroad of the defendant. Judgment was rendered for the plaintiff. The declaration avers that the cow was struck on a public highway crossing; that the employes in charge of the train might, with the exercise of proper vigilance, have seen the animal and avoided the collision, and that the statutory signals were not given eighty rods before the crossing was reached. The engine in question had nothing but a tender attached, and

SEC. 554. It is ordinarily negligence to go upon a railroad track without using the senses to ascertain the proximity of trains. A railroad company is liable for personal injuries arising from the frightening of a team standing at a safe distance from the crossing, through the unnecessary sounding of a whistle on one of its engines.[1]

SEC. 555. The statute only imposes a liability upon a railroad company for neglecting to ring a bell or sound a whistle as its train approaches a highway crossing, for injury resulting from that neglect of duty. Where it appears that the non-compliance with the statute did not result in injury, no cause of action will arise. The injury complained of must be the result of that neglect, either in whole or in part. If the company are guilty of other negligence, and it is doubtful which produced the injury, or if both combined produced the injury, then the company will be liable, if the injured party is not also in default to such an extent as to relieve the company from liability. Whether the failure to ring a bell or sound a

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was running at a high rate of speed. The engineer and fireman and the brakeman, who was on the engine, say they saw several head of cattle pass over the crossing, and this cow came running in the same direction as the others. They say she was not noticed until she was about on the track, not more than one hundred feet from the engine, when it was too late to stop. Two or three sharp sounds of the whistle were given, but the cow was struck and killed. The only points before the jury were pure questions of fact, whether there was omission to give the statutory signals, or to keep the proper lookout, or whether the collision was the proximate result of either of these matters of negligence.

[1] Wabash R. R. Co. v. Speer, 39 Ill. App. 599.*

* NOTE.—In this case the injury was occasioned, as alleged, by the unnecessary sounding of the whistle just as the train reached the crossing, and while the team of the plaintiff was standing a safe distance from the track, waiting for the train to pass. The team was frightened by the whistle, and, turning suddenly, upset the wagon, throwing the plaintiff violently to the ground. The defendant urges that it was negligence for the plaintiff to be there at that time, and that an instruction given at the instance of the plaintiff, which assumed the contrary or ignored the importance of due care to observe the approach of the train in coming to that point, was erroneous. The court did not so regard it. The plaintiff had a right to drive up to the point where she stopped, even though she knew the train was coming; she had a right to expect when she did so that no unnecessary sounding of the whistle would occur, and she may well complain if she was disappointed in that respect.

whistle on approaching a highway crossing by a railroad train, as required by the statute, was the cause of an injury sustained, is a question of fact for the determination of the jury.

While it is true that the traveler has the same right to cross a railroad at its intersection with a highway that the railroad has to cross the highway, yet each in so crossing is bound to use reasonable care and effort to avoid a collision or inflicting an injury on the other, or in receiving injury from the other. If a team can be checked on seeing the approach of a train more readily than the train, it should be so checked up; and it is also the duty of the person having it in charge to use all reasonable efforts to see and avoid the danger. And the same duty devolves on those having charge of the train. Neither has the right to be upon the crossing at the same instant of time.

Where the evidence showed that a road intersected by a railroad was traveled by the public, and had been worked and repaired by the authorities having charge of highways in that district, it was held *prima facie* evidence that it was a public highway, legally established, and sufficient to require a railroad company, when sued for injury, caused by a neglect to ring a bell or sound a whistle when approaching the same, to show that it was not legally established, in order to excuse itself from liability for neglect of this duty.[1]

SEC. 556. In a suit against a railroad company for damages occasioned by the negligence of its servants, where it appears the plaintiff's own negligence was the cause of the injury complained of, or where the negligence of the parties is equal, or nearly so, there can be no recovery. It is negligence for a person to walk upon the track of a railroad, whether laid in a street or upon an open field, and he who deliberately does so

[1] I. C. R. R. Co. v. Benton, 69 Ill. 175.*

* NOTE.—In crossing the railroad, one of defendant's engines, with a train attached, struck the horses, threw them and the wagon into the ditch at one side of the road, killing one of the horses and injuring the wagon. The declaration averred negligence in not slackening the speed of the train, and in failing to ring a bell or sound a whistle at the road crossing, as required by the statute. The trial resulted in a verdict and judgment for $135.75.

will be presumed to assume the risk of the peril he may encounter.[1]

SEC. 557. A railroad company is under no obligations to give signals before reaching a crossing which is not a public highway crossing. A person who is reckless as to his personal safety, as well as to the safety of his property, can not recover for injuries sustained.[2]

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[1] I. C. R. R. Co. v. Hall, 72 Ill. 222.*

[2] A., T. & S. F. Ry. Co. v. Booth, 53 Ill. App. 303.†

* NOTE.—The plaintiff was struck by a moving engine on the defendant's road, and this action is to recover damages for the injuries. By an ordinance of the city of Cairo, it was made unlawful to run trains within the limits of the corporation at a rate of speed greater than six miles per hour. The plaintiff had been to the city and was returning to his home, beyond the limits of the corporation, in company with three of his neighbors. He was walking on the river track, and, hearing the approach of a train, stepped over to the other, or inside, track, where he was almost instantly struck by an engine moving in the same direction with the one he was endeavoring to avoid. Had the plaintiff stepped on the path between the tracks, as one of his companions, Allcock, did, he would have been out of danger. There is no dispute that signals of warning were given by the ringing of bells on both engines, and it seems most singular that they were not heard by any of the four persons on the tracks until the trains were within a few yards of them. It can only be accounted for by the fact that the wind was blowing hard from the opposite direction, which prevented them from hearing readily. There was nothing absolutely to prevent plaintiff seeing both advancing trains, had he looked. He says in his testimony that he "did not take the precaution to look and see if there was a train coming on the inside track." The speed of the train is fixed at from one to twenty miles per hour by the plaintiff's witnesses; the defendant denies such rate.

† NOTE.—This was an action to recover for the killing of two horses and damaging of a wagon in a collision with one of defendant's trains, while plaintiff's driver was attempting to cross the railroad in front of the train. The negligence of the defendant charged was failure to ring the bell or blow the whistle for eighty rods before reaching the point of collision, which was alleged to be a public highway crossing. Trial resulted in a verdict for plaintiff of $194. The defendant claimed that where the collision occurred was not a highway crossing, and that no obligation rested upon it to give crossing signals there. There was such gross negligence on the part of the driver of plaintiff's team as to preclude a recovery. The court said: "While we are inclined to the opinion from the evidence that the place was not a public highway crossing, and defendant was under no legal obligation to give signals before reaching it, we prefer to put our reason for reversing the judgment upon another ground," namely, the negligence of the driver of the team. The driver, Booth, knew at the time that the train was about due. He looked from a position in which he could not see down the track

SEC. 558. A person knowing that a flagman is usually stationed at a railroad crossing has a right to presume that he is at his post and will do his duty, and, in the absence of any warning or signal of danger, is not chargeable with negligence in proceeding to cross the tracks.[1]

SEC. 559. A person who is familiar with the custom of a railroad company to close gates maintained at a railroad crossing when a train is about to pass, and with the location and surroundings, has a right to rely upon the *open gates as a notice*

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more than three hundred feet, when he could have taken a position that would have given him an unobstructed view for more than half a mile. After looking, he turned his team about and drove hurriedly toward the track, with his back toward the approaching train. He did not exercise common prudence. Indeed, his conduct was reckless, not only with reference to the safety of his team, but his own safety.

[1] C. & A. R. R. Co. v. Blaul, 70 Ill. App. 518.*

* NOTE.—This was an action to recover damages for injuries sustained by the plaintiff in consequence of a collision with one of the defendant's trains of cars, which came in contact with the buggy in which the plaintiff was riding, at the intersection of defendant's railroad tracks in the city of Joliet. Judgment for the plaintiff, $5,000. Van Garvin, who was driving, brought his horses to a stand-still and waited for a freight train to pull across the street, and about the time the caboose or rear car reached the north sidewalk, seeing nothing to prevent his going forward, and there being no gates closed or flagman at the crossing to give notice or warning of danger, he started his horses toward home, when, just as he reached the easterly or south-bound main track, and he was in the act of crossing, a train consisting of an engine and seven or eight flat cars bore down upon them at a rapid rate of speed from the north, striking the wagon in which the plaintiff was riding, throwing the occupants of the vehicle a distance of twenty or twenty-five feet, and inflicting upon the person of the plaintiff serious injuries. It is frankly admitted by counsel for defendant that under the ordinances of the city of Joliet it was the duty of the defendant to have a *flagman at the crossing*, and that one is usually on duty there, but that at the particular time of this accident he had left his post on some other business and was then absent from his place of duty. Counsel concedes that this was negligence on the part of the defendant, but contends that notwithstanding this negligence on the part of defendant, that the plaintiff can not recover because she had committed her safety to Van Garvin, the driver of the vehicle, and that the latter was guilty of negligence in not ascertaining that the east track was safe to cross before attempting to pass over it; that inasmuch as the view was obstructed to some extent by the freight train upon the north-bound main track, he should have waited until he could know with certainty that it was safe for him to cross. It is argued that, because Van Garvin knew there was usually a flagman at the crossing, he should have waited until notified by the flagman that it was safe to cross.

to him that no train is close at hand, and as a notification to him to make the crossing in safety, as far as an approaching train is concerned. Whether a plaintiff suing for personal injuries, caused by the negligence of the defendant, exercised due care for his own safety, is a question for the jury, and where it is a question upon which ordinarily intelligent men may reasonably differ, and there is evidence enough to leave the question one of considerable uncertainty, the court will not override the finding of the jury.[1]

SEC. 560. The law requires an engineer in charge of a locomotive, when he discovers cattle ahead of him upon the track, to do that which a reasonably prudent and careful engineer would be expected to do under the circumstances.[2]

SEC. 561. In a suit to recover for damages alleged to have been occasioned by fires set by sparks from a locomotive, if it is shown that such sparks set the fire, a *prima facie* case is established, and the burden is thrown upon the defendant to rebut the liability. And if it is shown that the fire actually started in the railroad company's right of way, in consequence of dangerous combustible materials having been negligently left thereon, a clear case of negligence is made against the company, without reference to the condition of the engine.[3]

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[1] C. & A. R. R. Co. v. Redmond, by his next friend, 70 Ill. App. 119.*

[2] Wabash R. R. Co. v. Aarvig, 66 Ill. App. 146.

[3] C. & A. R. R. Co. v. John and Martin Glenny, 70 Ill. App. 510.†

* NOTE.—The plaintiff caught hold of stakes at the tail of a wagon, and got so far aboard as to be standing upright on the wagon bottom and to have one or both of his legs over the chain that extended from stake to stake, while the driver continued his course. Before the wagon got across the railroad tracks, and while in that position, a passenger train of the defendant coming from the west struck the hind part of the wagon, threw the plaintiff a distance of from sixty to seventy-five feet, causing him the very serious injuries for which he recovered a judgment in this case of $2,400. The defendant had placed and maintained gates on both sides of the railroad at this crossing, but on the day in question such gates were not being operated or attended, and were in a position to indicate to anybody needing to pass that way, that the crossing was open and safe against approaching trains. The gateman usually kept to open and close this gate was, at the time of the accident, about one hundred and fifty feet away from the crossing.

† NOTE.—Action to recover damages for the destruction of property by fire, alleged to have been communicated by the defendant's engine drawing train of cars on its railway running past plaintiffs' premises. Trial resulted

SEC. 562. A child is only required to exercise that decree of care and caution which children of like age, capacity and experience may reasonably be expected to use under like circumstances. Considering the great amount of travel over the crossing where the injury was inflicted, the density of the population at that point, and the meagre provision which had been made by the railroad company for warning the public of approaching trains, the court concludes there was negligence in running the train which struck the plaintiff at a rate of more than twenty miles an hour.[1]

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in a verdict for the plaintiffs for $7,849.18, and the trial court required a remittitur of $1,349.18, and entered judgment for the remainder, $6,500. It appears from the evidence that there was no reasonable doubt but that the fire which destroyed the plaintiffs' property was communicated and started from a passing locomotive engine. This was made by the statute *prima facie* evidence to charge the defendant with negligence. It was shown by the defendant that the engine was properly equipped to prevent the escape of sparks, etc., notwithstanding which the plaintiffs' evidence showed that the sparks were thrown thirty feet high, "like a shower of hail or a thick snow fall." Under the evidence in the case, as made, it was a question for the jury. There was also evidence showing that the fire actually started in the defendant's right of way, in consequence of dangerous combustible materials having been negligently left thereon, which made a clear case of negligence against defendant under the authority of the case.

[1] C., R. I. & P. R. R. Co. v. Ohlsson, 70 Ill. App. 487.*

*Action on the case by the plaintiff, by her next friend, to recover for injuries sustained while attempting to cross defendant's track in front of a moving train. Trial resulted in a verdict and judgment in favor of plaintiff for $3,000. Plaintiff was a child six years of age. She and several other children had been playing about a small flat car, which stood upon a side track in the street, when the milk train approached. When this train was about fifty feet from the crossing, she atttempted to cross the main track, and in doing so was struck by the train. The evidence shows that the Collins street crossing is in a thickly populated portion of the city. At the time of the injury no gates had been established there, but the railroad company had a flagman stationed there. Train was running at a rapid rate of speed considering the thickly populated district it was running through. The flagman was at his post, and had signaled to persons who were wanting to cross. The plaintiff was evidently trying to reach another girl, who was standing upon the side track, on the opposite side of the track. In view of the tender years of the plaintiff, the court did not think there was such want of ordinary care, on her part, as would preclude recovery, if the defendant was guilty of negligence which caused the injury. She was only required to exercise that degree of care and caution which children of like age, capacity and experience may reasonably be expected to use under like circum-

SEC. 563. In a suit against a railroad company for injuries received at a railroad crossing, the court found that the plaintiff neither looked, listened nor thought of the train, and that he was therefore not in the exercise of ordinary care; that ordinary care is that degree of care which a reasonably prudent and cautious person would take to avoid injury under like circumstances.[1]

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stances. Such a rule is recognized by the courts of this State. (Kerr v. Forgue, 54 Ill. 482; C. & A. R. R. Co. v. Gregory, 58 Ill. 226; C. & A. R. R. Co. v. Becker, 76 Ill. 25; C., St. L. & P. R. R. Co. v. Welsh, 118 Ill. 572; Chicago City Ry. Co. v. Wilcox, 138 Ill. 370.) The conduct of the plaintiff on the occasion of the accident was quite natural for a child of six years; considering the circumstances of the density of the population in that part of the city, and the meagre provision made by the railroad company for warning the public of approaching trains, it is considered there was negligence in running the milk train which struck the plaintiff, at the rate of speed it was running at the time—more than twenty miles per hour.

[1] C. & A. R. R. Co. v. Stewart, 71 Ill. App. 647.*

* NOTE.—The plaintiff brought suit against the defendant to recover damages for personal injuries sustained by him in consequence, as alleged, of the negligence of the defendant in approaching and passing over the crossing of a street and public highway in the village of Cole City, town of Bracewood, Grundy county, Illinois. While driving in the direction of the railroad, the plaintiff sat on the wagon with his side toward the railroad, his back turned in the direction from which the train struck him. His mules were trotting until the railroad grade was reached, where they slackened to a walk as they passed upon the track. The plaintiff did not see or hear the approach of the train. The engine struck the front wheels of the wagon, threw the plaintiff into the air and upon the ground, broke his collar bone and two ribs and otherwise injured him, as was claimed, permanently. The jury returned a verdict against the defendant in the sum of $5,300. In referring to the evidence the court says: "We are compelled to the conclusion that the verdict is not supported by it. The burden of proof was upon the plaintiff to show that at the time he received the injuries for which he seeks to recover damages, he was himself in the exercise of ordinary care to avoid injury. He has failed to do this, but, on the contrary, the testimony of his own witnesses established the fact that he did not approach the railroad crossing where he was hurt with ordinary care, and that it was in consequence of such want of ordinary care that his injuries were incurred. The place where the accident occurred was open to view and well known to the plaintiff. Others who were on the same highway, and near to him just before and at the time he was struck by the engine, heard and saw the train. The plaintiff, of all the several persons in the neighborhood, was the only one, it appears, who did not see or hear the train. This fact proves he neither looked nor listened for the train, but doubtless, in a state of thoughtlessness, drove upon the crossing in a time of danger

SEC. 564. In an action against a railroad company for damages caused by the negligence of an employe, the burden is on the defendant to show that the plaintiff and the negligent employe were fellow-servants, although the declaration contained a negative allegation.

An employe does not assume all the risks incident to his employment, but only such as are usual, ordinary, and remain so incident after the master has taken reasonable care to prevent or remove them; or, if extraordinary, such as are obvious and expose him to danger so imminent that an ordinarily prudent and careful man would anticipate injury as so probable that in view of it he would not enter upon or remain in the employment.

A master is responsible for injuries to one of his servants caused by the negligence of another where the servant causing the injury is not a fellow-servant of the one injured.

Although the negligence of a fellow-servant may have contributed the cause of injury, if the person injured exercised due care, and his injury was caused by such negligence, and the contributory negligence of the master or of another servant, not a fellow-servant, the master will be liable.

A light so attached to a switch that an engineer in charge of a train can see whether it is open in time to stop the train, if necessary to avoid injury, is a reasonable provision against danger, and a jury may well find that a failure to provide such light is negligence.

The fireman on a locomotive was killed in consequence of a switch being left open, which should have been closed, and it was held that under the evidence the crew of the locomotive had no reason to suppose that the switch was open, and were not bound to suspect that a duty so plain and simple, and yet so important, had been neglected; and that a finding by a jury that in risking a possibility so bare and remote the deceased was not guilty of negligence, ought not to be disturbed.[1]

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and was hurt. He was not, therefore, in the exercise of ordinary care." (Chicago C. Ry. Co. v. Dinsmore, 162 Ill. 658.) The judgment was reversed by the appellate court.

[1] C. & A. R. R. Co. v. Hause, Adm'x, 71 Ill. App. 147.*

*NOTE.—A way freight train of the defendant stopped at the village of Gardner, in Grundy county, to do some switching. The road there has two

SEC. 565. To overcome a *prima facie* case made by the plaintiff in a suit against a railroad company to recover damages for the destruction of property by fire set by sparks from a locomotive engine belonging to the defendant, it is necessary to show that the engine was being properly handled at the time the fire was communicated to the plaintiff's property.[1]

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tracks. It was running at a rate of twenty-five or thirty miles an hour, its usual rate there, notwithstanding an ordinance forbidding a speed exceeding ten miles. A light kept on the switch had been taken off about six months previous to the accident. The train ran into the open switch, and by collision with some cars standing thereon, William Hause, the fireman on that train, was killed. To recover damages for the death of Hause, so caused, this action was brought by his widow. The declaration charged the company with negligence in taking off the light and in employing inexperienced and incompetent servants. A verdict for the plaintiff was rendered for five thousand dollars. The absence of the switch light, the failure to close the open switch, and the rate of speed at which the train was running are charged with the accident. It seems that the evidence sufficiently supported the finding that the crews of these two trains were not fellow-servants. They were not so co-operating or habitually associated as to make them such. Again, the train of the deceased was a midnight and fast train, and had nothing to do with the switch there, but was exposed to danger from its misplacement. The risk could be avoided or greatly lessened by the cheap and simple means of a light so attached to it that an engineer in approaching it could see whether it is open in time to stop or slow, as might be necessary, before reaching it. The company could easily have provided it, but the train crew could not.

[1] C., C., C. & St. L. R. R. Co. v. Case, 71 Ill. App. 459.*

* NOTE.—This was an action to recover damages for the destruction of property owned by the plaintiff in consequence of being set on fire by sparks escaping from one of the defendant's locomotive engines at the village of Waldron in Kankakee county. A verdict was rendered by the jury for the plaintiff for $520. It was not disputed that the plaintiff's property was destroyed as alleged in the declaration, but the defenses set up by the defendant were that the locomotive was equipped with the best known appliance to prevent the escape of fire or sparks therefrom; that it was in good repair, and that the engine was skillfully and carefully handled by a competent engineer. It was substantially conceded that if these facts were proven they constituted a complete defense to the *prima facie* case made out by the plaintiff, it having been proven that the fire was caused by fire escaping from the locomotive engine. It appears that the sparks did escape and set fire to the plaintiff's premises. It would seem to follow that something was out of order and not in proper repair, or that the engine was not properly handled. The only evidence as to the competency of the engineer was the testimony of the fireman. He and the engineer each swear to the

SEC. 566. The rule of a railroad company providing that a train approaching a station where a passenger train is leaving or discharging passengers must be stopped before reaching the passenger train applies to places used by such railroad as points at which to receive and discharge passengers. In a suit against a railroad company for injuries received at a crossing, it is proper to instruct the jury that it was the plaintiff's duty before crossing the track to exercise ordinary and reasonable care in looking out for approaching trains. It is not proper for the trial court, in submitting a case to the jury, to instruct that certain facts show negligence; it should allow the jury to determine from the facts in evidence whether or not there was negligence, and an instruction that certain facts constitute gross negligence is erroneous.[1]

SEC. 567. In a suit against a railroad company to recover the value of a horse alleged to have strayed upon the right of way of the company through insufficient fences, an instruction requiring the plaintiff to prove where the horse actually did get upon the right of way is improper. A fence that will turn ordinary stock, or stock not extraordinarily breachy, is a good and sufficient fence. In a suit for damages based on the insufficiency of a fence, evidence that the fence was removed shortly after the happening of the accident complained of is not admissible.[2]

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other's competency but neither swears that at the time the fire was communicated to the plaintiff's property the engine was being properly handled. It does not appear, therefore, that the plaintiff's *prima facie* case was overcome.

[1] Penn. Co. v. Reidy, 72 Ill. App. 343.

[2] Leggett v. I. C. R. R. Co., 72 Ill. App. 577.*

* NOTE.—This was an action to recover the value of a horse that strayed upon the right of way of the defendant through an insufficient fence, and was killed by a train of the defendant. The case was tried by a jury and a verdict found for the defendant. One of the errors assigned on the record is that the court below erred in overruling the motion for a new trial, and that the court gave improper instructions on behalf of the defendant. The plaintiff was bound to make out his case by the preponderance of the evidence, and bare preponderance is sufficient, though the scales drop but a feather's weight in his favor. A very different rule was adopted by the court below in this case. The court told the jury that if the proof fails to show with a reasonable certainty at what place the animal got on the right of way, then their verdict should be for the defendant; and if, after consid-

SEC. 568. It is sufficient for the plaintiff suing a railroad company for the value of stock alleged to have been killed on account of the failure of the company to maintain proper fences and cattle-guards, to show that the stock was killed at a point where the company was required to fence. He need not show that such stock entered upon the right of way at a place where the company was required to erect and maintain fences and cattle-guards.[1]

SEC. 569. Negligence can not be imputed to a railroad company killing stock on account of the manner in which its employes operate the train, when they do everything in their power, after the discovery of the stock upon the track, to save it from injury.[2]

SEC. 570. To enable a party to recover of a railroad company for stock killed while trespassing upon its right of way he must show that its servants in some way were notified that the stock were in fact on, or likely to be on the track, and that

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ering all the evidence together, they were unable to say with reasonable certainty whether the animal in entering the right of way went through a sufficient or insufficient fence, then the jury should find the defendant not guilty; and if you are unable to tell from the evidence with reasonable certainty whether the horse got on the right of way through the fence or some other fence, then it would become the duty of the jury to find the defendant not guilty. The degree of proof required to enable the plaintiff to recover is not warranted by law. Cause was reversed and remanded.

[1] Wabash R. R. Co. v. Pickrell, 72 Ill. App. 601.*

[2] C. & A. R. R. Co. v. Patterson & Johnson, 72 Ill. App. 428.†

* NOTE.—The mare of the plaintiff, with other horses, escaped from the plaintiff's pasture into the public highway and from thence upon the right of way. She was struck by an engine on the main track at a point nearly half a mile west of the depot and about 300 feet east of where the side track joins the main track. The evidence shows that she was killed at a point where it was the duty of the defendant to fence against stock. It was contended that she went upon the track between the west elevator and the stock fence at a place where the company was not required to fence, and for that reason the plaintiff was not entitled under the pleadings to recover. The evidence did not clearly show where she entered upon the track. No one saw her when she did so.

† NOTE.—Action for killing stock. The engineer saw three horses coming over the embankment about 500 feet ahead of the engine. He applied the air brake, whistled, and the automatic bell ringer was sounding the bell. It was impossible to stop the rapidly moving train in such a short distance, and as the horses ran across the track the engine struck the one in the rear. The leading horses scampered up the opposite bank and disappeared.

they, by the exercise of proper care and prudence, could have prevented the injury.[1]

SEC. 571. Whether a person about to cross a railroad track is guilty of negligence if he does not look and listen is a question of fact for the jury, to be determined from a consideration of the circumstances of the particular case, and it can not be held as matter of law that a person who fails to look and listen under such circumstances is guilty of negligence.

While it is the duty of the appellate court to consider the evidence and determine, when the question is properly presented, whether a verdict is manifestly against the weight of the evidence, it is not the duty or right of the court to usurp the province of the jury and set aside their verdict merely on the ground that the court, had they been sitting as jurors, would have found differently.

Whether a railroad company, at the time of an accident, was running a train at a dangerous and unreasonable rate of speed is a question for the jury, to be determined by a consideration of the circumstances of the particular case.

Although there may be no evidence of any ordinance requiring a flagman at a certain railroad crossing, and therefore no absolute duty incumbent on the railroad company to have one at such crossing, yet the fact that there was no flagman at such crossing is proper to be considered by the jury in passing on the question of the alleged negligence of the company in operating its road.

The engineer testified that when about 250 feet from the crossing he saw a man from twenty to forty feet from the tracks approaching the tracks, and that, at the rate the train was running he could have stopped it within a space of fifty feet. It was held that the evidence was competent under the declaration alleging that the railroad company, by its servants, so carelessly managed its locomotive engine and train, in driv-

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[1] Robert Peirce, receiver St. L. & K. C. R. R. Co., v. Wright, 73 Ill. App. 512.*

* NOTE.—This was an action to recover the value of two horses killed by the defendant in operating an engine and train of cars. A verdict was rendered for the plaintiff for $100. The only error insisted on is that the verdict of the jury is not sustained by the evidence. It was a matter for the jury, and the court declined to disturb the verdict.

ing the same at such high and unreasonable rate of speed, that by and through the negligence and improper conduct of the defendant the injury was caused.[1]

SEC. 572. When the fact is shown that the railroad company, at the time of the accident, was running its train at a rate of speed prohibited by law, a *prima facie* liability is established, and in the absence of proof rebutting the statutory presumption it becomes conclusive.

In an action by a personal representative to recover damages for the death of a person by negligence, the burden of proof is upon the plaintiff to show that at the time of the accident the deceased was in the exercise of ordinary care to avoid injury, and unless such fact appears from the evidence there can be no recovery. What is or is not negligence is a question of fact for the jury.

There can be no rule of law as to what a person is bound to do for his own protection when in a position of peril. What a reasonably prudent person would do under such circumstances must be left to the jury as a question of fact.

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[1] L. S. & M. S. R. R. Co. v. Foster, Adm'r, 74 Ill. App. 387.*

* NOTE.—This is a case to recover for killing of one Louis Smith. The declaration alleges as negligence the running of the defendant's train at a high and unreasonable rate of speed, failure to ring a bell or sound a whistle, leaving gates open, failure to give warning at the approach of train, and provide a flagman. The defendant contends that the deceased did not exercise ordinary care in approaching the tracks, and that in this respect he was guilty of contributory negligence such as should bar a recovery. It was claimed that he did not look or listen for the train, but the testimony on this point is unsatisfactory, as the witnesses upon that point were not so situated as to be able to testify positively. But the court said that as a matter of law it could not be said the deceased was negligent; that that was a question for the jury under all the facts and circumstances in evidence; citing C. & N. W. Ry. Co. v. Hanson, 166 Ill. 623; Penn v. Frana, 112 Ill. 398; C. & E. I. R. R. Co. v. O'Connor, 119 Ill. 586; T. H. & I. R. R. Co. v. Voelker, 129 Ill. 551; C. & I. R. R. Co. v. Lane, 130 Ill. 116; L. S. & M. S. R. R. Co. v. Johnson, 135 Ill. 647.

The crossing at Ewing avenue was exceedingly dangerous. Six donble tracks cross the avenue within a space of 245 feet. Whether, in view of the circumstances in evidence, the defendant (appellant), at the time of the accident, was running its train at a dangerous and unreasonable rate of speed was a question for the jury. All of the witnesses for the defendant say the train was running very fast, and the evidence is that there was no flagman at the crossing. Under all the circumstances the question was one for the jury.

SEC. 573. In a suit against a railroad company by the owner of land adjoining its right of way to recover double the value of the fence built by such owner, the court considers the notice served on the railroad company, and holds that while the demand in the notice to build a suitable and sufficient fence would have been fulfilled if the defendant had either built a new fence or repaired the old one in a manner to make it a good and sufficient fence, as required by law, yet, as it did neither, the plaintiff had a right, under the provisions of the statute and said notice, to either build a new fence that would be good and sufficient, or to repair the old one in a manner to make it such a fence, whichever the condition of the old fence reasonably required.[1]

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[1] I. C. R. R. Co. v. Hill, 75 Ill. App. 621.*

* NOTE.—The following is a notice which was given by the plaintiff to the railroad company on its date, namely :

"DECATUR, ILL., Sept. 19, 1896.

"TO THE ILLINOIS CENTRAL RAILROAD COMPANY :

"You are hereby notified that the fence along the west side of your right of way over the southwest ¼ of section 8, and the north ½ of the northwest ¼ of section 17, all in township 14 north, range 2 east of the 3rd p. m., and adjoining premises owned by the undersigned, in Mason county, Illinois, is not suitable and sufficient to prevent cattle, horses, sheep, hogs and other stock from getting on such railroad; and you are further notified that unless the same is made suitable and sufficient, as is required by the statute of the State of Illinois, within thirty days from this date, I, the undersigned, H. W. Hill, will proceed and make such suitable and sufficient fence and hold your said railroad company for double the value thereof, as is by the said statute in such case made and provided.

(Signed) "H. W. HILL."

It appears that on the 21st day of October, 1896, the plaintiff procured men and material on the ground and commenced at the north end thereof to build a new fence where the old one was between him and the right of way of the defendant, and had by the 26th day of October, 1896, built five hundred and eighty feet of new fence. On this latter day the defendant commenced six inches back on its right of way from the line, and that distance from the end of the five hundred and eighty feet of fence then completed by the plaintiff, and built a fence from there to the end of the line between the parties hereto, making it all the way six inches from the line and making it partly from material from the old fence and partly from new material. The plaintiff continued to build and completed on the line a good and sufficient new fence, using new cedar posts, fence plank, wire, nails and staples. The old fence was not sufficient under the law, and it was necessary to either repair it or build a new one. Plaintiff recovered a judgment against the defendant in the sum of four hundred and thirty dollars.

SEC. 574. It is the duty of those having charge of the train to give notice of its approach to all points of known or reasonably apprehended danger, and a railroad crossing is a place of known danger, and persons using the same are bound to use reasonable precaution to avoid injury to others, and this is the rule at common law where the highway passes under or over the railroad track, or where they cross upon the same grade.[1]

The statutory provision requiring railroads to ring a bell or blow a whistle upon approaching the crossing applies to places where the highway passes under or over the railroad track as well as upon the same grade.

SEC. 575. It can not be said that an engineer is negligent who sees a boy nearly nine years old standing in a place of safety near the track, because he does not stop or slacken the speed of his train, or blow a whistle when his bell is ringing

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[1] C., C., C. & St. L. Ry. Co. v. Halbert, 75 Ill. App. 592.*

* NOTE.—Action to recover damages for injuries received on account of the alleged negligence and careless manner of the servants and employes of the defendant railroad company at and near an overhead road crossing near the city of Paris, Illinois. Verdict of $1,500 for the plaintiff. The overhead bridge is a part of the Clinton road, which runs north and south and connects at Clinton road with the Paris and Terre Haute road. The railroad track just west of the overhead bridge runs through a cut, and upon the north bank of this cut is the earth taken from the cut, and it is overgrown with weeds and shrubbery. On the morning of July 17, 1896, the plaintiff returned from his farm. When he came to the intersection of the boundary line road with the Clinton road he stopped his horses (he was driving in a single buggy) and looked and listened for the train. Not hearing or observing any indication of the train, he drove west on the Clinton road on a trot and turned south to go over the bridge, and just as he got to the bridge he saw the train, and as it shot under the bridge it whistled and his horse became frightened and ran south off the bridge to the Terre Haute road, then turned south toward Paris. At this point the plaintiff's wagon was turned over and he was thrown out and dragged, by being caught in some part of his wagon, about three hundred or four hundred feet down a gravel hill, and received the injuries complained of. There was no point between where the plaintiff stood and listened for the train that the train could be seen coming from the west until the bridge was nearly reached. The declaration charged a failure to perform the duties required by law; that is, to give a notice of the approach of defendant's train at all points of known or apprehended danger; also statutory negligence, failure to ring the bell or blow a whistle at a point eighty rods from the crossing, and keep the same ringing or the whistle sounding until the crossing was reached.

and crossing gates located at such place are down, nor must he assume that such a boy will not take the ordinary and reasonable precaution of looking both ways before he steps upon the track, or that the boy is, in fact, ignorant of the approach of the train.

It is the duty of persons about to cross a railroad track to look about them and see if there is danger, and not to go recklessly upon the track, but to take the proper precautions to avoid accident.

Where it appears that a person standing near a railroad track did not distinguish the noise made by an approaching train from other noises, in order to charge the train crew with negligence in failing to take proper steps to prevent an accident, it is necessary to prove notice of the facts to the train crew at least long enough before the accident to have enabled them to have formed an intelligent opinion as to how it might be avoided and to apply the means.[1]

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[1] Theobald, Adm'r, v. C., M. & St. P. R. R. Co., 75 Ill. App. 208.*

* NOTE.—Action for damages for the negligent killing of John P. Theobald by the defendant company. The boy was eight years and eight months old at the time of the accident which caused his death. He was of average intelligence and average size for his age. On the 5th of April, 1892, about half past six o'clock in the evening, after he had been playing with other boys in a stoneyard situated at the corner of Division and Halsted streets, in the city of Chicago, being told by a companion that his sister was calling him, the deceased started to go home. Trains were then approaching the crossing from opposite directions, crossing gates were down and the tower bell ringing. The train coming from the southeast was running upon the eastward of the double tracks of the railroad company. As it crossed the street in front of him, the boy was standing apparently at a point near the southwest corner of Division street and the railroad right of way, not more than six or eight feet from the tracks, watching this train. Meanwhile a train was approaching from the northwest upon the track nearest to where he was standing. It was in plain sight from where the boy stood for a long distance before it reached him, but he evidently did not look in that direction and did not see it. The engine of this south-bound train is stated to have been about two or three coach lengths from Division street, and the north-bound train was at the center of that street. When the rear end of the north-bound train passed where the boy was standing, apparently watching for it to go by, he was seen to step suddenly forward upon the track nearest him and directly in front of the south-bound train. It was running with the tender in front and its engine bell was ringing. The tender struck the boy upon the head. The court instructed the jury to return a verdict for the defendant.

SEC. 576. Although a person who has boarded a freight train may be a trespasser, that does not prevent a recovery against a railroad company for the act of a brakeman in ejecting him from a train while it was in motion, and without regard to the safety of his person or the preservation of his life.

A brakeman of a freight train, acting under orders from the conductor, forcibly ejected from the train a person who was riding thereon, and he was seriously injured. It was held that the conductor was a vice-principal, and that the railroad company was liable for acts performed under his direction.

When there is not a legal measure of damages, and when the damages are unliquidated, and the suit is referred to the discretion of the jury, the court will not ordinarily interfere with the verdict. It is the peculiar province of the jury, under proper instructions from the court, to decide such cases, and the law does not recognize in the court the power to substitute its own judgment for that of the jury.[1]

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[1] I. C. R. R. Co. v. Davenport, 75 Ill. App. 579.*

* NOTE.—This action was brought by the plaintiff to recover damages on account of being forcibly and violently ejected from a freight train by the servants of the defendant, while attempting to ride from Maroa to Emery. It is claimed in the declaration that the plaintiff became a passenger on said railroad to be carried from Maroa to Emery, and was legally and lawfully on such train, and that it became the duty of the defendant to carry the plaintiff; but that the defendant, disregarding its duty, by its agents and servants then in the management and control of such train, unlawfully, forcibly, cruelly, wickedly, and while such train was going at a high rate of speed, to wit, at the rate of twenty miles per hour, forcibly ejected the plaintiff from the train to and upon the ground with great force and violence, while he was in the exercise of due care and diligence and lawfully upon such train, by means whereof he received great and permanent injuries, etc.

The case was heard before a jury, who returned a verdict for the plaintiff assessing damages at $2,000. It appears that the plaintiff and one Swift went to the station of Maroa and purchased tickets for passage from that station to Emery. As they received their tickets, a train was moving slowly past the station, and they asked the ticket agent if they could go to Emery on that train, and he advised them that they could. The train being in motion, and they fearing lest the motion of the train might be too great when the caboose reached where they were, boarded an empty coal car opposite them, some eight or ten cars in front of the caboose, and started to go toward the caboose over the empty coal cars. The station agent was mistaken; this was not the freight train that carried passengers; it only carried

SEC. 577. Under the statutes of this state proof that property was destroyed by fire communicated from a passing engine is to be taken as full *prima facie* evidence to charge the railroad company operating the same with negligence; and to rebut the case made by such proof it is incumbent upon the company to show that the engine was at the time equipped with the best known appliances to prevent the escape of fire, was in good repair and was skillfully and carefully handled.

The statute in regard to fires communicated by locomotives was not intended to absolve the owner of property from all care whatever, and confer upon him the right to make such extraordinary use of his land adjoining a railroad as that he might, regardless of danger, pile up vast quantities of highly combustible material, liable at any moment to be set on fire by a passing engine, and he himself take no risk. In this case the court holds that the question whether the plaintiff was guilty of contributory negligence in stacking a large quantity

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passengers that had tickets and a permit from the division superintendent to ride. While the freight train that carried passengers was due, it had not yet arrived. Of these facts the plaintiff and Swift were ignorant. When they came to the second car from the caboose they met Hill coming from the caboose. He was the rear brakeman. He called them "s—s of b—s" and wanted to know what they were doing on this train. They exhibited their tickets and said the station agent had sold them tickets and told them to get aboard this train. He called them liars, and said the agent never told them that that was the train and told them they would have to get off the train. They replied that if they were in the wrong, if he would stop the train that they would get off. At this time Montag, the brakeman, came from the front end of the train onto the car and addressed Swift and the plaintiff in a manner similar to what Hill had addressed them. He finally told Swift that he would smash him, and that he would throw him off. He then took him by the collar and took him to the front end of the car. At that time Hill took charge of the plaintiff and took him to the rear end of the car and ordered him to get off, giving him a shove. The plaintiff grabbed a brace on the side of the car and got his foot in the stirrup, and while holding there Hill told him to get down from there and struck his hand with a lump of coal and broke his hold loose, and whipped him around, and then hit him on the head, and he fell off, falling on his back a little to the right side, his head striking on one of the ties. He was knocked senseless and remained in an unconscious condition, until Swift, who had been forced off the train by Montag, came to him and lifted him up. The court says: "The conduct of the brakeman, Hill, in ejecting the plaintiff from defendant's train while it was in motion, and without regard to the safety of his person, or the preservation of his life, was wanton and wilful, and gives the plaintiff a right to recover, although he may have been a trespasser."

of straw near the railroad track was properly submitted to a jury.

The question arising in this case as to the relative merits of different methods of preventing the escape of sparks from a locomotive was one of fact, within the province of the jury to determine, and it was for them to reconcile the conflicting evidence, if they could; and if not, then to give credence where they thought it properly belonged.[1]

SEC. 578. Where stock enters a railroad right of way at a place exempted from the operation of the statute, in regard to fences and cattle-guards, and wanders along the track to a place not exempted, because of a failure to erect a suitable fence or cattle-guard, and is there killed by a train, the railroad company is liable.

Such part of the depot grounds of a railroad company as is necessary for the use of the road by the public is exempt from the operation of the statute, even though not within an incorporated city or village.[2]

SEC. 579. It is not a rule of law that a traveler is bound under all circumstances to look and listen before crossing a railroad track.

It is not negligence in every case and under all circumstances for a person whose view is obstructed by smoke and dust from a train passing on one track to step upon a parallel track before his view becomes unobstructed.

Where the evidence in a case is such that reasonable men of fair intelligence may draw different conclusions, the question of negligence must be submitted to a jury.[3]

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[1] American Straw Board Co. v. C. & A. R. R. Co., 75 Ill. App. 420.*

[2] C. & E. I. R. R. Co. v. Blair, 75 Ill. App. 659.

[3] C. & N. W. Ry. Co. v. Hansen, 166 Ill. 623.†

* NOTE.—This was an action to recover against the defendant for the destruction by fire of 3,476 tons of baled straw and a straw stack, which straw was stacked in close proximity to a switch track operated by defendant. It is claimed that the fire which consumed this property was communicated from one of the defendant's engines engaged in hauling cars upon said switch track. The defense was that the engine was properly equipped with the best known appliances to prevent the escape of sparks, and was properly handled. The case was tried by a jury, which returned a verdict in favor of the defendant.

† NOTE.—This was an action to recover damages for injury received from the defendant's train at a railroad crossing. The jury returned a verdict

SEC. 580. In a personal injury case whether the plaintiff's intestate was killed by or through their negligence, is a question of fact for the jury. It is not the duty of the court to say that the existence of a certain state of facts does or does not constitute negligence.

An instruction that, as a matter of law, servants of a railroad company in charge of a train may assume certain things therein specified and act thereon without being guilty of negligence, may be refused.

An instruction to find for the defendant must be refused where there is evidence tending to prove the plaintiff's cause of action.[1]

SEC. 581. Although an act of imprudence, it is not negligence *per se*, in every case, as a matter of law, for a person to

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for the plaintiff. Complaint was made in the higher court of the refusal of the trial court to direct a verdict for the defendant. The accident occurred after dark on Sunday evening, July 29, 1894. The tracks are double. The north is for trains going east and the other for trains going west. The plaintiff, who was seventeen years old, approached the crossing with another young lady. As they reached the street a long freight train was going east on the further track from them. They walked slowly toward the crossing so as to reach it about the time the train passed. As that train cleared the crossing they stepped upon the south track and were struck by a passing train going west. The declaration charges that the defendant company failed to keep the gates at the crossing closed, but left the same open and raised; failed to keep a flagman or switchman at the crossing, neglected to ring the bell on the passenger train, and ran it at a greater rate of speed than permitted by ordinance. On these grounds it was claimed that defendant was liable for the damages and injury to the plaintiff. There was evidence tending to establish each of these charges of negligence against the defendant. It was also necessary to show that the plaintiff was in the exercise of ordinary care in going upon the crossing. It is upon this ground that it is claimed the court erred in refusing to direct the verdict. It is claimed that the plaintiff was not in the exercise of reasonable care for her own safety, and therefore one necessary element of proof to enable her to recover was lacking. The plaintiff testified that they both looked before reaching the platform to see if anything was coming in both directions, and did not see or hear anything, and then stepped on the track, when she was injured and her companion killed. Her testimony and that of the witnesses in her behalf was that the freight train made a great deal of dust and noise and that the smoke from it settled down toward the south on the track, and by this means she was prevented from seeing or hearing the approaching train. Two other witnesses testified to substantially the same effect, who were just behind the plaintiff.

[1] L., N. A. & C. R. R. Co. v. Patchen, Adm'r, 167 Ill. 204.

attempt to cross a railroad track in front of an approaching train when the crossing gates are down.

In an action against a railroad company for the negligent killing of a woman, proof that her next of kin are adult children will not raise a presumption of pecuniary loss to them from her death; but where there is evidence tending to prove that they derive a benefit from her life, the pecuniary value of that benefit must be left to the jury.[1]

SEC. 582. Under section 24 of the act on the operation of railroads (Revised Statutes of 1874, page 811), the running of the trains through the limits of a city, town or village at a speed prohibited by ordinance, whereby an injury is occasioned, is not negligence of itself, but merely raises a presumption of negligence.

In an action against a railroad company for causing the death of plaintiff's intestate at a street crossing, proof that the deceased was a man of careful habits may be admitted where the evidence leaves it in doubt whether any person saw the deceased when he was struck by the train. The court must refuse an instruction to find for the defendant where there is evidence tending to prove the averments of the declaration.[2]

SEC. 583. The act on the fencing and operating of railroads (Revised Statutes of 1874, page 807), which requires railroad companies to erect and maintain fences and cattle-guards as therein provided, is not intended merely for the protection of property, but for the protection of railroad employes and passengers, by keeping the track clear of obstructions. It imposes on railroad companies an absolute duty to erect and maintain fences and cattle-guards as therein provided, and the company is liable to an employe who, while exercising due care, receives an injury caused in case of the failure to perform such duty. The duties of a railroad engineer are not of such a nature as to direct his attention to fences and cattle-guards, and the law does not require that he have knowledge of their condition.

The fact that an engineer has passed through an unincorporated village several times a week for a number of years, in

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[1] C. & W. I. R. R. Co. v. Ptacek, Adm'r, 171 Ill. 9.

[2] I. C. R. R. Co. v. Ashline, Adm'r, 171 Ill. 313.

running over the road, does not charge him with notice that the company has neglected to erect fences and cattle-guards at a highway crossing in such village, so as to amount to an assumption by him of the increased risk thereby occasioned.

A railroad company is liable in damages for the death of an engineer caused by the derailing of his train by striking cattle which strayed on the track at a highway crossing, where the company had neglected to erect fences and cattle-guards, in violation of its duty, if the engineer was not negligent in running his train and is not shown to have had notice of the absence of such fences and cattle-guards.

SEC. 584. A verdict finding the defendant railroad company guilty of gross negligence upon the plaintiff's uncontradicted evidence that the servants of the company after nightfall uncoupled a car from a backing train while moving, and "kicked" it in upon a siding, unattended by a brakeman, and without a light, at a time when such servants knew that a great many people were walking upon said track, will not be set aside on appeal.

A city ordinance providing that railroad trains when backing shall have a conspicuous light in the rear car or engine, etc., is admissible under evidence that the servants of the defendant railroad company in the night time uncoupled the rear car of a switching train while moving backward, and "kicked" it upon a siding without a light.[1]

SEC. 585. Allowing dry grass to accumulate on land adjoining a railroad is not, under section 1 of the act relating to fires on locomotives (Revised Statutes of 1874, page 814), such contributory negligence by the owner as bars his recovery for fire caused by a locomotive.[2]

SEC. 586. Where a passenger train was thrown from the track by a broken rail on the outside of a curve in the road, from which a passenger received a severe personal injury, and was found outside the coach in an insensible condition, and it appeared that the train was not run at an unusual or dangerous speed, that the track was kept in good repair, and had just been carefully inspected and no defects were discoverable, that everything connected with the train was in good order and

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[1] C. & A. R. R. Co. v. O'Neill, Adm'r, 172 Ill. 527.

[2] C., C., C. & St. L. R. R. Co. v. Stephen, 173 Ill. 430.

that it was managed by skillful and prudent operators, and the proof is made to show that the passenger jumped out of the car in the confusion, while if he had remained he would have received no serious injury, it was held by the court that in a suit by the passenger against the company to recover damages, that the injury was either attributable to the plaintiff's own want of care, or to one of those accidents occurring in very cold weather, which no skill or prudence could foresee and guard against, and that he could not recover.

In a suit against a railroad company to recover for personal injury to a passenger occasioned by a train being thrown from the track in consequence of a broken rail, the court, at the instance of the plaintiff, instructed the jury that the throwing of the train from the track, if they believe from the evidence that it was thrown from the track, and that the plaintiff was thereby injured, is *prima facie* evidence of negligence, and the plaintiff need prove nothing more; but it then devolves upon the defendant to prove that the injury sued for was occasioned without the least negligence or want of skill or prudence or vigilance on the part of defendant, its agents or servants. It was held that this instruction stated a stricter rule of liability and imposed a higher degree of carefulness than the law warrants.[1]

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[1] Heazle v. I., B. & W. R. R. Co., 76 Ill. 501.*

* NOTE.—On the night of the 20th of February, 1872, the passenger cars on defendant's road were thrown from the track a short distance east of Mahomet station, by which plaintiff was severely injured. The accident was caused by a broken rail. After the cars left the track the train ran a distance of eight hundred feet upon the ties before it was stopped. The rear car was entirely off the track, and the rear trucks of the next car were also off. Another car tipped over. Previous to the accident plaintiff occupied the third seat from the rear door in the last car but one composing the train. The doors and windows of the car were closed. After the train was stopped plaintiff was found in an insensible condition at the bottom of a culvert, over which the cars had passed after encountering the broken rail. How he got out of the car or at what precise point of time is not shown by the evidence. Plaintiff sustained severe, perhaps permanent injuries, suffered great pain and incurred considerable expense in being cured. When it was discovered that the cars were off the track, the conductor enjoined it upon all passengers to remain in their seats. No one saw the plaintiff leave the car. He has no recollection himself as to how he got off. No other passenger was seriously injured. It is probable the plaintiff must have gone out of the car either just before or after it was discovered to be

SEC. 587. The true rule in regard to the degree of care required by railroad companies to guard against injury to their passengers, is that the carrier shall do all that human care, vigilance and foresight can reasonably do, consistent with the mode of conveyance and the practical operation of the road. A railroad company can not be required, for the sake of making travel upon its road absolutely free from peril, to incur a degree of expense which would render the operation of the road impracticable. For example, it would be unreasonable to hold that a road-bed should be laid with ties of iron or cut stone, because in that way the danger arising from wooden ties subject to decay would be avoided.

In an action against a railroad company for personal injuries received from the alleged negligence of the defendants, if it be shown by the plaintiff that the injury was caused by the overturning of a car on the defendant's road, in which he was a passenger, without fault upon his part, he thereby makes out against the company a *prima facie* case of negligence, and places upon them the burden of rebutting that presumption by proving that the accident resulted from a cause for which they should not be held responsible.

The liability of a railroad company to respond in damages for an injury occasioned by accident to a passenger on their road is not discharged *pro tanto* by the payment of any sum on account of such injury by an accident insurance company, the primary liability being on the railroad company.

In an action against a railroad company to recover for injuries to the plaintiff occasioned by the negligence of the defendants, it appeared that the plaintiff, on account of the injuries, was confined from two to three weeks in his bed, but did not,

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off the track. If he attempted to leave the car after it was discovered it was off the track, it was imprudent in the extreme. Had he remained in his seat, it seems more than probable he would have sustained no injury. Although the plaintiff suffered very great injury, we see no ground, the court said, on which to base a recovery, which was through no fault of defendant or defendant's agents or servants. They omitted no duty imposed upon them by law or by due regard for the safety of passengers. Everything connected with the train was in good order, and it was managed by skillful and competent operators. The track had been constructed with skill and care, and the road was as safe as it could reasonably be constructed. The jury found a verdict for the defendant.

when quiet, suffer greatly from pain. After that period he began to walk about, though with great difficulty, but did not resume business in his office for three months. At the time of the trial, thirteen months after the accident, he was still feeling some pain and inconvenience. It was held by the court, if such temporary confinement and pain were the only consequences of the injury, a verdict of $5,000 should be regarded as excessive. But the proof being conflicting as to whether plaintiff was injured in the membranous covering of the spine, or merely in the muscular ligaments connected with it, there being evidence from which the jury might find the plaintiff would never entirely recover, the attendant physician and two others called by the plaintiff testifying that in their opinion, in the future, any imprudence or unusual exposure, which would not affect a person in sound condition, might lead to very serious and even fatal results, a verdict for that amount was not disturbed.[1]

SEC. 588. When a passenger on a railroad refuses to pay his fare, he may be ejected from the cars at any regular station, but not elsewhere.

If a passenger is ejected for that cause at any place other than a regular station, it is a violation of the statute, for which the road must pay at least nominal damages, but whether a recovery should be beyond that will depend upon the circumstances attending the expulsion.

Where a passenger wantonly refuses to pay his fare, simply insisting upon riding in the cars without paying for it, and is ejected by the conductor at a point two miles distant from a regular station, but in a manner free from indignity toward

[1] P., C. & St. L. Co. v. Thompson, 56 Ill. 138.*

* NOTE.—The evidence was very contradictory as to whether the road-bed was in a safe condition at the time the accident occurred. Whether the cars were precipitated from the track in consequence of the defective road-bed, admitting it to have been defective, or by reason of the inexplicable breaking of an axle apparently sound, can not, from the testimony, be determined. Axles may sometimes break when the track is in good condition. When the plaintiff showed the injury was caused by the overturning of the car, without fault on his part, he made out against the company a *prima facie* case of negligence and placed upon them the burden of rebutting that assumption, by proving that the accident resulted from a cause for which they should not be held responsible.

the passenger, who was subjected to no other injury or inconvenience by the expulsion than that of being obliged to walk to the station, which he could have avoided by paying his fare, he is not entitled to recover anything beyond nominal damages. A recovery of a verdict against a railroad company for $450 under such circumstance was considered by the court excessive and a new trial was awarded for that cause.[1]

SEC. 589. Where the plaintiff applied to the office of the defendant railroad company for a ticket but could get no answer, and then took passage on a train carrying passengers, and explained to the conductor the fact of his inability to procure a ticket, and was put off the train in the night time, not at any regular station or usual stopping place, and compelled to walk back, it was held by the court, in an action to recover for the wrong, that a verdict of $500 was excessive.[2]

SEC. 590. A railroad company has a clear right to make a rule that no one shall be carried as a passenger on its freight trains; but when it is in the habit of carrying passengers on such a train, and had its regular hour for departure posted in its office at the station, it will not be justified in refusing to carry a passenger from such station, or in putting him off such train.

When a railroad company adopts a rule prohibiting passengers from being carried on its trains, or on its freight trains, without the purchase of tickets, it must furnish abundant facilities to the public by keeping open the ticket office a reasonable time in advance of the hour fixed by its time-table for the departure of the train. Should it fail to do so, a person desiring to take passage will have the right to enter the car and be carried to his place of destination on the payment of the regular fare to conductor.[3]

SEC. 591. Passengers who neglect to purchase tickets before embarking on cars may be charged additional fare if proper conveniences and facilities are furnished them for procuring tickets. If a passenger on a railroad pays only from one station to another without a ticket, he may be compelled to pay

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[1] C. & A. R. R. Co. v. Roberts, 40 Ill. 503.

[2] I. C. R. R. Co. v. Cunningham, 67 Ill. 316.

[3] I. C. R. R. Co. v. Johnson, 67 Ill. 312.

an extra charge at each station, as a new contract between the company and the passenger is thus made at each station.

If a passenger refuses to pay the fare required by the tariff of the railroad company, he may be ejected from the cars at any regular station, but not elsewhere.

Although a party who is ejected from a car elsewhere than at a station for non-payment of fare sustains an injury for which he may bring an action, yet where there is no improper conduct on the part of the agents of the company nor any peculiar circumstances to justify it, $1,000 will be held to be excessive damages for the act.[1]

SEC. 592. Where a railroad conductor forcibly expels a passenger from the cars between usual stopping places on the road, because he refuses to pay his fare, it is held that it is unlawful, and that trespass will lie for the injury. In such a case, where a passenger refuses to pay his fare and informs the conductor that he will get off if the conductor will stop the train, and when it stops refuses to do so, it is held that this does not authorize the conductor to forcibly expel him at a place other than a regular station.

Where a party sues a railroad company for putting him off

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[1] C., B. & Q. R. R. Co. v. Parks, 18 Ill. 460.*

*NOTE.—It appears that the plaintiff took passage on the cars at Aurora without a ticket and paid the conductor when called on in the cars for his fare the regular price to Batavia, to which place he took and paid for a passage. He paid the five cents more than the price of the ticket for the same passage, according to the rules established by the company. No complaint nor remonstrance seems to have been made to the payment of the five cents more than the price of the ticket for the passage to Batavia. While the train remained at Batavia, the plaintiff concluded to go on to Junction, which is the next station, and took passage to that point without having obtained a ticket. After the train had started, the conductor applied to the plaintiff for his fare. He tendered him twenty cents, which was the price of the ticket, but the conductor demanded of him twenty-five cents, which was the price fixed by the rules of the company for the fare from Batavia to Junction when it is paid to the conductor. The plaintiff claimed that as he had already paid the extra five cents on his passage from Aurora to Batavia, he was not bound to pay an additional five cents on the route from Batavia to Junction, while the conductor claimed he must pay the conductor's fare in both cases. The statute provides that if any passenger shall refuse to pay his fare or toll, it shall be lawful for the conductor of the train and the servants of the corporation to put him out of the cars at any usual stopping place the conductor shall select.

the cars with force at a place not authorized by law, and he recovers damages grossly in excess of the injuries received, the verdict of the jury should be set aside by the court trying the case, and, failing to do so, the judgment will be reversed, that a new trial may be had.[1]

SEC. 593. In trespass against a railroad company for ejecting the plaintiff from a passenger coach near a station, and no extraordinary violence was used and no maliciousness or wanton recklessness was manifested, and the plaintiff was not seriously or permanently injured, it was held by the court that $2,500 damages were excessive and a new trial was awarded.[2]

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[1] C. & N. W. Ry. Co. v. Peacock, 48 Ill. 253.*

[2] C., R. I. & P. R. R. Co. v. Riley, 74 Ill. 70.†

* NOTE.—This case is analogous to the case of the St. Louis, Alton & Chicago Railroad Co. v. Dalby, 19 Ill. 353, and is a precedent for the determination of this case. The plaintiff failed to pay his fare when it was demanded, which authorized the conductor to require him to leave the train at a regular stopping place, and at such a place he would have been required to first request him to leave the cars, and in case he refused, to then employ such force, and only such, as would be necessary to remove him from the cars. In Dalby's case the road was held liable because the conductor used force where the law did not warrant it. In this case force was employed where the law prohibited it, and hence the two cases are alike.

† NOTE.—Action to recover for injuries received in consequence of being violently ejected from a passenger car on defendant's road by its servants, at or near Mineral. The verdict of the jury was for the plaintiff, assessing damages at $2,500. The plaintiff entered the car, which was one of a regular passenger train, at Mineral, intending to go to Burlington Crossing and thence to Princeton. The fare charged by the defendant for passengers from Mineral to Burlington Crossing was fifty cents, but at two and a half cents per mile, which was claimed by Kepler and others of the party to be legal fare, it would have been only thirty-five cents. Soon after the train started from Mineral, the conductor came to the seat in which were the plaintiff and Kepler collecting fare. Kepler handed him thirty-five cents, after informing him where he was going. This the conductor returned to him, telling him he must either pay fifty cents or leave the car. Upon his refusing to comply, the train was checked, run back some distance toward the station and he was removed. The plaintiff says the conductor did not demand his fare, but ordered him, Kepler, to be seized and removed, although he notified him he was willing to pay the regular fare. On the other hand, the conductor and several other witnesses say he expressly refused to pay more than what he called legal fare, thirty-five cents.

The verdict of the jury was for the plaintiff, assessing damages at $2,500. A fair consideration of all the evidence, the court said, relieved the conduct of defendant's servants of that degree of wanton maliciousness or

SEC. 594. A railroad company may require that passengers procure tickets before riding on freight trains, and conductors may expel from the cars at regular stations such as neglect to comply with the regulation. An action will lie and damages be awarded for putting off a passenger at other than a regular station. The measure of damages in such case is the actual injury or loss proven to have been sustained, being in the nature of compensation. If no circumstances of aggravation be shown and no evil motive be imputed, vindictive damages should not be given.

In the absence of proof that injury and indignity have been inflicted, from which malice may be shown, or inferred, it is error to instruct the jury upon the question of vindictive damages.[1]

SEC. 595. In a suit against a railroad company for expelling plaintiff from its car, where there is nothing to authorize the recovery of vindictive damages and no actual damages shown, a judgment for $750 will not be sustained.[2]

SEC. 596. In an action by a passenger against the railroad company to recover damages for being ejected from the cars, where the plaintiff insisted that he had purchased a ticket to a certain station, which the conductor took up before reaching the same, while the conductor contended that the ticket called for a passage only to the station where the plaintiff was put off, the trial court instructed the jury as a matter of law, that it was the duty of the conductor in taking up the ticket to give back a check, or punch the ticket and allow the plaintiff to hold it until all intermediate stations were passed. It was held by the supreme court that the law imposes no such duty, and if it did, the neglect to do so could work no injury, as the plaintiff was entitled nevertheless to be carried to the station to which he paid his fare, and that by not demanding a check on surrendering the ticket the point could not arise.

If a passenger pays his fare to a certain station, and the ticket agent inadvertently gives him a ticket to an intermedi-

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recklessness which is essential to justify so large a verdict, unless it has been proved that the plaintiff was seriously and permanently injured. The verdict was set aside and a new trial ordered.

[1] T., P. & W. R. R. Co. v. Patterson, 63 Ill. 304.

[2] P., C. & St. L. R. R. Co. v. Dewin. 86 Ill. 296.

ate station, the demand of fare a second time by the conductor will be a breach of the implied contract on the part of the company to carry him to the proper station. By paying on such demand, his action will be as complete as if he resists the demand and suffers himself to be ejected, and his ejection in such a case will add nothing to his cause of action. It is his duty to pay the fare demanded, and if the company fails to make suitable reparation for the indignity, he can maintain his proper action.

A passenger must observe proper decorum and observe all rules adopted by the company. He is not authorized to interpose resistance to every trivial imposition to which he may feel himself exposed, that must be overcome by counter force in order to preserve subordination; as, when the passenger's ticket, by mistake, did not take him to the proper station, and twenty cents fare was demanded of him, which he refused to pay, and he suffered himself to be forcibly ejected, and afterward entered another car, and while the conductor was making change for him, used profane and obscene language in the presence and hearing of gentlemen and ladies, for which he was again expelled, with no more force than was required by his resistance, it was held by the supreme court that whatever personal injury he received in consequence of his resistance and violence, should be attributed to his own want of subordination, for which the law gives him no redress.

The use of grossly profane and obscene language, by a passenger in a railroad coach where there are ladies, is such a breach of decorum, no matter if provoked to it, as will work a forfeiture of his right to be carried as a passenger, and the conductor has a right to cause him to be expelled from the cars, using no more force than is necessary for the purpose.

The exaction of a trifling sum as fare, which had already been paid, can not justify the use of grossly profane and obscene language by a passenger in the presence of ladies, so that the company may not expel him from the cars. He must observe order and seek his remedy for the illegal exaction of the law.

In such a case as here indicated, it is held that a verdict against the company for $1,500 was grossly excessive and out

of all proportion to the injury inflicted upon the plaintiff. other than what was attributable to his misconduct.[1]

SEC. 597. In an action against a railroad company for personal injury received by the plaintiff, by reason of the train in which he was a passenger having struck a cow which suddenly ran upon the track, and the cars thrown from the rails, it appeared that cattle were in the habit of resorting to the station where the accident happened, being attracted there by the corn scattered upon the ground, and that a few days before this accident, a train had run over a cow at that station, and there was no switchman there to keep the track clear, and the train was passing the station at more than ordinary speed. With a known liability of such accidents at that place, this was held to be inexcusable negligence.

In this case it appeared that the plaintiff had no broken bones. He stated at the time of the accident that he was not much hurt. On the trial he stated that he was severely bruised on his left side, and his physician said it was merely a muscular injury. He kept to his bed nearly all the time for a month, getting up, however, and walking about the house every day, and claimed to be still lame at the trial, which was about ten months after the accident. A verdict for $5,000 was considered excessive, and the judgment was reversed for that cause by the supreme court.[2]

SEC. 598. Where a railroad company regularly carries passengers by a freight train, and so holds itself out to the public, it thereby becomes a common carrier of passengers by such freight train, and has no more right to expel a passenger therefrom without cause than from a regular passenger train.

Railroad companies have the power to make all reasonable rules for the government of their trains, and as to certain classes of trains they may require tickets to be purchased before entering the train.

A passenger who, entering, disregards the rule requiring tickets to be purchased before taking passage, is upon the same footing with one who refuses to pay fare, and may be expelled at any regular station.

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[1] C., B. & Q. R. R. Co. v. Griffin, 68 Ill. 499.

[2] C., R. I. & P. R. R. Co. v. McAra, 52 Ill. 296.

When a railroad company requires tickets to be purchased at a station, facilities must be furnished to the public by keeping open the ticket office a reasonable time prior to the time fixed for the departure of the train, and a failure to do so gives the right to a person desiring to take passage to enter the train and be carried to his place of destination by a payment of the regular fare to the conductor, and under such circumstances his expulsion would be unlawful.

When a passenger wilfully neglects to purchase a ticket, as required, before entering the train, he can not be expelled at a place other than a regular station.

A water tank, even if the usual stopping place for trains, was not within the spirit of the law a regular station. A regular station means the usual stopping place for the discharge of passengers; and a local usage adopted by persons of getting on or off a train, for their own convenience, at a place other than the regular station, does not make such place a regular station for the discharge of passengers.

Where a passenger is expelled from a train, and without fault on his part, he may recover more than nominal damages, even though he has suffered no pecuniary loss or received actual injury to the person by reason of such expulsion. In such a case, although the proof shows that the conductor acted in good faith and without violence or insult, and that no actual damage was sustained, still the jury, in estimating damages, may consider not only the annoyance, vexation, delay and risk to which the person was subjected, but also the indignity done to him by the mere fact of expulsion.[1]

SEC. 599. In an action against a railroad company to recover damages by one who was rightfully on defendant's train and was ejected by its servants upon his refusal to obey the conductor's command to leave the train, it is a question for the jury whether the force used in so ejecting him was unjustifiable, violent and excessive, and whether such injuries as he sustained thereby were wantonly and maliciously inflicted.

In the case presented the trial court holds that a verdict for $7,000 for the plaintiff is not so large as to require a reversal

[1] C. & A. R. R. Co. v. Flagg, 43 Ill. 364.

on the ground that there was manifest passion and prejudice on the part of the jury.[1]

SEC. 600. In an action to recover damages for personal injuries suffered by the plaintiff in a collision while a passenger on the road of the defendant company, it is held by the court that the proof of the breaking down of the plaintiff's nervous system, and that his nerve trouble might result in death, was properly admitted; that the rules of pleading did not require plaintiff to set out in his declaration the evidence relied upon; that the evidence sustains the verdict for the plaintiff; that the appellate court will not interfere with the verdict, the credibility of the witnesses and weight of the evidence being conclusions for the jury; that the verdict for $5,000 is not excessive, and that the court below properly refused to grant a new trial on the ground of newly-discovered evidence.[2]

SEC. 601. Railroad corporations are required to use all reasonable precaution for the safety of the traveling public, whether in the construction and operation of their engines or coaches, the erection of their depots, the construction of their tracks, or the approaches to their trains. It is their duty to furnish safe and convenient approaches to their passenger coaches. In operating such immense forces it is their duty to use them with care and due regard to the safety of others. For any neglect in furnishing any of the appliances to their trains, or when furnished, if insecure or unsafe, when it could have been avoided by reasonable effort and precaution, an injury results, the company will be held liable for damages for injury resulting therefrom.

The railroad company, at a point where its passenger trains passed each other at the time of the accident, constructed a platform for the convenience of passengers getting on and off from its trains, between the main and the switch track, about 100 feet long and five and a half in width, so that when the trains stood side by side of each other there was between the coaches about two feet two inches clear space in the middle of the platform, which was the only means provided for approaching and leaving the trains. The plaintiff, after purchasing a ticket

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[1] Penn. R. R. Co. v. Connell, 127 Ill. 419; 26 Ill. App. 594.

[2] C., B. & Q. R. R. Co. v. Sullivan, 21 Ill. App. 580.

for the train going south, with a friend, passed over the main track to the platform for the purpose of getting upon the train then approaching on the side track, and while they were standing or walking slowly on the platform waiting for the passengers to alight, was struck by the train coming from the south on the main track and injured. When struck, his back was toward the approaching train. It was held by the court that the construction and use of so narrow a platform at a point where the trains passed each other, one on each side, was reckless and wanton carelessness and gross negligence; and that knowing, as the engineer and conductor did, the situation of the platform, it was a wanton disregard of human life to run the train upon the main track while persons were getting upon and from the other train, and that there was the highest degree of negligence, amounting to wilful injury.

The plaintiff in such case being a stranger, not familiar with the locality and not aware of the fact that the two trains passed each other at the place, could not be said to be wanting in care. Knowing the use of the platform, he went on it with the implied assurance that it was safe, and that he might use it for approaching and getting upon the train standing there to receive passengers. Although it might have been obvious to him that his situation would have been perilous if the other train should move up, as it did, on the main track, yet he was not bound to suppose that so reckless a thing would be done. He had a right to believe that the employes of the company would act with common prudence.

When the evidence showed negligence, gross and reckless, on the part of the railroad company, resulting in serious injury to the plaintiff, proof that plaintiff, while under the influence of great pain and his mind confused, if not unsettled, by the injury, said that no one was to blame, will not excuse the company. Even if the declaration was made deliberately, and the whole evidence shows that the plaintiff was mistaken, it will not relieve the company from liability.

Negligence.—In case of personal injury caused by gross and reckless negligence on the part of a railroad company, in its nature culpable and such as to authorize punitive damages, when the plaintiff in consequence of the injury lost his hand and was thereby rendered incapable of performing on a

musical instrument, necessary in his profession as a teacher of music, and compelled to employ an assistant at a high expense to pursue his business, and submit to greatly reduced income, and incurred about $1,000 in board, physician's bills and attendance, and was unable to attend to business for about six months, a verdict for $8,000 was not considered excessive.[1]

SEC. 602. Where a passenger went upon a train of cars and offered a worthless piece of paper, claiming it to be a pass, on being informed that it was not a pass, the passenger refusing to pay fare or leave the train, the servants of the company have a right to remove such passenger from the train at a regular station, and they may use the necessary force for the purpose. In such case it is error to instruct the jury in estimating damages that they may consider whether the plaintiff in good faith believed she had a pass and offered it in good faith, although the paper was not a pass. It was the duty of the passenger on being informed that it was not a pass to offer

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[1] C. & A. R. R. Co. v. Wilson, 63 Ill. 167.*

*NOTE.—Action by David Wilson against the defendant for personal injury from a train of the defendant company whereby he lost his right hand. The declaration charges that the accident was caused by the negligence and insufficient manner in which the platform was built. Trial and verdict for $14,000. Motion for a new trial was granted. At the second trial the verdict was for $8,000, and the motion for a new trial was overruled.

The platform had been constructed by the defendant for the convenience of approaching and leaving the trains on the defendant's road, and was situated between the main track and a switch track. It was also used in taking care of baggage, mail and express matter received and discharged at this station. At the time the accident occurred passenger trains passed each other at this station, and such had been the case for some weeks previously. The platform was about one hundred feet in length and five feet four inches in width. The time for the arrival of the trains was the same. In passing where the train coming from the north reached the south end of the switch it was opened and the train ran in and stopped opposite the depot. After receiving passengers, baggage and mails it passed out of the switch and went south. When the trains stood side by side of each other there was between the coaches about two feet four inches of clear space in the middle of the platform, the projection of the coaches covering about eighteen inches on each side. When struck the plaintiff was waiting for the passengers to alight from the train in which he expected to take passage, and his back was toward the approaching train. After receiving the injury the plaintiff was taken to a hotel close by, and his right hand being badly mangled, it was amputated.

to pay the fare or leave the train at the first station. If in such a case the employes of the railroad use more force than is necessary, then the company will be liable to damages, and the question of the good faith of the passenger believing she had a valid pass is wholly immaterial in assessing damages.

It is not error in such case to instruct the jury that if the servants wilfully and negligently injured the plaintiff they would be authorized to give exemplary damages, as they were engaged in the furtherance and execution of the business of the company, and the company is liable for misconduct and negligence of their servants when thus engaged.[1]

SEC. 603. When a passenger lawfully on a railroad train conducts himself in an orderly and decent manner, and pays, or offers to pay, the fare fixed by the company, his expulsion from the cars by the conductor, in a forcible manner, is unjusti-

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[1] C., R. I. & P. R. R. Co. v. Herring, 57 Ill. 59.*

* NOTE.—This was an action against the defendant for injuries received by the unnecessary use of force and violence in expelling plaintiff from a car on defendant's line. The plaintiff entered the car at the town of Joliet with the intention to proceed to Geneseo. When the conductor asked for her ticket she offered him a piece of paper with some writing thereon, which she testified some person in Joliet had given to her as a pass. The conductor told her that it was not a pass and was worthless. The conductor says the plaintiff positively refused either to pay her fare or any part of it, although he told her he would be obliged to put her off at the next station if she would not pay, and reasoned with her some minutes in regard to her conduct. The plaintiff does not claim that she offered to pay, but denies the use of any profane language. When they arrived at the station, the conductor and witness Pike testified she still refused to pay or leave the car, whereupon they raised her from her seat by the arms, she resisting, and Pike carried her to the platform of the car. She testifies he then pushed her violently from the platform and she fell on the ground. Pike testifies that he was compelled to carry her from the car, as she would not walk but would sit down on the platform, and when they reached the platform of the car he set her down, thinking she might still pay her fare, and that she at once slid down the steps of her own accord and threw herself on the ground. The conductor followed her, and as she refused to rise, he lifted her and placed her on the station platform in charge of the station agent. Plaintiff testifies that she was so badly hurt that she was not able to rise. Pike testifies that while he was carrying her through the cars she caught hold of the seats, and that they used no force beyond what was necessary to remove her from the car. The jury found a verdict of $2,500 damages. The judgment was reversed by the supreme court and the cause remanded.

fiable, and, being so, the company will be held liable for the assault and battery in a civil action.

A railroad company is liable for the acts of its conductor, performed within the scope of his authority, if he wrongfully and forcibly ejects a passenger from a passenger coach while in the employment of the company, and will be liable in trespass to the passenger.

Where a passenger tenders a railroad conductor a certain amount of fare to be carried to a certain station, which is less than the rate fixed by the company, saying he will pay no more, and the conductor retains a sum sufficient to take the passenger to an intermediate station, and returns the balance, the passenger will have the right, on reaching such intermediate station, to pay the fare demanded from that point to his place of destination, and upon his offering to pay the same he can not rightfully be put off the train.

If a railroad conductor, without demanding fare, or if the fare is offered to be paid, takes a passenger, who is properly behaving himself, by the collar and leads him to the door of the car and puts him off, tearing his coat in the act of expulsion, and such act is unprovoked, wilful and malicious, and performed in a rude and aggravating manner, with the intention to wound the feelings of the passenger, and bring him into contempt and disgrace, in trespass against the company the jury may give punitive or exemplary damages.[1]

SEC. 604. Through tickets in the form of coupons sold to a passenger by one railroad company, entitling him to pass over successive connecting lines of road, in the absence of an express agreement, creates no contract with the company selling the same to carry him beyond the line of its own road, but they are distinct tickets for each road sold by the first company as agent for the others, so far as the passenger is concerned.

A person intending to take passage by railroad from Omaha to New York purchased at the former place from the Wabash, St. Louis & Pacific Railway Company a through coupon ticket, purporting to give the right of carriage from Omaha to New York over the several lines intermediate and connecting

[1] C., B. & Q. R. R. Co. v. Bryan, 90 Ill. 126.

between those two points, one of the connecting lines being the Pennsylvania Railroad. There was printed on the face of the ticket: "In selling this ticket for passage over other roads, this company acts only as agent for them, and assumes no responsibility beyond its own line." The coupon over the Pennsylvania Railroad declared: "Issued by the Wabash, St. Louis & Pacific Railway on account of the Pennsylvania Railroad," which the company owning the latter road refused to accept, and on refusal to pay the regular fare demanded, ejected the passenger from the train. It is held by the supreme court, in a suit by the passenger against the latter company, that the first named company contracted with the passenger only as agent of the defendant company.

Where a coupon ticket has been sold calling for passage over several distinct lines of railroad, the rights of the passengers and the duty and responsibility of the several companies over whose roads the passenger is entitled to a passage, are the same as if he had purchased a ticket at the office of each company constituting the through line.

Where a conductor of a railroad company, acting under instructions from his superiors, refuses to accept a ticket issued by another company as agent of the former, and demands full fare, the passenger, if his ticket was issued by authority, may pay the fare again and recover of the company requiring payment the sum paid as for a breach of contract, or he may refuse to pay it and leave the train when so ordered by the conductor, and sue and recover of the company all damages sustained in consequence of his expulsion from the train; but if he refuses to leave, he can not recover for the force used by the conductor in putting him off, when no more force is used than necessary, and the expulsion is not wanton or wilful. A passenger who has rightfully bought a ticket for his passage over a line of railroad, and such ticket is refused, and he is expelled from the cars on refusal to pay fare to the conductor, will be entitled to recover of the railroad company the amount of the cost of a ticket from the place where he was ejected to the place called for in his ticket, and also such damages as he may have sustained on account of delay by his expulsion, and all additional expense necessarily occasioned thereby, as well as reasonable damages for the indignity of being expelled from

the train; but not damages for personal injuries received in putting him off, unless the expulsion was malicious or wanton, as he may have avoided such injury by leaving the train when so ordered. In such case, it would be his duty to pay or leave the train, and sue for damages if he should choose to do so.[1]

SEC. 605. In the absence of wanton or wilful misconduct on the part of a railroad conductor ejecting a passenger from a train upon his refusal to pay extra fare for want of a ticket, such passenger can not recover for personal injuries caused by his own resistance, although he was not ejected at a station or usual place for receiving and discharging passengers.

It is the duty of a passenger peaceably to submit to the commands of the conductor, though wrongful, his remedy being an action for damages.[2]

SEC. 606. Where a passenger is ejected from a railroad car

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[1] Penn. R. R. Co. v. Connell, 112 Ill. 295; Penn. R. R. Co. v. Connell, 127 Ill. 419.

[2] C., B. & Q. R. Co. v. Wilson, 23 Ill. App. 64.*

* NOTE.—Action against the defendant to recover damages on account of being expelled from the railroad train of the latter while he was on it as a passenger between the stations of Leland and Earlville, en route to the latter point in April, 1880. The verdict and judgment of the court below was $500 against the defendant. It appears that the defendant had a rule that tickets must be purchased by any person who proposed to ride on any of its freight trains as a passenger, such as the one the plaintiff was on, and on failure to do so an extra charge of ten cents for each fare would be charged. The plaintiff was aware of the existence of this rule. Notwithstanding this fact, the plaintiff neglected to purchase a ticket, although he had time and opportunity to do so before taking passage on the train, and went on board of the train without a ticket. When the train started the conductor called for tickets and the plaintiff handed him twenty-five cents for fare, the price of the ticket for the proposed journey. The conductor at first took the money, but as soon as he examined his card of rates found that if cash was paid the fare was ten cents more, and he demanded an additional ten cents, which the plaintiff refused to pay. After some parley the conductor told him he would have to put him off the train unless he paid the ten cents more, and he would back the train to Leland, which was some mile and a half distant, and put him off. Plaintiff told him that if he would back him to Leland station he would get off. The train was then backed to about within eighty rods of the station at Leland and stopped, and the plaintiff refusing to get off or pay the additional ten cents, the conductor summoned his brakeman and the two forcibly ejected the plaintiff from the train, he making stout resistance and being somewhat injured in his shoulder in consequence of the scuffle he had with the brakeman and conductor while being expelled from the train. While going back to

for non-payment of fare at a place other than a station, he can not recover as part of his damages for injuries received from unnecessarily walking to his home, several miles distant, he being in poor health, when the station at which he boarded the train was within five or ten minutes walk of the place of ejectment.[1]

SEC. 607. Railroad companies are required to keep their offices open for the sale of tickets to passengers for a reasonable time before the departure of each train and up to the published time for its departure, but not up to the time of actual departure.

If definite and reasonable opportunity to purchase tickets is afforded the public, extra fare may be charged such as do not avail themselves thereof. A passenger refusing to pay the extra fare under such circumstances may be ejected from the train.

A demand for fare by the conductor of the passenger train must be paid, or the passenger must, at the conductor's request, leave the train in a peaceable manner. If he refuses so to do, he can not recover damages for the use of unnecessary force in ejecting him from the train, unless the expulsion was malicious or wanton.[2]

SEC. 608. In an action against a railroad company for injuries to the plaintiff, a passenger on a train of the defendant, occasioned by the negligence of the company, the jury may consider, in estimating damages, whether the mental faculties of the plaintiff were impaired by the accident, and this is a legitimate subject of inquiry without reference to the question whether the act was wilfully done.

In such case it is competent for the physician who attended upon the plaintiff on the occasion to testify on behalf of the plaintiff as to his opinion in respect to the effect of the injuries received by the plaintiff upon his future condition.

In an action to recover for injuries received by reason of the negligence of the defendant in a case where the latter

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Leland, the conductor had returned to him the twenty-five cents spoken of. The verdict and judgment of the court below was $500 against the railroad company. The judgment was reversed and remanded.

[1] O. & M. Ry. Co. v. Burrow, 32 Ill. App. 161.

[2] C., R. I. & P. R. R. Co. v. Brisbane, 24 Ill. App. 463.

should exercise the highest degree of care, the jury may properly be instructed that the defendant should have exercised extraordinary care, as that does not differ from the phrase "greatest care," which means the highest degree of care.

SEC. 609. A party suing for an injury received can only recover such damages as flow from and are the immediate results thereof. Damages produced by other agencies than those causing the injury, or even by agencies remotely connected with those causing the injury, can not be regarded proximate or proper.

Where speculation or conjecture has to be resorted to for the purpose of determining whether the injury results from a wrongful act or from some other acts, damages can not be allowed for such injury.

Where a railroad train wrongfully fails to stop to take on a passenger, he is entitled to recover nominal damages and such actual damages as he may sustain by reason of the delay, but he has no right to inflict injury on himself to enhance the damages.

Where in such a case the passenger, instead of procuring a comfortable and safe conveyance to the place he desired to reach, or waiting a few hours for another train, went there on foot unnecessarily, and thereby brought on sickness, he was not entitled to recover damages on account of such sickness.[1]

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[1] I., B. & W. Ry. Co. v. Birney, 71 Ill. 391.*

* NOTE.—It appears that the train did not stop at the station to take on the plaintiff, and this is an action to recover damages for its failure to do so. But the sickness and loss of time proved in this case did not result from the failure of the train to stop for the plaintiff. That is the only wrongful act charged to the defendant. The walk by the plaintiff to the next station was not a natural consequence of the failure of the defendant to stop the train to get aboard. That he would be delayed in reaching that point was a natural consequence, as there was no other means in which the space could be overcome in so short a time as by a train of cars; but that the plaintiff should walk through the extreme cold to that point, and thus injure his health, was by no means a necessary result; he had his option to remain five or six hours and take the next train, or procure a horse and carriage, and thus have a ride much sooner, and all persons, of even small prudence and judgment, know, with less exposure to his health, and being a physician he must have known that he was incurring increased hazard to his health when he determined to walk instead of ride. Judgment reversed.

SEC. 610. Whatever rule tends to the comfort, order and safety of the passengers on a railroad the company are authorized to make and to enforce, but such rules must always be reasonable and uniform in respect to persons.

A rule setting apart a car for the exclusive use of ladies and gentlemen accompanied by ladies is a reasonable rule and it may be enforced. The mere fact that under the rules and regulations of the company a certain car in a passenger train had been designated for the exclusive use of ladies and gentlemen accompanied by ladies will not justify the exclusion of a colored woman from the privileges of such car upon no other ground than that of her color.

Under some circumstances it might not be an unreasonable rule to require such person to occupy separate seats in a car furnished by the company equally as comfortable and safe as those furnished for other passengers; but in the absence of any reasonable rule on the subject, the company can not lawfully, from caprice or wantonness or prejudice, exclude a colored woman from the ladies' car merely on account of her color.

Where a person seeking a passage in a particular car in a railroad train is wrongfully and wantonly excluded therefrom, he may recover, in addition to the actual damages, something for the indignity, vexation and disgrace to which he was subjected by reason thereof.

So when a colored woman was refused admittance to a ladies' car solely on account of her color, and was directed to take a seat in another car, which was set apart for her, and mostly occupied by men, which she declined to do, insisting upon her right to be admitted to the ladies' car, and the evidence, justifying the conclusion that the brakeman in excluding her from that car, did so in a very rude manner and in the presence of several persons, it is held that a verdict of $200 recovered by the woman against the company is not excessive.[1]

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[1] C. & N. W. Ry. Co. v. Williams, 55 Ill. 185.*

* NOTE.—Action on the case by Anna Williams, a colored woman, against the Chicago & Northwestern Railway Company, to recover damages resulting to her by reason of being excluded from the privileges of a car upon the defendant's road which had been designated by the rules of the company for the exclusive use of ladies and gentlemen accompanied by ladies, the only reason for such exclusion of the plaintiff being on account of her color. Verdict of $200 affirmed.

SEC. 611. The price paid for a passenger ticket upon a railroad includes the carrying of his baggage, and the recognition by the road over which the passenger is entitled to travel of the validity of the ticket, is an admission that the check given for the baggage is equally binding.

Where a passenger's ticket entitles the holder to travel over different lines of road to his place of destination, and to which his baggage is checked, all of them recognizing the validity of the ticket when presented by the passenger, each company to whose possession the baggage may come will be liable to the owner for its loss while in the possession of said company.

Where a passenger seeks to hold one of several roads in his line of transit liable for the loss of his baggage, the recognition of his ticket purchased at the beginning of his trip by the conductor of such road is in effect an admission that it was issued by some person having competent authority to bind the company; and in such case it is immaterial whether the ticket was issued by a special agent of the company sought to be held liable, or by the ticket agent of some other company.[1]

SEC. 612. A passenger in a railroad car need only show that he has received an injury while in the exercise of due care for his own safety, to make a *prima facie* case against the carrier. The carrier must rebut the presumption in order to exonerate himself. Negligence is a question of fact, which the jury should pass upon.

Persons in position of great peril are not required to exercise all the presence of mind and care of a prudent, careful man.

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[1] C. R. I. & P. R. R. Co. v. Fahey, 52 Ill. 81.*

* NOTE.—This was a suit to recover for the loss of a carpet-sack and its contents claimed to have been lost by the defendant. Trial resulted in a verdict and judgment against the company for $70 and costs. The case was removed by appeal to the circuit court, where there was another trial and the jury found another verdict for $68.90 against the defendant. It appears that the evidence fails to show that the baggage was lost by the defendant. There is no evidence tending to show that it ever left New York or to trace it into the possession of defendant. In the absence of such proof, the jury were not warranted in finding that the defendant had received and lost this baggage, and the judgment was reversed.

The law makes allowance for them and leaves the circumstances of their conduct to the jury.[1]

SEC. 613. In an action by a personal representative against a railroad company to recover damages for the death of the intestate through negligence, the test of the plaintiff's right to recover is the exercise by the deceased of ordinary care, or such care as a prudent and ordinarily cautious man would observe for his personal safety, and the failure of the railroad company to exercise proper care, and injury therefrom causing the death.

In such action, to recover for the death of a passenger caused while riding on a foot-board of an engine, in determining whether the deceased was negligent in occupying a place of danger, the jury may consider not only the acts of the deceased, but also the acts of the servants of the company, not alone in respect to the management of the engine, but as connected with the act of the deceased. Placing a passenger in a place of unnecessary hazard, or giving him assurance of safety, and thereby throwing him off his guard, may render his apparent want of care the negligence of the carrier, and relieve his act of the quality of negligence.

If a passenger takes a place of extra peril by the invitation of a carrier's servants, the law requires of the latter the exercise of a corresponding degree of care for his safety. The carrier's care ordinarily is to be measured by the known peril of

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[1] G. & C. U. R. R. Co. v. Yarwood, 17 Ill. 509.*

*NOTE.—This action on the part of Yarwood was against the defendant for personal injuries. The declaration avers that Yarwood was a passenger on the cars of the defendant from Elgin to Clinton, on the second of August, 1852; that just before reaching said station or stopping place, by the action of the wheels of the said engine and cars, the said iron and wooden rails were torn up for a great distance, to wit, twenty feet, in consequence of said rails being constructed of poor material and so insufficiently and insecurely fastened as aforesaid that said car on which the said plaintiff was then and there a passenger was thrown violently off the said road, by reason of which the life of the plaintiff was put in great peril and danger, insomuch so that plaintiff was obliged to and did jump from said car to the ground (said car being then and there off the said track and still running at a rapid rate over the ties of said road), in doing which the plaintiff's left leg was broken near the ankle and he was otherwise injured, all of which was caused by the unskillfulness and carelessness of the defendant. The subsequent counts of the declaration, two, three and four, state the same cause of action in different words. Verdict for the plaintiff for $2,500.

the party it undertakes to carry. If the passenger is placed in a position of great danger he should be informed of that fact, so as to enable him to exercise greater precaution or avoid the danger altogether.

While a railroad company may not ordinarily carry passengers on its freight trains or locomotives, or hold them out to the public for that purpose, yet if, through its authorized agents, the company accepts a passenger for reward upon said trains or engines, it will be bound to exercise care and diligence for the safety of such passengers.

And so, although a stock or freight train may not be operated for the carrying of passengers, yet if those in charge thereof assume to carry one thereon and he is on the engine by their invitation or direction, it can not be said as a matter of law that the carrier is not bound to operate the same in any other than the usual manner for the convenience of stock; on the contrary, the servants of the carrier must operate the train in such manner as due care and caution may suggest for the safety of the passenger. Even if a party is wrongfully on an engine and is permitted to remain there, this will not excuse the want of ordinary care to prevent injury to him.

Where servants of a railroad corporation keep within the course of their employment, the master will be responsible for their negligence or wrongful acts, although such acts are against instructions or even wilfully performed.

The private rules and regulations of a railroad company pre scribing the duties and powers of its servants and employes can not affect persons having no notice of them. As the company is liable for the acts of its servants in the course of their employment, both in the rightful use and in the abuse of the powers conferred on them, or even their wilful acts, evidence that its servants exceeded their rightful powers is not admissible to defeat a recovery against the company by one injured by their acts, unless he had notice of the extent of the servants' powers. Persons dealing with railroad corporations can only judge of the powers given to its agents and servants from appearances and the position and acts of such employes. So when those in charge of a train, in which a person has a carload of cattle, direct him to get upon the train or the engine, to be carried to the destination of his stock, he will not be

bound to inquire as to the extent of their authority to act before obeying their directions in order to relieve himself from the imputation of negligence.

Whether a passenger on a freight train in charge of stock shipped by him is guilty of gross negligence in getting upon the foot-board of a transfer engine and riding there by the direction or invitation of those in charge of his stock and of such engine, is a question of fact for the jury, to be found from all the facts and circumstances shown by the evidence.

If a railroad company gave a shipper of live stock a pass to stockyards at a distance from its line of road, to which place the stock was shipped, or engaged to transfer the shipper to such stockyards, and its servants, clothed with apparent authority to act for the company, directed him to take passage on the engine after leaving its road, and undertook to carry him on the same, these are facts proper to be considered by the jury in determining whether such shipper was a passenger while on the engine.

In an action against the railroad company to recover damages for the killing of the plaintiff's intestate by negligence, while taking him and his car of stock from the defendant's yard to stockyards, the place of destination, evidence of a custom of the defendant in allowing shippers of live stock to ride upon its engines and cars containing stock to the stockyards, is admissible, as tending to show the authority of servants of the railroad company to thus carry the deceased, and that the latter was at the time a passenger for reward.

In an action against a railroad company to recover for the death of the plaintiff's intestate through negligence, the court instructed for the plaintiff, that if the jury believed from the evidence that the deceased was rightfully on the defendant's engine, as alleged in the declaration, and that while he was on said engine he was using ordinary care on his part for his personal safety, and was by and through the carelessness and negligence of the defendant's servants in running and handling said engine, thrown from said engine and injured, from which said injuries he died, then to find for the plaintiff, it is held by the supreme court that such instruction did not exclude a consideration of the negligence of the deceased in placing himself on the engine, and did not assume that defendant's

servants were guilty of negligence in running and handling the engine, and was not subject to the objection that it failed to confine the right of recovery to the specific negligence named in the declaration.[1]

SEC. 614. In an action against a railroad company to recover for personal injuries to the plaintiff occasioned by negligence, the defendant asked for an order of court that the plaintiff submit to an examination by certain physicians named in the

[1] L. S. & M. S. R. R. Co. v. Brown, Adm'x, 123 Ill. 162.*

* NOTE.—This was an action on the case by Nancy J. Brown, administratrix of the estate of Nelson Brown, deceased, against the defendant railroad company to recover damages for wrongfully causing the death of the intestate, who was the plaintiff's husband. The substance of the declaration was that the defendant possessed and operated a railroad in Cook county, and also a certain locomotive engine and train of cars, which were under the management of defendant's servants, who were driving the same upon said railroad toward the Union Stockyards; that a stock car in said train, attached to said engine, was loaded with stock belonging to said Nelson Brown, who was then rightfully and by direction of defendant's servants riding upon said locomotive engine from the main line of defendant's railroad to said stockyards; which said car with stock, with said Nelson Brown in charge thereof, the defendant undertook for a certain reward to transport and carry safely to said stockyards; and it then and there became the duty of the defendant, with all due care and diligence, to transport and carry said carload of stock, with said Nelson Brown, safely and without injury, to the said stockyards. Yet the defendant did not regard its duty or use due care in that behalf; but, on the contrary, while disregarding the same and knowing that said Nelson Brown was riding on said engine, and without any warning to him, the defendant, by its servant, carelessly, negligently and improperly drove the said engine and cars upon and along said railroad track at a high rate of speed, and then suddenly checked said locomotive, and without warning to the said Nelson Brown, uncoupled said engine from said car, and then suddenly throwing on a full head of steam, drove the said locomotive suddenly along said track and turned the said car, still running at a high rate of speed, to and upon a side track, thereby making what is called a running switch; and the plaintiff avers that by reason of the careless, negligent and improper conduct of the defendant, by its servants, in uncoupling the said engine from the said car, and then suddenly increasing the speed of the said engine, without warning to the said Nelson Brown that they were about to make a running switch, they well knowing the danger thereof, the said Nelson Brown was by and through the careless, negligent and improper conduct of the defendant then and there thrown from such engine to and upon the ground, and before he could arise was struck and run over by the said cars of stock and was bruised, mangled and injured, and his leg cut off, his leg broken and his lungs injured, from which injuries he, the said Nelson Brown, afterward died.

motion, which was overruled. Something over a year later the defendant sent two physicians of its selection to examine as to the plaintiff's physical condition, one of whom had before made a thorough examination. He was not admitted but the other was, and made an examination. Still later another of the physicians named in the motion was allowed to make a thorough examination of the plaintiff. It is held by the supreme court that as the defendant had the benefit of an examination by three of its physicians, it could not complain of the overruling of its motion.

In an action by a party injured by a collision with a railroad train against the railroad company operating such train, the plaintiff would have a right to show the position of the defendant's train and what precaution, if any, the conductor in charge of the train had taken to guard against danger; and the statements or declarations of the conductor a few minutes before the collision, being a part of the *res gestae*, may be shown for that purpose.

In case of personal injury from negligence, the injured party may recover such actual damages as are the natural and proximate result of his injury, such as loss of time, his pain and suffering, and his necessary and reasonable expenses in medical and surgical aid and nursing, as shown by the evidence; and if the injury is permanent and incurable, the jury in assessing the damages may take such fact into consideration. The fact that he has a wife living can not, however, be considered by the jury in fixing the plaintiff's damages.[1]

Sec. 615. In an action to recover damages for personal injuries suffered by the plaintiff in a collision while a passenger on the road of the defendant company, it is held that there was no variance between the declaration and the testimony; that proof of the breaking down of the plaintiff's nervous sys-

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[1] C. & E. R. R. Co. v. Holland, 122 Ill. 461.*

* Note.—This was an action on the case by Isaac W. Holland against the C. & E. R. R. Company to recover damages for personal injury caused, as alleged, by the negligence of defendant's servants. The plaintiff at the time he was injured was in the employ of the C., R. I. & P. R. R. Company, as a conductor in charge of the surburban passenger train running on one of the lines of that company between the city of Chicago and South Chicago. A trial resulted in a verdict and judgment in favor of the plaintiff.

tem and that his nerve trouble might result in death was properly admitted; that the rules of pleading did not require the plaintiff to set out in his declaration the evidence relied upon; that the evidence sustains the verdict for the plaintiff; that the court will not interfere with the verdict, the credibility of the witnesses and weight of the evidence being questions for the jury; that the verdict for $5,000 is not excessive, and that the court below properly refused to grant a new trial on the ground of newly-discovered evidence.[1]

SEC. 616. When an injury to a passenger on a railroad train is the result of the breaking of the wheel of the coach, and it appears that said wheel was made by one of the most skillful manufacturers and had previously been thoroughly tested by skillful and experienced men and no defects perceived, and such wheel is in extensive use, the company will not be liable for negligence; nor will the company be liable in such case for defects in a rail which did not contribute to the injury.

Where a car wheel while in operation breaks, and thereby a passenger is injured, negligence in the company will be presumed, but this may be rebutted by the company. A party traveling in a railroad coach on a free pass issued to a different person, which is not transferable, and passing himself as the person therein named, is guilty of such fraud as to bar his

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[1] C., B. & Q. R. R. Co. v. Sullivan, 21 Ill. App. 580.*

*NOTE.—The plaintiff avers in his declaration that the defendant, by its servants, negligently allowed said car in which the plaintiff was, to be run into and telescoped by another locomotive engine and cars operated by defendant, by means whereof said car was wrecked and the plaintiff, with force and violence, was crushed, shocked, bruised, lamed, forcibly hurled forward in said car and jammed between the seats thereof, and divers other ways abused and injured; by means whereof one of his legs was seriously crushed and bruised, one of his hips and his side above said hip was permanently injured; one of his hands cut and disabled; his head cut and gashed, and he was otherwise greatly injured, bruised, wounded, lamed and disabled. Trial resulted in a verdict and judgment for the plaintiff for $5,000. It was admitted on the trial that the injury was occasioned through the negligence of the defendant. It being considered that the injury to the plaintiff was the result of the negligence of the defendant, the only question involved is as to the extent the plaintiff suffered injury from the acts of the defendant. In order to accurately determine the scope and extent of the injury, we must consider the physical condition of the plaintiff at the time of and prior to the injury, and his physical condition since, and to what extent his present condition is attributable to the injury.

right to recovery for the personal injury, except for gross negligence on the part of the company amounting to wilful injury.

If a passenger on a railroad train, while riding under a free ticket containing the usual restrictions, is injured by an accident, he can not hold the company liable, except for gross negligence or a degree of negligence having the character of recklessness.[1]

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[1] T. W. & W. R. R. Co. v. Beggs, 85 Ill. 80.*

* NOTE.—This was a case for personal injury brought by Harvey Beggs against the defendant railroad company. There was a verdict for the plaintiff, which the court refused to set aside, and rendered judgment on the verdict. The plaintiff alleged that the defendants were common carriers and in duty bound to provide safe cars and engines and to employ safe and careful competent agents to conduct their trains; then avers that plaintiff got upon the train of these defendants, having a ticket issued by defendants for his transportation from Hannibal to Jacksonville; that the defendants negligently and carelessly put into said train of cars a certain caboose in which plaintiff was placed, having a cracked and broken wheel, placed in charge of careless, reckless, negligent and incompetent servants, by means of which the car on which plaintiff was, by reason of the defective and broken wheel, was thrown from the track and overturned and plaintiff greatly injured. It is urged that the preponderance of the evidence establishes that there was no defective rail or defective ties, and that the car wheel which broke was made by one of the most celebrated manufacturers of car wheels, and had been in use but three months, and been thoroughly tested in the usual manner by the hammer after a run of fifty miles; that such wheels might be and are successfully used in runs of thirty or forty thousand miles; that there was nothing in the appearance of the wheel to indicate unsoundness and it answered clear to the stroke of a hammer; that the break in the wheel occurred before the car reached what is called the broken rail, consequently the broken rail was not the cause of the accident: that the defect in the car wheel was not discoverable by the usual and proper tests, and on the authority of Illinois Central Railroad v. Phillips, 49 Ill. 239, the court must hold the company under the proof in this regard not liable. That the car wheel broke when in operation, raising the presumption of negligence in the corporation, is admitted; but that presumption is overcome by showing the wheel was the work of one of the most skillful manufacturers in the United States; that it was of the kind usually employed in the service and had been subjected to and withstood the usual tests. There is no complaint that it was not driven with judgment and skill, and by persons of experience. Another question of importance is raised in this case: Was the plaintiff a passenger on this train in the true sense of that term? He was traveling on a free pass issued to one James Short and not transferable, and passed himself as the person named in the pass. By his fraud he was riding on the car. Under such circumstances the company could only

SEC. 617. In a suit to recover damages for personal injury occasioned by the negligence of the defendant, the allegation and proof must correspond. The plaintiff can not aver negligence in one particular and prove on the trial that the defendant was guilty of negligence in another.

In a suit against a railroad company for damages on account of personal injury, alleged to have been caused by the defendant carelessly running its train against a horse, it is not competent for the plaintiff to prove that the railroad track was not properly fenced, or that the cars were not provided with steam brakes, or any other negligence than that averred.

Where the only negligence averred in a declaration in a suit against a railroad company is that it ran its train carelessly, it is error to instruct the jury that if the defendant was negligent in its failure to use proper air brakes or other proper machinery in running its train, the plaintiff is entitled to recover.[1]

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be held liable for gross negligence which would amount to wilful injury. But on the assumption that he was a passenger on the car riding on a free ticket containing the usual conditions as aforesaid, then the case is like that of Illinois Central Railroad Company v. Read, 37 Ill. 484, where it was held such a pass or ticket is a perfect immunity to the company for such unavoidable accidents as will happen to the best managed railroad trains; not, however, shielding them from liability for gross negligence or any degree of negligence having the character of recklessness. Judgment reversed.

[1] Foss v. T. W. & W. R. R. Co., 88 Ill. 551.*

* NOTE.—This is an action brought by Charles H. Foss to recover for personal injury received while a passenger on the defendant's road between Jacksonville and Springfield. The declaration alleges that defendant negligently and carelessly ran the train of cars on which plaintiff was a passenger violently against and upon a horse, by means whereof the car of the train occupied by plaintiff was thrown from the track, by which means the plaintiff was injured. The second count is substantially like the first. On the trial of the cause the court permitted the plaintiff to prove the railroad track was not properly fenced; that a gate was down so that animals could get upon the road; and also permitted the plaintiff to show that the train was not provided with steam brakes. This testimony was improper, yet the plaintiff based his right of action upon the negligence of the defendant in failing to use proper machinery in the equipment of his trains, or in neglecting to make or keep in repair fences sufficient to keep animals from its track. The established rules of pleading required him to aver these facts in his declaration, so that the defendant might, on the trial, be prepared to meet them by proof.[2]

[2] I. C. R. R. Co. v. McKee, 43 Ill. 120.

SEC. 618. *Liability of master for torts of servant.*—While it is a general rule that where an employe acts outside the line of his employment, and for purposes of his own inflicts an injury upon the person of one who has no claim upon the employer arising from any special relation existing between them, the employer is not liable, yet in the case of a common carrier of passengers the rule does not apply.

Duty of common carrier to passenger.—A common carrier owes a duty to passengers that they shall, during the transit, be protected from all dangers as far as the efforts of the carrier and its servants can be made available. As to such passenger the servants of the carrier stand in the place of the carrier, and their acts, so far as they have a direct connection with the performance or non-performance of the carrier's contract, must be held to be the acts of the carrier himself.

Where a passenger lawfully upon a train of cars is wilfully assaulted by a brakeman upon said train, the railroad company is liable for the injury inflicted.[1]

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[1] C. & E. I. R. R. Co. v. Flexman, 9 Ill. App. 250.*

* NOTE.—This was a suit brought by James Flexman against the defendant company to recover damages for personal injuries inflicted upon him by a brakeman in the employ of the defendant. Flexman purchased from defendant's agent a railroad ticket entitling him to ride from Hoopeston to Milford. He took passage on a train carrying passengers and very soon after boarding the train lay down on the seat in the caboose and went to sleep. Upon the arrival of the train at Milford, his place of destination, he was awakened by the conductor. While the train was stopped at Milford, Flexman discovered, as he then supposed, that he had lost, or been robbed of his watch and chain. He was told to get off, but refused, until his watch should be recovered, having informed the conductor of his loss. The conductor consented to allow Flexman to remain on the train until it arrived at Watseka, another station on the line. After the re-starting of the train in the direction of Watseka, a passenger on the train assisted Flexman in making a partial search of his person for the watch and chain without finding it. After doing so the passenger inquired of Flexman who he thought had his watch, to which he, Flexman, replied "that fellow," pointing at and indicating the brakeman. He was then in the caboose, whereupon the said brakeman struck Flexman in the face with a railroad lantern, and thereby inflicted the injury complained of. Flexman had, during the day, drunk five or six glasses of beer. There was but one other passenger on the train when Flexman boarded it, and none on its arrival at Milford. After the injury complained of, the watch was found in Flexman's coat pocket. The blow from the lantern severed the plaintiff's nose from his face so that it lay over his mouth, suspended by a mere

SEC. 619. A shipper of stock on a railroad train may be rightfully upon any part of such train, as regards the company, while carrying his stock to a stockyard; still such right will not relieve him from the duty of using due care to protect himself from injury from another company's train colliding with the same, where such other company is sought to be held liable for his death occasioned by the collision.

Where a shipper of stock, going to the stockyards in company with five or six other persons, rides on the front of the engine, all of whom except him, seeing a backing train on the same track, jump off and thus escape injury, but he does not and is killed by a collision of the trains, the question of negligence arising on his failure to *jump off* and save himself is a question of fact, which should be submitted to a jury under proper instructions in an action to recover for his death; and an instruction ignoring this, not cured by others, is erroneous.

Where a passenger on a railroad train is injured by the mutual negligence of the servants of the company on whose train he is rightfully traveling and of the servants of another company with whom he has no contract, there being no fault or negligence on his part, he or his personal representatives may maintain an action against either company in default, and will not be restricted to an action against the carrier company on whose train he was traveling.

Where one has received an actionable injury at the hands of two or more wrong-doers, all, however numerous, are severally liable to him for the full amount of damages occasioned by such injury, and the plaintiff in such case has his election to sue all jointly or to sue each or any one of the wrong-doers.

The law extends to a passenger on a railroad train or other public conveyance the same protection against fraud, force and negligence that it does to any one else. By assuming the relation of a passenger he neither expressly nor impliedly

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thread of flesh. The plaintiff having closed his evidence, the defendant moved the court to exclude the evidence and offer a direction to the jury. to find for the defendant. This the court refused to do, and the jury, under the instructions, found for the plaintiff and assessed his damages at $2,000. The defendant introduced no evidence and asked no instructions.

waives that indemnity against injury which the law gives him.[1]

SEC. 620. Although a person who has boarded a freight train may be a trespasser, that does not prevent a recovery against the railroad company for the act of a brakeman in ejecting him from a train while it is in motion, and without regard to the safety of his person.[2]

SEC. 621. A brakeman of a freight train, acting under orders from the conductor, forcibly ejected from the train a person who was riding thereon and he was seriously injured. Held, that the conductor was a vice-principal, and that the railroad company was liable for acts performed under his direction.[3]

SEC. 622. Where stock enters a railroad right of way at a

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[1] W., St. L. & P. Ry. v. Shacklet, Adm'x, 105 Ill. 364.*

[2] Ill. Cent. R. R. Co. v. Davenport, 75 Ill. App. 579; North C. City Ry. Co. v. Gastka, 128 Ill. 613; Lake S. & M. S. Ry. Co. v. Bodemer, 33 Ill. App. 479; St. L., A. & T. H. R. R. Co. v. Reagan, 52 Ill. App. 488; Chicago, M. & St. Paul Ry. Co. v. Doherty, 53 Ill. App. 282.†

[3] Ill. C. R. R. Co. v. Davenport, 75 Ill. App. 579.

* NOTE.—The injury complained of occurred in East St. Louis on the short line of railroad belonging to the East St. Louis National Stockyards, and was caused by a collision of two trains of cars belonging respectively to the defendant, W., St. L. & P. Ry. Company and the Union Ry. & Transit Co. The road on which the collision occurred connected the stockyards with the various lines of railroad running through or terminating at East St. Louis and was open alike to the free and common use of all railroad companies for the purpose of shipping live stock to and from the stockyards. This connecting line of road belonging to the stock yards company consists of two main tracks connected at or near the stockyards by necessary switches and turnouts, so with proper care and caution collisions between incoming and outgoing trains might readily be avoided. At the time of the accident the transit company was pulling a train into, and the defendant was pushing one out from, the stockyards on this track, both trains being loaded with live stock, but owing to a sharp curve in the track and other obstructions on the line of the road, those having the trains in charge did not discover their close proximity until it was too late to avoid the collision. Shacklet at the time was riding on the engine of the transit company's train, and a number of the cars belonging to it were loaded with his stock.

* NOTE.—In the case of Davenport it appears the plaintiff, by the mistaken direction of the railroad ticket agent, got on board of a freight train that did not carry such passengers. By order of the train conductor the plaintiff was forcibly put off the train by a brakeman while it was going at the rate of about fifteen miles per hour and severely injured.

place exempt from the operation of the statute in regard to fences and cattle-guards, and wanders along the track to a place not so exempt, beause of failure to erect a suitable fence or cattle-guard, and is there killed by a train, the railroad company is liable. Such part of the depot grounds of a railroad company as is necessary for the use of the road by the public is excepted from the operation of the statute, even though not within an incorporated city or village.[1]

SEC. 623. In a suit against a railroad company by a United States transfer mail clerk for injuries received by him while in the discharge of his duties, the court admitted in evidence a rule of the railroad company regarding the operation of trains and a government rule regulating the conduct of clerks in the transfer of mail. Held, under the circumstances, the action of the court was proper. The running of a freight train at a high rate of speed past a station where a passenger train is receiving and discharging passengers is plainly negligence; and it is equally negligent to so run a freight train just as the passenger train is pulling into the station, and more especially when the track on which the freight train is moving is between the depot and the track on which the passenger train is moving.[2]

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[1] Chicago & E. I. R. Co. v. Blair, 75 Ill. App. 659; Wabash R. Co. v. Pickerell, 72 Ill. App. 601.

[2] Chicago & A. Ry. Co. v. Katie C. Kelly, 75 Ill. App. 490.*

* NOTE.—Action for killing plaintiff's husband by defendant's train at Bloomington. Verdict for plaintiff, $3,800. It was the duty of deceased clerk to get the mail from passing trains on one road, and see that they were properly placed upon trains going out upon other roads from the Union depot. Four roads intersect there. The depot is immediately west of and adjoining the main line of defendant's road, which at this point has two tracks, a west track and east track. East track is used by south-bound trains and the west by north-bound trains. Passengers and others going to and from the depot from south-bound trains are compelled to pass over the west track. A short distance south of the depot and west of the main line was the office of the transfer mail clerk, where incoming mail was placed in sacks and pouches until they could be delivered to mail agents on outgoing trains. To get from this office to south-going trains on defendant's main line, Kelly was obliged to cross the west track. On the night that he was killed the regular mail train for St. Louis was due at 1:25 A. M. It arrived on time. At the time it was pulling in, a freight train from the south stopped on the west track for the railroad crossing, about 500 or 600 feet south of the depot. When the engineer stopped his train the target

SEC. 624. A person purchased a ticket of a railroad company with the intention of becoming a passenger on one of its trains, and passed through a turnstile provided by the company for that purpose and onto its depot platform. Held, that the relation of carrier and passenger existed between the parties when the purchaser of the ticket passed through the turnstile to the platform. A railroad company is bound to use reasonable care in providing for the safety and protection of its passengers while in its enclosures, and while being conducted to its trains, with due regard to the number and character of those on its premises and with due reference to the risks to which they are exposed; and this duty may require it to provide a

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signal was against him. As soon as the target man had given the passenger train the signal to proceed he signaled the freight train to come on, thus bringing the two trains into the station at the same time. The engineer of the freight train did not obey the signal until it had been given him a second time. When his train reached the station it was moving at a rapid rate of speed, ten to twenty-five miles an hour. Just before reaching the depot the engine struck Kelly as he was going across the track to the small platform between the tracks where the mail of the south-bound trains was usually dumped. He was instantly killed. Only two witnesses saw the accident, one for the plaintiff and one for defendant. Both agree that Kelly did not look up or down the track, and did not act as though he knew of the approach of the freight train. Two men testified that they warned him, but it is uncertain whether he heard them. A rule (13) of defendant was admitted in evidence as follows: "Trains approaching a station where a passenger train may be standing, receiving and discharging passengers, must be *stopped* before reaching the passenger train, and must not be moved forward until the passenger train moves forward. When two passenger trains, running in opposite directions, arrive at a station on double track at or about the same time, the train having the right of the road (on single track) will have the right to go to the station platform first, and the other train must stand back until the opposite train has discharged its passengers and departed." Kelly must have known the rule, and if he knew it he had a right to suppose that it would be observed, and doubtless his movements in the discharge of his duties in the transfer of mail were influenced by it. A rule of the government, requiring great vigilance in caring for and guarding the mail, was introduced. Court says, "The running of a freight train at a high rate of speed past a station where a passenger train is receiving and discharging passengers is so plainly negligent as not to require comment." This case was reversed and remanded because plaintiff's attorneys insisted upon, and the trial court granted, a rehash of the obsolete doctrine of "*comparative negligence*" delivered to the jury with the instructions.

suitable number of men to properly control a crowd, and to protect its passengers incident thereto.[1]

SEC. 625. It can not be said that an engineer is negligent who sees a boy, nearly nine years old, standing in a place of safety near the track, because he does not stop or slacken the speed of his train, or blow a whistle, when his bell is ringing and crossing gates located at such place are down; nor must he assume that such a boy will not take the ordinary and reasonable precaution of looking both ways before he steps upon the track; or that the boy is in fact ignorant of the approach of the train. It is the duty of a person about to cross a railroad track to look about him and see if there is danger, and not to go recklessly upon the track.[2]

SEC. 626. Under the statutes of this state, proof that the property was destroyed by fire communicated from a passing engine, is to be taken as full *prima facie* evidence to charge the railroad company operating the same with negligence, and to rebut the case made by such proof it is incumbent on the company to show that the engine was at the time equipped with the best known appliances to prevent the escape of fire, was in good repair, and was skillfully and carefully handled.

The statute in regard to fires communicated by locomotives was not intended to absolve the owner of property from all care whatever, and confer upon him the right to make such extraordinary use of his land adjoining a railway as that he might, regardless of danger, pile up vast quantities of highly combustible material, liable at any moment to be set on fire by a passing engine, and he himself take no risk; and the court holds that the question whether the plaintiff was guilty of contributory negligence, in stacking a large quantity of straw near a railroad track, was properly submitted to the jury.[3]

SEC. 627. A passenger takes all the risks incident to the mode of travel and the character of the means of conveyance which he selects, but the care, vigilance and skill of the parties furnishing the conveyance should be adapted to it. The carrier and the passenger owe reciprocal duties each to the

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[1] Ill. Cent. R. R. Co. v. Treat, 75 Ill. App. 327.

[2] Theobald v. C., M. & St. P. Ry. Co., 75 App. 208.

[3] American Straw Board Co. v. C. & A. R. R. Co., 75 App. 420. Verdict for defendant.

other. A carrier of passengers is not an insurer against all accidents, but is liable only for the want of a suitable degree of care, diligence and skill. If a passenger on a railroad car is guilty of negligence by unnecessarily exposing himself to danger by wrestling or scuffling on the cars, or by imprudently and unnecessarily passing from one car to another while the cars are in motion, and receives an injury, and his carelessness or imprudence has contributed in any way to produce the injury, he can not recover. A passenger who seeks redress from a carrier for an injury, must show not only that the injury to him was the result of the carelessness or negligence of the carrier, but that he himself was without fault in producing the injury, and the burden of proof is on him not only to show that the carrier was negligent, but that he himself was not guilty of negligence.[1]

SEC. 627*a*. In an action against a railroad company to recover damages resulting to the plaintiff by reason of injuries received by him in leaping from defendant's train of cars, the plaintiff being a passenger on the train, while the cars were in motion, at a station where the train did not stop, it was held by the court that even if the plaintiff leaped from the car on suggestion of the conductor, and the conductor only gave it as his opinion that the plaintiff could leap from the train in safety, it was the passenger's duty to exercise his judgment whether or not it was safe, and if the danger was so apparent that a prudent man similarly situated would not have attempted the leap from the train, then the plaintiff was guilty of negligence and should not be permitted to recover. The plaintiff, if left to act voluntarily and not under constraint, was bound to exercise ordinary prudence.

When a passenger purchases a ticket, he only acquires the right to be carried according to the custom of the road. He has a right to go to the place for which his ticket calls on any train that usually carries passengers to that place; but he does

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[1] G. & C. U. R. R. Co. v. Fay, 16 Ill. 558; C. & N. W. Ry. Co. v. Carroll, 5 Ill. App. 201; P. C. & St. L. R. R. Co. v. Thompson, 56 Ill. 138; C. & A. R. R. Co. v. Pillsbury, 123 Ill. 9; St. L. Coal R. R. Co. v. Moore, 14 Ill. App. 510; C. & A. R. R. Co. v. Willard, 31 Ill. App. 435; O. & M. R. R. Co. v. Muhling, 30 Ill. 9; L. S. & M. S. R. R. Co. v. Brown, 123 Ill. 162.

not acquire the right to insist that the company shall carry him out of the customary course of their road. It is his duty when he purchases a ticket to inform himself as to the usual mode of travel on the road, and so far as the customary mode of passage is reasonable he should conform to it.

Railroad companies, furnishing reasonable means for carrying passengers to all their stations, have the right to run trains that only stop at designated or the principal stations on their road; and when a person purchases a ticket he should ascertain before getting on a train whether such train will only stop at the principal stations or at all of them; and were he to get on one that was not accustomed to stop at the station to which he desired to go, and for which his ticket called, he would not, without an agreement to stop, have any right to insist upon the company's changing the course of their business for his accommodation and to serve his convenience. And should a person get on a train, without the consent of the employes of the road, not accustomed to stop at the station to which he desired to go, and for which his ticket called, the taking up of his ticket merely, without an agreement to stop at the desired station, would not amount to an undertaking by the company to put him off at that place.[1]

SEC. 628. A railroad company has a right to put a passenger off the train for non-payment of fare at a regular station, but not elsewhere.[2]

SEC. 629. Where a railroad company adopts a rule prohibiting passengers from being carried on its trains, or on its freight trains, without the purchase of tickets, it must furnish convenient facilities to the public by keeping open the ticket office a reasonable time in advance of the hour fixed by its time-table for the departure of the train. Should it fail to do so, a person desiring to take passage will have the right to enter the car and be carried to his place of destination on payment of the regular fare to the conductor.

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[1] C. & A. R. R. Co. v. Randolph, 53 Ill. 510.

[2] T. H., A. & St. L. R. R. Co. v. Vanatta, 21 Ill. 188; C., R. I. & P. R. R. Co. v. Herring, 57 Ill. 599; C. & N. W. Ry. Co. v. Bannerman, 15 Ill. App. 100; St. L. & C. R. R. Co. v. Carroll. 13 Ill. App. 585; I. C. R. R. Co. v. Sutton, 42 Ill. 438; C. & A. R. R. Co. v. Flagg, 43 Ill. 364.

Where a person desiring to take passage upon a freight train which carried passengers applied several times to procure a ticket but could not get one, for the reason the office was closed, and he then got upon the train and tendered the conductor the regular fare, explaining to him his inability to procure a ticket, but the conductor stopped the train and put him off, not at any station or regular place for passengers to get off, it was held by the court that the company was liable to such passenger in an action on the case for damages. In such case it is held that $200 damages assessed by the jury were not excessive.[1]

SEC. 630. The court, upon review of the evidence, sustains a verdict of $300 for the plaintiff in an action to recover damages for having been wrongfully put off a moving train some distance from a station by a conductor of the defendant company.[2]

SEC. 631. The purchase of a ticket by a person on a company's railroad between two stations, creates the relation of carrier and passenger between them, with all the duties the law imposes on each. It is the duty of every railroad company to cause its passenger train to stop at each station advertised as a place for receiving and discharging passengers a sufficient length of time to receive and let off passengers with safety, and to provide a reasonably safe way of reaching and departing from their cars at all usual stations; and it is the duty of passengers to exercise ordinary care for their safety in attempting to take passage on railway cars.

No degree of carelessness or negligence on the part of the passenger will excuse a wanton and malicious attack on him

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[1] I. C. R. R. Co. v. Johnson, 67 Ill. 312.

[2] T., St. L. & K. C. R. R. Co. v. Kid, 29 Ill. App. 353.*

* NOTE.—When the conductor came to Kid he tendered fifteen cents, all the money he had, saying he wished to get off at Dresser, and was told by the conductor that the train would not stop there and that he would have to go on to Ramsey. The plaintiff replied that he wanted to go to Dresser only, and was then told that he must get off, to which he objected. But the conductor took him by the arm and led him through the car to the rear platform and forced him to get off, in doing which he fell and hurt himself severely. The train was then about a quarter of a mile from Herrick and was moving at the rate of five or six miles per hour. The court said: "We think the evidence sustains the verdict upon all material points."

by the conductor or other servant of the railroad company. No matter how negligent a passenger may be for his safety, that will not warrant the infliction of a wilful injury by a railroad employe.

In an action for damages against the railroad company, the proof showed that the plaintiff, having a ticket, delayed getting upon the train until it had started and got under considerable speed, when he caught hold of the railing at the end of the rear car and stepped upon the bottom step, when he was swung round to the rear of the car with his back toward it, and in an effort to recover himself, swung back, and, with his right hand, took hold of the other guard-rail, and while in that position, it was claimed, he was wantonly and maliciously assaulted by the conductor. The court instructed the jury that if they believed from the evidence that the plaintiff, under all the circumstances, in attempting to board the train, acted as a reasonably prudent man would have done under like circumstances, without negligence, and used ordinary care to prevent accident, and that injuries were sustained by him resulting from the wilful or wantonly malicious conduct of the servant of the defendant, acting in the line of his duty, the defendant company was liable for such injuries. It was held by the Supreme Court that while, under some circumstances, the principle of the instruction might be applicable, it was calculated to mislead the jury under the facts of the case tried.

Where an injury is wantonly and wilfully inflicted, the jury may, in addition to the actual damages sustained, visit upon the wrongdoer vindictive or punitive damages by way of punishment for the wrongful act, but the party is not entitled to such damages as a matter of right, and it is error to so instruct in any case. Whether a party may have such damages, rests largely in the discretion of the jury under all the circumstances, and they should be left free to exercise their judgment in this respect.

In an action against a railroad company to recover for a permanent personal injury to the plaintiff, including one to his spine, claimed to have resulted from an unjustifiable assault upon him by the conductor as he was attempting to board a car while in motion, the proof tending strongly to

show that the principal injury, the one to his spine, was caused by a severe strain or wrenching of his body in attempting to get on the train, an instruction which ignores the fact that such injury might have resulted from his own imprudent act should not be given. It should exclude from the jury all idea that there can be any recovery for injuries sustained by the imprudent attempt to board the car while in motion.[1]

SEC. 632. In an action against a railroad company to recover for an injury alleged to have resulted from the negligence of the company in placing a post upon its platform provided for receiving passengers, in such near proximity to the cars that passengers, although using due care, could not enter the cars in safety, it appeared that the plaintiff, although given ample opportunity to get upon the train while it was standing at the platform for the purpose of receiving passengers, omitted to do so, but, waiting until the train had started, undertook, while it was in motion, to get aboard, and in this attempt he held on to the iron railing of the car and followed the moving train until he came against the post on the platform, whereby he was injured. It was held by the court that the plaintiff was guilty of such negligence in attempting to board a moving train as to preclude a recovery.

A passenger having no right to get on board a railway train while it is in motion, the company is under no obligation to provide means to assist him in doing so. If the company has constructed and maintained a platform at a convenient and suitable place, by which passengers can safely and securely enter cars when the train is placed in position for the reception of passengers when the cars are not in motion, it has fulfilled its duty to the passenger, as far as the platform is concerned.

Although the question of negligence be one of fact, to be left to the jury, yet if it appear in an action to recover for the alleged negligence of the defendant that the plaintiff has been guilty of gross negligence, on account of which the injury is received, or was injured by reason of a failure on his part to exercise ordinary care and caution to avoid danger, it would

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[1] W., St. L. & P. R. R. Co. v. Rector, 104 Ill. 296.

not be error for the court to instruct the jury that if such is the case the plaintiff can not recover.[1]

SEC. 633. One of a large funeral party who took passage upon a train to go a distance of twelve miles was standing upon the steps of the platform of one of the cars holding on to the railing, when the conductor came along collecting fare. In making change for a bank note which the passenger paid for his fare, the wind carried away the paper as it was passing from the hand of the conductor to that of the passenger. The latter, in attempting to regain it, and as he was then standing on the edge of the platform or on the steps, lost his foothold and fell against an embankment, was thrown back under the cars and killed. The cars were quite full, but there was standing room in all of them. In an action against the company under the statute to recover damages for the death of the deceased, it was held by the court that it was the negligence of the deceased, not that of the company, which caused his death, and there could be no recovery.

When a passenger voluntarily places himself in such an exposed position, with abundant standing room in the cars, even though the seats are all full, and falls to the ground, not in consequence of a collision or a broken rail, or other fault of the company, but in the endeavor to recover money that the wind has blown away, the negligence of the passenger is far greater than that of the company.

While it is negligence on the part of a railroad company, for which they should be held strictly accountable, not to furnish comfortable seating accommodation for their ordinary number of passengers, or even for an extraordinary number upon due notice, yet the same strictness should not be applied when a train is unexpectedly crowded by a large party going only a few miles.[2]

SEC. 634. Railroad companies must afford a reasonable time to passengers, whether young or old, to leave the cars in safety, and if the time-tables do not allow sufficient time for this purpose and an injury is thereby occasioned, the company will be liable therefor. But the age or decrepitude of a pas-

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[1] C. & N. W. Ry. Co. v. Scates, 90 Ill. 586; C. & A. R. R. Co. v. Wilson, 63 Ill. 167.

[2] Quinn, Adm'x, v. I. C. R. R. Co., 51 Ill. 495.

senger will not determine the time of the stoppage of a train on its arrival at a station.[1]

SEC. 635. In an action brought against a railroad company to recover damages for an injury received by the plaintiff while riding on the steps of a baggage car on defendant's road, where the declaration was based on the hypothesis that plaintiff was a passenger, and the defense fairly raised the question whether or not the relation of carrier and passenger existed between the parties, the appellate court holds that an instruction which permitted a recovery, although the jury might not believe that such a relation existed, was erroneous.

The evidence in the case presented failed to establish any such state of facts as would sustain a finding of gross negligence on the part of the defendant or wilful injury of plaintiff, and therefore an instruction based on that hypothesis was likewise erroneous.[2]

SEC. 636. In an action to recover damages for a personal injury resulting from negligence, an instruction for the plaintiff which omits to state, as a condition precedent to the right of recovery, that the plaintiff at the time of the injury was in the

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[1] T., W. & W. R. R. Co. v. Baddeley, 54 Ill. 19; I. C. R. R. Co. v. Able, 59 Ill. 131.*

[2] C., B. & Q. R. R. Co. v. Mehlsack, 44 Ill. App. 124.†

* NOTE.—Action against a railroad company to recover damages for an injury to the plaintiff, a passenger on the train, occasioned by the negligence of the company, and a verdict for the plaintiff of $10,000, one-half of which was remitted by the plaintiff and judgment entered for $5,000. As to the merits of this case, the testimony was very conflicting, on the strength of which the jury would have been warranted in coming to a conclusion against the plaintiff, and had they done so the court would hardly have been justified in setting the judgment aside as being against the weight of the evidence. Judgment was affirmed.

† NOTE.—The plaintiff got on board defendant's passenger train at Meagher street, Chicago, Illinois, intending to ride to the Union depot. The train was quite full. The plaintiff testified the cars were so crowded that he was obliged to. and did, ride upon one of the steps of a passenger car; other witnesses testified that there was room inside the passenger cars. The steps of the car upon which the plaintiff was standing came in contact with a pile of stone or dirt beside the track, breaking the steps and throwing the plaintiff off. This pile had been thrown up the previous night by employes engaged in putting in an interlocking switch. They had leveled off the pile so that they thought there was no danger, and the foreman of the party who did the work testified that on the morning of and before the

exercise of ordinary care, is such an error as to require a reversal, unless the defect is supplied in other instructions, or it appears that the defendant was not injured thereby.

But when the requirement of ordinary care on the part of the plaintiff is correctly stated in a subsequent instruction for the plaintiff, and in several instructions for the defendant, thus supplementing and extending the defective instruction, and there is no conflict in the series of instructions which, as a whole, state the law fully and fairly, and the attention of the jury, by special interrogatory, is called to the question of the plaintiff's exercise of ordinary care, the error will not be such as to require a reversal.

Special interrogatories to be submitted to a jury under the statute, must relate to the ultimate facts and not to mere evidentiary facts that tend more or less to establish the assumed facts upon which the rights of the parties depend.

Where answers to special interrogatories will furnish merely evidentiary or probative facts and not ultimate facts, or those from which the ultimate facts will necessarily result, there is no error in refusing to submit the interrogatories to the jury.[1]

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accident several trains of passenger cars passed the pile without coming in contact with it. No one save the plaintiff was injured. He paid no fare, but testified that he had money in his hand with which to pay his fare, but was not asked for it. The defendant contended that the plaintiff unnecessarily rode upon the steps of the car. The jury returned a verdict of $5,000 for the plaintiff. The appellate court, upon consideration of the testimony and of the facts in the case, reversed and remanded the case.

[1] L. E. & W. R. R. Co. v. Morain, 140 Ill. 117.*

* NOTE.—Action on the case against said railroad company for injuries received while alighting from a train. There was a verdict and judgment for $5,000 in the trial court in favor of the plaintiff, and that judgment was affirmed in the appellate court. The ground of negligence relied on in this case is that the train did not stop long enough to enable the plaintiff to get off safely, and incidental to this that it started forward with a slight jerk, whereby the plaintiff, while attempting to alight, was thrown down and so injured that it was necessary to amputate his leg just above the ankle. Analyzing the question of negligence, as presented by the evidence, the chief inquiry was, How long did the train stop? Did it stop the usual time? Did it stop long enough to allow plaintiff a reasonable time to alight? The plaintiff by his testimony and that of other witnesses, made it appear plainly that the interval was too short, and that to this the injury was clearly attributable. On the other hand there was a mass of testimony fully as great tending to the opposite conclusion.

SEC. 637. It is the duty of a railroad company carrying passengers on a freight train, in reaching the station of the passenger's destination, to bring the train to a full stop with due and proper care and caution with reference to the personal safety of the passengers; and thereupon not to start or move forward such train in an improper and dangerous manner at a time when such passengers may rightfully, in the exercise of due care, arise from their seats and prepare to leave the train at such station.

The implied contract of a railway carrier of passengers to carry them safely to their destination includes the duty of furnishing them a reasonable opportunity to alight from the train in safety at the end of the journey.

If the conduct of those operating a freight train, to which was attached a caboose, and their management of the train, amounted to an invitation for passengers to alight at a station for the discharge of passengers, and would be so understood and acted upon by reasonable and prudent persons, and a passenger, acting in good faith upon such invitation, arises upon the train coming to a stand-still for that purpose, and is injured by a sudden start of the train, the jury will be justified in finding that he was in the exercise of ordinary care for his safety at the time of the injury.

If, by reason of such apparent invitation to alight, the passenger is placed in peril from the further movement of the train, the duty of the railway company will at once arise to stop its train a sufficient length of time to permit him to leave it in safety, or to warn him of the danger in time to avert injury. In such case it will not be material whether the shock to the train producing the injury was an incident of the ordinary operation of the train, or was extraordinary and unnecessarily violent.[1]

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[1] C. & A. R. R. Co. v. Arnol, 144 Ill. 261.*

* NOTE.—This was an action by the plaintiff, Julia Arnol, to recover for personal injury alleged to have been occasioned by the negligence of the servants of the defendant company, and trial resulted in a verdict for the plaintiff of $2,500. By the fourteenth instruction the defendant asked that the jury be instructed to return a verdict for the defendant, which was refused. This refusal is assigned for error. The evidence tends to show the caboose stopped twice at Shirley, where the plaintiff intended to alight, the first

SEC. 638. A return excursion train was so crowded and overloaded that all the seats and standing room in the coaches were occupied as well as the platforms of the cars and the steps of the same. The plaintiff got on the steps of the front car and was carried to the next station, when a large number of passengers got off. It did not appear that the plaintiff might have got a better or safer position, or that he received any notice by the conductor or any one else that he might find room in some other car, and so he continued to occupy his position on the platform steps until he arrived at another station, when he was pushed off the steps by the crowd of other passengers and injured. It was held by the court that this failure at the first stop of the train to try to find a safer place was not such negligence, as a matter of law, as to preclude a recovery by him, but that the question of his negligence in fact was properly submitted to the jury.

A passenger on a railroad train does not owe a duty to the company to push and crowd his way in order to get an advantage over other passengers in securing a place within the cars; and it does not follow as a matter of law that he will be guilty of negligence for not so doing, nor will his duty to the company require that he shall wholly disregard the usual and ordinary courtesies and amenities of life. In fact, it is not necessarily and as a matter of law negligence to stand aside and allow ladies to occupy the safest and most desirable positions in a public conveyance. The question of negligence is ordinarily a question of fact to be tried by the jury. It is only when the inference of negligence necessarily results from the statement of facts, that the court can properly instruct the

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time at the north end of the platform, and was then jerked forward and came to the final stop at the south end of the platform. Just where it stopped the first time and how far the caboose ran between that stop and the final one was in controversy. Plaintiff shows that upon the approach of the train to the station a brakeman called out "Shirley! Shirley!" in the usual manner of announcing the approach to a station. Plaintiff says that having heard the station announced, and observing the slowing up of the train and its coming to a stand-still, she arose from her seat with the intention of leaving the train, when instantly and without warning the caboose was jerked so violently forward that she was thrown down to the floor of the car and was seriously injured. The passengers who went immediately to her assistance were thrown into confusion by the jar, and she was found to be insensible, and in that condition was taken from the car.

jury that such facts establish negligence. Standing or sitting upon the platform or steps of a railway car when the train is in motion, although it may be *prima facie* evidence of negligence, is not, under all circumstances, negligence *per se*, and as a matter of law.[1]

SEC. 639. If the conductor of a fast train receives fare from passengers to a station at which such train is not advertised or scheduled to stop, it becomes the duty of the conductor to notify the passengers so paying that the train will not stop at that station, or to carry them to such station and then give them sufficient time to get off in safety.

Where a train is not bound to stop at a particular station to receive or discharge passengers, but it is required by law to stop within eight hundred feet of a railroad intersection some five hundred feet beyond such station, but the proof showed that the conductor received fare to such station, and that there were passengers for that station, and on approaching the station the whistle was sounded and the speed of the train slackened and the train was finally stopped, it is held by the court that the passengers on the train, in the absence of a contrary announcement, had the right to act on the belief that the stop was to enable passengers to get off, and that the company was liable for an injury to a passenger caused by starting the train before allowing a reasonable time to get off.

Where the ordinary signal is given on approaching a station, and it is announced in the usual manner by the brakeman or conductor, so as to lead a passenger to believe the train is going to stop at such station, and it does stop there, the

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[1] C. & A. R. R. Co. v. Fisher, 141 Ill. 614.*

* NOTE.—Action for personal injuries. The result of the last four jury trials in the circuit court was a verdict and judgment in favor of the plaintiff for $16,000, and said judgment was affirmed by the appellate court. On the 18th day of August, 1886, the defendant ran an excursion train between Petersburgh and Ashland, and plaintiff became a passenger thereon. On the return journey, the defendant permitted the train to become overcrowded, and by reason thereof the plaintiff, while exercising due care, was, by the pressure of persons on the platform and steps of the car, unavoidably crowded off, and thereby injured. The second count states the same condition of the car and alleges that by reason thereof the plaintiff was unable to stand on the platform and unavoidably fell off and was thrown against a heavy truck, etc.

company can not avoid liability to the passenger for an injury caused by the train starting before he has time to get off, by showing those in charge of the train intended to go on further before discharging passengers, of which no notice was given.[1]

SEC. 640. Instructions that common carriers are required to do all that human care, vigilance and foresight can reasonably do under the circumstances to prevent injury to passengers are not erroneous.

It is not error to modify instructions which state as a proposition of law that the alighting of a passenger from a moving train constitutes negligence in such manner as to submit that question to the jury as one of fact.[2]

SEC. 641. A railroad company owes a passenger the duty of furnishing a suitable and safe platform and steps upon which to leave the cars, and is responsible for any defect therein causing injury to the passenger which human care, vigilance and foresight, reasonably exercised, could have discovered and guarded against, consistent with the operation of the road.

Where a woman was injured while alighting from a car, as the result of catching her dress upon a coupling-pin projecting three inches above the level of the car platform, it appearing not to have been necessary to carry the pin in that place or

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[1] McNulta, Receiver, v. Ensch, 134 Ill. 46.*

[2] C. & A. R. R. Co. v. Byrum, 153 Ill. 131.†

*NOTE.—The declaration charged that it was the duty of the defendant to stop at Starnes Station a sufficient length of time to enable the plaintiff to get off the train in safety and have the platform lighted, and that the defendant negligently failed to stop said train a sufficient length of time for that purpose, and negligently failed to cause a light to be placed upon the platform, by means whereof the plaintiff, being in the act of getting off the train after it had stopped, and in the night time, in the exercise of due care, the train suddenly started and he was thrown down between the platform and the station and was caught by said car and carried beyond the platform, whereby he was injured.

† NOTE.—The declaration charged that the plaintiff, Sarah J. Byrum, was a passenger on one of the defendant's trains between the villages of Broadwell and Elkhart, and that she suffered injury to her person caused by the negligence of the defendant, in that, upon the arrival of the train at Elkhart, and while she was in the exercise of due care and caution, and was about to alight therefrom, the defendant carelessly and negligently caused said train to suddenly and violently start and move, and thereupon she was thrown with great violence from said train to the platform and injured;

manner, a peremptory instruction for defendant is properly refused, although it was customary to carry a coupling-pin in that manner, and no like accident had before happened. That a like accident had never been known or heard of before by persons engaged in the management of railroads, will not relieve a railroad company from liability for injuries to a passenger, which, by the exercise of the highest degree of care, could have been foreseen and guarded against.[1]

SEC. 642. It is not necessary that there should be an express contract in order to constitute the relation of carrier and passenger, nor that there should be a consummated contract by the payment of fare; the contract may be implied from slight circumstances, and seems to depend largely upon the intentions of the purchaser.

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that said train was not stopped at Elkhart a sufficient length of time to allow her to alight therefrom in safety.

It appears from the evidence that the brakeman announced the station, and as the train slowed up at Elkhart she started, with her valise in her hand, to go down the car and out by the forward door, but was somewhat impeded by others coming in. The train stopped but a short time. The plaintiff got out upon the platform of the car as soon as she could, and then perceived that the train had started, but was moving so slowly that she thought she could step off without danger. When she made the attempt to alight, the train had moved only about two-thirds of the length of the car, or about forty feet. In stepping off, she was thrown down upon the platform by the motion of the car. Her right arm was broken, and she was otherwise bruised, cut and injured.

[1] I. C. R. R. Co. v. O'Connell, 160 Ill. 636.*

* NOTE.—The plaintiff recovered a judgment against defendant for $5,000. Plaintiff's declaration alleged that she was a passenger on one of the defendant's suburban trains running to and from the city of Chicago; that upon arriving at her destination, South Chicago, in attempting to alight from the car in which she was riding, because of the unsafe condition of the platform and steps of the car, which had bolts, nails and parts projecting from the same, her clothing caught thereon and she was thrown with great force and violence off the car upon the ground, and thereby severely and dangerously wounded. There was no conflict in the evidence upon the trial as to the fact plaintiff was a passenger, nor that in alighting from the car the bottom of her dress skirt caught upon the head of a coupling-pin, used on what is known as the "Miller" car platform, causing her to fall from the steps and being injured. It was claimed on the part of the defendant that there was no evidence of the negligence charged in the declaration, because it wholly fails to state that the company could have reasonably foreseen the happening of such an accident.

A person riding upon a free pass may recover for personal injuries received from the gross negligence of the company. Gross negligence is defined to be the want of slight diligence or care.

The fact that a person, to prevent being left behind, got upon the front platform of the baggage car of a passenger train while it was leaving the station, and being unable to gain admission to the car remained there until he was killed, in consequence of a collision with a freight train coming in the opposite direction, remaining so upon the platform having nothing to do with his death, will not necessarily prevent a recovery by his personal representatives.[1]

SEC. 643. One traveling by consent of a railroad company upon a freight train in charge of cattle which are being transported for him is a passenger for hire, whether supplied with a drover's pass or not.

The rule of liability for negligent injury to a passenger upon a freight train is the same that applies where the train is devoted exclusively to passenger service.

Injury to a passenger, during the course of his transportation upon a railroad, caused by an apparatus furnished by and under the control of the railroad company, raises a presumption of negligence, the burden of rebutting which rests upon such company.

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[1] I. C. R. R. Co. v. O'Keefe, 63 Ill. App. 102.*

* NOTE.—This suit was brought by the plaintiff, as administratrix of John O'Keefe, to recover damages for his death, which, it is averred, was caused by the negligent operation and running of the defendant's passenger train No. 4 and freight train No. 81, whereby said trains ran together, met and collided near Makanda with great force and violence, and thereby occasioned a great wreck and greatly demolished the engines and cars of said trains, and thereby said John O'Keefe, then and there a passenger on said train, was crushed, mashed and killed in said wreck. The jury found the defendant guilty, and assessed the plaintiff's damages at $3,000. The defendant claimed that the deceased at the time he was killed was not exercising ordinary care; was not a passenger at the time he was killed; that at the time of the accident he had in his possession a free pass, containing the condition that the person accepting it assumed all risk of accidents and agreed that the company was not to be liable under any circumstances for any injury to the person or for any loss or injury to the property of the passenger using this ticket; that the collision of the two trains was not the result of negligence.

A *prima facie* case of negligence on the part of a railroad company arises when a passenger on a freight train in charge of cattle is injured by being caught between two cars while he is descending the ladder to look after his cattle while the train is stopping for water.[1]

SEC. 644. Ordinarily a railroad ticket is not a contract, but merely a means adopted for convenience to enable persons in charge of trains to recognize the holder as entitled to passage.

While the sale of a ticket for successive rides does not of itself import a contract to carry a passenger beyond the line of the company selling the ticket, yet such company may bind itself to be responsible for the entire journey.

It is admissible to prove by parol evidence, outside of the mere ticket sold, the terms of the contract in fact entered into between the carrier and the passenger.

A railroad company is responsible for an injury to a passenger riding on its excursion train over a terminal line on a through ticket sold him by such company, when such excursion was advertised and scheduled by published time-tables to run to the final destination, without notice of the existence of any terminal line, or that the company did not assume the entire responsibility, although an engine of the terminal company, in fact, hauled the train over such terminal line and the agent of the terminal company took up the terminal coupons.

There is no difference between the diligence required of a carrier furnishing cars and conveyances for the safety of pas-

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[1] N. Y. C. & St. L. R. R. Co. v. Blumenthal, 160 Ill. 40.*

* NOTE.—An action to recover damages for a personal injury. Verdict of the trial court was in favor of the plaintiff. The declaration charges that the plaintiff is a cattleman by trade and was engaged in the business of driving cattle from one station to another on January 10, 1891; that on said day he was a passenger on a freight train traveling from Chicago to New York, and was looking after a lot of cattle which he had shipped thereon, as a passenger, with the consent of the defendant company; that on the morning of that day the train stopped at a station, when the plaintiff proceeded, as was his custom, to inspect his cattle, and was obliged in doing so to walk on top of the cars. Plaintiff further avers that he was descending on the ladder of one of the cars for the purpose of inspecting the cattle, when, without any sign or warning or notification whatsoever, the engineer in charge of said train suddenly started the same, whereby the plaintiff was caught between two of the cars of said train, and was crushed, wounded and bruised and permanently injured.

sengers and the care required for their safety in other respects.

An instruction that a railroad company is not liable for injuries to a passenger upon an excursion train because the injury happened upon the track of a terminal association which managed the train from a junction to the terminal station, is properly refused where the evidence tends to show that the company selling the ticket made itself liable for the whole route.

An instruction in an action for the death of a person, that he would be chargeable under certain circumstances with negligence in riding on the platform through a tunnel, is properly modified by requiring that the jury believe that he knew when he took the train that it was so crowded that he could not get inside the car.[1]

SEC. 645. It is negligence on the part of a railroad company to permit the aisles of its passenger cars to be obstructed with valises while passengers are entering or departing therefrom, by which they are injured while exercising due care.[2]

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[1] C. & A. R. R. Co. v. Dumser, 161 Ill. 190.*

[2] C. & A. R. R. Co. v. Buckmaster, 74 Ill. App. 575.†

* NOTE.—On Sunday, July 22, 1894, Charles F. Dumser went to St. Louis on an excursion train of defendant's from Broadwell, Illinois. The train was to return the evening of the same day. In the evening he got on the train at St. Louis to return, but could not get further than the platform, on account of the crowded condition of the cars, and in passing through a tunnel he was probably overcome by the gas, smoke and vapor, and was thrown or fell off and injured so that he died soon after. The plaintiff brought this suit as his widow, by virtue of the statute of Missouri giving her the right of action, and recovered $5,000. The ticket purchased by the deceased was as follows: "Issued by C. & A. R. R.—Special Excursion Ticket—Good for one first-class passage and return only on presentation of this ticket, with coupon attached. Subject to the following contract." Here followed conditions, among which was this: "2d. It is good for going and returning passage only on special train, Sunday, July 22, 1894." To this ticket were attached four coupons, each marked: "Issued by C. & A. R. R." On the margin of each was written: "St. Louis and Return." (See case of C. & A. R. R. Co. v. Edward A. Mulford, 162 Ill. 522.)

† NOTE.—The plaintiff took passage on defendant's passenger train at Godfrey, for Alton, Illinois, a distance of five miles. In the aisle and next to the seat in front of her, a passenger had placed a valise about eighteen inches long and about eleven inches wide. It had remained there two hours. When the plaintiff started to leave the car at Alton, she struck her foot against the valise, as she testifies, and was thereby thrown down,

SEC. 646. Under the statute relating to fires communicated by locomotives, the burden is upon the railroad company to establish such facts as will excuse it from the consequence of these fires.

The act of the general assembly, approved March 29, 1869, relating to fires by locomotives, provides a rule in reference to, and applies to uses and conditions of property existing before the construction of the railroad as well as to uses and conditions arising after its construction.

The measure of damages to realty by the destruction of fruit trees, meadows, etc., as parts of such realty, resulting from fires communicated by locomotives, is the amount that such realty as a whole has been lessened in value by the destruction of such parts.[1]

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spraining her ankle and breaking her leg. The jury awarded her $700 damages. The declaration avers that it was the duty of the defendant to provide plaintiff with a safe passage, and to keep the train in such condition that the plaintiff might leave the train in safety on its arrival at Alton; that defendant negligently suffered the passage-way to become obstructed by a valise, satchel or hand-bag, and that while the plaintiff, with all due caution, was in the act of leaving the train at Alton, she struck her foot against said obstruction and was thereby thrown with great force and violence upon the floor of the car, by means whereof her leg was broken.

[1] C., C., C. & St. L. R. R. Co. v. Stephens, 74 Ill. App. 586.*

* NOTE.—The testimony shows that there were two fires which burned over portions of the plaintiff's premises and which caused injury to his property, and it also clearly showed the fact that both these fires were communicated by locomotive engines while being operated by the defendant upon its railroad. Under the statute the burden is upon the defendant to establish such facts as will excuse it from the consequence of these fires. The appellate court says: "We have carefully examined and considered all the evidence in this record, and hold that the jury was warranted by the evidence in finding that issue for the plaintiff."

CHAPTER IX.

MINES AND MINING.

The following sections of the act entitled, "An act providing for the health and safety of persons employed in coal mines," approved May, 1879, and in force July 1, 1879, are taken from Vol. II, Starr & Curtis' Annotated Statutes, Chapter 93, entitled "Miners." The number of the sections as they are in the statutes are preserved in brackets.

SEC. (1) 646*a*. *Map of mine—Copies to be filed.*—The owner, operator or superintendent of any coal mine shall make or cause to be made an accurate map or plan of such mine, which shall exhibit all the openings and excavations, the shafts, slopes or tunnels, the entries, rooms and break-throughs; and shall show the directions of the air currents therein, and accurately delineate the surface section lines of the coal lands controlled by the owner of said mine, and show the exact relation to and proximity of the workings of said mine to said surface line. Said map or plan shall also show the exact date of each survey made, and indicate the boundary line of the most advanced face of the workings at each such date; and in case more than one seam of coal is opened or worked, a separate map or plan as aforesaid shall, if desired by the inspector, be made of the workings in each such seam. The said map or plan or a true copy thereof, with a record of all the surveys of said boundary lines and underground workings, shall be delivered by said owner, operator or superintendent to the state inspector of mines, for the district in which said mine is located, to be filed in his office; and the original or a true copy of the same shall be retained for reference and inspection at the office of said coal mine. The maps and plans so delivered to the inspector of mines as aforesaid, shall be the property of the state, and shall remain in the care and custody of said inspector during his term of office, and be transferred by him to his successor in office. Maps of mines filed with the inspector shall be open to the examination of the public, in the presence of the inspector, but in no case shall any copy of the

same be made without the consent of the owner, operator or his agent.

The maps or plans herein provided for shall be made during the month of July next succeeding the passage of this act, and thereafter in July of each and every year the owner, agent or operator of every coal mine shall cause surveys to be made of all alterations and extensions of the workings made during the year preceding, and shall have the record and results of said survey duly entered upon the map of the inspector and upon that kept at the mine. The said extensions shall be placed on the inspector's map, and the map shall be returned to the inspector within thirty days from the completion of the survey.

When any coal mine is worked out and is about to be abandoned, the owner, operator or superintendent shall have the maps or plans thereof extended to include all the excavations made, showing the most advanced workings of every part of the mine, and the relation of such boundaries to given boundaries on the surface.

SEC. (2) 647. *Inspector may make map at cost of owner.*—Whenever the owner, operator or superintendent of any coal mine shall neglect or refuse, or, from any cause not satisfactory to the mine inspector, fail, for the period of three months, to furnish, to the inspector, the map or plan of such coal mine, or of the extensions thereto, as provided for in this act, the inspector is hereby authorized to make, or cause to be made, an accurate map or plan of such coal mine, at the expense of the owner thereof, and the cost thereof may be recovered, by law, from said owner, operator or agent, in the same manner as other debts, by suit in the name of the inspector and for his use.

SEC. (3) 648. *Escapement shaft—Roadway—Owner or occupant to construct.*—For all coal mines in this state when more than six men are employed, whether worked by shaft, slope or drift, there shall be provided and maintained, in addition to the hoisting shaft or opening, a separate escapement shaft or opening to the surface, or an underground communication between every such mine and some other contiguous mine, such as shall be approved by the mine inspector as coming within the requirements of this act, and such as shall consti-

tute two distinct and available means of ingress and egress to all persons employed in such coal mines. Such escapement shaft or communication with a contiguous mine, as aforesaid, shall be constructed in connection with every vein or stratum of coal worked in such mine; and all passage-ways communicating with the escapement shafts or places of exit from main hauling ways to the escapement shaft shall be at least five feet wide and five feet high. Every escapement shaft shall be separated from the main shaft by such extent of natural strata as shall secure safety to the men employed in such mines; and before any escapement shaft shall be located, or the excavations for it be begun, the district inspector of mines shall be duly notified to appear and determine what shall be a suitable distance for the same; the distance from main shafts for such escapement shaft shall not be less than 300 feet, without the consent of the mine inspector, nor more than 300 feet without the consent of the operator. Such escapement shafts as shall be equipped after the passage of this act shall be supplied with stairways, partitioned off from the main air-way and having substantial hand-rails and platforms, and such stairways shall be at an angle not greater than forty-five degrees; provided, that in mines more than 100 feet in depth there shall be substituted for such stairways a suitable cage suspended between guide-rails and operated by such hoisting apparatus as shall, in the judgment of the inspector of mines, insure the safe and speedy removal of all persons within the mine in case of danger. No accumulation of ice shall be permitted in any escapement shaft, nor any obstruction to travel upon any stairway or ladders. The time which shall be allowed for completing such escapement shaft or making such communication with an adjacent mine, as is required by the terms of this act, shall be for mines already opened or in process of development when this act shall become a law, one year for sinking any shaft 200 feet or less in depth, and one additional year, or *pro rata* portion thereof, for every additional 200 feet or fraction thereof; but for mines which shall be opened after the passage of this act, the time allowed shall be two years for all shafts more than 200 feet in depth, and one year for all shafts 200 feet in depth, and one year for all shafts two hundred feet in depth or less; and the time shall be reckoned in all cases from the

date on which coal is first hoisted from the original shaft for sale or use; and it shall be the duty of the inspectors of mines to see that all escapement shafts are begun in time to secure their completion within the time herein specified. In all cases where the working face of one mine has, by the agreement of adjacent owners, been driven into the workings of another mine, the respective owners of such mine, while operating the same, shall keep open a roadway at least five feet wide and five feet high, thereby forming a communication, as contemplated in this act, and in no case shall the workings of any mine be driven closer than ten feet to the line of land of any adjacent owner, without the written consent of such owner. And in all cases where the shaft of one mine is used, or may hereafter be used as an air or escapement shaft for another mine, neither owner nor operator shall close or obstruct his shaft without first giving one year's notice in writing to the other operator or owner, of his intention to abandon his mine; but the operator continuing the working of his mine shall be at the expense of keeping abandoned workings in repair.

Sec. (4) 649. *Daily examination—Use of explosives—Furnace.*—The owner, agent or operator of every coal mine, whether operated by shaft, slope or drift, shall provide and maintain for every such mine a good and sufficient amount of ventilation for such men and animals as may be employed therein, the amount of air in circulation to be in no case less than one hundred cubic feet for each man, and six hundred cubic feet for each animal, per minute, measured at the foot of the downcast, and the same to be increased at the discretion of the inspector according to the character and extent of the workings, or to the amount of powder used in blasting, and said volume of air shall be forced and circulated to the face of every place throughout the mine, so that such mine shall be free from standing powder, smoke and impure gases of every kind. All doors set on main entries for the purpose of conducting the ventilation, shall be constructed and hung as to close of themselves when opened, and shall be made sufficiently tight to effectually obstruct the air currents. In all the larger mines a boy or trapper shall be kept in attendance upon such doors, to see that they are kept securely closed, and the air currents properly controlled. Whenever the inspector shall find men

working without sufficient air, or under any unsafe conditions, he shall first give the operator a reasonable notice to rectify the same, and upon his refusal or neglect so to do, may himself order them out until said portions of said mine shall be put in proper condition. All mines in which men are employed shall be examined every morning by a duly authorized agent of the proprietor, to determine whether there are any dangerous accumulations of gas, or lack of proper ventilation, or obstructions to roadways, or any other dangerous conditions, and no person shall be allowed to enter the mine until such examiner shall have reported all of the conditions safe for beginning work. Such examiner shall make daily record of the conditions of the mine in a book kept for that purpose, which shall be accessible at all times for examination by the men employed in and about the mine and by the inspector. The currents of air in mines shall be so split as to give a separate current to at least every one hundred (100) men at work, and the inspector shall have discretion to order a separate current for a smaller number of men if special conditions render it necessary. In case the galleries, roadways or entries of any mine are so dry as to become filled with dust, the operators of such mines shall be required to have such roadways regularly and thoroughly sprinkled, and it shall be the duty of the inspector to see that in all mines every practical precaution shall be taken against accidents from the careless handling of powder within the mine, and in no case shall more powder be stored in the mine, at any one time, than in the discretion of the inspector is necessary for each day's use. It shall be unlawful for coal miners, in any mine, to charge a blasting-hole with loose powder, or otherwise than with a properly constructed cartridge, and in dry and dusty mines to load cartridges except with a powder-can constructed for the purpose; nor shall any miner fill a cartridge from a keg or powder-can, or handle loose powder in any manner whatever with his lamp in line with the air current passing the powder; nor shall his lamp be less than three feet horizontally from the powder that he is handling. Every miner about to fire a shot shall, before firing, see that all other persons are out of danger from the probable effects of such shot, and shall take means to prevent any person approaching the place until such shot has exploded

and immediately before firing shall shout "fire." No person shall return to a missed shot within fifteen (15) minutes, unless the firing is done by electricity, and then only when the wires are disconnected from the battery; nor shall a second shot be fired in a working place where the roof is broken or faulty, until the smoke from the previous shot has cleared away and the roof been examined. It shall be unlawful for the owner, agent or operator of any mine to permit miners to work in said mines with tools prohibited by law. It shall be unlawful for any operator or agent of a coal mine to employ persons underground, whose duties may involve contact with inflammable gases or the handling of explosives, who have not had experience in such duties, unless all such employes are placed under the immediate charge and instruction of such a number of competent men as to secure the safety of other persons employed in the same mine. The ventilation required by this section may be produced by any suitable appliance, but in case a furnace shall be used for ventilation purposes, it shall be built in such a manner as to prevent the communication of fire to any part of the works, by lining the upcast with incombustible material for a sufficient distance up from said furnace: Provided, that it shall not be lawful to use a furnace for ventilating purposes or for any other purpose, that shall emit smoke into any compartment constructed in or adjoining any hoisting shaft or slope where the hoisting shaft or slope is the only means provided for the ingress or egress of persons employed in said coal mines. It shall be unlawful, where there is but one means of ingress and egress provided at a coal shaft or slope, to construct and use a ventilating furnace that shall emit smoke into a shaft as an upcast, where the shaft or slope used as a means of ingress and egress by persons employed in said coal mines is the only means provided for furnishing air to persons employed therein.

SEC. (5) 650. *Bore-holes.*—The owner, agent or operator shall provide that bore-holes shall be kept twenty feet in advance of the face of each and every working place, and if necessary, on both sides, when driving toward an abandoned mine or part of a mine suspected to contain inflammable gases, or to be inundated with water.

SEC. (6) 651. *Signals—Hoistways—Children under fourteen and females not to labor in mines.*—The owner, agent or operator of every coal mine operated by shaft shall provide safe means of hoisting and lowering persons in a cage covered with boiler iron, so as to keep safe so far as possible, persons descending into and ascending out of such shaft, and such cage shall be furnished with guides to conduct it on slides through such shaft, with a sufficient brake on every drum to prevent accident in case of the giving out or breaking of the machinery; and such cage shall be furnished with safety catches, intended and provided as far as possible, to prevent the consequences of cable breaking or the loosening or disconnecting of machinery. No person under the age of fourteen years, nor females of any age shall be permitted to enter any mine to work therein; and before any boy shall be permitted to work in any mine he shall be required to produce an affidavit from his parent or guardian sworn and subscribed to before a justice of the peace or notary public, that said boy is fourteen years of age. Such affidavits of all the boys employed in any mine shall be produced upon the demand of the inspector. The owner, agent, or operator of every coal mine operated by shaft and by steam power, shall place competent persons at the top and bottom of such shaft for the purpose of attending to the signals while men are being lowered into or hoisted out of the mine; they shall be at their post of duty at least thirty minutes before the hoisting of coal is commenced in the morning and remain at least thirty minutes after the hoisting of coal has ceased at night. It shall also be their duty to see that the men do not carry any tools, timber or material with them on the cage, and that only the proper number of men are allowed upon the cage at one time. A sufficient light shall be furnished at the top and bottom of the shaft to insure as far as possible the safety of persons getting on or off the cage. The following code of signals between the top man, bottom man and engineer are prescribed for use at all mines operated by shaft and by steam power.

From the bottom to the top.

One bell shall signify to hoist coal or empty cage, and also to stop either when in motion. Two bells shall signify to lower cage. Three bells shall signify that men are coming

up. When return signal is received from the engineer, men will get on the cage and ring one bell to start. Four bells shall signify to hoist slowly, implying danger.

From the top to the bottom.

One bell shall signify all ready, get on cage. Two bells shall signify send away empty cage. Provided, that the manager of any mine may add to this code of signals in his discretion for the purpose of promoting their efficiency, or the safety of the men; but any code which may be established shall be conspicuously posted at the top and bottom of the shaft and in the engine-room. Any person neglecting or refusing to perform the duties required to be performed by sections three, four, five, six, seven and eight of this act, shall be deemed guilty of a misdemeanor and punished by a fine in the discretion of the court trying the same, subject, however, to the limitations as provided by section ten of this act.

SEC. (7) 652. *Operating hoistway—Competent engineer.*—No owner, agent or operator of any coal mine operated by shaft or slope shall place in charge of any engine whereby men are lowered into or hoisted from the mine, any other than competent, experienced and sober engineers and firemen, and they shall not be less than eighteen years of age. No person shall ride upon a loaded cage or car used for hoisting purposes in any shaft or slope, and in no case shall more than twelve persons ride on any cage or car at one time, nor shall any coal be hoisted out of any coal mine while persons are descending into such mine. The number of persons permitted to ascend out of, or descend into, any coal mine at one time shall be determined by the inspector; and they shall not be lowered or hoisted more rapidly than six hundred feet per minute. Whenever a cage-load of persons shall come to the bottom to be hoisted out, who have finished their day's work or otherwise been prevented from working, an empty cage shall be given them to ascend, except in mines having slopes or provided with stairways in escapement shafts.

SEC. (8) 653. *Steam boilers—Inspection.*—All boilers used in generating steam in and about coal mines shall be kept in good order, and the agent, owner or operator as aforesaid shall have said boilers examined and inspected by a competent

boilermaker or other qualified person as often as once every six months, and oftener if the inspector shall deem it necessary; and the result of every such examination shall be certified in writing to the mine inspector.

The top of each and every shaft, and the entrance to each and every intermediate working vein, shall be securely fenced by gates properly protecting such shaft and the entrance thereto; and the entrance to every abandoned slope, air or other shaft, shall be securely fenced off, and every steam boiler shall be provided with a proper steam gauge, water gauge and safety valve.

All underground, self-acting or engine planes, with single tracks on which coal cars are drawn and persons travel, shall be provided with some proper means of signaling between stopping places and the ends of said planes, and sufficient places of refuge at the sides of such planes shall be provided at intervals of not more than ten yards, and all other signal planes or gangways twenty yards, and they shall not be less than six feet wide and six feet in depth, and shall be whitewashed or otherwise distinguished from the surrounding walls. The bottom of every shaft shall be supplied with a traveling way to enable men to pass from one side of the shaft to the other without passing under or over the cages. All sumps shall be securely planked over so as to prevent accidents to men.

SEC. (9) 654. *Accidents—Duty of district inspector.*—Whenever loss of life, or serious personal injury, shall occur by reason of any explosion, or of any accident whatsoever, in or about any coal mine, it shall be the duty of the person having charge of such coal mine to report the facts thereof, without delay, to the mine inspector of the district in which said coal mine is situated; and if any person is killed thereby, to notify the coroner of the county also, or, in his absence or inability to act, any justice of the peace of said county; and the said inspector shall, if he deem it necessary from the facts reported, immediately go to the scene of said accident, and make such suggestions and render such assistance as he may deem necessary for the safety of the men. And the inspector shall investigate and ascertain the cause of such explosion or accident, and make a report thereof, which he shall preserve

with the other records of his office; and to enable him to make such investigations he shall have the power to compel the attendance of witnesses, and administer oaths or affirmations to them, and the cost of such investigations shall be paid by the county in which such accident has occurred, in the same manner as costs of coroners' inquests are now paid. And the failure of the person in charge of the coal mine in which any such accident may have occurred, to give notice to the inspector or the coroner, as provided for in this section, shall subject such person to a fine of not less than twenty-five dollars ($25), nor more than ($100), to be recovered in the name of the People of the State of Illinois, before any justice of the peace of such county, and such fine, when collected, shall be paid into the county treasury for the use of the county in which any said accident may have occurred.

SEC. (10) 655. *Fines and penalties.*—In all cases in which punishment is provided by fine under this act for a breach of any of its provisions, the fine for a first offense shall not be less than fifty dollars ($50), and not more than two hundred dollars ($200), and for the second offense not less than $100 or more than $500, in the discretion of the court, except as is specially provided for in section nine of this act.

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SEC. (14) 655*a*. *Injuries—Remedies for widow and dependent persons.*—For any injury to person or property occasioned by any wilful violations of this act or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby; and in case of loss of life by reason of such wilful violation or wilful failure, as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any other person or persons, who were, prior to such loss of life, dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives, not to exceed the sum of five thousand dollars.

SEC. (15) 656. *Conduct of miners—Injury to machinery—Disobedience.*—Any miner, workman or other person who shall knowingly injure any water gauge, barometer, air-course or brattice, or shall obstruct, throw open any air-ways, or carry

any lighted lamps or matches into places that are worked by the light of safety lamps, or shall handle or disturb any part of the machinery of the hoisting engine, or open a door in the mine and not have the same closed again, whereby danger is produced either to the mine or those at work therein; or who shall enter into any part of the mine against caution; or who shall disobey any order given in pursuance of this act; or who shall do any wilful act, whereby the lives and health of persons working in the mine, or the security of the mine or mines, or the machinery thereof, is endangered, shall be deemed guilty of misdemeanor, and, upon conviction, shall be punished by fine and imprisonment, at the discretion of the court.

SEC. (16) 657. *Timber for props.*—The owner, agent or operator of every coal mine shall keep a supply of timber constantly on hand of sufficient length and dimensions to be used as props and cap-pieces, and shall deliver the same as required, with the miner's empty car, so that the workmen may at all times be able to properly secure said workings for their own safety.

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SEC. (19) 658. *Copper implements for coal blasts.*—That all miners and employes engaged in mining coal shall use copper needles, in preparing blasts in coal, and not less than five (5) inches of copper on the end of all iron bars used for tamping blasts of powder in coal, and the use of iron needles, and iron tamping bars, not tipped with five inches of copper, is hereby declared to be unlawful. Any failure on the part of a coal miner or an employe in any coal mine, to conform to the terms and requirements of this act, shall subject such miner or employe to a fine of not less than $5, nor more than $25, with cost of prosecution for each offense, to be recovered by civil suit, before any justice of the peace, said fines, when collected, to be paid into the treasury of the county where the offense was committed, to the credit of the fund provided for the payment of the county inspector of mines.

SEC. 659. The deceased was the agent of the defendant company, owner of a coal mine, and was engaged in superintending the mining of coal, and as such agent failed to put catches on the brake and thus comply with the statutory duty imposed upon an owner, agent or operator of a coal mine by

the sixth section of the act of the legislature of 1879 for the safety of persons employed in a coal mine, and in consequence of such failure was killed. It was held by the appellate court that his widow and heirs could not recover damages from the owner because of his death. The deceased was the defendant's agent, and it was as much his duty as that of the defendant to place catches on the brake, and in failing to do so they failed to comply with the provisions of the statute and are *in pari delicto*, and the maxim that no man shall take advantage of his own wrong applies.[1]

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[1] The Beaucoup Coal Company v. America J. Cooper, 12 App. 373.*

* NOTE.—This case of America J. Cooper was an action by the widow and heirs of James M. Cooper, deceased, against the defendant, Beaucoup Coal Company. The declaration sets out that the deceased was on the 22d of May, 1881, and prior thereto, in the employ of the defendant in the operation of its coal mine, which was operated through a shaft; that a cage was lowered into and hoisted out of said mine; was furnished with guides and worked upon slides in said shaft, and was lowered and hoisted by means of a cable attached to said cage and passed over a pulley at the top of the shaft and thence to a drum, to which the other end of the cable was fastened, and the drum was operated by a steam engine run by defendant's servants: that it was defendant's duty to provide safe machinery and to attach to said drum a guide and sufficient brake, and to furnish the cage with spring catches to prevent the consequences of the breaking of the cable or the disconnecting of the machinery, as provided by the act entitled "An act to provide for the health and safety of persons employed in coal mines," approved May 28, 1879; that the defendant, disregarding its duty, wilfully violated section 6 of said act, and negligently, carelessly and wilfully neglected and failed to have a guide and sufficient brake attached to said drum, and to furnish said cage with spring catches, as required by law; that it was Cooper's duty on the 22d of May, 1881, as a servant of defendant, to descend through the shaft into the mine in the said cage, and while he was so descending, using due care and diligence, the said cable broke, and by reason of the wilful and negligent failure of the defendant to provide said brake and catches, the said cage fell to the bottom of said mine, and Cooper was thereby killed. The damages were laid at $10,000.

The first plea set up that Cooper at the time of his death was and for six months before had been agent of the defendant, having the care and management of the said coal mines, and it became and was his duty as said agent to attach said catches and brake, and that he had before his death sufficient time, means and power to do so; and that notwithstanding all this he failed and neglected to discharge his duty in the premises, and by means of his said failure and negligence was killed. The testimony shows that Cooper was the pit boss; that he had charge of the mines and represented the defendant in mining coal; that he had charge of the mining of coal and the hoisting apparatus; and that it was his duty, imposed by the

It is a well settled principle of law that if the plaintiff can not make out his claim without showing an illegal act on his part, he can not maintain his action. A party can not be heard to allege his own illegal act and expect a recovery. The party who seeks redress must come into court with clean hands; and an action which requires for its support the will of an illegal act can not be maintained.[1]

If this suit had been brought by the widow and heirs of an operative in the mine upon whom no statutory duty devolved, and against whom no wilful omission of duty could be alleged, quite different questions would arise.

SEC. 660. An action to recover damages for the death of a miner, caused by neglect to observe the provisions of the statutes relating to miners, is properly brought by the widow of the deceased. The action is given to the widow and not to the personal representative. Chapter 70, Revised Statutes of 1874, entitled "Injuries," does not repeal the 14th section of the act relating to "miners." The former act is general while the latter is special, and must control as to all cases specially enumerated therein, and the first, being general, will embrace all other cases.

Under the practice act the court has ample power to allow amendments to be made as to the character in which the plaintiff sues, and this is no ground for a continuance unless the defendant shows by affidavit that he is surprised.

Where a declaration alleged that the defendant was hoisting coal out of the shaft in its mine at the time the deceased was ascending, and he was killed in consequence of that illegal act, and the proof showed that he had just got upon the cage to be raised when he was killed by the fall of coal, it was held there was no material variance, as the danger was as great as if the cage was in fact ascending at the time.

Where a count averred that the defendant used in its mine uncovered cages to hoist out and lower into the mine persons employed to work therein, and that deceased had gone upon an uncovered cage to be hoisted out of the mine, and while

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statute, to see that catches were put on the cages. He was furnished with the necessary means by defendant, and had ample time and opportunity to do so.

[1] Wheeler v. Russell, 17 Mass. 258.

upon it was struck by a lump of coal falling down the shaft and killed, by reason of there being no such cover on the cage, and the plaintiff showed that immediately after the accident he was found lying on his back off the cage, with his feet six inches from it, it was held by the court that there was not necessarily a variance, and that even if he was killed while in the act of getting off the cage this would constitute no variance.

Where an action is brought to recover for an injury resulting from the negligence of another, which was not wanton or wilful, it is an essential element to recovery that the person or plaintiff injured must have exercised ordinary care to avert the injury; but where the injury has been wilfully inflicted, an action may be maintained, though the plaintiff or party injured may not have been free from negligence.

Where a party is killed, on attempting to ascend from a coal mine, by the fall of a lump of coal, and it appears that the defendant wilfully used uncovered cages for the ascent and descent of persons working in the mine, in violation of the statute, which caused the death, a recovery may be had by his widow notwithstanding the deceased may not have been free from fault and negligence on his part.[1]

SEC. 661. In a suit brought under section 14 of the "Act providing for the health and safety of persons employed in coal mines," where the violation charged in the declaration was failure to furnish the drum with a safe brake, thereby

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[1] Litchfield Coal Co. v. Taylor, 81 Ill. 590.*

* NOTE.—Action by Mary A. Taylor, widow of James Taylor, deceased, against the Litchfield Coal Company, to recover damages for an injury received by the deceased, resulting in his death, alleged to have been caused by the wilful conduct of the defendant in using uncovered cages for the purpose of conveying miners into and out of the mine, and for hoisting coal from the mine at the same time the miners were being hoisted from the mine, in violation of the provision of chapter 93, entitled "Miners," Revised Statutes of 1874. A trial of the cause before a jury resulted in a verdict for the plaintiff for $1,500. In the commencement of the action the plaintiff sued as administratrix of the estate of James Taylor, deceased. Subsequently, on motion, the court allowed the summons and declaration to be amended so that the action might proceed in the name of the plaintiff as widow of the deceased. This amendment was assigned as error. The court was satisfied the widow was the proper person to bring the action. The 14th section of the act expressly authorizes her to bring the suit. The judgment of the court below was affirmed.

causing the death of the plaintiff's husband, an employe of the mine, evidence tending to show the character, purpose and effect of the brake and the manner in which it would have been applied had there been one, is admissible.

Where the evidence showed that the cage went down the shaft in consequence of some failure or diminution of the pressure of the steam on the face of the piston, and not in consequence of the breaking or want of strength, proper construction, or repair of the machinery, it was held by the court that the giving way of the machinery, whether from the breaking or imperfection of some of its parts, a failure of the motive, or rather of the static power, to hold it in equilibrium, or from any other cause, is a "giving out" of the machinery within the meaning of the statute.

Although the statute seems to contemplate the recovery of the damages sustained by the widows, lineal heirs, adopted children and others dependent upon the deceased, the court is of opinion that it gives but one action, and when a suit is brought by a person entitled to bring it, all damages recoverable for the death of deceased must be recovered in that action. It is held by the court, in such a suit brought by the wife of deceased, evidence that the latter left children surviving him is admissible.

Although the statute fails to make any express provision as to the distribution of the moneys recovered, yet, as it creates a right of action for the recovery of the damages sustained by the several parties, the implication is unavoidable that the damages so recovered are subject to distribution among the several beneficiaries according to their respective rights.

The statute authorizes the recovery only of damages resulting to the survivor from the death of the person killed. As such damages are not dependent upon, nor are they measured by, the wealth or poverty of the survivors, evidence as to the pecuniary circumstances of the plaintiff and her children at the time of her husband's death and up to the day of trial, is inadmissible.

As contributory negligence on the part of the engineer in the management of the engine was a ground of recovery

embraced neither within the statute nor the declaration, plaintiff could not take advantage of such matter.[1]

SEC. 662. In an action by a widow against a mining company to recover for the death of her husband through negligence, the plaintiff showed, by the engineer of defendant, that he had run the engine connected with the hoisting apparatus

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[1] Beard et al. v. Skeldon, 13 App. 54.*

* NOTE.—Action by Janet Skeldon, widow of George Skeldon, deceased, under the provisions of section 14 of the act providing for the health and safety of persons employed in coal mines. At the time of and prior to the death of George Skeldon, Beard, Hickox & Co., defendants, were the owners and operators of a certain coal mine in Grundy county, Illinois, operated by a shaft and provided with a steam engine and other machinery for hoisting coal. The hoisting apparatus consisted of a cage which was raised and lowered in the shaft by means of a wire rope suspended from a drum placed above the mouth of the shaft, said drum being connected with and run by the engine. Skeldon was an employe of the defendants at work in the mines, and on January 20, 1881, was directed by the defendant's foreman or pit boss to clean out the "sump" or open space at the bottom of the shaft under the cage seat. Before going into the "sump" Skeldon signaled the engineer to hoist the cage, and after it had been hoisted to a point midway in the shaft, he signaled him to stop it. Skeldon then went into the "sump" and proceeded to clean it out. In order to hold the cage in its position, suspended part way by the shaft, the engineer had allowed the steam to go through the throttle valve against the face of the piston, thus producing an equilibrium. He then, thinking, as he testified, that there was sufficient steam to hold the cage in its position, left the engine and went to the boiler room to regulate the valves which supplied water to the boilers. In his absence the force of the steam upon the face of the piston was in some way so diminished that the cage descended to the shaft and struck said Skeldon and so crushed and injured him that he soon afterward died. The second count of the declaration avers that the defendants were the owners and operators of said mine and employed the plaintiff to work therein; that it was the duty of the defendants to have provided a sufficient brake upon every drum to prevent accidents in case of the giving out or breaking of the machinery; that the defendants, contrary to the statute, wilfully omitted to provide such brake, and that by reason thereof while the defendant's machinery and drum were being used by them for the purpose of holding the cage suspended in said shaft, and while said Skeldon was occupied at the bottom of said shaft in cleaning out the "sump" at the special request of the defendants, the defendants' machinery gave out for want of a brake upon the drum, causing said cage to descend said shaft, thereby causing the death of said Skeldon. At the trial the jury found the defendants guilty and assessed the plaintiff's damages at $6,000, and the plaintiff, after remitting $2,000 from the verdict, had judgment for the residue. The decision of the appellate court in this case was affirmed by the supreme court, reported in 113 Ill. 584.

of the mine, for two months prior to the accident, and, over defendant's objection, he was allowed to testify to his want of experience and competency at the time of his employment and as to what proficiency he had attained as an engineer at that time, the injury having resulted from the alleged incompetency of the engineer; it is held by the supreme court that the evidence was proper, as tending to show, from his previous training and experience, or want of it, whether the engineer was competent and experienced, at the time of the injury.

In an instruction for the plaintiff, after correctly stating the duties of mining corporations under the statute, the court told the jury that if they believed, from the evidence, that the defendant had wilfully failed to comply with its duty, or wilfully violated the provisions of the statute, as alleged in the declaration, the defendant was liable, if the other necessary facts which were named concurred. Two counts of the declaration were faulty and did not state defendant's duty correctly, but no evidence was heard under such counts. It was held by the supreme court that while the instruction was not to be commended, there was no prejudical error in giving it, as it would be presumed the jury looked to the breach of duty stated in the instructions, and not to that alleged in the faulty counts.

In an action to recover damages occasioned by the death of a person from negligence, an instruction for the plaintiff after having left it to the jury to be found from the evidence whether the deceased had children, and the plaintiff was his widow, told them that if they further believed from the evidence "that if the plaintiff had been damaged by reason of the loss of the life" of her husband, "then the jury will find the defendant guilty," and in "establishing said damages the jury may take into consideration that the deceased left surviving said children, in addition to the plaintiff, his widow." In the next instruction the rule of law as to the measure of damages was correctly stated and limited the recovery to the pecuniary loss sustained by the plaintiff; it is held by the supreme court that taking the two instructions together there was no prejudicial error. The first was not intended as an instruction upon the measure of damages.

After the cause had been submitted to the jury it was

agreed that they might, when they should agree, seal the verdict and separate and meet the court on the following morning. On the reconvening of court, the jury were present and answered to their names, and the verdict was handed to the judge, who, on finding that they had failed to answer certain questions, directed the jury to retire and further consider of their verdict, and return answers to the questions submitted to them. Upon their return into court, their verdict and answers were read, and the court polled them, and each answered "these were their verdicts;" it was held by the supreme court that it was no error in sending the jury back to return a proper verdict.[1]

SEC. 663. In a suit by a minor to recover for personal injury while being lowered into the mine, from the alleged incompetency of the engineer, the court should give only the law as to the liability of the defendant in case of negligence in the employment of an incompetent engineer, without intimating any opinion in regard to the force of the evidence showing such negligence. What time or training is requisite to make one a competent engineer is no question of law, but one of fact only.

In a suit to recover for personal injury caused by the em-

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[1] Consolidated Coal Co. of St. Louis v. Amelia Maehl, 130 Ill. 551.*

*NOTE.—This was a suit brought by the plaintiff, Amelia E. Maehl, against the Consolidated Coal Co. to recover pecuniary damages for the loss occasioned by the death of her husband, John Maehl, at the mines of the defendant, through the negligence of the defendant, and its failure to perform its legal duty in respect of said mines and the operation thereof. The trial resulted in a verdict for the plaintiff of $5,000. This judgment was affirmed by the appellate court.

The engineer testified that he had run the engine connected with the hoisting apparatus of this mine for two months prior to the injury of Maehl, and, over defendant's objection, was permitted to testify to his want of experience and competency at the time of his employment, and to what proficiency he had attained as an engineer in that time. This, it is insisted, was error and tended to the prejudice of the defendant. The court thought that in so far as it tended to show his capacity at the time of the accident it was clearly competent. It was for the jury to say if they found that the injury resulted through the fault or negligence of the engineer, whether he was a competent, experienced and sober engineer, such as defendant was required to place in charge of its engine used in lowering into or hoisting persons from the mines. His previous training and experience, or want of it, would furnish one means by which a conclusion might be reached.

ployment of an incompetent servant, mental suffering of the plaintiff is not a distinct element of damages in addition to bodily suffering.[1]

SEC. 664. Where a coal company had opened three coal mines, the first some seventy feet below the surface, the second some sixty-five feet below the first, and the third one hundred and twenty feet below the second, and although the same had been in operation about two years, there was no second escapement constructed to the second and third mines, and, while employing more than fifteen laborers in the second mine a fire occurred in the main shaft, filling the latter mine with smoke, and the miners, in alarm and confusion consequent on the alarm, rushed to the shaft, and one fell down the shaft into the third mine and was killed, it was held by the court that the company was liable in an action to his widow for his death, even though the fire was purely accidental, for the neglect to furnish a second means of escape.

A party giving another a reasonable cause for alarm can

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[1] Christian Joch v. Henry Dankwardt, 85 Ill. 331.*

* NOTE.—This was a suit to recover damages for injuries sustained by the plaintiff, Christian Joch, a coal miner, in being lowered into the coal mine of the defendant, in whose employ he was mining coal. A recovery was had by the plaintiff and defendant appealed. The occasion of the injury was in being precipitated into the bottom of the mine, while being lowered into it in a cage containing the plaintiff and others, which was operated by means of a steam engine and machinery which one Schaffer had the charge of as engineer, and it was claimed that the accident occurred in consequence of his negligence and mismanagement as the engineer. The testimony was to the effect that Schaffer, before he became engineer, was a laborer and driver of mules in the mine; that defendant's sons taught him to run the engine; that he had only worked at the defendant's mine four or five, or, at most, six months. The trial court instructed the jury that proof of the employment of one who had always been a manual laborer, or mule driver, to run a steam engine, raises a presumption of negligence of the master without showing that he had actual notice of the servant's antecedents, if you believe from the evidence that such laborer had been employed and was in charge when plaintiff received the injuries complained of in this suit. The supreme court says of the instruction, "It was manifestly erroneous. What constituted negligence in the employment of an incompetent engineer was entirely a question of fact for the jury, and it was error for the court to instruct that the fact named in the instruction raised a presumption of negligence. What time or training is requisite to make one a competent engineer is no question of law, but one of fact solely." Judgment was reversed and the cause remanded.

not complain that the person so alarmed has not exercised cool presence of mind, and thereby found protection from responsibility for damages resulting from the alarm, when he is guilty of negligence or violation of law contributory to the injury.[1]

SEC. 665. *Negligence—Dangerous occupation.*—If a workman knowing there is danger in doing any certain kind or job of work, voluntarily places himself in a known place of

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[1] Wesley City Coal Company v. Ann Healer, 84 Ill. 126.*

* NOTE.—The defendant, the Wesley City Coal Company, in November 1874, was the owner of mines called the Hope Mines. These mines, before July, 1872, were in operation, and consisted of one main perpendicular shaft communicating with three several veins of coal, the first seventy feet below the surface, the second sixty-five to seventy feet lower than the first, and the third one hundred and twenty feet lower than the second. In November, 1874, the defendant was not working the first or upper vein, but was working both the second and third veins. An escapement valve had been sunk to the first vein, which, by the excavations on that plane, communicated with the main shaft. There was no escapement shaft from either the second or third vein and there was no communication from either of those veins connected with any contiguous mine or mines, and there never had been. The only mode of ingress or egress to and from the second and third veins was by way of the main shaft. The second vein was less than two hundred feet below the surface of the earth, and more than two years had elapsed since the statute came in force. In November, 1874, notwithstanding the want of the required second mode of ingress and egress, required by the statute, the defendant was working in the second vein more than fifteen men, in direct violation of the statute. Defendant was at the same time working a number of these men in the third vein. In this condition of affairs some combustible material, in connection with the "up-cast" (or flue, provided to conduct the smoke from the furnace operated for ventilation), took fire, and by reason of the burning, a quantity of smoke was produced and thrown into the main shaft above the second vein. The devices for ventilation were such that, by currents of air, this smoke was carried (besides to other places) down the main shaft, and through some of the passages and chambers of the second vein, causing great alarm among the miners and darkening the passages. The miners generally rushed to the main shaft, that being the only possible avenue of escape. The husband of the plaintiff at that time was a laborer in the second vein. The evidence tends to show that he, among others, rushed toward the main shaft in the midst of the general alarm, and that by reason of the darkness, or for some other cause incident to the fire, he fell down the main shaft to the bottom of the third vein, and thus lost his life.

This action was brought under the statute by the widow of the deceased. The statute was intended to provide against just such unavoidable accidents in mines by which many valuable lives have been lost.

danger, no damages can be recovered for injuries or death occasioned thereby.

In an action by an administrator of a deceased miner against the mining company, to recover for the causing of the death of the intestate through negligence, it is error to instruct the jury for the plaintiff, that it was the duty of the defendant to cause the mine to be examined every morning with a safety lamp by a competent person, to ascertain if firedamp was present, and to cause to be provided suitable means of signaling between the top and bottom of the mine, where such failure of duty in no way contributed to the accident which caused the death. Such an instruction has no proper application to the facts.

An instruction which is unnecessarily lengthy, involved, confusing, argumentative, and contains one-sided recitals of evidence, is objectionable and erroneous.[1]

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[1] Coal Run Coal Company v. Mary Jones, Adm'x, 127 Ill. 379.*

* NOTE.—Action brought by Mary Jones, as administratrix of the estate of Thomas Jones, to recover for loss occasioned by the death of Thomas D. Jones, caused by the negligence of the defendant, the Coal Run Coal Company.

The Coal Run Coal Company owned a tract of land near Streator, Illinois, upon which it sunk a shaft to the depth of fifty-three feet to a stratum of coal underlying same. This stratum of coal it worked out, and then abandoned the shaft and mine. The coal miners entered and withdrew from the mine through a slope extending from the surface to this stratum of coal. A year or two after abandoning its said shaft, defendant sunk or continued the same shaft a short distance further and struck another stratum of coal, but this proved unprofitable, and thereupon the company abandoned this new mine and the shaft or pit, and it remained abandoned for nearly a year. Defendant, becoming satisfied that there was still a lower stratum of coal. resolved to sink a shaft to such lower stratum for the purpose of opening up a coal mine therein. On the 19th of November, 1883, the work of opening the new mine in the lower stratum, a distance of about 185 feet from the surface, had progressed so far that the persons employed for that purpose had sunk the shaft down to a short distance below this stratum, and commencing at the bottom had timbered the shaft up to the upper stratum, about fifty-three feet from the surface. As the shaft was being sunk the workmen constructed a temporary partition in the center of the shaft for the purpose of creating a circulation of air. The air coming in through the old slope struck one side of this temporary partition fifty-three feet below the surface, passed down that side and up on the other, making a current of air around the lower end of the partition, the side down which the air passed being called the "down-cast" and the other side the "up-cast." There was but one par-

SEC. 666. *Mines and mining.*—Sec. 8 of Chap. 93 of the R. S., entitled "Miners," saying that "All underground, self-acting or inclined planes or gangways on which coal cars are drawn or persons travel, shall be provided with some proper means of signaling between the starting places and the end of such planes or gangways, and sufficient places of refuge at the sides of such planes or gangways shall be provided at intervals of not more than twenty feet apart," applies to all underground self-acting or engine planes, and also to all underground gangways on which coal cars are drawn and persons travel, whatever the motive power may be.

In an action on the case by a miner to recover for a personal

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tition put in for this temporary purpose, but in timbering up, two were constructed so as to divide the shaft into three compartments, one to be used for ventilation and two for lowering and hoisting the cages. In timbering up the shaft, it was divided into sections and a platform erected across the shaft for the men to stand upon while doing this work, and when the permanent timberings and partitions were completed as high above the platform as the men could conveniently work therefrom, the old platform was removed and a new platform erected higher up, and another section of the temporary partition remained. There was left a space of six inches at both ends of the platform, but the necessary removal of the temporary partition for the construction of the permanent one cut off the circulation below the platform, for the air coming down the "down-cast" would seek the first break in the partition to pass into the "up-cast." The shaft was making some gas, which originated in the lower stratum of coal; this was known to the workmen as they lighted it and worked thereby while sinking the shaft. The accident that resulted in Jones' death occurred on the 19th of November, 1883. He had been engaged in the work of timbering this shaft two days before the accident. When he commenced work the timbering had not been completed as high up as the upper stratum, but on the morning of the accident a new platform was erected across the shaft, similar to those that had been erected below, and the men were engaged in work on this platform at the time of the accident. The platform was erected with a space of about six inches at both ends of the shaft, left for the purpose of permitting the gas that might arise from below, to pass up and out of the shaft. While at work at this platform the old slope connected with the upper stratum was used as a "down-cast" and was ample for furnishing air. The shaft above was used for the "up-cast." The quantity of air was so great as to cause the miners' lighted lamps to flicker. As soon as the gas passed above the platform and came in contact with the air, being supplied through the "down-cast" or old slope, it became diluted and would not ignite, but below the platform it was dangerous. Jones had been at work some two or three hours on the morning of the accident, when he tapped his lamp on the toe of his boot and brought the flames of

injury while working in a coal mine, the court instructed the jury that if the defendant company knowingly, negligently, etc., failed to keep its doors across its gangways, and the gangways themselves, in reasonably safe condition and repair, and by reason thereof the plaintiff was injured as alleged, they should find for the plaintiff; it is held by the supreme court that the instruction was proper, as laying down the rule of liability for negligence at the common law, and did not attempt to lay down the rule under the statute.

When a duty is imposed upon and intrusted to an agent by a corporation, notice to such agent of matters falling within his line of duty is notice to the corporation.[1]

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the lamp in contact with the gas flowing upward from beneath the platform, the result whereof was an explosion. which caused his death.

The second instruction given for the plaintiff informed the jury, among other things, that it was the duty of the defendant "to cause said mine to be examined every morning with a safety lamp by a competent person, to ascertain if fire damp is present in said mine, and to cause suitable means of signaling between the top and bottom of said mine." These are requirements of Sec. 6, Chap. 93, of the R. S. of 1874, and of Sec. 4 as amended by the amendatory act of June 21, 1883, the amendment requiring as follows: "And in all mines where fire damp is generated, every working place where such fire damp is known to exist, shall be examined every morning with a safety lamp by a competent person, before any other persons are allowed to enter." The point is made that the whole subject of this legislation relates only to "open and worked mines," and not to the sinking and completion of a shaft which is only preparatory to the opening up and working of the mine or stratum of coal.

The first and second instructions given for plaintiff, each one of which occupies two and a half pages of counsel's brief, are objectionable for their length, as being involved, confusing, argumentative and containing a one-sided recital of evidence. This kind of instructions has been frequently condemned by the Supreme Court. Judgment reversed.

[1] Sangamon Coal Mining Company v. Wiggerhaus, 122 Ill. 279.*

* NOTE.—Action brought by the plaintiff to recover for personal injuries received by him while in the employ of the defendant company. Trial resulted in a verdict and judgment for the plaintiff, which was affirmed by the appellate court. The first count avers that the defendant was operating its mine and had underground planes and gangways in said mine, with doors in and across the same at intervals, on which coal cars were drawn and persons traveled, and that it was the duty of the defendant to provide at intervals of not more than twenty feet apart, sufficient places of refuge at the sides of such underground planes and gangways, and that the defendant wilfully, wrongfully and negligently disregarded its duty and failed to provide the same; that the plaintiff was engaged in loading cars

SEC. 667. *Negligence.*—Where a mining company failed to comply with the requirements of the act of 1872 to provide "for the health and safety of persons employed in coal mines," which required "the top of each shaft" to be "securely fenced by vertical or flat gates, properly covering and protecting the area of the shaft," in consequence of which an employe, while using due care, fell into a shaft and was killed, it was held by the court that the company was liable in an action on the case to his personal representatives for the death.

The fact that the accident occurred a few days after the statute went into effect and before the company had time to comply with its provisions, presents no defense to the action, as, if the company was not prepared to comply with the law, it should have suspended operations until it was able to do so, and not having done so, its failure must be regarded as wilful.[1]

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in said mine, and in placing empty cars in position to be loaded; and that while he, with all due care and diligence in the discharge of his duty, was passing on said underground gangway of defendant in said mine leading to the shaft thereof, certain loaded cars were being drawn on said underground gangway toward the shaft in front of him, when they broke loose and became detached from the power by which they were being moved at a point where they were going up an incline in said gangway, and ran rapidly down the same, and by reason of the failure of the defendant to provide such sufficient places of refuge, plaintiff was unable to escape on either side of the track, and he was, in consequence, struck by said cars and injured.

The second count alleges substantially the same.

The third count alleges that it was the duty of the defendant to provide and keep sufficient space on the sides of its underground planes or gangways from obstruction so that persons on the same could step aside and avoid injury, etc., and that by reason of failure, etc., of defendant in that respect, he was injured.

A gangway is defined as a passage-way or avenue into or out of any inclosed place.

There was evidence tending to sustain the plaintiff's case, and the judgment of the appellate court was affirmed.

[1] Bartlett Coal & Mining Co. v. Drury D. Roach et al., 68 Ill. 174.*

*NOTE.—Action by Drury D. Roach, father, Delpha Roach, the mother, and Cuzzy A. Roach, the sister of the deceased, against the Bartlett Coal and Mining Company, to recover damages for the death of Andrew J. Roach, caused by neglect of duty on the part of the defendant. Plaintiffs recovered judgment for $800 damages in the court below, and defendant appealed.

The death of Andrew J. Roach was alleged to have been caused by the

SEC. 668. In October, 1869, an employe in a coal mine, while descending a shaft in a cage, was precipitated to the bottom, a distance of thirty-five or forty feet, by reason of the breaking of the rope by which the cage was being let down, and was seriously injured. In the spring prior to the injury the rope was old and in a bad condition and was then spliced; and was again spliced in August and September of the same year. The employer was then informed it was unsafe The party injured had been employed at the mine only about twenty days when the accident occurred. One witness stated he told him he would be injured if he worked in the mine. The defect in the rope could not be detected by ordinary observation. It is held by the supreme court that the use of the rope in its unsafe condition was gross negligence on the part of the employer, and he should respond in damages to his employe for the injury resulting therefrom; that it was not incumbent on the latter, under the circumstances, to notify the former of the defect, which he had but slight opportunity of knowing, and notice of which had already come to the employer.[1]

wilful failure of the company to comply with the provisions of the 8th section of the act of 1872, in regard to mines, which requires that the top of each shaft shall be securely fenced by vertical or flat gates, properly covered and protecting the area of the shaft.

There can be but little doubt, in view of the evidence, that the accident would not have occurred if the top of the shaft had previously been secured as required by the statute, and as has since been done. It was suggested by the defense that the clause of the statute under which the action was brought was properly designed to protect third persons and stock from injury in open mines. The court declined to adopt this construction. The title itself expresses the beneficent purpose of the legislature to provide " for the health and safety of persons employed in coal mines." The injury was not occasioned by the negligence of a fellow-servant. It was caused by the failure of the company to comply with the provisions of the law. Judgment was affirmed by the supreme court.

[1] Perry v. Ricketts, 55 Ill. 234.*

*NOTE.—The defendant owned and operated a coal mine. For egress and ingress a rope was fastened to the cage and thence run over pulleys and attached to an engine. The plaintiff was employed as a miner, and in descending into the shaft, the rope broke and precipitated him thirty-five or forty feet, by means whereof he was seriously injured. This suit was brought to recover for such injury, and a verdict obtained for $587.33, and judgment rendered thereon.

The rope was evidently defective, the injuries sufficiently serious to jus-

SEC. 669. If the only operating cause of the injury received by the plaintiff, in an action to recover for injuries received by him while being hoisted up the shaft of a mine in a cage, was his carrying a drill upon the cage, in violation of law, he can not recover.

If, however, the mine owner has wilfully and negligently failed in his duty, as charged in the declaration (such failure being in violation of the statute) and if the injury was caused chiefly by such failure, the owner would be liable even though the party may have been guilty of contributory negligence.[1]

SEC. 669*a*. The requirements of the statute as to the duty of

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tify the verdict rendered, and hence the case is narrowed to the discussion of a knowledge of the defect by the parties. The judgment was affirmed.

[1] Illinois Fuel Company v. Thomas Parsons, 38 App. 182.*

* NOTE.—Action by Thomas Parsons to recover for personal injury in the mine of the defendant, in which he recovered a judgment of $2,000. The plaintiff in his testimony says he got on the cage with an iron drill in his hand and started up the shaft. When he had gone up the shaft some twenty or thirty feet, the cage gave a sudden jerk, throwing him to one side of the cage and injuring his right hand in such a way as to cause him to lose two fingers. He says: "I had a drill in my hand. One end of drill was on bottom of cage; drill was about six feet long; the cage covered with some kind of iron; I was standing about the center of the cage with one end of drill resting on cage; when it jerked was thrown across the bar; did not fall down; laid across the drill; sudden jerk of cage threw me down; it did not stop at all; think it started on faster; could not tell rate of speed cage was going; it was going too fast; cage was hoisted some twenty or thirty feet; can not tell how fast it was going previous to the accident; jerk came all of a sudden; if I had known it, could have guarded against it: gave a sudden jerk and I fell, and if I had fallen off the cage, would have gone to the bottom of the shaft. My hand came in contact with those bars that come along the side of the cage, and the drill coming in contact with it caused the injury. In case my hand had gone inside of those bars, the consequence would have been to be thrown off the cage." The court said in part: "We hold as we did in Niantic Coal and Mining Company v. Leonard, 25 Ill. App. 95, where the same principle was involved, that if the only operating cause of plaintiff's injury was his carrying his drill upon the cage, in violation of law, he can not recover. On the other hand, we think the law is, that if the defendant has wilfully and negligently failed in its duty, as charged in either of the amended counts, and it appears that the injury was caused principally and substantially by such failure, the defendant would be liable, although the plaintiff may have been negligent in carrying his drill on the cage, and such negligence may have in some degree contributed to the injury, as was held in the case of Catlett v. Young, 143 Ill. 74."

mine owners, in affording protection to operatives, are positive, and can not be excused or lessened by counter-charges of negligence against such operatives. When mine owners do not attempt substantially and in good faith to comply with these statutory requirements, and injuries occur by reason of such wilful failure, they must be held liable, notwithstanding the person injured may have been guilty of negligence. The legislature has power under the constitution to establish reasonable police regulations for the operation of mines and collieries, and the "Act providing for the health and safety of persons employed in coal mines" (R. S. 1874), which requires the owner or agent of every coal mine or colliery employing ten men or more, to make, or cause to be made, an accurate map or plan of the workings of such coal mine or colliery, etc., is not unconstitutional.

The question whether certain requirements are a part of a system of police regulation adapted to aid in the protection of life and health, is properly one of legislative determination, and the court should not lightly interfere with such determination, unless the legislature has manifestly transcended its province.

Under Sec. 2 of the "Act providing for the health and safety of persons employed in coal mines" (R. S. 1874), where the county surveyor, who was *ex officio* inspector of mines in his county, through his deputy prepared a map of the workings of a coal mine, on the neglect of the agent or owner to do so, the former may maintain an action to recover the cost of the same in his own name. It is not necessary to sue in the name of the deputy doing the work.[1]

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[1] Daniel v. Hilgard, 77 Ill. 640.*

* NOTE.—This was a suit brought by Gustavus Hilgard v. Isaac Daniels, before a justice of the peace of St. Clair county, to recover the cost of making a map or plan of a coal mine, operated by the defendant as superintendent. The plaintiff recovered before the justice $92 and costs, and the defendent appealed the case to the circuit court, where a trial was had before the court without a jury, resulting in a judgment in favor of the plaintiff for $42 and costs.

The first section of the act requires that the owner or agent of every coal mine or colliery in this state, employing ten men or more, shall make or cause to be made, an accurate map or plan of the workings of such coal

SEC. 670. *Mines.*—Under Sec. 9 of Chap. 93, R. S. of 1874, relating to mines, as amended by the act of May 11, 1877, the person whose duty it is made to report any accident in any mine or colliery causing loss of life, or serious personal injury, to the mine inspector, etc., and upon whom a fine is imposed for neglect of such duty, is the one who has immediate personal charge of the mine or colliery. The owner and operator of the mine or his agent is not within the penalty unless he has the personal charge of the mine.[1]

SEC. 671. *Mines and miners.*—Under the statute providing "for the safety and health of persons employed in coal mines" the company will be liable for a personal injury to a person in its employ, while descending into the mine, resulting from the employment of an incompetent engineer to take charge of the engine used in lowering persons into and hoisting them out of the mine, and in improperly loading the descending car with a heavy piece of timber.

Where the act of a coal mining company producing a personal injury amounts to a personal violation of the law by the company, the doctrine relating to a recovery by the plaintiff for the negligence of fellow-servants will have so little appli-

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mine or colliery, etc., and deposit a copy thereof with the inspector of mines, and also with the recorder of the county.

The second section provides that, upon neglect or refusal to furnish the inspector of mines and recorder with such map or plan, the inspector of mines is authorized to cause the map or plan to be made at the expense of the owner or agent, and that the cost thereof may be recovered from the owner or agent, by suit, in the name of the inspector, for his use. Judgment affirmed.

[1] Adam Scholl v. The People of the State of Illinois, 93 Ill. 129.*

*NOTE.—This was a prosecution under Sec. 9, Chap. 93, R. S. of 1874, as amended by the act of May 11, 1877. The question presented is whether the defendant here was the person having charge of the coal mine within the meaning of this section of the statute. The suit was for the recovery of a fine under this section. The evidence upon the point was in part as follows: James Scholl sworn, says: "Am a son of defendant. Defendant owns the coal bank and controls it. I am the general manager of the business; receive a salary. Joseph Scholl runs the bank; employs the men, etc. My father owns and operates the mine. Defendant had not been near the bank for six months prior to the explosion. He had been off on a trip to New Orleans, and I heard nothing about the explosion until several days after it happened."

cation to the real issue made that a mistake in laying down the doctrine on that subject will be an immaterial error.[1]

SEC. 672. In an action by an administrator against a coal mining company, to recover damages for causing the death of the plaintiff's intestate, the only omission of duty charged by the declaration being a failure to furnish props and prop the clod, dirt, slate and other materials, so that they would not fall, it is held by the appellate court that the declaration does not show a violation of Sec. 16, Chap. 93, R. S., under which the owner is only required to furnish and send down such props; that the negligence charged does not constitute a cause of action at common law; that an instruction given for plaintiff which directed the attention of the jury to other and different elements of liability than those alleged in the declaration, was erroneous; and that the motion in arrest of judgment should have been granted. An instruction which directs attention to elements of liability not specified in the declaration is fatally defective.[2]

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[1] Niantic Coal and Mining Co. v. Lawrence Leonard, 126 Ill. 216.*

[2] Consolidated Coal Co. of St. Louis v. Andrew Young, Adm'r, 24 App. 255.†

* NOTE.—This suit was brought by Lawrence Leonard against the defendant Coal and Mining Co. to recover for personal injuries caused by the negligent conduct of the defendant. On the trial the jury found the issue for the plaintiff, and assessed his damages under the evidence submitted.

The evidence shows that the defendant employed an incompetent person to take charge of the engine used for lowering into and hoisting persons out of the mine; that defendant employed such a person and retained him in its service after his incompetency was known; and that the pit boss improperly directed a piece of timber to be placed in the cage on which the plaintiff was about to descend into the mine. Conceding these were controverted questions of fact, the jury must have found them in favor of the plaintiff, and the affirmance of that finding by the appellate court is conclusive upon the supreme court, so that they are not open to further consideration. Assuming these facts to be well founded, they sustained the judgment rendered in favor of the plaintiff, and judgment is affirmed.

† NOTE.—This was an action on the case brought by Andrew Young, administrator of one Larcher, deceased, against the coal company, in which it is averred that the defendant was operating a coal mine, and by its servants mining and hoisting coal therefrom; that while deceased was loading coal in boxes in said mine, without any fault and negligence on his part, a great quantity of coal, dirt, slate and other material, fell on him from the roof of the mine and killed him; that it was the duty of defendant to furnish props and prop said clod, dirt, slate and other material, so

SEC. 673. Where gates are placed at the top of coal shafts, as provided by statute, it is the duty of the mine owner to use reasonable care to prevent the gates or bars becoming or remaining open. If the circumstances in this case tend to show negligence in not keeping the gate closed, there were not any facts developed from which wilful negligence could be imputed, and it was therefore error to submit to the jury the question of wilful negligence.[1]

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that the same would not fall; that the defendant, not regarding its duty, as aforesaid, carelessly and negligently, with a full knowledge of the dangerous condition of the said clod, dirt, etc., and knowing the same was liable to fall and inflict great injury upon said Larcher, or to kill him, neglected and failed to put under said clod, etc., proper supports or props, and by reason of said failure, after notice of the dangerous condition thereof, the said clod, etc., so fell, as aforesaid, and crushed and killed Larcher, as aforesaid, without fault and negligence on his part. The declaration averred that the deceased left a widow and minor children. There was a trial by jury. Judgment rendered for plaintiff for $3,000. Defendant appeals. The defendant treated the case as an attempt to recover for the omission of a statutory duty imposed by the 16th section of the "Act to protect miners," Chap 93, R. S., and insists that the declaration does not show any violation thereof, that section requiring only the owner, agent or operator of coal mines to keep a sufficient supply of timber to be used as props when required; when, as it is here averred, it was not only the duty of defendant to furnish the props, but also to put them in and prop the roof of the mine so as to make it safe for the workmen. It was also urged that as a proceeding under the statute, the action was improperly brought by the administrator instead of by the widow. Judgment was reversed and cause remanded.

[1] Coal Run Coal Co. v. James Coughlin, 19 App. 412.*

* NOTE.—Action by James Coughlin, plaintiff, based on Sec. 8 of the statute of 1872, in regard to mines, which provides that the "top of each shaft shall * * * be securely fenced by vertical or flat gates, properly covering and protecting the area of the shaft."

The plaintiff fell from the surface entrance of the defendant's coal shaft to the bottom of the mine, and received injuries, compensation for which is sought in this action, and recovered $2,000.

It appears that the top of the shaft from which the plaintiff fell was provided with proper fence and gates, in accordance with the law, unless there was a want of a lock or fastening for the gate, if one was required, or unless the gate was negligently allowed to remain open by the defendant. It would be a question of fact for the jury whether the gate without a lock would properly protect the area of the shaft, as well as whether the gate was negligently allowed to remain open. This action is based on the alleged failure of the defendant to keep the gate in question closed, by reason of which the plaintiff fell down the shaft and received the injury complained

SEC. 674. Where a party voluntarily goes into a known danger while pursuing his duties, not required or forced so to do by the master, and is injured, he can not recover.

Where the plaintiff, an employe in defendant's coal mine, was injured by a rock falling upon him from the roof of one of the passages, and it appeared that the dangerous condition of the roof was as well or better known to the plaintiff than to any other person, and that he did not notify the defendant or his foreman of the danger, it is held by the appellate court that he could not recover.[1]

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of. Gates like these are made for use, and are only required to be closed when not necessary to be open in and about the working of the mine in like manner as bars and gates in fences inclosing railroad tracks. The law requires railroads to be fenced in like manner as the act in question requires the construction of these gates at the top of a coal shaft. Railroad companies are not held liable where the gates and bars are left open and remain so without their fault and damage occurs on account of it. While the circumstances in this case, as shown by the evidence, tended to show negligence, there were no facts developed from which wilful negligence could be imputed. It was proper to submit the case to the jury on the question of the want of ordinary care on the part of the defendant in not keeping the gate closed, and the exercise of it by defendant to prevent injury, but it was improper to submit the question of wilful violation of law in not keeping the entrance of the shaft fenced and the gate closed, as was done in plaintiff's second, third and fourth instructions. The cause was reversed and remanded.

[1] Richard Evans v. George Chessmond, 38 App. 615.*

* NOTE.—Suit by the plaintiff, Chessmond, to recover damages resulting from an injury received by him while engaged as a miner in the coal mine of the latter. The gravamen of the charge as contained in the declaration is that the defendant was the owner and operator of a coal mine in which the plaintiff was employed to mine coal, and that it was his duty to keep the entry-ways leading from the shaft to different portions of the mines and cells securely propped and in good repair and condition, so that the stones and coal upon said roof would be secure; that it was required by law that defendant should examine such mine and keep such entry-ways and roofs thereof in good and sufficient repair and safe for travel. It was charged that the defendant failed in the above particulars, and by reason thereof the plaintiff, while in the exercise of care and caution, and while he was engaged as a miner in passing on and along one of said entry-ways adjacent to the room in which he worked, was struck and injured by falling rock and coal from the roof of said entry-way. There was a trial and verdict for the plaintiff of $3,000. From this judgment an appeal was taken.

The facts of the case appear in substance as follows: "There never were any props or supports to the roof maintained in the mine of the defendant,

SEC. 675. *Negligence in mining law.*—The law makes it the duty of every operator and owner of a coal mine to securely fasten the top of the shaft by gates properly protecting the shaft and the entry thereto, and if he fails wilfully to so fence the same and by reason of such failure a person employed about the mine is killed, the owner or operator will be liable to the widow of the person so killed for damages not exceeding $5,000, even though the person so killed may be chargeable with contributory negligence.

But if the statute has been complied with by the operator or owner of the mine, or the injury is not occasioned by the wilful violation or wilful failure denounced by the statute, but by some other alleged negligence of the mine owner, and the person killed or injured has failed to exercise ordinary care for his safety, there will be no right of action.

The statute requires that the top of the shaft in a coal mine shall be securely fenced by gates properly covering and protecting the shaft and the entrance thereto; providing a flat car so that it can be placed over the shaft when not otherwise used, making its safety as to being covered depend upon the exercise of due care in operating such car on a movable block acting upon a pivot, is not a compliance with the statute.

The very object to be attained by the statute requiring the shaft in a coal mine on the entrance thereof to be fenced, is to prevent injuries to persons employed in a coal mine, so that negligence on their part in the manner of doing their work shall not prove fatal to a recovery for an injury suffered by them.

In an action against the owner and operator of a coal mine to recover damages for the death of the plaintiff's intestate,

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and the roof was of a material called soapstone, and was, as a rule, an ordinarily safe roof, although not as good as roofs of some other material. But it appears that the plaintiff accepted employment under the defendant and continued therein, fully knowing the condition of the mine so far as props and supports were concerned, and without exacting any promise from the defendant that any would be placed in the mine. The immediate cause of the accident was the falling of a rock or boulder that hung in the roof of an entry-way near room 22, where plaintiff was at work running coal, and under which he was passing at the time it fell, in the discharge of his duty. The accident happened and the rock fell upon him about twenty feet from the mouth of the room where he had been at work.

caused by failure to properly fence a shaft and the entrance thereto, it is not error to instruct the jury that by a wilful violation of the law is meant the violation of its provisions, knowingly and wilfully committed.

Where a miner, after quitting his employment and being paid off, again went to work at the mine, and was killed by falling into a shaft not properly fenced by gates, it was held in an action by the widow of the deceased that it was not error to instruct the jury that if he so went to work with knowledge of and without objection on the part of the superintendent of the mine, who was in charge of the work, then the relation of employer and employe existed as between the owners of the mine and the deceased; nor was it error to refuse to instruct the jury that if he went to work without the knowledge of the defendants then the defendants were not liable. The knowledge and implied consent of the superintendent in charge of the work was the knowledge and consent of the defendants.[1]

SEC. 676. It is the duty of owners and operators of mines to provide safe means, etc., for carrying persons in and out of the mines. Sec. 14 of Chap. 93, entitled "Miners," declares the liability when the owner or operator of a mine "wilfully" fails to provide such safe means or machinery. A wilful violation of the statute is a violation of its provisions knowingly and deliberately. To constitute wilful negligence, the act done or omitted must have been intended. Negligence so gross in character as to amount to recklessness and to indicate a willingness to subject others to a known and avoidable risk, will support a charge of wilful or intentional wrong.

Failure to use ordinary care does not necessarily include the elements of wilfulness. A charge of wilfulness is not maintained by proof of mere negligence.

The test demanded by law as to the machinery is that it shall be safe, but the test of the liability of the mine owner is that he wilfully failed to make or keep it safe.

The law does not require mine owners to use any particular make of machinery, nor does it require them to use the very

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[1] Hiram B. Catlett et al. v. Laura Young, 143 Ill. 74.*

* NOTE.—The judgment of the appellate court in this case was affirmed.

best and most modern kinds; it only requires that the machinery shall be reasonably safe and suitable for the purposes for which it is used.

When recovery is sought for injuries resulting from mere inadvertence, or negligence, pure and simple, the defendant may often defeat liability upon the ground that the plaintiff knew of the dangers to which he might be exposed, and voluntarily chose to take the chances of encountering them; or upon the other ground that the plaintiff was injured by the negligence of a fellow-servant; but neither of these defenses is available when the injury is the result of the wilful act, or lawful failure of the defendant to act.

Evidence.—The proper purpose of a hypothetical question is to obtain the opinion of one entitled by superior learning and experience to speak, and express an opinion upon a state of facts which, for the purpose of his consideration, is to be received by him as true.

If a man in employing an engineer had knowledge at the time of his employment, or at any time before an injury occurred, that he was incompetent or inexperienced, and has wilfully employed or kept him in his employment after obtaining such knowledge, the company will be liable.[1]

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[1] The Girard Coal Company v. Charles Wiggins, 52 App. 69; Same v. John C. Cloyd, *Id.;* Same v. James Sinnott, *Id.;* Same v. James McKnight, 52 App. 69.*

* NOTE.—The Girard Coal Company, defendant in all the foregoing cases, was operating a coal mine at Chatham, Illinois, by means of a shaft in which it lowered its employes in iron cages, which were hoisted and lowered by a steam engine and other appliances provided for it for the purpose. On the 16th day of January, 1892, one of its cages, in which the plaintiffs in the cases named, all being employes of the defendant company, were being lowered into the mine, fell with great force and violence to the bottom of the shaft. All of the plaintiffs were injured by the fall, and each brought an action on the case to recover damages by them thus respectively sustained. The cases were tried before the court and jury, the result in each instance being a judgment against the company. From this judgment the defendants prosecuted an appeal. The facts in each case as to the manner and cause of the fall of the cage are the same, and counsel, by agreement, presented all the cases in one brief. The ground of recovery in each case is, that the defendant company wilfully violated Sec. 6 of Chap. 93 of R. S., as amended by the act of the general assembly in force July 1, 1887, by providing for the use of the mine in hoisting and lowering the cages an unsafe and unsuitable steam engine and defective, worn-out

SEC. 677. Where the master provides or prepares the place where his servant is to work, the law does not make him a guarantor of its safety. It requires of him only exercise of reasonable or ordinary care to have and keep it reasonably fit for the use to which it is put.

If he exercises this care in selecting or ordering the material required and in employing competent persons to construct or prepare the place, and there is no obvious defect of plan, material or work, he will not be liable for an injury to the servant resulting from any that is latent.

Sec. 16, Chap. 93, R. S., implies that where no timberman is employed, it is the duty of miners, and a part of their employment, to carefully observe the roof under which they are working, from day to day, and to set props wherever they appear to be needed.

Where a timberman is employed, miners are not thereby relieved of the duty of observing the conditions and promptly reporting to the mine manager or timberman any signs of danger they may discover which require his services.

While after an accident has occurred it may be easy to see what would have prevented it, that, of itself, does not prove or tend to prove that reasonable or ordinary care would have anticipated and provided against it.

Mine owners in this state are under no statutory obligation to absolutely keep the roof of a mine so propped that it will not fall.

Where a personal injury to a servant is the result of the negligence of fellow-servants, the master is not liable unless

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and insufficient appliances used in connection therewith; and that it violated section 7 of the same chapter of the statute by placing such steam engine and appliances in charge of an incompetent, inexperienced and intemperate engineer; and that the fall of the cage and the consequent injury to the plaintiffs was the result of such wilful violations and omissions of statutory duty. It appears from the testimony that the engine and other parts of the machinery brought into requisition in hoisting and lowering the cage were so defective as to be unsafe, and that the engineer in charge was incompetent and inexperienced; and further, that the defendant company, through its chief officials, was sufficiently advised of the unsafe condition of the machinery, and of the fact that the engineer was not competent and had not had sufficient experience as an engineer to justify his retention in that position.

some preceding personal negligence on his part also led directly to it as a cause.

The employment of a timberman in a mine is not an exception to the rule that servants in a given employment assume all risk of injury arising from the negligence of fellow-servants.

An employer is not bound to give his servants notice of the ordinary danger pertaining to the particular service for the reason that all persons engaged in it are presumed to know them.

In the case presented, this court holds that in failing to discover before the accident in question the dangerous condition from which it resulted, defendant did not fall short of the measure of its duty to the plaintiff.[1]

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[1] Consolidated Coal Company of St. Louis v. Scheller, 42 App. 619.*

* NOTE.—October 3, 1888, the plaintiff, then about twenty years of age, was employed to work in defendant's coal mine as a loader, to push the empty boxes from the entry to the face, load them there and push them back to the entry to be hauled to the pit bottom. He had worked there two years in the mines as a loader and laborer, but not any during the two next preceding. In the morning of the day mentioned the pit boss directed him to go into the mines; the timekeeper told him the driver would show him the room, and the driver showed him to No. 14, where he had never before been. He had worked a little more than an hour, having loaded two boxes, and while pushing in the third, about forty feet from the face, a mass of slate, weighing 600 to 800 pounds, becoming detached from the roof, fell upon him. For the injury thus received he brought this action and recovered judgment on a verdict, which the court refused to set aside, for $12,000. It appears that the width of the room at that place was about thirty-six feet and its height from seven to eight. The width of the track was two feet or a trifle over, and of the boxes, three and one-half to four. On each side of the track was a row of props supporting the roof and extending to a point twelve or fourteen feet from the face. These rooms were variously stated to have been from six to nine feet apart, the more reliable evidence placing them at about seven, leaving room to get around the boxes without obstruction from the props. These were placed in each row at the usual distance apart of five feet by Charles Opp, a timberman, especially employed by defendant for that work in the mine. The mass that fell upon plaintiff was what is called a slip, of which a clear idea from the testimony is given, by the plaintiff's counsel, as a formation of slate around a pot, bulge or tit projecting downward from the roof. At the bulge the slate runs to a feather edge, which first becomes loosened from the rock above, and this causes the slate to gradually drop down, commencing at the bulge, until finally the loosened feather end becomes so heavy that the slate breaks off and falls to the floor. The piece that fell formed a smooth skin over a tit of bulging

SEC. 678. A careful and prudent miner will not willingly and knowingly incur avoidable danger. An injury resulting from such an unwarranted and reckless course can not be made the ground of recovery.

Where the verdict of a jury is palpably against the evidence and so manifestly wrong, the duty of the court to interfere is imperative and it will be set aside.[1]

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rock. The piece was about four by five feet on the surface, and holding between the props on the right side of the track approaching the face. Its fall disturbed neither of them. The probability seems that it became detached, first at the bulge end, which was farthest, swung down and fell on that end leaning toward the track. Plaintiff was found on the right rail, caught from his feet to his arms. No question is made of the competency of the mine manager or pit boss or his assistant, nor of their faithfulness, except in this instance. They were practical miners of large experience. They went through the rooms and entries daily observing and doing, for aught that appears, just what those in such positions ordinarily do. The timberman understood his business, and it would hardly do for the plaintiff, in face of the ruling of Hull v. Johnson and Troughear v. Power Vein Coal Company, to attribute injury to negligence on his part. He followed the miners and propped the roof to their satisfaction. To all appearance, as presented to men constantly passing under it, skilled in judgment as to its natural condition and the sufficiency of its artificial supports, aware of the dangers to themselves from defects in either, in duty bound to look carefully for them, and expressly enjoined to perform it, it was well propped and of sufficient strength. They reported no defect. The company had no actual notice of any, nor was there any so patent as to attract attention in the course of such usual observation as is shown to have been ordered and made. The judgment of the circuit court was reversed and the cause remanded.

[1] McLean County Coal Company v. Lamprecht, 51 App. 649.*

* NOTE.—This was a case by the plaintiff, Lamprecht, against the coal company, to recover damages for an injury received in defendant's mine, occasioned, as it was alleged, by the negligence and improper conduct of the defendant's servants. Trial resulted in a verdict for the plaintiff in the sum of $5,000. The right of recovery in this case rested upon the following claim: That the vein of coal in this mine is from three and one-half to four feet thick. The first thing the miner does in the prosecution of his work is to take the earth or other substance immediately below the coal out, so as to leave the coal projecting into the room, and hanging over the bed or place where the excavation is made. A careful miner, when he has dug to any considerable extent, takes a prop, one end of which is placed in the bottom of the room and securely fastened, and the other end is placed against the face of the coal. That prop, by the miners, is called a "sprag," and usually stands at an angle of about forty-five degrees, and prevents the coal from falling on the miner while he is still digging under-

SEC. 679. A judgment of a trial court may be reversed *pro forma* on account of the failure of an appellee (plaintiff in the court below) to file briefs therein.

Gross negligence is the want of ordinary care; what constitutes ordinary care varies with the circumstances of each case; one must act under all circumstances as a reasonably prudent person should act.

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neath the coal, in case there should be any tendency toward falling, or any weakness in the vein of coal at the point he is working. When the miner has dug underneath the coal until he comes to a break, he stops digging and knocks the coal down. That is usually done by placing a wedge in about the center and splitting or breaking off the lower half, which drops down, leaving the top half still supported by the "sprag." When the lower half of the coal is broken up and taken away, then the "sprag" is knocked out and the upper half drops down, and it, in a like manner, is broken up and carried away. The defendant claims to have had a rule by which miners were forbidden to use railroad ties for "sprags," but the evidence clearly shows that it very often happened that the company failed to supply "sprags," as it was its duty to supply them, and in all such cases the miners, without any question from the company, used railroad ties—those ties that the company had supplied for laying a track for its coal cars in the bottom of the mine. In addition to the "sprags" used by the miners, they also used props which they placed perpendicularly to support the roof of the mine. A few days before the accident plaintiff had been unable to procure props and had therefore taken some ties to be used by him as props and "sprags." He took four of these ties to his room, two of which he placed in an upright position and the third on top of the two as a cap to support the roof of the mine. The fourth he placed as a "sprag." On the 19th day of December, 1891, plaintiff went to work about seven A. M. At that time James Doran was track-layer, and it was his business to superintend the construction of the repair of the tracks of the company, and for that purpose he had the use and control of the ties. About ten o'clock A. M. Doran went into the room where the plaintiff was at work, and ordered the plaintiff to take the ties out of his room. That is, the three ties that plaintiff had placed as props, and the one that he had placed as a "sprag." The plaintiff, well knowing the danger of taking them away, refused to comply with the order, and told Doran that he could not do it, and thereupon Doran became very angry and said that he would do it if plaintiff would not, and he said: "G——d d——n Dutch, I will take them away anyhow." Doran thereupon took his sledge and knocked out all the ties, including the one used as a "sprag," and loaded them in his car and took them away, and instead of the four ties put up a single prop, such as the company supplied for that purpose, but put up no "sprag," thereby leaving the coal wholly unsupported. After Doran had taken out the props and "sprag" plaintiff removed some coal that had been broken down so as to get it out of the roadway and then started to go toward the east for the

It is against public policy to allow the provisions of the statute relating to all the care which an employer must exercise with regard to the protection of his employes from personal injury, to be dispensed with by contract.

An employe endangered through the negligence of his master may release him from liability therefrom upon receipt of a sum agreed upon.

In the case presented this court holds, in view of the evidence, that under the statute it was sufficient for the plaintiff to notify the mine car driver that props were necessary in the room where he was at work; that the release in question was understandingly executed and delivered by the plaintiff to the defendant, and that in view thereof the judgment in his favor can not stand.[1]

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purpose of getting his tools to make the coal secure. In order to do so, it was necessary for him to pass close to the face of the coal, and while doing so, the coal fell down, catching the plaintiff's left leg and breaking and crushing it. The alleged negligent and wrongful conduct of defendant's track-layer, Doran, is that he took away the tie used as a "sprag" and put up no "sprag," thereby leaving the coal wholly unsupported, so that it fell on the plaintiff as he was passing by for the purpose of getting his tools to make it secure. There was some conflict of testimony as to what Doran did, etc. The case was reversed and remanded.

[1] Chicago, Wilmington & Vermilion Coal Co. v. Frank A. Peterson, 39 App. 114.*

* NOTE.—In October, 1889, and prior thereto, the defendant was the owner of a coal mine in Bureau county, and engaged in operating the same, and employed the plaintiff therein as a loader, under a contract which was reduced to writing. The mine was operated as what is known as "long wall" work, all the coal being taken out as the work progressed. Roadways were maintained at the base of the mine from the elevated shaft to the coal face, and, deflecting therefrom, entrances and branches were made, denominated rooms. These roadways, entries and rooms, as the work progressed, required building up on the sides, and props with caps to sustain the roof. The building up was done in the night time, principally by the defendant's servants, and consisted in building or erecting a wall of stone or other solid material from the base to the roof of the mine, about three feet from the coal face, and filling in the back with dirt or other material to support the sides or the roof from caving and falling in. Holes were drilled in the coal face and the coal loosened by powder blasts so that it could be pulled down by the loaders, placed on the pit cars and taken to the shaft and elevated. As the coal is taken down and removed, the space between the building and the coal face increased, and it became the duty of the loader to secure the roof from falling by props, as before stated. It

SEC. 680. *Evidence.*—On the trial of a suit brought by a miner against the alleged owner and operator of a mine, one of the witnesses designated the mine as the defendant's and one of the surgeons who treated the plaintiff for his injuries testified that the defendant paid him for attending on either the plaintiff or some one else injured at the mine; it is held by the supreme court that such evidence, uncontradicted, had some tendency to show that the defendant was the owner of the mine, and was sufficient evidence to justify the court in submitting the question to the jury.

The failure of a miner, while moving a car in a dark, low and narrow passage of a coal mine, having no other light than the lamp carried by him, to discover such a grade in the track upon which the car was standing as would cause the car to run of its own momentum, without having his attention previously called to the grade, does not raise any implication of negligence on the part of the miner so as to defeat a recovery by him for a personal injury. On the contrary, the failure to make such discovery may be entirely consistent with the exercise of ordinary care.

Where a plaintiff, in his testimony, fully details the circumstances attending his injury, the question whether he was in

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was the duty of the defendant to deliver to the plaintiff the props and cap pieces as the same should be required, with the miner's empty car, so that the plaintiff, as such workman or loader, might at all times be able to properly secure said workings for his own safety while so engaged, and for any wilful failure so to do would be liable in damages for any direct injuries by plaintiff sustained arising from such neglect. Session Laws 1887, entitled "Mines and Miners."

On the morning of the 22d of October, 1889, the plaintiff and his associate loader, commonly called a "butty," went into the mine and commenced work as loaders, where they were put at work by the pit boss of the defendant. About nine or ten o'clock in the morning of that day, plaintiff and his co-worker "butty" both called to the driver of the miner's empty car to bring in more props and caps. This request was repeated many times during the day, and before the injury complained of occurred, but none were brought them, though the miner's empty car was driven in to them to be loaded every fifteen or thirty minutes. At about four o'clock in the afternoon of that day, and while so engaged as a loader in said mine, the roof on the left side of the room in which he was put at work caved in for want of being sufficiently propped; a quantity of rock, coal and earth fell upon the plaintiff, causing the injury complained of, and for which this suit was brought.

the exercise of due care or not depends wholly upon the construction and force to be given to his evidence. It is a mere question of fact for the jury whether the plaintiff was guilty of negligence.[1]

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[1] Consolidated Coal Company v. Bruce, 150 Ill. 449.*

* NOTE.—Thomas Bruce brought this action against the Consolidated Coal Company of St. Louis to recover damages for a personal injury. The declaration alleges in substance that at and before the date of the injury the defendant owned and operated a certain coal mine in Trenton, Clinton county; that certain parts of the mine were extra-hazardous and dangerous for persons who were unacquainted with the topography of the mine and its condition; that it was the duty of the defendant to inform his employes on entering upon their duties in the mine, of the places therein extra-hazardous and dangerous before sending them to work in such parts of the mine; that on or about January 1, 1891, plaintiff was employed to shovel and load coal in the mine and that he hired to the defendant for that purpose; that the defendant was informed by the plaintiff that he had but little experience in mines, and none except in shoveling and loading coal; that after his employment by the defendant he commenced to work in the mine at the work he was employed to do and continued until February 25, 1891, when he was directed by the defendant to proceed to a part of the mine with which he was wholly unfamiliar and bring away a car loaded with dirt, then standing in the entry-way near one of the rooms of the mine, and unload it in one of the empty rooms some distance along the entry; that the part of the mine where the car was standing and along the entry to the place where the car was to be unloaded was extra-hazardous and dangerous, owing to the steep grade in the entry, of which the plaintiff had no notice or knowledge, and was not informed by the defendant; that he proceeded with due care and caution to push the car for the purpose of moving it along the entry to the place of unloading, but finding for some reason it would not move, he went in front of it and found some dirt in front of the wheels which he removed; that he then with due care and caution pulled on the car to see whether it was free, when it started forward down the grade, gaining greater velocity as it went; that he endeavored to stop it so that he might be able to get behind it but was unable to do so, owing to the steep grade and the momentum of the car; but owing to his efforts to stop the car, his light was extinguished and he was left in total darkness, and not being familiar with that part of the mine, he was unable to get out of the way, but was unavoidably struck by the car and thrown against the side of the entry, whereby he received the injuries complained of. The defendant pleaded "not guilty," and at the trial the jury found the defendant guilty and assessed the plaintiff's damages at $2,000. The plaintiff remitted $500 and took judgment for $1,500. The defendant introduced no evidence, but at the close of the plaintiff's evidence, the defendant's counsel asked the court to instruct the jury to find the defendant not guilty. This instruction the court refused to give, and the defendant excepted.

SEC. 681. *Negligence — Master and servant — Respondeat superior.*—A declaration in a suit by a servant against a coal company showed that the defendant was the owner and operator of a coal mine and had in its employ a pit boss to whom it had given authority to direct and control the labors of those employed in its mine; that plaintiff was employed by defendant to labor in the mine, under the direction and control of the pit boss, and was so laboring; that the pit boss, knowing that there was loose, overhanging rock in the roof of the mine, insufficiently braced to prevent its falling and doing great personal injury, falsely represented to plaintiff that there was no danger to be apprehended from the overhanging rock, and directed him to work under such loose rock in the roofing of the mine, and the plaintiff did, pursuant to such directions, work thereunder, and while so doing, and without fault on his part, said overhanging rock fell from the roofing of the mine upon him, and severely wounded and injured him. Held, by the supreme court, that the facts so alleged make a *prima facie* case of negligence.

Where the negligent act of one servant causing injury to another is the direct result of the authority conferred upon the foreman by the master over the servant injured, the master will be liable for such injury. In such case the servant whose negligent act causes the injury stands in the place of the master, and the servant injured has no discretion or independent judgment of his own, but owes the same duty of obedience as if the master were himself acting.

An agent or boss of a mining company having charge of the mining operations and of the servants employed in the work, and power to direct and control them, will be presumed to have notice of the danger of a particular service he requires of a workman, and his neglect to inform the workman of such danger will be the negligence of the mining company.

A servant entering upon an employment assumes only such risks as he has notice of, either express or implied; and it is culpable negligence on the part of the master to fail to notify him of risks which are not patent, and of which he is not cognizant from the nature of his employment.

Where a master permits his agent in charge of a mine to direct and control the workmen therein employed, as to the

place they shall work, he will be estopped, when sued by a servant for an injury resulting from the negligent act of his agent, to deny the authority of the agent to direct the servant injured to work in a dangerous place.

In an action by a servant against a mining company to recover for a personal injury received from falling rock while working in a place where he was directed, on the assurance of the company that there was no danger, whether the plaintiff was guilty of contributory negligence, but knowing the danger and failing to observe due care to avoid it, if susceptible of proof, is a matter of defense which need not be anticipated or negatived in the declaration. An objection that there is a variance between the declaration and the proofs, when made for the first time on an appeal for error, comes too late.[1]

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[1] Consolidated Coal Company v. Wombacher, 134 Ill. 57.*

* NOTE.—Action for personal injury by George Wombacher against Consolidated Coal Company. The declaration sets out that the defendant, on the 2d day of February, 1888, at the village of Trenton, in St. Clair county, owned and operated a coal mine, from which it was mining coal; that it had engaged certain employes to run mining machines, and other employes to drill and blast coal after it had been mined by the machines, and other employes to load the coal into boxes to be transported to the bottom of the shaft, to be hoisted to the surface, and other employes to drive mules attached to the said boxes, and other employes to build roads, to drive in open entries and set up props to prevent clod, dirt, coal, rock or other overhanging material from falling; that defendant had also an employe called a "pit boss," who was the master and director of the other employes, having power to employ and discharge and to control and direct all of the said other employes; that it was the duty of those running the mining machines to mine coal, and the duty of the said blasters to drill and blast down the said coal so mined, and of the loaders to load said coal so mined and blasted upon boxes, and of the drivers to haul said coal to the pit bottom and the others to lay roads, and set props to prevent the falling of clod, dirt, rock and other material overhanging; that defendant had no props for the purpose of propping up said coal, clod, dirt and rock; that plaintiff was employed by defendant as a loader and it was his duty to load coal on boxes in the mines; that while he was so engaged there was overhanging him a large quantity of rock which was not propped up; that while he was so engaged, the said pit boss examined the said rock and directed the plaintiff to continue his labor thereunder, and represented to the plaintiff that the said labor under said rock was without danger, and that the said rock would remain overhanging until plaintiff could complete the work directed by the pit boss to be done; that plaintiff thereupon continued said work and while so engaged, and without any fault or negligence on his part, the rock fell and crushed him and fractured his spine and caused paralysis of

SEC. 682. Upon the case presented, the jury were justified by the evidence in finding that the post, the fall of which killed plaintiff's intestate, was improperly secured, and the negligence complained of was not that of a fellow-servant of the deceased.[1]

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his lower extremities, and otherwise permanently and incurably injured him, on account of which he has been compelled to lay out $500 for medical attendance, and has been deprived of the means of earning a living for himself and family; that the pit boss at the time knew it was dangerous to work under said rock which he had examined, and knew the rock was liable to fall on plaintiff, and notwithstanding said knowledge, directed plaintiff to continue his labor there, and informed plaintiff that said labor was then and there safe; that it was the duty of said pit boss to place props under said rock, and he neglected to order said props to be set, and by means of said neglect and of said failure of said pit boss, the plaintiff, without any fault on his part, was by the fall of said rock injured, to his damage $5,000. The jury returned a verdict in favor of the plaintiff, assessing his damages at $2,500. Judgment was affirmed by the supreme court.

[1] McLean County Coal Company v. John McVey, Adm'r, 38 App. 158.*

* NOTE.—Joseph McVey, the plaintiff's intestate and son, was killed on August 18, 1888, in the mine of the defendant, while at work in its employ. He was hired by his father to the defendant for the purpose of greasing cars. He began work June 27, 1888. He was seventeen years old and had worked in the mines some six or seven weeks at the time he was killed. When he commenced work he was placed under the orders and in charge of one Hall, the foreman having charge of the boys at work about the mouth of the shaft. On the day of the accident the shaft shut down about one o'clock in the afternoon, when the regular work of the deceased would cease for the day. The deceased and other boys requested of Hall work for the remainder of the day. Hall took deceased back something like 1,000 feet into the mine, and with two other young boys, two older ones and himself, went to work in cleaning up one of the roadways of the mine and putting in what witnesses termed "lagging," which is placing poles behind the posts at the side of the roadway and shoveling the loose dirt and debris in the roadway back behind the poles. The plaintiff, the father of deceased, did not know of his son being sent to assist in this work. While engaged in this work, and while Hall was engaged in picking out a place behind one of the side-posts in which to insert poles, one of the posts at the side of the roadway, from some cause suddenly fell forward into the roadway and upon deceased, crushing his skull and producing almost immediate death. One of the questions of fact most sharply contested was whether this post was properly fastened and secured. These side-posts were about six by eight inches, placed at the side of the roadway with a thimble called a collar, somewhat larger, extending across the roadway, supported by the side-posts, and the whole intended to support the roof of the roadway. In this roadway there was no notch cut in the collar of the post or cleat nailed underneath to keep the top of the side-post in place, but a wedge was driven in between the top of the posts and the roof of the cellar by which the collar was driven up against

SEC. 683. *Mines and mining.*—A mine is a pit or excavation in the earth from which ores or mineral substances are taken by digging. A colliery is defined to be a mine, pit, or place where coals are dug with the machinery used in discharging and raising the coal.

A pit, intended to be used when completed as a shaft of a coal mine it was designed to open and work, is not a coal mine within the meaning of Section 8 of Chapter 93, Rev. St., entitled "Miners," making it the duty of the owner or operator of coal mines to fence the top of each and every shaft of the mine by gates, properly protecting such top and entrance thereto.

Section 14 of Chapter 93, R. S., entitled "Miners," gives a widow a right of action only in the event that the death of her husband was occasioned by the wilful failure of the defendant company to comply with the provision of the statute in question or by wilful violation of the act.

If the death of a person is caused by some mere neglect or fault of another, not wilful in its character, the right of recovery, if any, is not in the widow, but in the administrator of the deceased, suing for the benefit of the widow and children, the next of kin of the deceased, under the provisions of Sections 1 and 2 of Chapter 70, R. S.

The provisions of the statute (Chap. 93, entitled "Miners") apply only to coal mines; not to mines out of which are taken lead or other materials or ores, nor to pits or excavations not parts of a coal mine.

Wilfulness and negligence are, it has been well said, the opposite of each other; the one signifying the presence of intention or purpose, the other its absence.[1]

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the roof, and reliance was placed on the constant and downward pressure of the roof to keep the wedge tight and the side-posts in their places. Evidence was given to the jury to show that this method was the best known, while it was insisted by plaintiff, and evidence offered to support such theory, that it was not a good method, but that there should have been either a notch cut in the collar, making a shoulder, or a cleat nailed to the collar to prevent the side-posts, when loose from any cause, from falling out into the roadway.

[1] Springside Coal Mining Company v. Dora Grogan, etc., 53 App. 60.*

* NOTE.—On the 1st day of March, 1889, the defendant company began to sink a pit which was intended to be used when completed as the shaft of a

SEC. 684. *Corporations.*—When a duty is imposed upon a corporation and entrusted to it by an agent, notice to such agent of the matters falling within his line of duty is notice to the corporation.

Pleading.—In an action for personal injuries resulting from negligence, it is sufficient to aver that the defendant knew the conditions, etc., before the accident, but it is not necessary to aver the evidentiary facts showing how he had such knowledge.

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coal mine it designed to open and work. Thomas Grogan, husband of the plaintiff, was among others employed to aid in digging and removing the earth from the pit. He began work when the pit was of the depth of eight feet and continued until the depth of about 200 feet had been reached, when a heavy barrel, which a sudden gust of wind blew into the mouth of the pit, fell to the bottom where he was at work and struck and instantly killed him. The eighth section of the act of the general assembly, entitled "An act providing for the health and safety of persons employed in coal mines," approved May 28, 1879, as amended by an act approved June 30, 1885, makes it the duty of the owner or operator of every coal mine to fence the top of each and every shaft of the mine by gates properly protecting such top and entrance thereto. The top or entrance to the pit in which plaintiff's husband was working at the time of his death had not been provided with or fenced by gates. The plaintiff contended that had such gates been provided, the barrel which caused the death of her husband could not have been blown into the pit, and upon the theory that the work which the defendant company was prosecuting was a coal mine, and the defendant required by the statute to fence the same, brought an action under the statute as his widow to recover damages occasioned by his death. She recovered a judgment for $5,000. This was reversed and remanded by the appellate court. This case appears to have been again tried in the circuit court and the case again reappears in 67 App. at page 487. Additional facts appear in the case to the effect that certain planks had been laid across the opening or mouth of the air shaft to prevent the entrance of any object of such size or weight as might fall upon and injure the workmen, and that the mouth of the pit or shaft was thus protected at the time Thomas Grogan went into the shaft to work on the day of his death, and that after he had gone down into the pit and without his knowledge, the planks were removed by the employes of the defendant company and the pit left open, so that when the barrel blew or fell from the truck there was nothing to obstruct its entrance into the pit, and that it did so enter the mouth of the pit and from thence drop to the bottom and there struck and killed said Thomas Grogan. Upon the second trial judgment was entered against the defendant company for the sum of $3,700. Upon the second trial of said cause, it was held that no one is liable for a pure accident, but if a person be injured by the combined elements of accident and the negligence of another while in the exercise of due care and caution for his own safety, and if it be shown that such negligence was the proximate cause of the injury, the

Instructions as to defective counts.—The effect of instructions directing the jury to ignore certain counts in the declaration is to confine the evidence to other counts.

Ordinary hazards.—A failure to perform an assumed duty, by which an injury results to one in the exercise of due care, creates a liability at common law. It is an ordinary hazard if an injury occurs where there is no such breach of duty.

Practice.—It is not error in a civil case for counsel to comment upon the fact that certain officers of the defendant (corporation), presumed to have peculiar knowledge of the facts in controversy, did not testify upon the trial. The fabrication, or withholding of evidence, is properly a subject of inference.

Elements of damages—Liability for physician's services.—In an action for damages resulting from personal injuries, it is sufficient if there is a liability to pay for the services of a physician in being cured, and the jury may consider such services as paid in making up a verdict.[1]

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party guilty of the negligence may be made to respond in damages. From the appellate court the above case was taken by appeal to the supreme court, and the same is reported in 169 Ill. at page 50. Upon the hearing of the case there, the court made the following announcement: "In an action against an employer for damages for negligently causing the death of the plaintiff's intestate, whether the deceased was a fellow-servant with the party whose act occasioned the injury is a question of fact for the jury, which is conclusively settled by a judgment of affirmance by the appellate court. And further, in suits at law the judgment by appellate court is conclusive, not only of the controverted ultimate questions of fact, but also those evidentiary or subordinate facts upon which the ultimate facts are based, and the judgment of the appellate court is affirmed."

[1] Consolidated Coal Company of St. Louis v. Michael Scheiber, by his next friend, 65 App. 304.*

* NOTE.—The defendant, The Consolidated Coal Company of St. Louis, owned and operated a coal mine near Collinsville, in Madison county, called the Hennitz Bluff Mine. The plaintiff was employed in the mine as a driver, and had been for about five months before he was injured. For about nineteen months prior to the time he began to drive he had been employed there as a "trapper," whom plaintiff defines to be a person who goes about with the driver to help him out. In all he had worked two years in the mine. He was about sixteen years old at the time he was hired. He had worked two months in the room where the accident happened. On the 16th of January, 1895, he was hauling coal from room 10 to the shaft bottom. At about 2:30 in the afternoon he came in to haul out two boxes, but the boxes were only partially filled and he waited for the two loaders who were there to get them filled. There was some fine coal in his shoe, and he walked

SEC. 685. *Practice.*—The faulty counts in a declaration which the court is authorized by section 50 of the practice act (R. S. 1874, 781) to instruct the jury to disregard, are such only as would be insufficient to sustain the judgment after verdict.

The refusal by the court to instruct the jury to disregard an alleged faulty count in a declaration, is not a decision that such count is faultless, but only that it is sufficient after issue joined, and in view of the evidence, to support a verdict and judgment for the plaintiff.

Pleading.—A defect in pleading, in substance or form, which would have been fatal on demurrer, is cured by verdict where the issue joined is such as necessarily requires proof of that fact so defectively presented, and without which proof it is not to be presumed that the judge would have directed or the jury have given the verdict.

Improper refusal to instruct the jury to disregard certain counts in a declaration is harmless where there is one good count in the declaration to which the evidence is applicable and which is sufficient to sustain the judgment.

Master and servants.—A master who voluntarily assumes a duty toward his servant and undertakes to perform the same, must do so in a proper manner, and if by reason of his careless performance thereof the servant is injured while exercising due care for his safety, the master is liable.

Where one party has withheld from the case evidence which is within his control, it is not improper for opposing counsel to comment on that fact in his argument before the jury.

Whether the servants of the same master are fellow-servants,

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away to the refuse pile and sat down to take it out. His back was against the standing prop, but there was a piece of loose slate which fell on him and cut an artery in his left leg. There were two men working in the room at the time. They knew the slate was loose over the refuse pile, and one called to plaintiff and he was just leaving when the slate fell. The track and two or three feet on each side was protected by timbers. The defendant had a timberman to look after props and roof. He was there in the morning and Johnescheck told him the slate was loose, but the timberman said there was no danger, that he had to look after a place where a machine was running. He went away and did not return. His duty when notified was to prop the roof. The plaintiff, after the injury, was carried home. About four weeks after the accident his leg was amputated below the knee, and subsequently again above the knee, for which services he became liable to pay several hundred dollars. Judgment affirmed.

within the legal significance of that term, is a question of fact to be determined by the jury from all the circumstances in the case.[1]

SEC. 686. *Mines and mining—Actions under Section 14 of Chapter 93, R. S.—Mines.*—In order to maintain an action in case of loss of life occasioned by violation of Section 14 of Chapter 93, R. S., entitled "Mines," Hurd's Statute, 1898—1091, the burden is upon the plaintiff to show that the violation was wilful.[2]

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[1] Consolidated Coal Co. of St. Louis v. Michael Scheiber, 167 Ill. 539.*

[2] Mo. & Ill. Coal Co. v. John Schwalb et al., 77 App. 593.†

* NOTE.—This is the same case as that reported in the previous section, and the supreme court affirmed the judgment of the appellate court wherein the plaintiff was allowed as damages on account of his injury, the sum of $7,566.35.

† NOTE.—Adolph Schwalb was killed in the mine of defendant, the Mo. & Ill. Coal Company, on the 11th of April, 1896, about half past eleven in the forenoon, by the falling of a pot or clod of dirt from twelve to fifteen feet in diameter, thin at the edges and eighteen inches thick in the middle, from the roof of the room in which he had been at work. At about eleven o'clock in the forenoon of the above date, he was called to the foot of the shaft where, for some reason, he was discharged. He returned to the room for his tools, and while getting them the pot or clod fell, causing his death. This action is brought by the father, mother and four brothers of the deceased. It was tried upon the second amended declaration. The part of the declaration material to be considered is in substance as follows: Plaintiffs aver that it was the duty of the defendant to have had its said mine examined every morning by a duly authorized agent, to determine whether there were any dangerous accumulations of gas or lack of proper ventilation or obstructions to roadways, or any clod, dirt, rock, or any other overhanging material likely to become detached from the roof of said mine and fall upon and injure defendant's employes, or any other dangerous conditions, and to allow no person to enter the mine until such agent shall report all conditions safe for beginning work; and to have required such examiner or agent to make a record of such daily examinations in a book kept for that purpose, such book to be kept where it could be inspected by the men employed in and about the mine. Plaintiffs further averred that the defendant, contrary to the statute, wilfully, wrongfully and negligently failed and omitted to have its said mine examined as aforesaid, and wilfully, wrongfully and negligently allowed and permitted its employes to enter said mine without first having had said mine examined as aforesaid, and failed to give notice of such examination in a book to be kept for that purpose, as aforesaid. Plaintiffs further averred that on the 11th day of April, when Adolph Schwalb was in the employ of defendant, and was engaged in and about his duties in said mine, while so engaged, a large quantity of rock, dirt and clod became detached and loose from the roof of

SEC. 687. *Verdict—On conflicting evidence.*—In a personal injury suit, the court discusses the evidence and holds that while it was conflicting on some of the questions involved, that the facts did not warrant the interference of the court and that the verdict of the jury must be sustained.

Common law.—The legislature could formulate a complete code of rules so particular and minute in their character as to cover all common law rights with reference to any particular business, and in that event there would be a complete supersedure of the common law; but unless that is done all common law rights, not at variance with some provision of the enactment, continue in force.

The court holds that the contention of counsel in this case, that since the passage of the several acts of the legislature regulating the operation of mines, there can be no such thing as negligence in common law in conducting the business, and that whenever a mine operator complies with the statute he is absolved from all charges of negligence, is not well founded, and that the declaration in this case sets out facts and circumstances which constitute a cause of action under the common law.[1]

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the mine and fell upon him and so crushed his body that he immediately died. An examination of the mine was made in the morning before the miners entered and no record made of its condition. The important question, then, to be answered, is, "Did Adolph Schwalb lose his life through a wilful failure to make an examination in the morning, as required by the statute?" If he did, the defendant is liable under the declaration. If he did not lose his life through such failure, defendant is not liable. This leads to the consideration of two propositions: First, if an examination made in the morning before the miners entered, would not have disclosed the dangerous condition of the room, then Adolph Schwalb did not lose his life through a failure to make such examination. Second, if an examination of the character intended by the statute was made at half past eight in the morning, two hours before Schwalb was killed, and did not disclose the clod or pot which fell and killed him, then defendant is not liable under this declaration. After an examination of the testimony the appellate court reached the conclusion that the defendant did not lose his life through the failure to make the examination, in the morning, of the mine, as required by statute, and the judgment of the circuit court was reversed.

[1] Consolidated Coal Co. of St. Louis v. Frank Bokamp, 75 App. 605.*

* NOTE.—This suit was commenced by the plaintiff, Bokamp, against the Consolidated Coal Company to recover for injuries sustained by him while

SEC. 688. *Mines and mining.*—Before a recovery under Section 4, Chapter 93, R. S., entitled "Miners," providing for the inspection of coal mines, can be had, it devolves upon the person seeking such recovery to show that the violation of the act has been wilful and that the injury complained of is the result of such failure.

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working as a driver in defendant's coal mine. At the time of the injury complained of, it had a main entry running north from the bottom of the shaft, from the east wall of which various side entries had been driven. The side entries ran east at right angles with the main entry. The injury took place at the ninth east entry. The plaintiff had been in the employ of the appellant as a driver in this mine for about three years. It was his duty to drive a mule, hauling empty cars from the shaft bottom to the working places and one loaded back to the shaft bottom. The ninth east entry was about eight feet wide and six feet high. It extended about a quarter of a mile from the main entry. The coal was being mined from rooms adjoining it by a machine with a capacity of forty-eight boxes a day. Near the east end of the east entry was what was called a " back entry," running in a northeasterly direction from the ninth east entry. At this point there was a switch. In doing his work it was the practice of the plaintiff to couple on four empty boxes on a switch in the main entry, haul them out of that entry to ninth east, thence out ninth east to the back entry; that left two of them on the west side of the switch while he went on down the entry to the place where the coal was being mined and loaded, exchanged the two empties taken with him for two loaded boxes, hauled the two loaded ones up to the east side of the switch, stopped them, then took his other two empties into the back entry, exchanged them for two loaded boxes and brought them out the back entry to the switch. As the mule pulling the cars approached the turn at the switch, plaintiff would step from his seat on the front box, going across to the ninth east track and start the two loaded boxes which he had left standing there. There was a down grade from that point west. After starting the two loads he would start after the mule, moving slowly with the other two, and the two started would follow him. Some twenty feet from the point where he would follow the cars was a wide place in the entry on the north side of the track. At this point he would pass around to the right of the cars in front of him and mounting the seat which he had left when he went to start the other cars he would then drive down the grade and up to the one that was further on. After reaching the top of the second grade he would detach from the first and return for the two cars started, which he would haul up to the others, couple on and proceed with the four toward the shaft. Some three or four days before he was hurt he noticed that two cross-beams supporting a portion of the roof of the ninth east a short distance west of the switch and at the wide place mentioned were cracked and sagged down in the middle. On the Saturday before he was injured on Tuesday he claims that he notified his pit boss, Ramsey, of the dangerous condition of the roof at that place and that Ramsey promised to have it repaired. On

The action under Sections 4 and 14 of Chapter 93, R. S., entitled "Mines and Miners," is not to recover a penalty, but it is to recover damages caused by the violation of the law.

The right of recovery for the failure to make examinations of the mines is based upon a wilful failure or a wilful violation of the statute requiring such examination.[1]

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the day that he was injured he had made several trips, finding the ground underneath the sagging cross-beams clear and all right. On the trip when he met his accident he had taken his last two empties into the back entry and returned with two loads. He had started the two loads which had been left to the east side of the switch and had walked to the wide place. While trying to mount the seat on the front car, as was his wont, his right foot was caught on some slack and top coal, as he contends, which had been precipitated from the defective roof above since the time he passed with the empties, and he was thrown forward and jerked off by the timber which supported one end of the broken cross-beam. He was hurled in front of the first car, which so crushed and mangled him as to paralyze both lower limbs, and the amputation of one became necessary. Trial resulted in verdict and judgment in favor of the plaintiff for $5,150, and the judgment was affirmed.

[1] Missouri & Illinois Coal Co. v. Schwalb, 74 App., 567.*

* NOTE.—In this case the appellate court reversed and remanded the cause.

CHAPTER X.

DRAM-SHOPS.

The following sections of the statutes of Illinois are taken from Volume 2, Chapter 43 of Starr & Curtis' Annotated Illinois Statutes, being the act of March 30, 1874, as amended from time to time:

(Section numbers are preserved in parentheses.)

SEC. (1) 689. *Dram-shop defined.*—Be it enacted by the people of the State of Illinois, represented in the general assembly: That a dram-shop is a place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon, and intoxicating liquors shall be deemed to include all such liquors within the meaning of this act.

SEC. (2) 690. *Selling liquor without license.*—Whoever, not having a license to keep a dram-shop, shall, by himself or another, either as principal, clerk or servant, directly or indirectly, sell any intoxicating liquor in any less quantity than one gallon, or in any quantity to be drank on the premises, or in or upon any adjacent room, building (,) yard, premises or place of public resort, shall be fined not less than twenty dollars ($20) nor more than one hundred dollars ($100), or imprisoned in the county jail not less than ten nor more than thirty days, or both, in the discretion of the court.

SEC. (3) 691. *How license may be granted.*—The county boards of each county may grant licenses to keep so many dram-shops in their county as they may think the public good requires, upon the application by petition of a majority of the legal voters of the town, if the county is under township organization, and if not under township organization, then of a majority of the legal voters of the election precinct or district where the same is proposed to be located, and upon the payment into the county treasury of such sum as the board may require, not less than $50 nor more than $300 for each license, and upon compliance with the provisions of this act: Provided, such board shall not have power to issue any license to keep any dram-shop in any incorporated city, town or village, or within two miles of the same, in which the corporate authori-

ties have authority to license, regulate, restrain or prohibit the sale of liquors, or in any place where the sale of intoxicating liquors is prohibited by law.

SEC. (4) 691*a*. *Form of license—Rights under—Revocation.* —The license shall state the time for which it is granted, which shall not exceed one year, the place where the dram-shop is to be kept, and shall not be transferable, nor shall the person licensed keep a dram-shop at more than one place at the same time, and any license granted may be revoked by the county board whenever they shall be satisfied that the person licensed has violated any of the provisions of this act, or keeps a disorderly or ill-governed house or place of resort for idle or dissolute persons, or allows any illegal gaming in his dram-shop, or in any house or place adjacent thereto.

SEC. (5) 692. *Bond of licensee—Suit on.*—No person shall be licensed to keep a dram-shop, or to sell intoxicating liquors, by any county board, or the authorities of any city, town or village, unless he shall first give bond in the penal sum of $3,000, payable to the people of the State of Illinois, with at least two good and sufficient sureties, freeholders of the county in which the license is to be granted, to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain, either in person or property, or means of support, by reason of the person so obtaining a license, selling or giving away intoxicating liquors. The officer taking such bond may examine any person offered as security upon any such bond, under oath, and require him to subscribe and swear to his statement in regard to his pecuniary ability to become such security. Any bond taken pursuant to this section may be sued upon for the use of any person or his legal representatives, who may be injured by reason of the selling or of the giving away any intoxicating liquor by the person so licensed, or by his agent or servant.

SEC. (6) 693. *Selling or giving to minor or drunkard.*—Whoever, by himself, or his agent or servant, shall sell or give intoxicating liquor to any minor without the written order of his parent, guardian, or family physician, or to any person intoxicated, or who is in the habit of getting intoxicated, shall,

for each offense, be fined not less than $20, nor more than one hundred dollars ($100), or imprisoned in the county jail not less than ten nor more than thirty days, or both, according to the nature of the offense: Provided, that this act shall not affect any prosecution pending at the time this act takes effect, but in every such prosecution the accused shall, upon conviction, be punished in the same manner in all respects as if this act had not been passed.

SEC. (6½) 694. *Buying liquor for minor or drunkard—Penalty.*—Every person, whether the keeper of a dram-shop or not, who shall buy or in any manner procure or aid in procuring any wine, rum, brandy, gin, whiskey, lager beer, hard cider, alcohol, or other vinous, malt, spirituous, fermented or mixed liquor, or any intoxicating liquor whatever, for any minor, without the written order of such minor's parent, guardian or family physician, or shall so procure, or aid in procuring, any of said liquors for any person intoxicated, or who is in the habit of getting intoxicated, shall for every such offense be fined not less than twenty dollars nor more than one hundred dollars, or confined in the county jail not less than ten nor more than thirty days, or both, in the discretion of the court.

SEC. (7) 695. *Nuisances—Penalty—Bond—Evidence.*—All places where intoxicating liquors are sold in violation of this act shall be taken, held and be declared to be common nuisances, and all rooms, taverns, eating houses, bazars, restaurants, drug stores, groceries, coffee-houses, cellars or other places of public resort, where intoxicating liquors are sold in violation of this act, shall be deemed public nuisances; and whoever shall keep any such place, by himself, or his agent or servant, shall for each offense be fined not less than $50 nor more than $100, and confined in the county jail not less than twenty nor more than fifty days, and it shall be a part of the judgment, upon the conviction of the keeper, that the place so kept shall be shut up and abated until the keeper shall give bond, with sufficient security, to be approved by the court, in the penal sum of $1,000, payable to the people of the State of Illinois, conditioned that he will not sell intoxicating liquors contrary to the laws of this state, and will pay all fines, costs and damages assessed against him for any violation thereof;

and in case of a forfeiture of such bond, suit may be brought thereon for the use of the county, city, town or village, in case of a fine due to either of them. It shall not be necessary in any prosecutions under this section to state the name of any person to whom liquor is sold.

SEC. (8) 696. *Liability for support of intoxicated person.*—Every person who shall, by the sale of intoxicating liquors, with or without a license, cause the intoxication of any other person, shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and $2 per day, in addition thereto, for every such intoxicated person shall be kept in consequence of such intoxication, which sums may be recovered in an action of debt before any court having competent jurisdiction.

SEC. (9) 697. *Suit for damages by wife, child, employer, or other person—Forfeiture of lease.*—Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring suits and control the same and the amount recovered, as a *feme sole;* and all damages recovered by a minor under this act, shall be paid either by such minor, or to his or her parent, guardian or next friend, as the court shall direct; and the unlawful sale, or giving away, of intoxicating liquors, shall work a forfeiture of all rights of the lessee or tenant, under any lease

or contract of rent upon the premises where such unlawful sale or giving away shall take place; and all suits for damages under this act may be by any appropriate action in any of the courts of this State having competent jurisdiction.

SEC. (10) 698. *Suit—What liable to execution—Land liable for occupant—Proceedings.*—For the payment of any judgment for damages and costs that may be recovered against any person in consequence of the sale of intoxicating liquors under the preceding section, the real estate and personal property of such person, of every kind, except such as may be exempt from levy and sale upon judgment and execution, shall be liable, and such judgment shall be a lien upon such real estate until paid; and in case any person shall rent or lease to another any building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquors, or shall knowingly permit the same to be so used or occupied, such building or premises so used or occupied shall be held liable for, and may be sold to pay any such judgment against any person occupying such building or premises. Proceedings may be had to subject the same to the payment of any such judgment recovered, which remain unpaid, or any part thereof, either before or after execution shall issue against the property of the person against whom such judgment shall have been recovered; and when execution shall issue against the property so leased or rented, the officer shall proceed to satisfy said execution out of the building or premises so leased or occupied, as aforesaid: Provided, that if such building or premises belong to a minor or other person under guardianship, the guardian or conservator of such person, and his real and personal property, shall be held liable instead of such ward, and his property shall be subject to all the provisions of this section relating to the collection of said judgment.

SEC. (11) 699. *When suit may be before justice.*—When the damages claimed under either the eighth or ninth section of this act do not exceed the sum of $200, the action therefor may be prosecuted before a justice of the peace of the proper county, and the judgment may be enforced in the same manner as other judgments recovered before justices of the peace.

SEC. (12) 700. *Indictment—Suit before justice.*—Any fine or imprisonment mentioned in this act may be enforced by

indictment in any court of record having criminal jurisdiction, or the fine above may be sued for and recovered before any justice of the peace of the proper county, in the name of the people of the State of Illinois; and in case of conviction the offender shall stand committed to the county jail until the judgment and the costs are fully paid.

SEC. (13) 701. *Shifts.*—The giving away of intoxicating liquors, or other shift or device to evade the provisions of this act, shall be held to be an unlawful selling.

SEC. (14) 702. *Pleading—Evidence.*— In all prosecutions under this act, by indictment or otherwise, it shall not be necessary to state the kind of liquor sold; or to describe the place where sold; nor to show the knowledge of the principal, to convict for the agent or servant; and in all cases the persons to whom intoxicating liquors shall be sold in violation of this act, shall be competent witnesses.

SEC. (15) 703. *City or village ordinance no defense.*—It shall be no objection to a recovery under this act that the offense for which the person is prosecuted is punishable under any city, village or town ordinance.

SEC. (16) 704. *Fixes minimum license fee in municipality.*—That hereafter it shall not be lawful for the corporate authorities of any city, town or village in this state, to grant a license for the keeping of a dram-shop, except upon the payment, in advance, into the treasury of the city, town or village granting the license, such sum as may be determined by the respective authorities of such city, town or village, not less than at the rate of five hundred dollars ($500) per annum: Provided, that in all cases when a license for the sale of malt liquors only is granted, the city, town or village granting such license, may grant the same on the payment, in advance, of the sum of not less than at the rate of one hundred and fifty dollars ($150) per annum: And provided, further, that the city councils in cities, the board of trustees in towns, and president and board of trustees in villages, may grant permits to pharmacists for the sale of liquors for medicinal, mechanical, sacramental and chemical purposes only, under such restrictions and regulations as may be provided by ordinance.

(End of statutory quotations.)

SEC. 705. In a suit by a widow against a dram-shop keeper to recover for an alleged injury to the means of support of the

plaintiff as the result of the death of her husband, occasioned by his being in a state of intoxication produced by the drinking of intoxicating liquors furnished to him by the defendant, to make out a case under the statute it is necessary to establish, first, that the defendant sold or gave to the plaintiff's husband intoxicating liquors; second, that the giving or selling of such liquors caused, in whole or in part, his intoxication; third, that such intoxication caused his death; and fourth, that by reason of his death the plaintiff was injured in her means of support.

If, upon the trial in such a suit, the death of the plaintiff's husband is shown, and that his death was occasioned by intoxication produced by liquors sold or given to him by the defendant, in the absence of any proof to the contrary, the jury will be warranted in inferring therefrom an injury to the plaintiff's means of support. That will be sufficient to shift the burden of proof, and entitle the plaintiff to at least nominal damages.

In such case, in order to ascertain the measure of plaintiff's loss from the death of her husband, it is proper to show his age, what he himself had done in his lifetime, the character of his business, his habits of industry, thrift, income, and all that sort of thing, with a view of determining what he probably would have continued but for his death.

But what the widow may have done or what expenditures she might have made, since his death, in respect to the business in which her husband had been engaged, would afford no ground of presumption as to what he would have done in the event he had lived. So where, in such a case, it appearing the plaintiff's husband was a farmer, the plaintiff was permitted to prove that since her husband's death she had expended considerable sums in ditching upon the farm and having rails split and fencing made, it was held that proof of such expenditures should not have been allowed, as it afforded no criterion by which to determine the extent to which the plaintiff's means of support had been permanently diminished by her husband's death.

The plaintiff was also permitted in giving her testimony to detail to the jury the inconveniences she had labored under since her husband's death—how she had to go to town on cold days, and the fact of one of her girls having to work out, and

also to speak of the mangled condition in which she found her husband shortly after the injury which was the immediate cause of his death; how she fainted away, and his dying remark to her, "Mary, I can't see you any longer—I am getting blind." All this was improper, as having no bearing on the issue as to the extent of injury to the plaintiff's means of support by the death of her husband, and only calculated to enhance the damages through sympathy for the plaintiff and prejudice against the defendant.[1]

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[1] Flynn v. Fogarty, 106 Ill. 263.*

* NOTE.—This was an action brought by Mary Fogarty under the ninth section of the dram-shop act against Daniel Flynn, Septimus Merrick, Gus Henderson and others, who were not parties in the appellate court, to recover damages for the loss of her husband, John Fogarty, whose death it was claimed was caused by intoxicating liquors sold to him by the appellants. The cause was tried before the court and a jury, resulting in a verdict and judgment for the plaintiff for $1,800, which was subsequently affirmed by the appellate court. The evidence shows that the deceased was between forty and fifty years of age, in good health, and by occupation a farmer, and that he was the head of a family consisting of himself, wife, and eleven children, the oldest, a son, being between eighteen and twenty years of age; that on the morning of the twentieth of October, 1879, he went to Galesburg by rail and shortly after his arrival there commenced drinking intoxicating liquors, and continued to do so off and on during the day; that at or shortly after a quarter past six in the evening he left Galesburg for home by way of Chicago, Burlington & Quincy Railway in a state of intoxication; that he arrived at St. Augustine, his home station, not far from seven o'clock the same evening; that in attempting to get off the train he fell from the platform between two cars, when the wheels of the rear one passed over both his legs, inflicting injuries from which he died the following morning. The evidence shows that the deceased drank intoxicating liquors at least three times during the day at Flynn's and Merrick's saloon—once in the forenoon and twice in the afternoon and twice in the evening. It was also shown that the deceased took three glasses of beer in the forenoon at Henderson's saloon, the exact time not being fixed. This was all the evidence tending to connect the defendants with the intoxication of the deceased. On the trial of the cause the court, at the instance of the plaintiff, gave to the jury, among others, the following instruction, namely: "The court instructs the jury for plaintiff, that if they believe from the evidence that John Fogarty, the husband of the plaintiff, came to his death on account of his intoxication, and that said intoxication was caused wholly or in part by intoxicating liquors sold or given to the said John Fogarty by the defendants, then the verdict of the jury should be for the plaintiff, with such damages as in the judgment of the jury, from the evidence, the plaintiff is entitled to recover, not exceeding in the aggregate the sum of ten thousand dollars." The supreme court said, in reviewing

SEC. 706. *Intoxicating liquors—Grounds of action for selling or giving away.*—The act of 1872 in relation to intoxicating liquors gives a right of action to the wife for three separate descriptions of injury caused by the selling or giving away of intoxicating liquors to her husband—injury in person, or property, or means of support.

In an action by a widow of a deceased person against parties for selling the deceased intoxicating liquors, where the alleged injury is the plaintiff's means of support, the evidence should be confined to such injury alone, and it is error to admit proof that the plaintiff was injured in person by the acts of her husband, while intoxicated, and the error will not be cured by an instruction that no damages should be awarded on account of such personal injuries.

Under the peculiar provisions of the statute giving an action to the person injured severally or jointly, against any person or persons who shall, by selling or giving away intoxicating liquors, cause intoxication, in whole or in part, it will not avail the defendant, when sued for such selling, to show that others sold the party liquor that may have contributed to his intoxication.

But where the proof shows or tends to show in this suit by a wife to recover damages for an injury to her means of support, caused by the selling of liquor to her husband, that she attended various places where liquor was sold with her husband, and that he at such places drank intoxicating liquor with his wife, and with her approval and consent, which may have contributed to the injury complained of, it was held by the supreme court, error to instruct the jury, that if the husband drank liquor at other places than the defendant's saloons, such facts should not be considered in the reduction or mitigation of damages.

The fact that the wife accompanied her husband to various places and gatherings, and drank liquors with him, and that the husband kept liquors in his house, and drank the same at

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this instruction, "We think there was no substantial error in giving it. In the absence of any proof to the contrary we think the jury were warranted in inferring an injury to the plaintiff's means of support by showing Fogarty's death, and that it was occasioned by intoxication produced by liquors sold or given to him by the defendants."

home with the wife's knowledge and approval, and that all such drinking on the part of the husband was with her knowledge and consent, is proper to be considered by the jury, on the question of damages, in a suit by the wife to recover for an injury caused to her means of support by the sale of liquor to her husband, especially as the statute allows exemplary damages in such an action. But such facts do not constitute a bar to the action.

In a suit by a wife to recover for an injury in her means of support by the sale of liquor to her husband, thereby causing his intoxication, where the defendants introduced evidence showing that she, during the period complained of, had accompanied her husband to various places and gatherings, where she drank with him, as bearing on the question of damages, it was held by the supreme court proper to prove by the wife, in rebuttal, that her husband compelled her to attend at such times and places with him, and the circumstances, as explanatory of her conduct.

The husband being under a legal obligation to support his wife whether she has means of her own or not, or whether she is able to earn a livelihood by her own means or labor, it can not be said that the reduction of his estate to insolvency or impairing his ability to provide the support by means of selling him intoxicating liquors, does not injure her in her means of support.

In a suit by a wife to recover for an injury to her means of support, caused by selling intoxicating liquor to her husband, if it appears that, in consequence of such wrongful act, she has sustained actual and real damages to her means of support, the jury may, in addition to the actual damages shown, give exemplary or vindictive damages, but the jury are not bound to award the latter kind of damages.

The person or persons owning, running, leasing, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that causes in whole or in part the intoxication of any person, are made by the statute severally and jointly liable with the person or persons selling or giving such liquors, for all damages

sustained in consequence of such intoxication, and for exemplary damages. In this respect there is no distinction made between the seller and the owner of the building; and the owner of the building is liable for both actual and exemplary damages whether sued alone or jointly with the person selling.

Under the statute the right of a wife to recover exemplary damages for injury to her means of support, by the sale of intoxicating liquor to her husband, is not limited to a case of furnishing him liquor after notice not to do so, or to the case of preventing one endeavoring to reform from habits of intemperance from doing so, by inducing or tempting him to drink intoxicating liquors.[1]

SEC. 707. *Intoxicating liquors—Damages under acts of 1872 and 1874.*—The act of 1874 relating to intoxicating liquors, so far as it gives the wife a right of action for an injury by the sale of such liquors to her husband, is precisely the same as the repealed act of 1872, and hence there is no error in the assessment of damages under a declaration charging the damages to have commenced while the act of 1872 was in force, and continued until the act of 1874 took effect. The effect of the act of 1874 was to continue in force the act of 1872 so far as the wife's right of action is concerned.

The affidavit of a juror is not admissible to impeach his verdict on a motion for a new trial. He is not competent to show that the damages found were arrived at by each juror marking down the amount thought proper by him and dividing the aggregate by the number twelve.[2]

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[1] Hackett et al. v. Smelsley, 77 Ill. 109.*

[2] Reed v. Thompson, 88 Ill. 245.†

* NOTE.—This was an action on the case brought by Mary E. Smelsley, widow of George Smelsley, deceased, against Michael Hackett, James Keefe, Philip Reibsame, John Selbach, Charles Weifel, Franz S. Batteiger and Andrew Rothfres, under the act of 1872, concerning the sale of intoxicating liquors to recover damages to her means of support. Upon trial in the circuit court, plaintiff recovered a verdict against the defendants for $2,800. For errors occurring upon the trial the case was reversed and remanded by the supreme court for a new trial.

† NOTE.—This was an action brought by Eva J. Thompson against Mathias Reed in 1875. The declaration alleged that the plaintiff was the wife of one Philip Thompson before and on the 15th day of May, 1874, and continued to be until the institution of this suit, and that between that time and the commencement of the suit, the defendant at divers times had sold intox-

SEC. 708. *Intoxicating liquor—Statute construed—Liability to person injured.*—By section 9 of the act entitled "Dram-shops," a cause of action is given to any one who may be injured in his person or property or means of support by any intoxicated person, jointly or severally, against such person or persons who may have caused the intoxication, in whole or in part, of the person who commits the injury. An action is also given to any one who may in the same manner be injured in consequence of the intoxication of any one, whether habitual or otherwise, against the parties causing the intoxication.

An action lies for the direct damage done by a drunken person, as well as for damages that arise in consequence of the intoxication. Thus, where an intoxicated person on board of a freight train, in flourishing a pistol, shot and wounded another, such other was held by the supreme court to have a cause of action against the parties causing the intoxication by the sale of spirituous liquors to the person who committed the injury.

An instruction tha., if the person committing the injury while intoxicated had sufficient time between the drinking and the infliction of the injury to recover from the intoxicating effect of such drinking, the parties selling liquor to him were not liable, was held erroneous. The only proper question for the jury should be whether the drunken man had in fact recovered from the effects of drunkenness. An instruction as to the state of facts which is not supported by evidence, ought not to be given.

A count in a declaration to recover damages for personal injuries inflicted by a drunken man, averring that the defendants were each of them engaged in the business of selling intoxicating liquors, and that on, etc., at, etc., the defendants sold to one K. intoxicating liquors which were drank by him, and, being intoxicated in consequence of the liquors so sold to and drank by him, he then and there made an assault upon the

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icating liquors to her husband after he had been notified by the plaintiff not to do so, the defendant at the time well knowing, and the fact being, that her husband was in the habit of getting intoxicated, and that thereby he became intoxicated, and by reason of such intoxication she was injured in her means of support, being dependent upon her husband for support. The plaintiff recovered $370 and the defendant appealed. The judgment was affirmed by the supreme court.

plaintiff with a pistol loaded with gun-powder and leaden ball, and shot and discharged such pistol at plaintiff, by which he inflicted upon the plaintiff a serious wound, causing great suffering and pain, shows a good cause of action, and is not bad on general demurrer.[1]

SEC. 709. *Intoxicating liquors—Liability of seller for death of party purchasing.*—The seller of intoxicating liquor to a husband who becomes intoxicated by it, and, in consequence of abusive language used by him, is assaulted and killed by a third party, is not liable in the damages to the wife for the death.[2]

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[1] William H. King v. Haley et al., 86 Ill. 106.*

[2] Shugart v. Egan, 83 Ill. 56.†

*NOTE.—This suit was brought by William H. King against William Haley and Rudolph Heideklaing to recover damages for personal injuries inflicted upon him by Solomon Koffman while intoxicated with spirituous liquors sold to him by defendants. In the first count, among other things, it is averred that defendants were each of them engaged in the business of selling intoxicating liquors, and that on November 30, 1875, at Rochelle, in Ogle county, defendants sold Koffman intoxicating liquors which were drank by him, and, being intoxicated in consequence of the liquors so sold to and drank by him, then and there made an assault upon plaintiff with a pistol loaded with gun-powder and leaden ball, and shot and discharged such pistol at plaintiff, by which he inflicted upon plaintiff a serious wound, causing great suffering and pain.

The second count is substantially like the first. except that it contains an additional averment that the injury to plaintiff was in consequence of intoxication caused by intoxicating liquors drank by Koffman, sold to him by defendants. A general demurrer was interposed to both counts of the declaration, which was sustained as to the first but overruled as to the second. Trial was had, which resulted in a verdict for defendants, and the case went to the supreme court on appeal. Supreme court reversed and remanded the cause for a new trial.

† NOTE.—It is claimed that the plaintiff's husband, while in a state of intoxication caused by liquors obtained by him from the defendant Friel, insulted or menaced one McGraw, who thereupon stabbed him, inflicting a wound whereof he died shortly afterward. The court below in giving and refusing instructions, ruled that this entitled the plaintiff to recover of the defendants compensatory damages for the loss of her husband's life, as well as for other damages resulting, proximately. from the obtaining of liquors by him from Friel. The supreme court said: "It by no means follows, merely because a person, while in a state of intoxication. receives an injury, that it can be said, in a legal sense. the act of letting the persons have the liquor producing the intoxication caused the injury. * * * All that can be certainly said of the act of Friel in letting plaintiff's husband have liquor, is, that act caused or contributed to his intoxication. His intoxication may

SEC. 710. *Intoxicating liquors—Liability for injuries resulting from sale of intoxicating liquors.*—Where an intoxicated person in going to his home in the night has to cross a railroad, and next morning is found on the track, killed by being run over by a train of cars, intoxication will be held the proximate cause of his death, and the party furnishing him the liquor, and the owner of the premises where the liquor is furnished to him, will be liable to his widow, under the statute, for injury to her means of support.

It is not the intention of the statute that the intoxicating liquor alone, exclusive of any other agency, shall do the whole injury for which a civil remedy is given. The statute was designed for a practical end and to give a substantial remedy, and should not be so construed as to defeat the purpose designed.

Where a declaration in a suit by a widow to recover damages for the death of her husband by the sale of intoxicating liquors to him, alleged that he was killed by a train of cars in consequence of his intoxication, without any fault on the part of the railway company, it was held that in the absence of proof of fault on the part of the company it would be presumed there was none, and that the allegation not being material was not necessary to be proved.[1]

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have been the cause of insulting or menacing McGraw, and McGraw's act of stabbing him may have been the cause of this insult or menace; and because of this stabbing he died; but it is not entirely certain that he would not have insulted or menaced McGraw if he had not had any liquor, nor is it entirely certain that McGraw stabbed him in consequence of such menace or insult, because elements affecting mental organizations and dispositions of the parties may have existed in this instance, as they have in thousands of others of like character, inducing the tragic result, entirely independent of the influence the liquor had upon the deceased. Judgment reversed.

[1] Schroder v. Crawford, 94 Ill. 357.*

* NOTE.—On the night of May 6, 1876, James T. Crawford was killed by a train of cars on the track of Chicago & Alton R. R. Co., between the city of Bloomington and the town of Normal in the State of Illinois. Virginia F. Crawford, his widow, brought this action under the dram-shop act to recover damages for injury to her means of support from such death, the declaration alleging it to have been caused in consequence of the intoxication of decedent, and the action being against certain keepers of dram-shops in Bloomington as having furnished the liquors which caused the intoxication, and the owners of the buildings in which the liquors were sold, the

SEC. 711. *Dramshops—Proximate cause of death—Measure of damages.*—In an action under the dram-shop act, brought by a widow to recover damages for the death of her husband, it was held that the evidence justified the finding that the proximate cause of death was a fall by deceased while intoxicated.

Where deceased, after the fall, vomited, any one with a sense of smell was competent to testify as to the presence of spirituous liquor in the contents of the stomach.[1]

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statute giving action severally or jointly against such persons. The suit during its pendency having been dismissed as to all the defendants except Schroder, the owner of one of the buildings, and Dwyer, the keeper of one of the dram-shops, a verdict and judgment were rendered against Schroder and Dwyer for $2,500. The facts appearing are that Sullivan kept a drinking saloon in a building owned by Schroder; that decedent on the day of his death was at Schroder's saloon in the forenoon from about 9 to 12 o'clock; that he procured intoxicating liquor and was intoxicated there and was there again at two or three o'clock in the afternoon; that from about 12 to 3 or 4 o'clock in the afternoon, with the above exception, he was at Dwyer's saloon, where he obtained intoxicating liquor and was intoxicated while there; that he was seen at another saloon as late as 5 o'clock and was still intoxicated; that at 10 o'clock at night he was seen intoxicated and it was raining; that no more was seen of him and nothing was known of the circumstances of his death more than that at about 5 o'clock the next morning his dead body was found upon the railroad track crushed and mangled, evidently having been run over by a passing train of cars. To reach his home from Bloomington, two railroad tracks had to be crossed. It is contended on the part of the appellant that the proximate cause of decedent's death was the train of cars; that if his intoxication at the time contributed to his death, it was a remote cause in respect of which there is no liability. The supreme court cited the case of Emery v. Addis, 71 Ill. 273, as being a similar case to the present, where the death of the intoxicated person was caused by his being run over on a railroad track by a passing train in which the intoxication was held to be the proximate cause of the death; and the court further said the action is not a common law action, depending for its maintenance upon common law principles, but it is a statutory remedy and lies as given by the statute. The statute giving action is very broad in its terms, declaring that "every husband, wife, etc., who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person," shall have the right of action. If a person because of being intoxicated lies down upon or falls upon a railroad track and is unavoidably run over and killed by a passing train of cars, the result is in consequence of the intoxication. The judgment was affirmed.

[1] Marschall v. Laughran, 47 App. 29.*

* NOTE.—The plaintiff in the trial court brought this suit against defendant, a saloon keeper, to recover damages under the dram-shop act for injury

SEC. 712. *Intoxicating liquors.*—The statute of 1872, being of a highly penal character, providing a right of action unknown to the common law, in which the party prosecuting has a decided advantage, should, according to the well-understood canon, receive a strict construction.

In a suit by a wife for the selling or giving of intoxicating liquor to her husband, the anguish or pain of mind, or the feelings suffered by her by reason of her husband's intoxication, is not a matter for consideration of the jury in assessing damages, but the damages are confined to her injury in person, property or means of support.

In an action by a wife against one for selling intoxicating liquor to her husband, no exemplary damages can be given without proof of actual damages; and an instruction that if the act was not wilful or wanton, the jury should give exemplary damages, and, if it was wilful or wanton, they should annex more damages, is erroneous.

As the statute has provided for the punishment of those who sell or give away intoxicating liquors contrary to its provisions, by indictment, etc., it follows that exemplary or

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to her means of support resulting from the death of her husband, and obtained a verdict for $2,000, on which the court, after overruling a motion for new trial, entered judgment. The deceased was about twenty-eight years old when he died. He was an able-bodied man, of good general health, of good education and of sober and steady habits. He had learned the trade of a machinist and worked at it a short time, after which he enlisted in the regular army of the United States and served five years. He was discharged from the army March 5, 1891. During the evening of December 2, 1891, he went to the defendant's saloon perfectly sober and remained there until near midnight. While there defendant sold to him several drinks of lager beer and hot New England rum. The bill against him for liquor and cigars sold him on that occasion was $2.20, a part of which liquors and cigars were used in treating others, some of whom at least treated him to drinks in return. When he left the saloon he started with a companion for his home, which was in a second story in a building, and in going up the outside stairway he fell from the landing over the railing, headlong to the frozen ground below, a distance of from thirteen to sixteen feet. He was taken up unconscious and lived five days, during which time he was sometimes rational and sometimes delirious, and at the end of that time he died. He had professional medical attendance, who pronounced the injury concussion of the brain, or a clot of blood on the brain. The plaintiff testified, under objection, that deceased, when taken upstairs, after the fall, vomited blood and whisky, and that one could smell whisky all over the house.

punitive damages can not be awarded in a civil suit by one claiming to be injured by the offense.

If the court instructs the jury that the plaintiff is entitled to recover exemplary damages, in a suit against one for the sale of liquor to her husband, the defendant should have the right to show matters in mitigation, such as that he had forbidden his clerk to sell to the husband, and to have that fact considered by the jury, on the question of exemplary damages only.[1]

SEC. 713. *Dram-shops—Instructions—Damages.*—To warrant the giving of exemplary damages in actions brought to recover, under the dram-shop act, for loss of support, the

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[1] Freese v. Tripp, 70 Ill. 496.*

* NOTE.—This was an action brought originally before a justice of the peace by Mary L. Tripp against Daniel Freese and others, to recover damages for selling liquor to her husband, William Tripp. It appears that the trial court instructed the jury that "if the jury believed from the evidence that William Tripp was, before and at the time of the alleged selling or giving of intoxicating liquors to him. by the defendant or his barkeeper, an habitual drunkard, and that the plaintiff, in means of support or his person, was injured by said William Tripp, her husband, while he was intoxicated, or in consequence of his intoxication, caused, in whole or in part, by the defendant, or his agent or barkeeper, selling or giving to him, said William Tripp, intoxicating liquors since July 1, 1872, and before the commencement of this suit, then the jury should find for the plaintiff actual damages to the extent of the injury, and also exemplary damages, and in determining the injury in person or to the plaintiff, the jury have the right to consider the anguish or pain of mind, feelings the plaintiff suffered, if any, by reason of such intoxication of her husband, if any is shown by the proof, as well as loss of support, if shown by the proof, and exemplary damages are imposed on the defendant with a view of punishing him for disregarding the law in selling or giving away, to the plaintiff's husband, intoxicating liquor, in violation of law, if such has been shown; and in fixing the amount of exemplary damages the jury should consider whether or not the act was wilful or wanton or not: if it was not, the jury should give her exemplary damages; if it was wilful or wanton, the jury should annex more damages." The supreme court says of this instruction that it is erroneous for several reasons. In the first place it is not clear and intelligible; difficult of comprehension. In the next place, the anguish or pain of mind, feelings the plaintiff suffered by reason of the intoxication of her husband, is not a matter for the consideration of the jury. The statute contemplates injury in person or property or means of support, and not mental anguish. In the third place, it directs the jury to give, not only actual damages, but exemplary damages, whether actual damage is shown or not, etc., etc. Judgment of the court was reversed and case remanded for new trial.

proof must show actual damage sustained and aggravating circumstances attending the sale or giving of the liquors.

The selling to a man whom the seller knew to be in the habit of getting intoxicated, and the continuing to sell to one already intoxicated, so that the intoxication was increased and prolonged, would, in either instance, constitute a selling under aggravated circumstances within the meaning of the foregoing rule.

The appellate court holds that the sales to the person in question were made under such circumstances as to warrant the awarding of exemplary damages; that the verdict of $2,000 could not be regarded as excessive even as actual damages to the plaintiff's means of support, and declines to interfere with the judgment in her behalf.[1]

SEC. 714. *Dram shops—Loss of support—Action by married women.*—To determine the liability of the defendant to exemplary damages in an action brought by a wife against a saloon keeper to recover for personal injury and loss of support, arising from the sale and gift of liquor to her husband, the jury are called upon to do so from the evidence where defendant's conduct was wanton and in wilful disregard of plaintiff's rights.

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[1] Betting and Whitman v. Hobbett, 42 App. 174.*

* NOTE.—This was an action on the case brought by the plaintiff under the 9th section of the dram-shop act, to recover for injury in her means of support in consequence of the intoxication and death of her husband produced by liquor sold to him by the defendants. A trial by jury resulted in a verdict for $2,000. The deceased husband, Olson Hobbett, a strong and healthy man of twenty-five years, early in the afternoon of February 3, 1890, in company with several companions, began drinking at the saloon of Betting, and continued to drink there and at the saloon of Whitman until he became very much intoxicated. The saloons of Betting and Whitman were the only ones in the town of Leland, and it was clearly proven that the liquors producing the intoxication of the deceased were furnished him by the defendants or by their servants with their knowledge. The drinking continued all the afternoon until about seven o'clock, when the deceased, in a very drunken condition, started home in company with three of his companions, and while passing along the track of the C., B. & Q. R. R. Co., was run over and killed by a passing freight train. Under the evidence in the case no other conclusion can be reached than that the death of Olson Hobbett was the result of the intoxication produced by liquors sold and given him by the defendants, and that the plaintiff has been injured thereby in her means of support.

A person who regularly sells liquor to one who is in the habit of getting intoxicated, and whom he knows to be an habitual drunkard, is guilty of a wilful, deliberate violation of the statute.

In the case presented this court holds that there is nothing in the evidence to exempt the defendant from liability to exemplary damages on account of continued sales of liquor to the husband of the plaintiff, in wilful and deliberate violation of the law and against her wishes and request, and declines to interfere with the judgment in her behalf.[1]

SEC. 715. *Evidence—Preponderance sufficient in civil suit for selling liquor.*—In a suit by a wife before a jury for injury in her means of support occasioned by the sale of intoxicating liquors to her husband, she is not required to make out a case to the satisfaction of the jury beyond a reasonable doubt, but only by a preponderance of the evidence.

In a suit against a liquor dealer for damages occasioned by selling liquor to one in the habit of getting intoxicated, the fact that a juror has no prejudice against persons engaged in the sale of intoxicating liquors does not disqualify him if he says he can give the defendant the same kind of a trial as in any other case, and will be governed by the law and evidence. But a juror who will not give the same weight to the

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[1] Wolfe v. Johnson, 45 App. 122.*

* NOTE.—This was an action on the case by Mary Johnson against Richard Wolfe on account of injury to her person and means of support occasioned by the sale and gift of intoxicating liquors to her husband by defendant. There was a verdict and judgment thereon for $1,000. The evidence showed that the plaintiff's husband, Julius Johnson, was in the habit of getting intoxicated from October, 1889, to July, 1890, and that the defendant was well aware of that habit. Johnson and his wife lived in defendant's house near the saloon and his office as his tenants. The defendant saw him very frequently, and had ample opportunity to know what his habits were, and testified on the trial that he saw him under the influence of liquor pretty often. It was clearly proven that defendant knew him to be a person who was in the habit of getting intoxicated, and belonging to a class to whom the sale of intoxicating liquors was prohibited. Johnson was drunk pretty regularly on Sunday and during the early part of the week, and did not work in consequence of the intoxication. When he worked he earned $12 per week. When intoxicated he assaulted the plaintiff and threw her down, severely bruising her side and face, for which injuries she was treated by a physician, and which caused her physical suffering.

testimony of one engaged in the sale of intoxicating liquors that he would to those engaged in other business, is not a competent juror in a suit against a party for selling intoxicating liquors to one in the habit of getting intoxicated.[1]

SEC. 716. *Intoxicating liquors—Action against a saloon keeper—Death caused from intoxication.*—In an action against a saloon keeper on his bond, by a wife, to recover for a loss of her means of support, caused by the death of her husband while intoxicated, an instruction that no recovery could be had if the death of the deceased was caused by the negligence, want of caution, or wilful act of the deceased, is properly refused, as it does not exclude the hypothesis that such negligence, want of caution, or wilful act was not done or caused by his intoxication.

Where the declaration contains two counts of assignments of breaches, one for causing the death of the plaintiff's husband by the sale of intoxicating liquor to him, and the other charging that the principal defendant, in the lifetime of the husband, sold and gave him intoxicating liquors, he being then an habitual drunkard, whereby plaintiff was injured in her means of support, it was held by the supreme court that under the count last named, evidence of the habits of the deceased prior to his death, in relation to drinking liquor, is properly admitted, and it is not error to refuse to instruct the jury and to consider such evidence.

Such evidence is not admissible, however, for the purpose of forming a basis for the allowance of punitive damages, as the sureties on the bond are not liable for exemplary damages, but only for such actual damages as the person for whose use the action is brought may sustain either in person, property or means of support.

The fact that beer sold to a party is intoxicating liquor may be shown by other than direct and positive proof. Proof that the party drank beer many times during the afternoon of the

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[1] Robinson et al. v. Randall, 82 Ill. 521.*

* NOTE.—This was an action brought by Olivia J. Randall against William Robinson and others to recover damages sustained in her means of support in consequence of the sale by defendants of spirituous liquors to her husband, who was in the habit of using intoxicating liquors to excess. A trial of the cause before the jury resulted in a verdict and judgment in favor of the plaintiff for $350, which judgment was affirmed by the supreme court.

day of his death, and until nine o'clock at night, in a saloon, and became intoxicated, and left there with a bottle of whisky, is sufficient evidence that the beer drank was intoxicating, upon which to base an instruction submitting to the jury the question of whether the beer was intoxicating.

In an action by a widow upon the bond of a dram-shop keeper for depriving her of her means of support, an instruction in relation to the death of her husband was given, which contained the words: "Caused from intoxication, in whole or in part produced by the sale of intoxicating liquor sold to him by the defendant S." It was held by the supreme court that the words plainly mean, "in whole or in part produced by the sale of intoxicating liquor sold to him by such defendant," and do not mean either intoxicating "in whole or in part" or caused from intoxication "in whole or in part."

In such case, even if there was intoxication "in part" or partial intoxication, yet if such intoxication was sufficient to have caused the death of the plaintiff's husband, the case would still be within the purview of the statute. So if, notwithstanding the intoxication of the deceased, he would not have been killed if his horses had not run away, yet, nevertheless, there would have been a good cause of action, the gravamen of the action being that he, in consequence of his intoxication, was unable to properly manage and control his team, and that in consequence thereof they ran away.[1]

SEC. 717. Section 9 of the dram-shop act does not apply

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[1] Smith et al. v. The People, for the use of Anna Williamson, 141 Ill. 447.*

* NOTE.—This was an action of debt against James M. Smith and his sureties on a bond given in compliance with the requirement of section 5 of the dram shop act, and the bond was conditioned for the payment to all persons of all damages that they might sustain either in person or property or means of support by reason of said Smith selling or giving away any intoxicating liquors. This suit was prosecuted in the name of the People of the State of Illinois for the use of Anna Williamson. The declaration contained two assignment of breaches. The substance of one was that Smith, on divers occasions, sold and gave away intoxicating liquors to William Williamson, husband of Anna Williamson, by means whereof said Williams became and was habitually intoxicated, and by reason of being so habitually intoxicated, wasted and squandered his means, income and property, and became and was greatly impoverished, reduced and degraded in mind and body, as well as in his estate, and greatly neglected his duty as a farmer and stock raiser and other business, and thereby said Anna William-

to persons who are not directly or indirectly, or in any way or to any extent, engaged in the liquor traffic; and the right of action therein given to one injured in her means of support is not intended to be given against one who, in his own house or elsewhere, gives a glass of intoxicating liquor to a friend as a mere act of courtesy or act of hospitality, or without any purpose or expectation of gain or pecuniary profit.

In determining the scope of the statute in relation to dram-shops, and arriving at the true intent of its several provisions, not only the title of the act should be taken into consideration, but every other part of the same statute should be considered, for the real object and intention of the legislature are to be gathered from an examination and comparison of the context of the whole act, thereby ascertaining its spirit, import and meaning.

The dram-shop act is a statute of a highly penal character, and provides rights of action unknown to the common law, and should therefore receive a strict construction.[1]

SEC. 718. *Intoxicating liquors—Injury to means of support—Elements affecting the right of recovery.*—In an action by a widow against a dram-shop keeper and his lessor, to recover for an injury to her means of support, it is error for the court to so instruct the jury as to make the right of recovery depend upon the question whether the plaintiff has been injured in her means of support by the sale or gift of intoxicating liquor to her husband. Intoxication produced by the liquor sold or given, and not the *mere gift or sale* of the liquor, must be the cause of injury to the means of support.

In such an action it is necessary for the plaintiff to show the sale or gift of intoxicating liquor to the deceased; and also to

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son, being his wife, lost and was deprived of her means of support. The substance of the other breach was that on the 12th day of August, 1889, said William Williamson, being in a state of intoxication, caused by said Smith selling and giving to him intoxicating liquors, was incapacitated, by reason of said intoxication, from properly and safely managing, driving and controlling a team of horses drawing a wagon in which he was riding, by means whereof said team ran away and said William Williamson was thrown out of the wagon and killed, and that thereby said Anna Williamson was injured in and deprived of her means of support. A verdict and judgment was rendered for $1,000 and affirmed by the appellate court, and subsequently affirmed by the supreme court.

[1] Julia Cruse v. Caroline Aden, Adm'x, 127 Ill. 231.

show intoxication resulting from the liquor so sold or given, and injury resulting from such intoxication.

A husband is under a legal obligation to support his wife, and this right of support is not limited to supplying the bare necessaries of life, but includes comforts and whatever is suitable to the wife's situation and the husband's condition in life. Whatever lessens or destroys her husband's ability to supply her with suitable comforts, to that extent injures her means of support, even though she is not thereby deprived of the actual necessaries of life.

The dram-shop act was not intended to enable the affluent, or those well provided for, to sue and recover simply because the husband and father may become intoxicated, and while in that condition may lose time, neglect his business, and so become possessed of smaller means than he already had, but it was designed to protect the family of the drunkard against the immediate and probable want of adequate support.

In order to maintain her action under the statute for injury to her means of support, it is by no means necessary for the wife to show that she has actually been without support, or been at any time in whole or in part deprived of the means of support. Means of support relate to the future as well as to the present. It is enough that she show that the means of her future support have been cut off or diminished below what is reasonable and competent for a person in her situation in life and below what they otherwise would have been.

Where a dram-shop keeper continues to sell intoxicating liquors to a man in the habit of drinking to excess, in wanton disregard or defiance of the request and warning of the wife of the latter, in consequence of which the husband becomes intoxicated, and the wife is thereby actually injured in her means of support, the jury may, in an action by the wife, give her exemplary damages.

An instruction which attempts to merely state the measure of damages in case of recovery, is not required to recapitulate all the different elements constituting a cause of action which has been fully set forth in other instructions.

It is not objectionable when the plaintiff's counsel desires an instruction as to the rule of damages, to say to the jury that if they find, from the evidence, that the defendant is guilty as charged in the declaration, then the plaintiff is

entitled to recover, and define the measure of damages. Such a mode obviates the necessity of stating, and perhaps of reiterating hypothetically, each element of the cause of action before coming to the real point of the instruction.

In an action by a widow against a dram-shop keeper to recover for an injury to her means of support from the intoxication of her husband, the jury were told, by an instruction, that "if they should believe from the evidence that on, etc., plaintiff's husband was injured by a street car, and afterward died in consequence of such injury, and that he was so injured by reason of intoxication produced, in whole or in part, by intoxicating liquor sold or given to him by the defendant or his agent, etc. The declaration alleged that the deceased fell from a street car in consequence of his intoxication, and "did have one of his legs run over and broken and crushed by the wheel of the said street car." It was held that the instruction was not erroneous in omitting to call the attention of the jury to the particular manner in which the injury occurred.[1]

Sec. 719. In an action by minors against a saloon keeper for loss of support occasioned by the accidental killing of their father while intoxicated, from the effects of liquor furnished by defendant, proof that the deceased was industrious when sober, and showing what he had done to support his family, is proper.

Under a declaration of an action against a saloon keeper for furnishing liquor to plaintiff's father, causing him to become intoxicated, in consequence of which he lost his life, which charges a total loss of support, a recovery may be had for a partial loss.[2]

Sec. 720. In an action by a wife under section 9 of the dram-shop act for injury to her means of support through sales

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[1] McMahon v. Sankey, 133 Ill. 636.

[2] Henry W. Buck et al. v. Edward Maddock, 67 App. 466.*

* Note.—The defendants in error (plaintiffs in the court below) declared against the defendants in case, alleging that the defendant Buck was the keeper of a dram-shop in a house rented him for that purpose by one Walsh; that he furnished intoxicating liquors to Edward Maddock, father of the plaintiffs, causing him to become intoxicated, in consequence of which the said Maddock went upon a railroad track, and failing to exercise proper care for his own safety, was killed by a passing train.

Upon trial the defendants were found guilty, and damages assessed at $1,550, and the judgment was affirmed by the appellate court and the judgment is affirmed by the supreme court.

of liquor to her husband, evidence that the plaintiff warned the defendant more than five years before bringing suit, against selling liquor to him, is admissible, though the recovery of damages is limited to sales made within said five years.

A sale of intoxicating liquor to a husband after the seller had been warned against it by the wife under threat of invoking the law, may be regarded as wilful, and such fact is proper for the consideration of the jury in determining the question of vindictive damages.

Where the ground of recovery charged is the sale of liquor which has caused habitual drunkenness, the proof should be such that the jury can say that the defendant has made sufficient sales to materially aid in producing the effect charged, but positive proof of numerous sales is not indispensable to such conclusion.

An instruction so drawn that the jury might believe it to be their duty to award exemplary damages, is not ground for reversal if the verdict can not be recorded, under the evidence, as including more than actual damages.[1]

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[1] Siegle v. Rush, 173 Ill. 559.*

*NOTE.—This suit was brought by Emma Rush against John Siegle under the ninth section of the dram-shop act to recover damages for injury to her means of support by reason of the habitual intoxication of her husband, caused by the sale of intoxicating liquor to him by the defendant and his agents. She recovered a judgment for $1,750 against the defendant. The evidence shows that five years before the commencement of the suit the plaintiff was living with her husband and the one child at the village of Detroit in Pike county. He owned and operated at that place a blacksmith and repair shop and had an unpaid inheritance from his father's estate from between $3,500 and $4,000. There were no saloons in Detroit and none were open there for five years immediately prior to the commencement of the suit. The defendant had a saloon in Barry, the same county, and with a brother, operated two at Pittsfield during the years 1893 and 1894. In 1892 the plaintiff's husband began the excessive use of intoxicating liquor. The habit grew on him. He neglected his business. He dissipated his property, and before the commencement of this suit he had squandered his inheritance, had lost his shop and was left without any means of support. He had become an habitual drunkard and an incumbrance instead of a support to his wife, who by her needle and by keeping boarders was supporting the family. The plaintiff testified that before her husband had acquired the habits of a drunkard he did a profitable business and provided well for her and the family, and the court adds, that she has been injured in her means of support to the extent of $1,750, the evidence clearly shows. The judgment of the appellate court is affirmed by the supreme court.

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for personal injuries, controverted facts, such as whether deceased was struck while on highway crossing, or while trespassing on the right of way, are questions for jury, 542.

to recover damages for burning an elevator through sparks from an engine, it was proper to admit evidence that defendant offered plaintiff as inducement to rebuild, to haul lumber for half usual rates, 528.

against railroad company to recover for loss by fire set by a locomotive, court held that special finding of jury that proof was not sufficient to enable it to find at which of two places the fire originated, was not inconsistent with general verdict against the defendant, and no ground to set aside verdict, 527.

against railroad company to recover damages to plaintiff for injuries received by him in leaping from defendant's train of cars, he being a passenger, while train in motion, at a station where the train did not stop; it was held that if the plaintiff leaped from the car on suggestion of the conductor, it was the passenger's duty to exercise his own judgment whether safe or not, 627a.

against railroad company to recover for killing of stock, where plaintiff declares on the statute for failure to fence, it is sufficient for plaintiff to prove killing of the stock by trains of company and its neglect to fence. Such proof makes *prima facie* case, 492.

against railroad company for injuries to plaintiff passenger. Jury may consider, in estimating damages, whether mental faculties of plaintiff were impaired by the accident; his physician may testify thereon, 608.

by personal representative against railroad company for causing death of the intestate through negligence, the test of plaintiff's right to recover is the exercise by the deceased of ordinary care, and failure of railroad company to exercise proper care, and injury therefrom causing death, 613.

to recover damages for personal injury, suffered by plaintiff in a collision while passenger on road of defendant, it was held no *variance* between declaration and testimony, that proof of breaking down of plaintiff's nervous system, and same might result in death, was admitted, 615.

against railroad company for damages received by collision with train at a road crossing, the court instructed the jury that if the defendant omitted to ring a bell or sound a whistle as required by law, such

ACTION—*Continued.*

omission constituted *prima facie* negligence, and defendant is liable for resulting damage, 548.

to recover damages against railroad company for death of a passenger, it was held by the court that it was the negligence of the deceased that caused his death, and plaintiff could not recover, 633.

to recover damages for personal injury, resulting from negligence, an instruction for plaintiff which omits as a condition precedent to right of recovery, that plaintiff exercised ordinary care, is such error as to require a reversal, unless the defect is supplied in other instructions, 636.

for damages for the death of a miner, caused by neglect to observe the provisions of the statute relating to miners, is properly brought by the widow of deceased, 660.

under Sec. 14 of the "Act providing for the health and safety of persons employed in coal mines," where the violation charged was failure to furnish the drum with a safe brake, thereby causing death, it was held proper to show use of the brake, 661.

based on negligence, court instructed, if defendant was guilty of negligence causing injury, and plaintiff was guilty of contributory negligence, she could not recover, 191.

for negligent killing of child, request to instruct for defense, presents, on appeal, only question whether evidence proves negligence charged, 114.

against employer for injury sustained by employe by reason of defective machinery provided by employer, the right of recovery is confined to defects specified in declaration, not to *any* defect or insufficiency, etc., 101.

based on negligence, court instructed jury if defendant is shown guilty of negligence that caused injury, and plaintiff was not guilty of any negligence contributing to her injury, jury should find for plaintiff, 113.

against railroad company for damages for injury occasioned by negligence, it is good practice as to rule of damages, to say to jury if they find defendant guilty as charged, then plaintiff is entitled to recover, and define measure of damages, 100.

for damages for causing death of plaintiff's intestate, court instructed jury if defendant found guilty as charged in declaration, then plaintiff is entitled to recover such damages as the jury may deem, from evidence; a fair and just compensation therefor, having reference only to pecuniary injury, 99.

against railroad company for negligence, an instruction assuming the negligence of any one is improper—it is for the jury to find if so, 92.

to recover damages from street railway company for causing death of child, held that trial court properly refused motion to instruct jury to find for defendant, that questions were for jury, 106.

against railroad company for damages from negligence, whether there was contributory negligence, and, if so, to what extent, and whether the negligence of the company caused the injury, are questions of fact, 108.

ACTION—*Continued.*
against two, where concurring negligence is alleged, proof that one defendant told his co-defendant that certain supports were not strong enough before same gave way and caused the death of the servant, was admissible, 148.
for negligence causing death, the question of negligence is one of fact for jury to find from evidence and court has no right to instruct jury one thing is negligence and another not, 152.

ACCIDENT—
defined, an event happening unexpectedly and without fault, 16.
for purely accidental occurrences, causing damage without fault, no action will lie, 16.
where it results to servants by negligent and unskillful exercise of power by superintendent over men, master is liable, 279.

ACTUAL—
notice to city of defective sidewalk unnecessary, 38.

ABUTTING—
property owner—it is no defense to an action against him for injury by defective sidewalk that municipality is liable also, 332.
lot owner has no right to invoke aid of court of equity to prevent construction of street railroad—he has no standing in equity, 427.

ACT—
of legislature of 1893, prohibiting employment, of females in factory more than eight hours a day, etc.—unconstitutional, 249.
requiring railroad fencing and cattle-guards, is intended not merely for protection of property but protection of railroad employes and passengers; to keep track clear of obstruction, etc., for protection of all who need it, 518.
requiring fencing of railroads, is for the protection of all parties and property needing its protection, by keeping track clear of obstructions, 583.
of legislature, giving remedy where death caused by wrongful act neglect or default, 291.
of trespass separately done, or for positive act negligently done, although a single injury is inflicted, parties are not jointly liable, if no concert of action or no common intent, 95.

ACTIONABLE—
negligence grows out of want of ordinary care in respect to person to whom defendant is under duty to use ordinary care, 60.

ALLEGATION—
of running train negligently does not justify proof that train did not have *air brakes* or other proper machinery, 80.
general, of negligence, as applied to act of a party, is not a conclusion of law but a statement of an ultimate fact to be pleaded, 45.
essential, must be proved, 43.
and proof must correspond, 44.

APPELLATE COURT—

while it is its duty to consider the evidence and determine when the question is properly presented, whether a verdict is manifestly against the weight of evidence, it is not the duty of the court to usurp the province of the jury, etc., 571.

ANIMALS—

killed by railroad—owner must, by averment, show company required to fence, had failed to fence track, and negative various exceptions in statute and aver animals were not injured at point on road within exceptions, 475.

ASSUMED—

risks—a servant, entering upon an employment, assumes only such risks as he has notice of, either express or implied, and it is culpable negligence on part of the master to fail to notify him of risks not patent, 681.

perils—to take case out of rule it is incumbent on plaintiff to show that she was ignorant of the peril exposed to, and means of avoiding it, 258.

B.

BELL—

of thirty pounds—statute requires every railroad corporation to ring, or steam whistle sounded at a distance of eighty rods before highway crossing is reached, and when this is done the company has done its duty, whether heard or not, 551.

BUILDER—

of house in city, and excavating sidewalk for cellar, without license, is liable for all damages resulting therefrom, 33.

BURDEN—

of proof is on plaintiff to show by preponderance of evidence he was exercising ordinary care at time of injury, 59.

BOY—

of eighteen, employed several months at machine, oiling it, can not be regarded as needing any special warning of danger of reaching his arm through opening in wheel, 259.

BRAKEMAN—

law does not require he should know all defects of construction and obstruction along company's line, 278.

forcibly ejected from train a person riding thereon, by order of the conductor, and he was seriously injured. Held, railroad was liable therefor, 576.

of freight train, under orders of the conductor, forcibly ejected from the train a person who was riding thereon, and seriously injured him; *held*, the railroad company was liable therefor, 621.

of freight train standing at station wrongfully turned switch for passenger train to pass by and so sent the passenger train on track where his freight train stood, and thereby wounded fireman and killed engi-

[The References are to Sections.]

BRAKEMAN—*Continued.*

neer of passenger train; *held*, that they were fellow-servants directly co-operating with each other, 286.

killed in coupling cars, no one being present or knowing how accident occurred, evidence of prior habits, care and prudence, sobriety, admissible as tending to show deceased prudent, cautious, etc., 79.

BREAKING—

of a wheel of the coach caused injury to plaintiff, a passenger, and it was in defense shown that the wheel was made by one of the most skillful manufacturers, been thoroughly tested and such wheel was in extensive use, and company was held not liable for negligence, 616.

BOILER INSPECTOR—

knew conditions surrounding boiler when making inspection, as well or better than owner, and whether conditions were such that he could safely inspect—could not recover, 290.

BURDEN OF PROOF—

where a declaration in action for injuries causing death, avers that deceased and those causing his death were not fellow-servants, burden of proof is upon plaintiff to prove it, 137.

court refused to give any instructions asked by either party, and in lieu thereof gave one of its own. In two, asked for by defendant, it was stated to be the law that the burden of proof was upon plaintiff to prove her case by preponderance of evidence. It should have been given, 144.

BRIDGE—

over a stream which crosses a street within the limits of a city is a part of the street, 322.

do not require construction that makes accident impossible—bound to use care and prudence of careful and prudent men, 327.

built by railroad company over navigable stream within city limits, for use of railroad, under ordinance, may be regarded as built by city, 328.

C.

CITY—

having constructed sidewalk is legally bound to keep it in repair, 34.

in action against, for injuries received from defective sidewalk, the negligence, the injury, etc., are questions of fact for the jury, 33.

of Chicago owes duty to repair streets, 35.

liable on principles of common law, for damages resulting from negligence to repair, having means, etc., 35.

negligent to permit trap-door in sidewalk to be left open, 37.

liable for injuries resulting from streets out of repair, 40.

in action against, for personal injury from defective sidewalk, actual notice of defect is not necessary to prove, if it has existed long enough for reasonable diligence to discover same, 38.

or town, officers of, being guilty of no negligence as regards sidewalk, no recovery can be had, 36.

in action for damages for injury growing out of neglect, exemplary

CITY—*Continued.*

damages are not recoverable, and special damages must be pleaded, 75.

can not exempt itself from liability for injuries resulting from unsafe conditions of streets or any part of them, 333.

is bound to exercise reasonable care for discovery of want of repair of its sidewalks, 349.

action against, for damages caused by one who obstructs or excavates street, and such person has notice of suit, the judgment will be conclusive against him in action by city, 238.

was grading its streets, lowered its grade two or three feet at intersection of streets leaving sidewalk unchanged. Plaintiff, Sophie Dewey, attempting the crossing in night time caught her foot between trench and curb and broke her leg—city held liable, 356.

held liable where from insecure sidewalk lady caught dress on protruding nail and then fell down flight of stone steps, there being no guards on railing, 85.

is liable for damages where it constructs a sewer to carry off surface water where it is wholly insufficient and same might have been known to municipal authorities by reasonable care, 353.

or incorporated town or village is liable for damages by reason of defective streets, alleys, roads and bridges, within its limits, 327.

ordinance providing that railroad trains when backing shall have conspicuous light on rear car or engine, is admissible under evidence that servants of defendant railroad company in night time, uncoupled and "kicked" rear car on siding, 584.

Chicago owes duty to keep streets in repair, open to use of public as highways, and for pleasure and recreation, to be used by children in play, etc., 35.

of Chicago has adequate means to repair streets, 35.

is liable for injury received by persons observing due care as combined result of accident, and negligence of city, 42.

railway company is not liable for injury to another, by its servant, if its servant, in causing said injury, is not acting within scope of his employment with view to further the business, 378.

and villages can not divest themselves of their power over streets and bridges, etc., nor resulting duty to keep same in reasonable repair, so that public may pass over them in safety, 319.

is liable for damages for negligent performance of its duties, 33.

CARE—

ordinary, necessary for servant of railroad, to recover for injury from company, 7.

degree of, to be exercised by carrier of passengers, all that hnman care, vigilance, etc., reasonably can do, 15.

ordinary, defined, 7.

and caution of a child—A child is required to exercise that degree of care which children of like age and experience may reasonably be expected to use under like circumstances, 562.

in supplying safe instrumentalities in doing work undertaken by serv-

CARE—*Continued.*

ant, is a duty master owes servant, and when that duty devolves upon a fellow-servant master's responsibility still remains, 104.

CHILD—

degree of care required of, such as might be expected of his age and intelligence, 17.

COMPARATIVE NEGLIGENCE—

definition and history of, is now obsolete, 29.

CONTRACTORS—

independent, etc., having actual possession of premises for purpose of building, negligent acts of, not chargeable to owner, 32.

CONTRIBUTORY—

negligence of plaintiff is a question of fact for the jury, 21.

negligence is a defense, although not proximate cause of injury, 22.

negligence is the negligence of the complaining party, 22.

negligence on part of deceased being fairly raised, it is error in court to ignore it, 93.

negligence being involved, every instruction given, professing to lay down grounds for recovery, should state rule as to care and caution on part of plaintiff, 94.

CHILDREN—

no inflexible rule by which to determine the capacity of children for observing and avoiding care, as affecting question of contributory negligence. in case of injury to them, 83.

is a question of fact in each case, 83.

young—negligence not to be imputed to, as to persons of mature years, 17.

young—in action brought by parent, negligence of parent to be imputed to child, 17.

CASE OF FIRES—

also in case of explosion of locomotive boiler attached to train at depot, injuring a passer-by, 5.

CARRIER—

and passenger, relative rights of, are matters of law, and the fact that the duty alleged against a carrier, as a conclusion of law, does not harmonize with facts alleged as breach of duty, does not render declaration insufficient to sustain judgment, if facts alleged raise a duty, 135.

and passengers, stringent as obligations toward each other are, their obligations rest upon grounds of humanity and respect for rights of others, 399.

owes a duty to passengers that they shall during transit be protected from all dangers as far as the efforts of the carrier and its servants can be made available, 618.

of passengers for hire, is bound to exercise highest degree of diligence for safety of passengers, 410.

CARRIER—*Continued.*

of passengers, while not insurers of safety, are, so far as human foresight can go in ways consistent with the nature of the business to be done, to provide for safety of the passengers, 411.

COMMON LAW—

it being contended there can be no such thing as negligence in common law in conducting the mining business, where the operator complies with the statute, the court held the view was not well founded and that the declaration set out facts constituting a cause of action under the common law, 687.

CONDUCTOR—

received fare to a station where he was not bound to stop, but was bound to stop within 800 feet of a railroad intersection. 500 feet beyond such station, and on approaching such station the whistle sounded and train was stopped; it was held that the passengers on the train, in absence of a contrary announcement, had a right to believe the stop was to let them off, and company was liable for injury to them by starting train, 639.

of fast train who receives fare from passengers to a station, is bound to notify the passengers so paying that the train will not stop at that station, or carry them there and give them time to get off safely, 639.

of freight train that usually carried passengers stopped his train, not at a station, and put off a person who got on board without a ticket, ticket office being closed, and offered to pay regular fare, which was refused, and the jury gave said person $200 damages, and the court sustained verdict, 629.

it is duty of passenger peaceably to submit to commands of the conductor, though wrongful, his remedy being by an action for damages, 605.

if acting under instructions, refuses to accept a ticket issued by another company as agent of his company, and demands full fare, the passenger, if his ticket was issued by authority, may pay fare again and recover of the company, or he may refuse and leave train and recover all damages, etc., 604.

who fails to have train halt less than 200 feet before it reaches crossing of another railroad, and so contributes to collision, in which he is killed, his representatives can not recover, 92.

of street car company has right to keep trespassers off car—He pushed plaintiff off and injured him. In exercise of such right conductor must have due regard to life and limb, and for abuse of his authority the company will be held strictly accountable, 378.

CONTRACTOR—

where owner retains control and work is done under owner's superintending, owner liable, 234.

where put in exclusive control, furnishes his own assistance, executing work in detail, clear of supervision, he is an independent contractor, 234.

CONTRACTOR—*Continued.*

one who contracts to do a specific work, furnishes his own assistants and executes the work in accordance with his own ideas or with plan furnished by party for whom work is done, without being subject to orders of latter, is a contractor and not a servant, 138.

that he may be liable, must have exclusive control over erection as to plans, materials used, etc., as would enable him to avoid or avert danger, 234.

where work is being done for railroad company under a contract, the fact it retains right to demand discharge, under certain circumstances, of an employe of the person doing the work, does not make such company master so as to be liable for negligent acts of contractor, 138.

CONTRACT—

to purchase consent of property owner to laying down street railway in street upon which property abuts, for money or other consideration, is illegal and void, 367.

common carrier can not relieve itself by contract from loss sustained by consignor upon goods in possession of carrier, 196.

CHARTER—

imposes on lot owners the costs and charges of making and keeping sidewalks in repair, duty of keeping in safe condition and does not exempt the city, in this respect, from liability, 324.

CHANGING—

grade of street affects use of street, and work must be done with reasonable regard for public interest, 339.

CATCH BASIN—

city had right to make the opening into which plaintiff fell and was injured, but it was the duty of city to reasonably guard it when made, so as not to expose persons to unreasonable danger, 352.

CAR OF STREET RAILWAY—

was on street carrying passengers, and was wilfully driven into by wagon of defendant, and thereby a passenger (Cornell) was injured, who otherwise would have been carried safely. Cornell sued company for his injuries, recovered $4,000, which company paid, and then sued defendant and *did not recover* damages paid Cornell, 377.

CONFLICT OF EVIDENCE—

when there is, as to whether plaintiff was in exercise of ordinary care at time of injury, verdict is conclusive, 109.

COURT—

will not ordinarily interfere with verdict of the jury when damages are unliquidated and the suit is referred to the jury, 576.

should always instruct jury that if they find the facts involved in issue proved (reciting them), then they should find for the party in whose favor they so find the facts, 92.

upon review of evidence sustained a verdict of $300, for a plaintiff for having been wrongfully put off a moving train some distance from a station, 630.

COLORED—

woman can not be refused admittance to ladies' car *because of her color*, and, being directed to take seat in another car occupied mostly by men, declined to do so—brakeman excluded her in rough manner, and company was held in $200 damages therefor, 610.

CONDITION OF SIDEWALK—

evidence of same before and after accident admissible to prove its condition at time of accident. 321.

CORONER'S VERDICT—

not evidence in action for damages for negligence, 184.

COLLISION—

between horse-car and grip-car (grip-car having run into horse-car upon which deceased was riding) it was competent to show as bearing on question of negligence, that grip-car could have been stopped, 388.

COAL MINE—

employe was descending a shaft in a cage, rope broke and he was precipitated to bottom of shaft and badly injured. Rope was old and in bad condition, spliced, but defect could not be detected by ordinary observation. Held, that use of rope in its unsafe condition was gross negligence, 668.

mining company in action against, to recover damages for causing the death of plaintiff's intestate, the only omission of duty charged being failure to furnish props and prop the clod, dirt, slate and other materials, held, that the declaration does not show a violation of Sec. 16, Chap. 93. or state a cause of action, 672.

CONFLICTING EVIDENCE—

in a personal injury case—The court discusses the evidence and bolds that while it was conflicting on some questions involved, the facts did not warrant interference of the court, and the verdict must stand, 687.

COLLISION—

between wagon and car; bystander saw danger of collision and tried to warn driver of car; evidence showed if driver had exercised proper care he might have foreseen it; should have been left to jury, 424.

CATTLE-GUARDS—

in action against railroad company for killing horses on a railroad through insufficiency of cattle-guards, a witness testified that he had seen cattle and colts cross a cattle-guard on defendant's road like one in question, 511.

CORPORATIONS—

when a duty is imposed upon a corporation and entrusted by it to an agent, notice to such agent is notice to such corporation.

D.

DAMAGES—

six thousand dollars allowed to man of seventy-two years for injury in alighting from train, 63.

DAMAGES—*Continued.*
exemplary—permissible, in proper case, and that question is for jury to decide, and is allowable where gross fraud, malice or oppression appears, 64.
five thousand dollars for healthy young woman of nineteen, who suffered great pain, permanent stiffness of hip joint, leg can not be straightened, feeble, unable to work, etc., 62.
verdict $1,500 not unreasonable to sewing woman under circumstances stated, 62.
amount allowed when laborer got broken nose, cheek bone broken, eye injured, and got rupture, $6,000, 62.
fifteen thousand dollars sustained where injury to child of six years by loss of leg, leaving too short stump for artificial limb, 62.
what matters taken into account, $6,000 and $7,000 sustained, 63.
for physical injuries, the suffering, mental as well as physical, may be shown, recover all damages natural proximate consequence of injury, 61.
how measured—in respect to collision between vehicles on street, 61.
for injury causing death, damages must be largely left (within the statute) to jury, 73.
general, which are necessary result of injury, may be proved without special averment, 57.
special, admissible to prove only when such are alleged, 57.
important for plaintiff to show by evidence, previous physical condition and ability to labor, as well as such condition after injury, 52.
in action against city, by married woman, confined to those alleged and sustained by her alone, 52.
to boy of eighteen years $7,500 sustained, etc., 63.
to child, action by parents to recover for, negligence of parent, if any and contributory, imputed to child, 53.
exemplary—In a proper case jury may give exemplary or punitive damages, 64.
elements of—In an action for damages resulting from personal injuries, it is sufficient if there is liability to pay for physician's services in being cured in making up a verdict, 684.
recovered on account of deceased miner, being in favor of several parties, are subject to distribution among the several beneficiaries, 661.
the measure of, to realty, by the destruction of fruit trees, meadows, etc., as parts of the realty, resulting from fires communicated by locomotives, in the amount that such realty as a whole has been diminished in value, 646.
arising from inability to do business—Evidence admissible to show capacity of plaintiff to earn money in any employment for which fitted, 161.
are general and special—General damages are such as naturally and necessarily arise from wrong complained of; special damages are such as actually took place, but are not implied by law; must be stated in pleading, 383.
for death—Parents and even brothers and sisters might reasonably

DAMAGES—*Continued.*
expect, in many ways, to derive pecuniary benefit from continued life of intestate, 304.
for death—Question incapable of exact determination, and jury should calculate damages in reference to reasonable expectation of benefit, as of right or otherwise, from continuance of the life, 304.
not indispensable to prove services of pecuniary value rendered next of kin, 301.
where deceased, a minor, and left father entitled to his services, law implies pecuniary loss, left largely to jury, 301.
for death—When proof of age and relationship of deceased to next of kin is made, the jury may estimate the pecuniary damages from facts proven and their knowledge of matters of common observation, 301.
must be such as plaintiff has sustained, and evidence confined to proof of such damages, 314.
assessed and sustained in several cases of injury from defective streets and sidewalks, 314.
against city, where plaintiff received a fall upon sidewalk in consequence of negligence of city to repair, must be such as to afford compensation, 313.
must be measured by loss of time during cure, expense incurred, pain and suffering undergone by plaintiff, any permanent injury, 312.
are given as compensation for injury, and allowance of punitive damages is a departure from rule, which once obtained in England and this country, 312.
were $5,000 fixed by jury—Deceased left widow and two children. He was a laboring man and earned $1.50 per day. Appellate court may allow remittitur and give judgment for remainder, 310.
claimed for injury resulting from being ejected from street car, plaintiff got up and pursued and overtook the car, went to work next day as usual; verdict $1,200 held excessive, 373.
for personal injury against railroad company. Plaintiff must prove the injury and the negligence, 74.
there can be no apportionment of damages as between the several parties whose negligent acts contributed to the injury, 147.
for a loss, caused by negligence, the party seeking to recover, must be able to show his own misconduct has not concurred with other party in producing the injury, 140.
for personal injury from defective sidewalk against incorporated village, held to include pain and anguish suffered, all damage to person, permanent or otherwise, loss of time, expense incurred in effort to be cured and all damages alleged in declaration proved, 97.

DANGER—
seen, of a certain line of conduct, yet pursued, declining safe course, is want of ordinary care, 24.

DANGEROUS—
obstructions, permitted to remain in streets, renders municipal corporation liable in damages to person injured thereby, is negligence, 336.

DANGEROUS—*Continued.*
attractions to children (upon unguarded premises), are to be regarded as holding out implied invitation to, which will make owner liable in case of injury, 30.
attractions to children, whether premises are such, and an implied invitation to children, is a question for the jury, 30.
attraction for children—A deep pit with water uninclosed and floating timber, wherein child was drowned while playing—City held liable, 30.
machinery, person working on, though but twelve years old, must exercise such care as may reasonably be expected of one of his years, 211.
and safe routes, if there were two routes—one dangerous and the other entirely safe—if in the selection of route plaintiff saw proper to pass over the dangerous one, it can not be said, as matter of law, plaintiff was justified; question of negligence ought to be left to jury, 141.

DEATH—
by negligence—If no one saw the fatal accident, plaintiff must produce best possible evidence case admits of, 11.
of child by drowning in ditch five feet deep bordering on sidewalk, no guards; no negligence of parents or child; gross negligence of city, 74.
of Frank McMahon upon unfenced lot leased by city, parents without fault, 309.
and damages, for killing of Berend Scholton, caused by negligent care of sidewalk. Deceased was twelve years old, and while walking quietly along, sidewalk gave way and precipitated Berend and his brother to bottom of vault, injuring younger brother and killing him, 305.
of child too young to have rendered any service to parents. Major child was four years old. Jury was authorized to estimate the pecuniary damages from facts proven in connection with their own knowledge and experience, 306.
of a person caused by some neglect or default of another, not willful in its character, the right of recovery is not in the widow, but in the administrator of the deceased, suing for the benefit of the widow and next of kin, 683.
of person by negligence. The burden of proof is upon the plaintiff to show that at the time of the accident the deceased was in the exercise of ordinary care to avoid injury. Without it there can be no recovery, 572.
by negligent act, of Frank Wangelin, twenty-two years old, earning $50 per month, sister survived, to whose support he contributed, data not required of extent of pecuniary loss, "fair and just compensation," is for jury, 304.
from negligence; statute in giving action for death of minor to personal representatives does not limit right of recovery to father. Jury to give such damages as they shall deem fair compensation, etc., 303.
by wrongful act, only pecuniary damages can be recovered, nothing for solace or bereavement, 301.
of Max Werner by drowning in ditch filled with water in a street in front of parent's residence, 299.
of brakeman, caused by explosion of boiler of locomotive, while train

DEATH—*Continued.*

in motion; charged boiler was known to be unsafe (killed engineer also), 297.

by wrongful act person killed in night time by cars in motion, no eye-witness saw injury, deceased sober, started for home on sidewalk and was killed on direct route for home, soon after last seen, etc., 296.

by wrongful act, must affirmatively appear injured party was in exercise of due care, proved by circumstantial as well as direct proof, 293.

by wrongful act, allegation of negligence of defendant must be supported by evidence, otherwise case must fail, 294.

by wrongful act necessary to be proved, (1) accident was occasioned by wrongful act, neglect or default of defendant; (2) that party injured was in exercise of due care, 292.

from negligent act, train was running twenty miles per hour, whistle blowing and bell ringing, deceased whipped up his horse, disregarded order of flagman to stop, and tried to beat train over crossing—No care no remedy, 287.

of Max Werner, by negligence of city in permitting ditch, filled with water, without guard of any kind to prevent children from falling in, 300.

of child Logue, wandered out of house and sat down on track, where discovered too late to save life, 308.

of child, question of contributory negligence of parent is one of fact, 308.

of child of tender years, negligence of a parent which contributes to injury is imputable to child, and if established prevents recovery, 308.

by wrongful act, proper to show deceased was drunk at time of accident; proper as tending to show negligence, 74.

of child by drowning, in ditch filled with water, 73.

by negligence, to recover for, must prove what, 11.

DECLARATION—

charges that town of Harvard negligently permitted a certain sidewalk within corporate limits, north side of W. street, and opposite a lot owned by Z., to remain out of repair and covered with plank, ashes, etc., so that it was dangerous to travel upon, by means whereof, etc., 143.

or admissions of agents admissible only when part of *res gestae*, 81.

against carrier, alleging plaintiff became a passenger, and while attempting to alight at destination, using due care, the defendant carelessly caused train to be violently started, whereby plaintiff was thrown and injured, is sufficient after verdict, 135.

alleged that the defendant was hoisting coal out of the shaft in its mine at the time deceased was ascending and was killed in consequence of that illegal act, and the proof showed he had just got upon the cage to be raised when he was killed; it was held there was no material variance, 660.

of motorman, running electric car, made while car on body of child, admissible in evidence, 186.

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acting under orders of foreman to perform piece of work with help selected by himself, is thereby placed in authority over such help, master is responsible, 267.

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G.

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combined result of accident and defect in road, town is liable, 12.

where would not have happened but for combined negligence and accident it will not relieve the defendant that it was also the result of accident, 16.

to personal property, obtained by trespass, renders trespasser liable, 31.

causing instant death of person injured, where accident is unseen, evidence of due care need not be direct—due care may be inferred from circumstances, 119.

being result of neglect to perform a common duty resting on two or more persons, though there may be no concert, parties may be held jointly or severally liable, 95.

by fire from locomotive where railroad company suffers heavy growth of dry grass to remain on its right of way through plaintiff's premises and fire is communicated from the locomotive, 519.

causing instant death of party injured, evidence of due care on his part need not be direct, 190.

action against a saloon keeper—death caused by intoxication, 716.

to warrant the giving of exemplary damages in actions under the dram-shop act the proof must show actual damages and aggravating circumstances attending the sale of the liquors, 713.

recovery must be confined to injury of wife in *person, property* or *means of support;* no exemplary damages can be given without proof of actual damages, 712.

to a passenger, during his course of transportation upon a railroad, caused by apparatus furnished and under control of the company raises a presumpion of negligence, the burden of rebutting which, rests upon the company, 643.

where it is wantonly and wilfully inflicted the jury may, in addition to actual damages sustained, visit upon the wrongdoer vindictive or punitive damages by way of punishment for the wrongful act, 631.

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by joint result of accident and negligence, and injury would not have occurred but for such negligence, city will be liable, 88.

INTOXICATING LIQUOR—

where an intoxicated person in going to his home in the night, has to cross a railroad track, and next morning is found dead, killed by being run over, intoxication will be held proximate cause of his death, and the seller liable, 710.

the seller of intoxicating liquor to a husband who becomes intoxicated by it, and in consequence of abusive language by him, is assaulted and killed, is not liable in damages to wife for death, 709.

statute construed; liability to person injured; any one who may be injured in person, property or means of support by any intoxicated person, has right of action against party causing the intoxication, 708.

damages under acts of 1872 and 1874 were precisely the same—the effect of the latter act was to continue in force the act of 1872, 707.

under the provisions of the statute giving an action to the person injured jointly or severally, against any person or persons selling or giving away intoxicating liquors, causing intoxication in whole or in part, it will not avail defendant to show others sold liquor to the party, 706.

ground of action for selling or giving away; there are three separate descriptions of injury caused by selling or giving of intoxicating liquor: (1) injury in person or (2) property, or (3) means of support, 706.

injury to means of support; elements affecting right of recovery, 718.

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cities and villages vested with exclusive authority over matter of railroad crossings over streets and highways within their limits, 360.

company to operate a railway in a city upon such conditions as city may impose, and the city grants privilege of constructing same on certain streets, the city grant is a mere license, 361.

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contract of a railway carrier of passengers to carry them safely to their destination includes the duty of furnishing them reasonable opportunity to alight from the train in safety at the end of the journey, 637.

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INDEPENDENT CONTRACTOR—

where employer is not the immediate superior of those guilty of wrongful act, and has no choice in selection or contract of workmen,

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where act complained of necessarily occurs in ordinary mode of doing work, owner liable for injuries caused, 237.

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in action against master for negligence in selecting and retaining incompetent servant, burden of proof is on plaintiff, 241.

INJURED LIMB—

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which is unnecessarily lengthy, involved, confusing, argumentative, and contains a one-sided statement of facts should not be given—is erroneous, 665.

which states, as a proposition of law, that alighting of a passenger from a moving train constitutes negligence, is properly modified so as to submit that question to the jury as a question of fact, 640.

permitting a recovery by plaintiff, whether the relation of passenger and carrier existed or not (the question being fairly raised), is erroneous, 635.

to jury, that if they believe from the evidence that deceased was rightfully on defendant's engine, and was using ordinary care for his safety and was, through the negligence of defendant's servants in handling said engine, thrown from said engine and injured, from which injury he died, then to find for plaintiff, 613.

should not ignore the question of contributory negligence of plaintiff when properly raised by the testimony on part of defendant, plaintiff can not recover for injuries sustained by his own imprudent attempt to board train in motion, 631.

to find for defendant must be refused, where there is evidence tending to prove plaintiff's cause of action, 580.

not proper to instruct jury, that as matter of law railroad servants may assume certain things specified and act thereon without negligence, 580.

in an accident crossing case, was wrong in part. It implied that the corporation was liable *prima facie* for any and all damages party sustained when crossing signals omitted, from that cause or any other. Plaintiff himself may have been negligent, may have been no connection between the injury and signals. Until proof injury resulted from failure to ring bell or sound whistle, the burden of proving a negative should not be thrown on company, 537.

in personal injury cases. It is the practice settled by long line of judicial decisions, to give the jury such instructions as may be submitted by the respective counsel, provided they are based on the evidence and announce correct propositions of law applicable to case, 376.

that permits recovery where plaintiff's evidence slightly preponderates is not erroneous, clear preponderance not being required, 282.

that if plaintiff has proved all allegations of declaration as alleged he

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is entitled to recover, is not erroneous, where due care on plaintiff's part is alleged, 116.

that orders of superintendent in hearing of principal are to be considered by other employes as orders of his principal, effect being to relieve foreman and make contractor responsible for orders he never gave, is erroneous, 84.

that does not confine right of recovery to defects specified in declaration is erroneous, 81.

improper, that details certain facts as constituting ordinary care instead of leaving it to jury to determine from evidence, 77.

to jury, as to duty of all persons approaching highway crossings where a railroad is, to exercise care and caution to learn if any trains approaching and take such action as any cautious man would, etc., 96.

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upon a question of negligence must be confined to scope of negligence alleged in declaration, 125.

authorizing jury to base verdict against railroad company upon negligence not charged in declaration is erroneous, 126.

expression "due care" is properly changed to "ordinary care" and "reasonable care" as terms convertible, 127.

is properly refused which purports to take case from jury when there is a conflict of testimony, by telling them how to find a verdict, 100.

that assume to state to jury that certain facts *per se* constitute negligence on part of plaintiff's intestate, should not be given, 103.

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J.

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negligence of several. If two or more persons are jointly concerned

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in a particular act, which occasions injury to another, they may be sued jointly, if they act in concert or unite in causing a single injury (Keifer's death), 147.

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were instructed that if they believed from the evidence that by error in judgment in selecting pins too small the accident happened, when larger ones were provided and present, and could have been used but were not, then defendant is not liable, 84.

K.

KILLING STOCK—
where stock enters railroad right of way at a place exempt from fencing and cattle-guard, and wanders along track to a place not so exempt, because of failure to fence and erect cattle-guards, and is killed, the railroad company is liable, 622.

KNOWN DANGER—
a party who goes into such voluntarily while pursuing his duties, not required or forced so to do by the master, and is injured, can not recover, 674.

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L.

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could supersede the common law, but unless it does so all common law rights, not at variance with the enactment, continue in force, 687.

has power from time to time, by general laws, to regulate corporations in the exercise of their franchises so as to provide for the public safety. Omission to comply with law requiring signals at crossings is *prima facie* negligence, 536.

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so attached to a switch that an engineer in charge of a train can see whether it is open in time to stop train, if necessary to avoid injury, is a reasonable provision against danger, and failure to provide such, jury may regard as negligence, 564.

M.

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MINES AND MINING—

in action by miner to recover for personal injury while working in a coal mine, the court instructed the jury, that if defendant knowingly and negligently failed to keep its doors across its gangways, and the gangways themselves in reasonably safe condition and repair, and that by reason thereof plaintiff was injured, as alleged, they should find for the plaintiff, 666.

MINING COMPANY—

court told jury if they believed from the evidence that defendant had wilfully failed to comply with its duty, or wilfully violated the pro-

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visions of the statute, as alleged in the declaration, then the defendant was liable, 662.

in action against, by widow to recover for death of husband through negligence, plaintiff showed by engineer himself a want of experience and incompetency of engineer, 662.

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a careful and prudent miner will not willingly and knowingly incur avoidable danger. An injury resulting from an unwarranted reckless course can not be ground of recovery, 678.

employer is not bound to give his servants notice of the ordinary danger pertaining to the particular service, 677.

where a personal injury to a servant is the result of the negligence of fellow-servants, the master is not liable unless some preceding personal negligence on his part also led directly to it as a cause, 677.

mine owners in this state (Illinois) are under no statutory obligation to absolutely keep the roof of a mine so propped that it will not fall, 677.

where a timberman is employed, miners are not thereby relieved of duty of observing conditions and reporting any signs of danger to mining manager or timberman, 677.

if master exercises care in selecting material, employing competent persons to construct the place, and there is no obvious defect in plan, material or work, he will not be liable for an injury to servant resulting from latent defect, 677.

where no timberman is employed, it is the duty of miners, and part of their employment, to carefully observe the roof under which they work from day to day, and to set props wherever they appear needed, 677.

where master prepares the place where his servant is to work, the law does not make him a guarantor of its safety—requires him to exercise reasonable care to have it reasonably safe, 677.

knowingly employing an incompetent or inexperienced engineer, or keeping him after knowing his incompetency, will be liable, 676.

is not required to use any particular make of machinery, nor the very best modern kinds, but that the machinery shall be reasonably safe and suitable for purpose used, 676.

under the statute the mining company will be liable for a personal injury to a person in its employ while descending into a mine, resulting from employment of an incompetent engineer, and improperly loading a car, 671.

having failed to comply with statute of 1872 to securely fence top of each shaft by vertical or flat gates, and an employe fell in and was killed, the company was held liable for the death, 667.

in action against, by admiuistrator of deceased miner, to recover for

MINING COMPANY—*Continued.*

causing his death through negligence, it is error to instruct jury for plaintiff it was the duty of defendant to cause the mine to be examined every morning with safety lamp for fire damp, when such instruction has no application to facts, 665.

having opened three coal mines and failed to open a second escapement shaft to the second and third mines, and a fire occurred in the main shaft, filling mine with smoke, and miners in alarm rushed to shaft and one fell down shaft to third mine and killed, company was liable.

in action by miner to recover for personal injury, while being lowered into the mine, from incompetency of engineer, the court should give only the law as to liability of defendant in case of negligence, 663.

MINE—

a mine is a pit or excavation in the earth from which ores or mineral substances are taken by digging. A colliery is defined to be a mine, pit or place where coals are dug with machinery used in discharging and raising coal, 683.

upon case made, the jury were held justified in finding that the post that fell and killed plaintiff's intestate was improperly secured, and the negligence thus complained of was not that of a fellow servant, 682.

negligence of agent or boss of a mining company, having charge of mining operations, will be the negligence of the mining company, 681.

company had a pit boss to direct and control labor of those employed in the coal mine. The pit boss knowing of the loose overhanging rock in the roof of the mine insufficiently braced, falsely represented to plaintiff, working under him, that there was no danger and directed him to work there, and said overhanging rock fell on him and injured him—held, *prima facie* case of negligence, 681.

where the verdict of a jury is palpably against the evidence and manifestly wrong, the duty of the court is imperative to set it aside, 678.

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the same rule as to assumed risks applies to a minor as an adult, if he has the experience and capacity to understand, 252.

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is liable to action for damages for injury from defective street where, had there been no defect, the injury would not have happened, 332.

holds streets and alleys of city in trust for public, and is given power to vacate same when public convenience requires, 320.

must keep their streets and alleys in reasonably safe repair for use of public—failure to perform this duty is negligence for which action may be maintained by person injured thereby, 336.

if guilty of no negligence in regard to sidewalk and same is in reasonbly safe condition for people to pass over, no recovery can be had 349.

is liable for defective sidewalk by whomsoever built, 337.

is negligent and liable if it permit owner or occupant of abutting premises to make opening, and leave open hole in sidewalk so pedestrians may fall therein, 337.

MAN-HOLE—

in street, left from morning of one day till evening of next, with plank sticking up in it, makes question for jury as to notice and negligence of city, 39.

MANUFACTURER—

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of implements for use of employes, is held only to employment of every precaution which a reasonably prudent man would use under like circumstances, 209.

MOVING TRAIN—

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duty is to see that person in charge of work is capable of appreciating obvious dangers, 251.

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MASTER—

is responsible for injury to one servant by the negligence of another where the servant causing the injury is not a fellow-servant of the one injured, 564.

when calls servant from place of safety and commands him to work in place of danger without warning him of increased hazard, it can not be said the danger is an obvious one, 244.

can not relieve himself, by delegating to another, duty to inform servant of dangers, where duty is not done, 251.

can not relieve himself by delegating to another duty to exercise reasonable care to furnish safe place for servant to work, 251.

and servant—Where employe acts outside the line of his employment, and, for purposes of his own, inflicts injury upon one who has no claim upon the employer, from any special relation existing, the employer is not liable, but the rule does not apply in case of common carrier, 618.

impliedly undertakes, in providing appliances for use of servant, to use reasonable care to provide such as may be used safely, 2.

duties of, non-assignable, what they are, 14.

is held responsible to servant for injuries received by him from defects in structures or machinery, about which service rendered, which master knew or ought to have known, 214.

is deemed to have knowledge of defects in appliances furnished servant when by ordinary care he might have such knowledge, 216.

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must exercise reasonable and ordinary care in supplying safe instrumentalities in doing work undertaken, 198.
or employer is not bound to provide absolutely safe machinery—To use reasonable and ordinary care and diligence in providing suitable and safe machinery, 199.
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to charge with negligence for defective tools or machinery, it must be shown that he either knew or ought to have known of weakness that caused the accident, 119.
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N.

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of parent of young child which contributes to injury of child is imputed to child, if parent present, 114.

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view of highway crossing, and if injury results to stock at such crossing that might have been avoided but for such obstruction, the company will be liable, 520.

it is negligence for a person to walk upon the track of the railroad, whether laid in street or open field, and who deliberately does so will be presumed to assume the risk of peril he may encounter, 556.

can not be imputed to railroad company for killing stock when employes of company do everything in their power, after discovery of the stock upon the track, to save it from injury, 569.

to any degree on the part of a passenger will not excuse a wanton and malicious attack on him by the conductor or other servant of the railroad company, 631.

it is, in railroad company not to furnish seating accommodations for their ordinary number of passengers, yet the same strictness should not be applied when a train is unexpectedly crowded by a party going a few miles, 633.

where, if of one servant causing injury to another, and is the result of authority conferred upon the foreman by the master over the servant injured, the master will be liable for such injury, 681.

being one of fact, to be left to the jury, if plaintiff has been injured by his failure to exercise ordinary care to avoid danger he can not recover, 632.

in mining—Law makes it the duty of operator and owner of coal mine to fasten the top of the shaft and entry thereto by gates, and if he fails wilfully so to fence, and by reason thereof an employe is killed, the owner will be liable to widow in damages not exceeding $5,000, even though guilty of contributory negligence, 675.

of a miner—While moving a car in the dark, low, narrow passage of a coal mine, having no light other than the lamp carried by him, failure to discover such grade in the track as would cause the car to run of its own momentum (not having his attention previously called to it), does not raise any implication of negligence, 680.

of a miner—Where a plaintiff in his testimony fully details the circumstances attending his injury, the question whether he was in the exercise of due care or not depends wholly upon the construction and force to be given to his evidence and is for the jury, 680.

failure to perform an assumed duty by which an injury results to one in the exercise of due care, creates a liability at common law. It is an ordinary hazard if an injury occurs where there is no such breach of duty, 684.

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prudence requiring it, municipality must construct barriers against teams and wagons falling into ditches being excavated in streets, 349.

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when by it, animals on a railroad track can be saved from injury, it is the duty of companies to use that degree of care. Where stock is on track and train approaching, the engine driver instead of stopping his train to drive them off, pursues, overtakes and kills them where not likely to leave track, company is guilty of negligence, 537a.

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where injured party is in exercise of, no contributory negligence is attributable to him, 22.

what facts constitute presence and absence of, are for jury and not for court, 21.

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of the mere ticket sold, it is admissible to prove by parol evidence, the terms of the contract in fact entered into between carrier and passenger, 644.

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P.

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PLEADING—

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tendency is to too great particularity of details, 46.

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allegation specifying act causing injury, and that it was negligently and carelessly done, is sufficient, 46.

before verdict, intendments are against pleader; after, are in his favor, 47.

example of simplicity in boat collision case, 45.

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needlessly describing a tort must prove statement as made, 44.

may aver as many grounds of recovery as he thinks proper, but need not prove all alleged—illustration, 54.

for purpose of, general allegation of negligence only to be made, 46.

most approved precedents in cases against carriers for injuries to passengers, allege the negligence in general terms only, 46.

one desiring to have action of trial court in overruling his general demurrer reviewed, on appeal, should abide by his demurrer, as by pleading to the merits he waives the right to assign such overruling as error, 135.

is a fundamental principle that a party is not required to plead evidence upon which action is based, but in charging negligence it is necessary to set forth the negligence, 134.

one pleading over, after overruling of his demurrer, does not waive such substantial defects in declaration as would render it insufficient to sustain a judgment, 135.

defect in substance or form, which would be fatal on demurrer, is cured by verdict, where the issue joined is such as requires proof of facts imperfectly stated or omitted, 135.

where a declaration contained several distinct charges of negligence, if either of such charges sets forth a cause of action and is sustained by the evidence, a recovery may be had although other charges not proved, 137.

it is sufficient to allege facts which disclose an omission of legal duty; it is not essential that such omission be denounced as negligence, 136.

in an action for personal injury from negligence, it is sufficient to aver that the defendant knew the conditions before the accident, etc.—is not necessary to aver evidentiary facts, 684.

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injured in a collision with a railroad train, has a right to show the position of the defendant's train and the precaution, if any, of the conductor taken to guard against danger, and the statements and declaration of the conductor a few minutes before the collision, being part of the *res gestæ*, 614.

an employe in defendant's coal mine was injured by a rock falling on him from the roof of the mine, and it appeared that the dangerous condition was as well or better known to him than any other person and he did not notify defendant, held, he could not recover, 674.

had passed over the incline frequently before the accident; says had been apprehensive of danger; saw snow was hard and slippery when accident occurred; she chose to take the chances of a fall with knowledge of the situation, can not recover, 355.

attempted to get off car while it was moving toward a standstill and was injured, held, her injury was result of her own making, 420.

horses of, at time they were killed were trespassers. Defendant railroad company had done its duty as to fences—gates were not left open by defendant. Question was whether defendant's employes could with reasonable care have discovered and saved horses, 515.

PRESUMPTION—

being in favor of action of trial court, the bill of exceptions must show that question of *variance* was presented to trial court, and supreme court will not *presume* it made and argued, or an instruction directing a verdict, 135.

in suit against carrier for injury, mere proof of the accident by which injury occurred is sufficient to throw the burden on the carrier to show he exercised due care on his part, 255.

of negligence arises against carrier, where the cause of the accident is under its control, because it is in possession of almost the exclusive means of knowing what occasioned the injury, while the injured party is generally ignorant of facts, 409.

of negligence by collision of company's trains on same track—jury may find that a collision on same track of two cars or trains of passenger carrier, is due to negligence, 412.

PRIMA FACIE—
case of negligence from explosion of steam boiler may be rebutted, etc. (death of Burgess), 179.
case made by plaintiff against railroad company to recover damages for destruction of property by fire set by sparks from locomotive engine—to be overcome it is necessary for defendant to show the engine was properly handled at the time the fire was communicated, 515.

PROOF—
that deceased was a sober, industrious man, possessed of all his faculties, tended to show exercise of proper care, 157.
must support allegations, 177.
that property was destroyed by fire communicated from passing engine is to be taken as *prima facie* evidence to charge railroad company with negligence, but owner is not absolved from all care whatever in matter, etc., 377.
of negligence as to railroad crossing, 182.
of injury, as proximate result of an accident, etc., 187.

PERSON—
who has boarded a freight train may be a trespasser; that does not prevent a recovery against a railroad company for the act of a brakeman in ejecting him from the train while in motion, 620.
traveling by consent of a railroad company upon a freight train, in charge of cattle being transported for him, is a passenger for hire, whether supplied with a drover's pass or not, 643.
approaching railroad crossing, is bound in so doing to exercise such care, caution and circumspection to foresee danger and avoid injury as ordinary prudence would require, considering the dangers of the situation. No invariable rule can be stated from failure to look and listen, 552.
about to cross a railroad track should look about and see if there is danger, and not go recklessly upon the track, knowing the locality and that it is about train time; it is negligence not to look and see if a train is approaching, 534.
about to cross a railroad track is guilty of negligence, if he does not look and listen; whether negligent or not is a question of fact for the jury, 575.
who has boarded a freight train, though a trespasser, can not be ejected while train is in motion, by brakeman, without regard to safety of his person, 576.
knowing a flagman is usually stationed at a railroad crossing has right to presume that he is at his post and will do his duty, and, in absence of warning signals, is not chargeable with negligence in proceeding to cross tracks, 558.
has right to rely on open gates as notice to pass, 559.
dealing with railroad corporation can only judge of powers given to its agents and servants from appearances and the position and acts of such employes, 613.
injured from negligence of another, being in exercise of due care, is question of fact for jury, not of law for court, 96.

PERSON—*Continued.*

looking and listening for approaching train at railroad crossing and no warning is given by bell or whistle, he will be guilty of no negligence in going on the track, 521.

who erects a building on or near a railroad track and knows the danger incident to use of steam as motive power, must be held to assume some of the hazard connected with its use on such thoroughfare. He is bound to a higher degree of care to prevent loss by fire, 524.

PERSONAL INJURIES—

suffered in a collision while a passenger, the injured party may recover such actual damages as are the natural and proximate result of his injury, such loss of time, pain and suffering, reasonable expenses in medical and surgical aid and nursing, as shown by the evidence, and if injury is permanent and incurable the jury may take such circumstances into consideration, 614.

PERSONAL INJURY CASE—

whether the plaintiff's intestate was killed through negligence of defendant is question for the jury, 580.

question of contributory negligence being made, all the attending circumstances. before and after injury, are pertinent, 376.

PASSENGER—

on street car, while exercising ordinary care, was struck by a passing wagon and injured, doss not raise presumption of negligence against street car company, (n.) 189.

proof that he was injured while exercising ordinary care, raises presumption of negligence in carrier, 188.

on railroad, riding on free pass issued to another person, and not transferable, passing himself as person therein named, is guilty of such fraud as to bar right of recovery for personal injury, except for gross negligence, 615.

purchasing a ticket is entitled only to be carried according to the custom of the road—Has right to go to place for which his ticket calls on any train that carries passengers there. Railroad companies have right to run trains that stop only at designated stations, 627a.

who attempts to board a moving railway train and is injured in consequence, can not recover, 632.

on a railway train does not owe duty to company to push and crowd his way to get an advantage over other passengers in securing a place in the car, 638.

refusing to pay fare, may be ejected at any regular station, but not elsewhere, 588.

may, by *conduct*, in immediate presence of conductor, give notice of desire to alight, 421.

when one enters a street car in an open. orderly manner, conducts himself as a passenger and is conveyed from place of boarding to destination, the inference is that such person is a passenger, 423.

takes all the risks incident to the mode of travel and the character of the means of conveyance which he selects, but the care, vigilance and skill of the party furnishing the conveyance should be adapted

PASSENGER—*Continued.*
to it. Carrier is not an insurer against all accidents but is liable only for the want of suitable care, diligence and skill, 627.
who neglects to purchase ticket before entering car, may be charged additional fare, if proper conveniences are furnished him for procuring tickets, 591.
if ejected for non-payment of fare at any place other than a station, it is a violation of the statute, for which the company must pay nominal damages at least, 588.
wantonly refusing to pay his fare, and is ejected by conductor two miles from regular station, but free from indignity, is not entitled to recover beyond nominal damages, 588.
was unable to purchase ticket at depot, got on train carrying passengers, and explained inability to purchase ticket to conductor, but was put off train in night time, and not at any station; $500 was considered excessive damages, 589.
if he pays his fare to a certain station, the demand of fare a second time by the conductor will be a breach of the implied contract on the part of the company to carry him. By paying such fare his action will be as complete as if he resists, etc., 596.
must observe order on car, and seek his remedy for illegal exaction of the law, 596.
ejected from railroad car for non-payment of fare at place other than station, can not recover, as part of his damages, for injuries from unnecessarily walking to his home, several miles distant, he being in poor health and being near station where he got on, 606.
ticket includes carrying of baggage and recognition of ticket by road is admission that check given for baggage is equally binding, 611.
ticket entitles passenger to travel over different lines, then each company into whose hands the baggage may come will be liable to owner for loss of same, 611.
on street car was notified car had reached his getting off place, and while he was in act of stepping off, car started with jerk, threw him down and injured him, street car company held liable for negligence, 474.
in railroad car need only show he has received an injury while in exercise of due care for his own safety to make a *prima facie* case against a carrier. Carrier must rebut the presumption to exonerate itself, 612.
if he takes a place of extra peril by invitation of carrier's servants, the law requires the latter to exercise a corresponding degree of care for his safety. Passenger placed in position of peril should be informed of it, 613.
whether guilty of gross negligence or not in getting upon foot-board of a transfer engine and riding there, by the direction or invitation of those in charge of his stock and such engine, is a question of fact for the jury, 613.

PROFANE—
and obscene language by a passenger in a railroad coach, where there

PROFANE—*Continued.*

are ladies, is such a breach of decorum—no matter if provoked to it—as to work a forfeiture of right to be carried as a passenger, and conductor may expel, 596.

PRIVATE—

rules of a railroad company, prescribing duties and powers of its servants, can not affect persons having no notice of same, 613.

PERMISSION—

to street railway company to use a street is not a grant of an additional easement in the use of the street, 364.

PEDESTRIAN—

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PHYSICIAN'S—

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PERILS—

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PASSING—

over sidewalk crossing and stepping on track of street railway, where horse or grip cars run, without looking to see whether cars are coming, is negligence and want of ordinary care, though a question of fact for jury, 375.

PROPERTY—

committed to a common carrier, if brought by negligence of carrier under the operation of natural causes that work its destruction, renders carrier liable, 28.

right to labor and employ labor, protected by constitution, 249.

PREPONDERANCE—

of evidence—in determining, jury may take into consideration with other facts, instincts and presumptions which naturally lead men to avoid injury and preserve their lives, 120.

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is precluded from complaining of an instruction given on a certain theory, when he has requested instruction upon same theory, 124.

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PAVING—

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PUBLIC—

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PROPER—

place to alight—is no presumption of law that passenger knows proper place to alight, 423.

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having failed to comply with requirements of statute as to fences, etc., the owner has only to show the omission and injury; law imposes liability as a penalty, 469.
duty to fence road, and safety demands that they be held liable for all damages resulting from neglect to fence, 470.
no negligence is imputed to company, except failure to fence its track and station grounds at Ellery, place where injury occurred. Evidence shows land there laid off into lots and blocks about switch and depot grounds. Ellery is a station where train stops to receive and discharge passengers and freight, and the grounds where injury received used by company in receiving and discharging freight and passengers and the railroad company was not bound to fence, 505.
failure to fence, and stock running at large contrary to law; question, whether owner in such case is guilty of contributory negligence, is one of fact, to be determined by the jury from the circumstances of the case. It is not sufficient to charge owner with contributory negligence that he allowed stock to run at large. It must appear he did so under circumstances that the natural and probable consequences were that the stock would go on the track and be injured, 497.
has not had its road open for use six months; statutory liability for injury to stock has not attached, 479.

RAILROAD—
is enclosed by a sufficient fence, and a casual breach occurs without knowledge or fault of company, and through such breach stock gets upon track and is injured; the company is not liable unless it had reasonable time to discover such breach, etc., 480.
killing stock—Plaintiff has his election, according to facts of his case, to base his action on common law ground or upon the statute, 481.
killing stock—To recover against under the statute, declaration must state facts which bring case within statute provisions, and plaintiff is not bound to show mismanagement of train as cause of injury, 481.
statute makes it duty of company to maintain *sufficient* fence, and where proof shows the fence where animal got on track and was killed was not such as statute required, defendant is liable, 482.

RAILROAD—*Continued.*

Illinois Central must be held responsible for using road of another company unfenced and unprotected, 470.

is public highway, and, in relation to public, is subject to legislative supervision—subject to police power of state, 471.

fact that stock is running at large, in violation of statute, does not relieve railroad companies from liability for stock injured, 472.

where a railway company neglects or refuses to build a fence along its right of way, after notice of owner of adjoining land, the owner may build the fence, etc., 473.

in action against, for injury to stock, held, on motion in arrest of judgment, not material that plaintiff prove injury was done within jurisdiction of court, 474.

when it has been operating trains on its road more than six months, and failed to fence its tracks, and while passing through plaintiff's farm kills plaintiff's stock upon track, the company will be liable for value of stock, 476.

in action against, for personal injury on ground of neglect to fence track, evidence tended to show that road was not fenced—that if fenced and had cattle-guard cow would not have got on and accident not happened—Negligence held to be shown, 477.

can not relieve itself from performance of statutory duties imposed by law by transferring its corporate powers to others or leasing its road, except by special statutory authority, 523.

required to operate its trains, use every possible precaution, by best mechanical inventions, to prevent loss by escape of fire or sparks along its line of road, and company will be liable for neglect of such duty, 524.

must keep dead grass off its right of way during winter as well as summer, 525.

must not because of exigencies of business inflict avoidable loss upon owners of adjacent property, 526.

if it failed to ring a bell or blow a whistle in approaching a highway crossing, or whether plaintiff was negligent in attempting to pass over track, are questions of fact for jury, 531.

its liability for not giving crossing signals is not limited to injuries upon crossing alone, but attaches where same occurs within short distance, 532.

plain object in requiring companies to give signals at crossings of highways, is to protect persons who may be about to cross from collision. Failure to give same does not render company liable to persons injured in adjacent field, 533.

precaution required of company approaching a public crossing, is to ring a bell or sound a whistle—It is not duty of engineer to stop train because he sees a team approaching the crossing, 534.

companies are not liable for any and all damages a party may suffer when such companies have failed to give required signals at crossings, nor is the *onus* upon them until some proof has been given showing the injury resulted from want of signals, 536.

RAILROAD—*Continued.*

negligence, or want of skill by their agents, producing injury, will create liability, 538.

duty of, is to fence tracks. *Dumser* is not an incorporated city, village or town; has never been platted into lots and blocks; is a railroad switch at the place 2,000 feet long and extends both sides of company's station house. Cow was killed here, but company claimed was public necessity to keep grounds open; such does not appear from evidence, 496.

where owner contracts with company to build and maintain track fence the duty of maintaining the fence does not rest on the company, as between it and lessee of owner, 499.

where they fail to fence road and stock is killed, when it is lawful for it to run at large, the question of contributory negligence does not arise, 498.

fence of, having been breached by third persons without company's fault, and stock enters and is killed, company is not liable, 500.

is liable for stock injured—same running at large contrary to law and being upon company's unfenced right of way—if railroad's servants failed to use reasonable caution to avoid injury, 501.

is not required to fence tracks or build cattle-guards within limits of village, and where there is a station house, warehouse, store, post-office and five or six dwelling houses it comes under definition of village for purpose of excusing railroad company from fencing its tracks within its limits, 502.

statute as to fencing is not intended to apply to public stations and depot grounds, although same may not be within limits of a city, town or village or highway crossing. Side tracks not at stations or depots and such parts of side tracks as do not constitute part of depot may well be held within meaning of the statute, 503.

plaintiff's colt went through defective gate upon railroad tracks—(was not one of excepted places)—*Prima facie* it was the duty of company to fence and keep in repair there. Now company claims to be excused because of a counter higher duty owed to public to keep depot ground open. Company is estopped from this defense, 504.

must fence where track runs along public road—Statute requires company to fence its road, except at crossing of public roads and highways and such portions of cities and incorporated towns and villages as are platted into lots—This place is not within the exception, 483.

fencing depot grounds—Plaintiff claimed his horse got upon track through neglect of company to fence its road, in violotion of statute, at Fair Grange. Village consists of half dozen houses and two or three stores; is all east of railroad grounds; was nothing to prevent cattle or horses from getting on tracks, 484.

not required to keep up patrol all night whole length of its road to see that fence is not broken down by breachy cattle, by evil men or by a whirlwind, 486.

having left fence neglected for three months and cow got through and been killed, company held guilty of negligence, 487.

RAILROAD—*Continued.*

held not liable for injury to animals by fright, through fences not built and kept as law requires, 488.

held liable for killing plaintiff's mare that went on track through a farm crossing—negligence charged was that engineer was negligent in running down the mare, 489.

where stock owner is guilty of contributory negligence he can not recover against company for killing his stock, 490.

one owning pasture lands along track of railroad is not required to keep his stock out of such pasture because company fails to keep its fences in repair, 491.

where track enclosed with sufficient fence and casual breach occurs, without knowledge or fault of company, and through said breach cattle go on track and are injured, company is not liable, unless, etc., 493.

liability of, for killing stock. Proof showed mules went on track near culvert and engine driver saw them, whistled to frighten them and they ran north on track into cut; two were caught and killed on track and the others were caught and killed in cut. Train could have been stopped; held culpable negligence of company not to have stopped, 495.

not required to fence track within corporate limits of village—When animal is killed near village by train, and if place where animal killed is beyond them, it is beyond village, but if town extends beyond houses company must prove it, 478.

if it fails to fence its track, as required, it is sufficient to fix its liability if plaintiff's stock, in consequence thereof, and without contributory negligence on his part, goes upon track and is there killed, 478.

having statutory right of way over a public crossing, it must, in exercising that right, use ordinary and reasonable care to avoid accidents, 540.

in suburbs of a populous city where the public street is crossed at grade by six railroad tracks, used by three great systems, it is gross and wanton negligence to operate without any guard or protection to traveler over crossing in night time, 542.

failure to perform any of the duties required of it in approaching highway crossing, will render it liable for injuries resulting from such omission; to free themselves, the company must do every duty required by law, 547.

where neglecting to ring bell or sound whistle does not result in injury no cause of action against railroad company will arise, 555.

whether the failure to ring a bell or sound a whistle on approaching a highway crossing by a railroad train, as requlred by law, was the cause of the injury is a question of fact for jury, 555.

can be no recovery against railroad company where plaintiff's own negligence was cause of the injury, or where the negligence of the parties is equal, 556.

is under no obligation to give signals before reaching a crossing which is not a public highway crossing—Person reckless of his personal

RAILROAD—*Continued.*
safety or safety of his property can not recover for injuries sustained, 557.
in suit for injuries received at railroad crossing, the court found that the plaintiff neither looked nor listened nor *thought* of the train, and found, therefore, he was not in the exercise of ordinary care, 563.
action for damages caused by negligence of employe, the burden is on the defendant to show the plaintiff and negligent employe were fellow-servants, 564.
that a train approaching a station where a passenger train is leaving or discharging passengers must be stopped before reaching the passenger train, applies to points at which to receive and discharge passengers, 566.
in suing a railroad company for value of stock killed on account of failure of company to fence, it is sufficient for plaintiff to show that the stock was killed where it was the duty of company to fence, 568.
to enable a party to recover against company for stock killed while trespassing upon its right of way, he must show his servants in some way were notified that the stock were on right of way and by exercise of care they could have prevented the injury, 590.
removal of farm crossing while a specific liability attaches to failure to do most things required by the railroad act, no liability is fixed for failure to maintain, for proprietor, farm crossings. It imposes the duty, and a *remedy* is implied; burden is on plaintiff to prove damages sustained, 506.
had failed to fence its track at Carrier Mills. Plaintiff's hog got on track and was killed by defendant's engine near the warehouse. Defendant denied liability to fence. Carrier Mills is a station, has side track, depot and cattle pens for use of public there. Evidence does not show that hog got on track where company was required to fence, hence can not recover. Company is not required to fence where public require use of lands, 507.
statutory duty of company to maintain fences includes duty to use reasonable diligence to keep gates at farm crossings closed, 508.
can not excuse itself from consequences of failure to keep gates closed, by showing it supposed a third person would do it, 508.
companies are exempt from fencing their tracks at street crossings, the law requires them to provide cattle-guards to prevent passage of animals from street to right of way; if the duty is neglected liability follows, 512.
fences—It is a question of fact whether the convenience of the public requires that a railroad track at a particular place should remain unfenced; to be determined by a jury, 512.
company is liable in damages for death of engineer, caused by derailing his train in striking cattle strayed on company's tracks through neglect to fence same, if engineer was not negligent in running his train, 518.
is liable in damages for the death of an engineer, caused by derailing of its train by striking cattle, strayed upon its track, where company had neglected to fence and erect cattle-guard, 583.

RAILROAD—*Continued.*

train was thrown from track by broken rail and passenger injured. It was shown train was not run at unusual rate of speed, track was in good repair, just inspected, everything in connection with train was in good order, was managed with skillful and prudent operators, and plaintiff could not recover, 586.

liability of, is not discharged, *pro tanto*, by payment of any sum on account of such injury by an accident insurance company; the primary liability being on the railroad company, 587.

conductor expelled passenger between usual stopping places because he refused to pay his fare; it was held to be unlawful, and trespass therefor would lie, 592.

may require passenger on freight train to procure ticket before entering train, and conductor may expel at regular stations for refusal to comply with regulation, 594.

an action will lie against, and damages be awarded, for putting off passenger at other than regular station; measure of damages should be for actual injury or loss sustained, 594.

in suit against, for expelling plaintiff from its car, where no vindictive or actual damages were shown, $750 was considered excessive, and was not sustained, 595.

companies, when they locate their stations and depots in populous cities and thoroughfares, must, for protection of the community, be held to a degree of care commensurate with the greater danger such a situation involves, 538.

act relating to crossing signals applies to cases where cars are "*kicked*" by engine across public highway, 539.

action against, to recover damages by one rightfully on defendant's train and was ejected by its servants upon his refusal to obey conductor's command to leave train, it is question for jury whether force used was excessive, etc., 599.

in action for damages for personal injury suffered by plaintiff in collision, proof of breaking down of plaintiff's nervous system, that nerve trouble might result in death, was properly admitted, that rules of pleading did not require plaintiff to set out the evidence, 600.

companies are required to use all reasonable precaution for safety of traveling public, in construction and operation of engines, coaches, depots, tracks and approaches to trains. For any neglect in furnishing any appliance to their trains, or when furnished, if insecure when it could have been avoided, companies will be liable for injury therefrom, 601,

evidence showed negligence, gross and reckless, resulting in serious injury to plaintiff—Proof that plaintiff, while in great pain and mind confused, said *no one was to blame*—This will not excuse company—Would not in any case if evidence showed he was mistaken, 601.

in personal injury caused by gross and reckless negligence on part of railroad company, such as to authorize punitive damages, and in consequence plaintiff lost his hand and was disabled from following his profession as music teacher, $8,000 damages was not considered excessive, 602.

RAILROAD—*Continued.*

passenger went on train of, and offered worthless piece of paper as a pass, and being informed that it was not, refused to pay fare or leave the train, servant of company had right to remove such passenger—Good faith of passenger had nothing to do with the matter, 602.

when passenger conducts himself orderly and decently on, pays or offers to pay the fare, his expulsion from cars by conductor in forcible manner is unjustifiable, and company will be held liable for the assault and battery in a civil action, 603.

is liable for acts of conductor performed within the scope of his authority, if he wrongfully ejects a passenger from passenger coach, and will be liable in trespass to passenger, 603.

conductor, when tendered fare by passenger to be carried to certain station (less than rate fixed), saying will pay no more, and conductor retains enough to take passenger to intermediate station and returns balance, the passenger will have the right to pay the balance of fare demanded, and not be put off, 603.

conductor, without demanding fare, takes passenger, properly behaving himself, by the collar and leads him to door of car and puts him off, tearing his coat; such act is unprovoked, wilful and malicious; jury may give punitive damages, 603.

whether running a train at a dangerous and unreasonable rate of speed, is a question for the jury, to be determined by a consideration of the circumstances of the case, 571.

shown to have been running at dangerous rate of speed at time accident happened—speed prohibited by law—a *prima facie* liability is established, and in absence of rebutting proof, becomes conclusive, 572.

act (Sec. 24), running of trains through cities or towns at a speed prohibited by ordinance, whereby an injury is occasioned, is not negligence in itself, but raises a presumption of it, 582.

in action against, to recover double value of fence built by owner of adjoining land, plaintiff had a right to build a new fence or repair the old one, 573.

action was sustained against, for personal injury received by plaintiff by reason of train having struck a cow and cars thrown from rails. Was no switchman to keep track clear with known liability to accidents at this station; $5,000 was considered excessive, 598.

in action against, by United States transfer mail clerk for injuries received while doing his duties, court properly admitted in evidence rule of railroad company as to operation of trains, and government rule regulating conduct of clerks. Running freight train at high rate of speed past station where passengers are being received and discharged, is negligence, 623.

if servants of, keeping within the course of their employment, the company will be responsible for their negligence or wrongful act, although against instructions or even wilfully performed, 613.

companies must afford reasonable time to passengers, young and old, to leave trains in safety, 608.

damages—In suing for injuries received, a party can recover only for

RAILROAD—*Conntiued.*
such damages as flow from and are immediate results thereof—Damages conjectural and speculative, and produced by other agencies, can not be regarded, 609.
companies are required to keep their offices open for sale of tickets for reasonable time before departure of trains—Demand for fare by conductor must be paid or passenger must leave train, 607.
is bound to use reasonable care in providing for safety of its passengers while in its enclosures and while being conducted to its trains; that relation of passenger and carrier existed between parties when the purchaser of the ticket passed through the turnstile to platform, 624.
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companies, duty of, to ring bell or sound a whistle on approaching a railroad crossing, is for protection of travelers on highway and passengers on passing train and place of intersection, 142.
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for comfort order and safety of passengers, the company is authorized to make and enforce—Setting apart car for ladies, and gentlemen accompanied by ladies is reasonable—Can not exclude person, on account of color, 610.

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servant can not have, of his employer, from defect in machinery without showing employer had knowledge of it or might have had—Burden of proof is on plaintiff, 215.

in case of negligence, only where plaintiff exercises due care, 4.

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none, unless the more proximate cause is omission of defendant to use proper care, 20.

REASONABLE CARE—

of master to furnish reasonably safe place, use reasonable care to protect from dangerous machinery and methods of doing business, is qualified by other rule that if master fails in such respects, and servant is advised of the dangers and continues without objection, he himself takes the chances of the risks, 261.

REASONABLY—

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REASONABLE—

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to lay down tracks in any street of city, being limited by petition of majority of frontage of abutting property owners, it is for city council itself to determine whether such petition has been presented, 366.

ROCKFORD—

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SERVANT—
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assumes natural and ordinary risks of business, 14.
is not bound to investigate and find out, at his peril, whether common master has used reasonable care in selection of employes in same branch of service, 245.
of common master, not consociated in the discharge of their duties, employment does not require co-operation, etc., are not fellow-servants, in such case master liable, 223.
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or contractor—Where owner of premises enters contract with workman to erect building upon public street and surrenders possession for that purpose, neither the contractor or his employes are regarded in law as servants of owner, 233.
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may be, in relation to co-servant, a vice-principal in one relation and a fellow-servant in another, 228.

SERVANT—*Continued.*

to whom is delegated power of hiring and discharging other servants, in whom corporation rests sole control of such servants, when exercising such power is not a fellow-servant nor in same line of employment as those he controls, 226.

can recover for an injury caused by defective appliances furnished by master only when master knew or ought to have known of defects, 250.

is injured by stepping in a hole in a barge where he had worked for hours, and hole was clearly apparent, can not be regarded as free from negligence, 266.

employed in rolling mills, handling ladles of molten metal, must be regarded as negligent who stands with one foot on the rail, knowing truck may be moved any instant, 266.

about to do act, which if done with notice is not dangerous, if done without is very dangerous, it is negligent to act without notice, 266.

ordered to do particular work of master has right to assume he will not be exposed to unnecessary perils, 260a.

right to recover for injuries will not be defeated by some knowledge of attendant danger, if, in obeying order of master to do work, he acts with diligence of an ordinarily prudent man, 260a.

if has sufficient capacity to appreciate the danger, or has acquired knowledge otherwise than by instruction of the master, and is fully aware of it, he is, under the general rule, held to have assumed the peril of the employment, 258.

is bound to take notice of what is before him and obvious to his senses, 255.

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injured by temporary peril, to which he and other servants are exposed by negligent act of employer, without any negligence on his part, he is entitled to recover damages therefor, 203.

may rely upon machinery furnished by master, 278.

may go where his duty requires, and is under no obligation to keep out of unexpected, unknown danger, 278.

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discharged for cause, is entitled to wages up to time of discharge, 272.

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knowingly and intentionally disobeys reasonable rule established for his safety and is injured, he can not recover, 270.

being a common laborer and using an appliance that operates upon scientific principles (not obvious), is not chargeable with notice of principles of operation, 269.

entering an employment, assumes generally only such risks as he has notice of (express or implied), 221.

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master fails to discharge the incompetent servants, then he should quit service, 221.

though having knowledge of defective condition of machinery, yet has right to assume, in absence of notice to contrary, that it is reasonably safe to use, 280.

in absence of notice may rely upon presumption master has done his duty, 281.

who enters upon employment necessarily hazardous, accepts the service subject to the risks incidental to it, 210.

when enters hazardous employment, or if he thinks proper to accept service on machinery defective in construction or want of proper repair, the master can not be held liable for his injury within scope of the employment, 210.

being instructed to do certain work, without instruction as to mode, selected dangerous mode and was injured, when there was safe mode; held he could not recover, 213.

does not contract to waive liability of master for his own negligence, nor negligence of his authorized agent, 219.

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SNOW AND ICE—

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of which servant is not, from nature of employment, cognizant, and are not patent, it is duty of master to notify him, and on failure to do so, and servant is injured, is entitled to recover, 221.

SHAFT—

in a factory, with no protection about it, revolved 300 times a minute—it was duty of boy to go to barrel near it. In doing so his overalls were caught by pin on shaft and he killed. Proprietor held guilty of negligence, 265.

SEVERAL—

actions against a number of persons who commit trespass or other tort, jointly or severally, and recovers several judgments—One satisfaction, 315.

SEWER—

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SUIT—
based upon personal injuries occurring through negligence of the defendant to entitle plaintiff to recover, he must be shown to have been on the occasion in question in the exercise of due care, 145.

SPECIAL FINDINGS—
where a declaration contains three several charges of negligence, and special findings are returned as to some and none as to others, such do not show that jury did not find charges proved, verdict should be sustained, 137.

SUFFICIENT—
to prove enough of facts alleged to constitute cause of action, 43.

STREETS—
of city extend to and include portion occupied as sidewalk. Establishment of sidewalks is an act of city authorities, and they must keep in order, 86.
bridges, etc., are under absolute control of the cities and villages by the general incorporation law, 319.
street, in process of repair, being left unfinished over night, whether sufficiently lighted by electric street lights, is a question of fact for jury; not matter of law, 348.
whether corporation has performed its duty in keeping streets in repair is a question for jury under all the circumstances, 348.
highways and bridges, within city limits, city is looked upon as representative of state, 320.
dedicated by plat, unless lawfully reclaimed by person who platted them, forever remain to use of the public—Provided same not vacated by proper authority, when title reverts to dedicator, 317a.
and sidewalks, being duty of city to keep in good repair and safe condition, city liable to plaintiff for neglect of duty, 315.
are not kept in repair "for travelers" but kept in repair as streets for all purposes for which may be lawfully used, 302.
whether person injured in driving over pile of frozen mud in street, is guilty of negligence, is a question of fact for jury, 348.
whether municipality has exercised reasonable care in keeping its streets in reasonably safe condition for public travel, must depend on consideration of evidence, 351.

SIDEWALK—
on a public street—When it gets out of repair, so that it is unsafe to travel upon, and so remains for a considerable time, notice of its defective condition will be presumed, 321.
treated as a public thoroughfare by municipality makes village responsible for it as if it were such, 40.
being unusually icy and difficult to walk on, and accident occurred in

SIDEWALK—*Continued.*

night, it was duty of plaintiff to use more than usual degree of care and caution, 325.

person going upon, knowing it to be out of repair, may recover for injury if ordinary care used, 341.

under power of city to be built and kept in repair, with means therefor, and the exercise of the power follows as a duty, 324.

was badly out of repair where fall occurred and boy ten years old injured so he died (Keefe case), recovered, 302.

STREET CAR COMPANY—

has not exclusive right to use public street, but to use same jointly with rest of public, etc., 45.

STREET CARS—

whether standing on steps of car is negligence depends on whether there is vacant seat to be had and plaintiff knows it, and other circumstances, 383.

court should instruct *jury* on degree of care passenger bound to exercise and leave it to them to determine from facts proved whether he was guilty of contributory negligence, 383.

if passenger guilty of contributory negligence, in case of injury he can not recover unless the injury was wilfully inflicted by defendant, 383.

company legally operating its cars is entitled to track on meeting foot-passengers or vehicles, as against any person, carriage, etc., driven thereon, 385.

right of the road—Ordinance of city gives priority to them, but should not assert right by force, 386.

expulsion from—He was twice expelled within a minute or two from the same car; first time without injury, second time with such injury as necessary result of force to loosen his grasp on car, 388.

conductor must have supervision and control of train, must be civil and decorous to passengers, and passengers must observe proper decorum, 387.

STREET RAILWAY COMPANY—

has authority to make contracts and arrangements with other company for leasing and running its road, or any part thereof, 379.

must carry its passengers safely. If death of passenger results from carelessness of its servants in management of its car, defective track, overloaded car, or all combined, company will be liable, 381.

driver, knowing passengers are getting off, it is his duty not to start the car till they have *had time to get off*, 380.

passengers may get off where they please, provided the car is stopped when they attempt to do so, and they are to have reasonable time to do so, 380.

companies should adopt and enforce such rules as will protect passengers from injury, insult, disturbance and annoyance—Any violation of a reasonable police regulation of the road, which tends to endanger life or limb of passenger, may be met promptly to prevent threatened harm, 382.

STREET RAILWAY COMPANY—*Continued.*
companies may eject persons from cars who persist in use of profane, vulgar and indecent language in presence of passengers—Not to use unreasonable and excessive force or endanger life and limb, 382.
company being bound to exercise greatest diligence to enable plaintiff to enter car without injury, can not plead attention of its servants to other matters, 393.
company is bound to exercise all human foresight and skill for protection of plaintiff, 393.
company where it has stopped to take on passengers, is bound to give ample opportunity for safely mounting car; if it does not and party is injured, company will be liable, 394.
newsboy, plying his trade, was injured upon front platform of car by the car running off track, is not entitled to recover for injury—Was not a passenger, 395.
plaintiff ran after the car and attempted to mount front platform; fell under wheels and injured—Has no right of action against company, 396.
company charged with negligence in running car over plaintiff, (child of seven years), statement of driver while car was *on child* admissible in evidence as part of *res gestae*, 397.
different lines having equal rights at a crossing of their tracks, the *hind* end of one being struck by the *front* end of the other, is of itself, without explanation, presumptive evidence that colliding car was carelessly managed, 398.
where a car has the crossing, person in control of approaching car is bound to so govern his car as to prevent a collision, 398.
person struck and injured by car, is not entitled to recover because it does not appear he was in exercise of due care, 399.
a boy ran toward car, caught rear platform of *grip*—to what extent he got on steps, is in doubt, but boy fell and was run over and killed by trailer. The company owed no duty to this boy; not liable, 399.
any rate of speed of, without an ordinance regulating same can not be declared negligence as matter of law; might be, as a matter of fact. Limitation by ordinance is not authority to run up to limit *regardless of conditions*, 400.
it is competent for plaintiff to allege in same count negligence in law as to rate of speed by exceeding limit prescribed, and negligence in fact, by reason of circumstances and conditions apparent at time, 400.
company has no exclusive right of possession of city streets. They are intended for use of children as well as vehicles, to go to school, on errands of business and places to play, consistently with rights of others, subject to risks for want of care on their part, 400.
though passenger may have been on car contrary to rules, he may nevertheless be entitled to his action for injuries from want of care of company, 390.
party is not a trespasser after he gets on horse car, though no fare has been collected before he meets with accident, 390.
express contract not necessary to constitute relation of passenger and carrier, 390.

STREET RAILWAY COMPANY—*Continued.*

riding on platform is not conclusive proof of negligence, 390.

failure to stop car when properly requested, whatever damages passenger may sustain from same, company is liable, 291.

whether deceased was exercising due care in getting off car while in motion; whether approved appliances were in use which would have prevented the injury; whether use of such was consistent with the business of company, are questions for jury, 391.

the stopping of the car is an invitation to any one desiring to become a passenger to *get on board*, and it is duty of company to afford such opportunity to do so, 393.

reasonable time to get on board depends, to some extent, upon age and agility of party endeavoring to do so, 393.

company is a common carrier of passengers for hire, 416.

rate of fare not to exceed five cents for conveyance of passengers on any street railway within city limits, 416.

death of child six years old was by negligence of defendant, and claim is made that child exercised ordinary care; instruction of the court need not refer to care or negligence of parent, 375.

should exercise great care at crossings, especially when trains are moving in opposite directions there at about same time, 418.

is bound to afford a passenger reasonable opportunity for alighting in safety, and the crowded condition of the car is no excuse for lack of attention to request of passenger that car stop and let him off, 419.

failure of conductor to hold a car till passenger has reasonable opportunity to get off, in a manner that would not subject him to injury by passing team, is *negligence*, 419.

plaintiff passed to rear of one car and was struck, knocked down and injured by another car on further track, going other way, without notice; held that verdict for plaintiff must stand, 421a.

plaintiff was found guilty of contributory negligence in riding on platform of street car, and not holding on, and so fell off and was injured. Company not liable, 422.

coming to stop near crossing is reasonable notice to charge conductor and gripman with notice that passengers may leave car, and duty to exercise reasonable care, 423.

should stop car and give passenger time to alight safely at place desired, and if it so stop, and passenger with due care attempts to alight, and while so alighting, company starts car, *with jerk*, and injure passenger; whether company is negligent therein is a question of fact for the jury and not a question of law, 401.

collision between trains on same road is *prima facie* evidence of negligence of carrier, 402.

all the care required of a *passenger* on a street car is such as ordinarily careful persons would exercise under similar circumstances, 403.

riding on foot board, holding on to railing, where car is crowded, can not be said as matter of law to be negligence. It is a question of fact for jury to determine, 403.

company must give passenger reasonably safe place to alight, 404.

STREET RAILWAY COMPANY—*Continued.*

is responsible for a wilful trespass upon a passenger by its servant being in discharge of some duty owed to master, 405.

it is also a question of fact whether the company negligently managed its train in the presence of danger known to exist in crowded condition of the street. Plaintiff on foot-board had right to assume train would be managed so as to be safe, 403.

when a person is on a car, ready to pay fare, it is sufficient to show he is a passenger, and lawfully there, 405.

to charge company for personal injury growing out of an assault by one of its servants, declaration must allege plaintiff was a *passenger*, and set out *facts* to make carrier responsible for wrongful acts, 405.

company's defense—Plaintiff being shown to be without fault, a passenger for hire entitled to be safely transported, the overturning of the car is presumptive evidence of defective track or management, and the *onus* is upon company to show that the accident was one for which it was not responsible, 406.

accident—Burden of proof—Where injury to passenger occurs by reason of defective machinery, cars, apparatus or track of carrier, or where there is any unskillfulness or negligence in servants, a presumption arises in favor of negligence of the carrier, and burden of rebutting this is on it, 407.

if plaintiff's own evidence shows that the accident was beyond the control of the carrier, as presence of *vis major*, or the tortious act of a stranger, no such *prima facie* case is made out as will throw the burden upon the carrier to show that it was not guilty of negligence, 409.

plaintiff being passenger, company was bound to highest degree of care and skill to insure his safety. If to avoid imminent peril he *stepped off* the car and in so doing was injured, defendant is liable, 408.

if negligence is charged upon management of car, it is a question for jury, 407.

cities and villages may enforce police regulations as to running of trains, compel raising and lowering of tracks to conform to grade, keep tracks level with streets, so as to cross same at any place, 358.

city council or board of trustees have power to grant use of streets for street railway tracks, but only on petition of owners of land representing more than one-half the frontage of the street, 358.

in town of Olney city authorized construction in center of Camp avenue, required company to grade and drain the street and plank cross-ties so public travel should not be hindered, 359.

company that accepts a grant from city of right to use street in special manner, and the grant is burdened with a *duty* which it neglects, the company is responsible for the consequences, 364.

company that fails to perform condition subsequent, in ordinance reserved, city may *avoid* the contract, 368.

accepting ordinance burdened with terms, the railway company became bound to pay license fee so long as it enjoys the privilege conferred, 369.

[The References are to Sections.]

STREET RAILWAY COMPANY—*Continued.*

two companies, being authorized to use same street, are bound to place rails and use street so public may have benefit desired from such joint use—neither must interfere with other, 370.

obstructed in construction of its road over a right of way duly acquired, equity will interfere to restrain obstruction, 370.

interest in public street upon which its tracks are laid, is part of public easement in the street, 370.

injunction will not lie at suit of *abutting property owner* to restrain laying of street railway in a street, 371.

tracks being in close proximity to run a train in one direction at rapid speed, without signal, over sidewalk crossing, while a train bound in opposite direction is discharging passengers, is negligence, 375.

SUIT—

to recover damages for personal injury *alleged* to have been *caused* by careless *running* of *train against a horse*, it is not competent for plaintiff to prove railroad track was not properly *fenced*, cars not provided with steam *brakes* or any negligence other than alleged, 617.

for damages alleged to have been occasioned by fires set by sparks from locomotive—If it was shown that such sparks set the fire a *prima facie* case is established and the burden is thrown on defendant to rebut it; and if it is shown the fire actually started on railroad company's right of way in consequence of *combustible material negligently left* there, a clear case of negligence is made out, 561.

against railroad company to recover damages, plaintiff need not prove matters merely surplusage, 102.

to recover for value of a horse, said to have strayed upon right of way through an *insufficient fence*, an instruction requiring plaintiff to show where the horse actually did get on right of way, is improper, 567.

SUFFICIENCY—

of evidence raised by demurrer, moving to exclude it, asking instructions for defendant. If plaintiff goes to jury upon facts without any of these, no question of law is preserved upon facts, 193.

SUDDEN JERK—

it is the duty of driver to know *before he starts up* whether passengers are in position to be hurt, 156.

STREET—

burdened with mill race. over which is bridge, accepted by corporation assumes duty of keeping in repair, 328.

space under and above surface is held by municipality for benefit of public can not be granted to private persons interfering with public use, 331.

car—accident as proved, was such as to raise presumption of negligence, and to defeat action, company must show how accident happened and that it could not have been prevented, 389.

car—passenger injured only required to make *prima facie* case, then burden of proof is on the defendant company, 389.

SHIPPER—

of stock on a railroad train may be rightfully upon any part of such train, but such right will not relieve him from duty of using due care to protect himself from injury from colliding train, 619.

of stock, going to stock yards, with five or six others, and rides on front of engine, all of whom, except him, seeing a backing train on same track, jump off and escape injury, but he does not and is killed—The question of his negligence is for the jury, 619.

SPECIAL INTERROGATORIES—

to be submitted to a jury, under the statute, must relate to ultimate facts and not to mere evidentiary facts—Such may be refused, 636.

SUPERINTENDENT—

of coal mine, agent of the defendant company, failed to put catches on the brake in compliance with the statutory duty imposed upon an "owner, agent or operator" of a coal mine, and in consequence of such failure himself was killed—held, representative could not recover, 659.

STATEMENT—

of facts which admits almost any proof, is objectionable, 45.

STEPPING—

there is no absolute rule that failure to look where one is stepping is negligence, as *matter of law*, 284.

SETTLED PRINCIPLE—

of law is, that if a plaintiff can not make out his claim without showing an illegal act on his part, he can not maintain his action, 659.

STATUTE—

seems to contemplate the recovery of damages sustained by the widows, lineal heirs, adopted children and others dependent on deceased (miner); but the court holds that it gives but *one action*, and when that is brought all damages recoverable must be recovered in that action, 661.

requirements as to duty of mine owners, in affording protection to operatives, are positive and can not be lessened or excused by counter-charges, 670.

(on railroads) requires that railroad companies shall construct cattle-guards that shall be reasonably sufficient and turn ordinary stock, 509.

(on railways) makes it duty of railway companies to erect and maintain suitable and sufficient fence on both sides of their right of way, and a gate is part of the fence, and plaintiff had right to expect defendant to perform this duty, 510.

sections one (1) and one and one-half ($1\frac{1}{2}$) of railroad act discussed and expounded, 529.

section six of act of 1874 in reference to ringing bell or sounding whistle at distance of eighty rods is broad enough to include streets and roads in incorporated cities and towns, 531.

STOCK—

if it enters railroad right of way at a place exempt from operation of

[The References are to Sections.]

STOCK—*Continued.*

the statute in regard to fences and cattle-guards, and wanders along to a place not exempt from failure to erect fence or cattle-guard, and is there killed by train, company is liable, 587.

being killed by railroad company's train at a place where the statute requires road to be fenced, and the fence built has not been kept in repair, the railroad company will be liable for all damages for killing stock, regardless of whether killed through negligence, 494.

if it is killed by railroad company within corporate limits of town or city, where law does not require company to fence, a different rule prevails, from that where required to fence, 494.

being permitted to run at large in a town or village through which railroad runs and the fact is known to the operators of railroad, they will be held to a higher degree of care than where the road is fenced, 549.

where not prohibited by law from running at large, it is not negligence for owner to permit it to do so where railroad runs through village, 549.

SALOON KEEPER—

action by minors against, for accidental killing of their father while intoxicated, recovery may be had, 719.

SAFETY—

whether a party injured has negligently *failed* to exercise ordinary care for his own safety depends upon circumstances proved, and is for jury to determine, 351.

T.

TRESPASSING—

upon a railroad track; one so found can not recover for injury unless wantonly inflicted, 25.

TORT FEASORS—

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