A TREATISE

ON THE

LAW OF RAILROADS

CONTAINING A CONSIDERATION OF THE ORGANIZATION, STATUS AND POWERS OF RAILROAD CORPORATIONS, AND OF THE RIGHTS AND LIABILITIES INCIDENT TO THE LOCATION, CONSTRUCTION AND OPERATION OF RAILROADS; TOGETHER WITH THEIR DUTIES, RIGHTS AND LIABILITIES AS CARRIERS

INCLUDING

STREET AND INTERURBAN RAILWAYS

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CHAPTER XLII.

RAILROADS IN STREETS.

§ 1076. Authority to use streets.—The legislature of the state represents the public at large and has paramount authority over its public ways, including the streets in cities as well as country roads.[1]

[1] Dillon's Munic. Corp. § 656; Elliott Roads and Streets (2d Ed.) §§ 9, 421; Portland &c. R. Co. v. Portland, 14 Ore. 188; 12 Pac. 265; 58 Am. R. 299; O'Connor v. Pittsburgh, 18 Pa. St. 187; Duval

Municipal corporations have no inherent power to create other corporations or grant franchises, and they cannot give a railroad company the right to lay its tracks and operate its road in their streets unless they are authorized, either expressly or impliedly, to do so by the legislature.[2] Authority to use highways in this way must come, either directly or indirectly, from the legislature; but it is customary for the legislature to confer upon the municipalities the power to very largely regulate and control the roads and streets within their jurisdiction, and street railways are usually required by the legislature to obtain the consent of the municipality before using its streets.[3]

County Comrs. v. Jacksonville, 36 Fla. 196; 18 So. 339; 29 L. R. A. 416; Chicago &c. R. Co. v. Dunbar, 100 Ill. 110; Barney v. Keokuk, 94 U. S. 324; Council Bluffs v. Kansas City &c. R. Co. 45 Iowa, 338; 24 Am. R. 773; Perry v. New Orleans &c. Co. 55 Ala. 413; 28 Ala. 740; Lennon v. Mayor, 55 N. Y. 365; West Chicago Park Comrs. v. McMullen, 134 Ill. 170; 25 N. E. 676; 10 L. R. A. 215n; Jersey City v. Jersey City &c. R. Co. 20 N. J. Eq. 360. As we shall hereafter show, however, the abutters have certain rights which cannot be taken away without compensation. See, also, McKeon v. New York &c. R. Co. 75 Conn. 343; 61 L. R. A. 730.

[2] Peoples' Railroad v. Memphis Railroad, 10 Wall. (U. S.) 38, 51; Saginaw &c. Co. v. Saginaw, 28 Fed. 529; Pittsburg &c. R. Co. v. Hood, 94 Fed. 618; State v. Hilbert, 72 Wis. 184; 39 N. W. 326; Clinton v. Cedar Rapids &c. R. Co. 24 Iowa, 455; Eichels v. Evansville &c. Co. 78 Ind. 261; 41 Am. R. 561; Denver Circle R. Co. v. Nestor, 10 Colo. 403; 15 Pac. 714; Davis v. Mayor &c. New York, 14 N. Y. 506; 67 Am. Dec. 186n; Perry v. New Orleans &c. R. Co. 55 Ala. 413; 28 Am. R. 740; Metropolitan &c. R. Co. v. Chicago &c. R. Co. 87 Ill. 317; Potts v. Quaker City &c. R. Co. 161 Pa. St. 396; 29 Atl. 108; Atlantic &c. R. Co. v. St. Louis, 66 Mo. 228; Reg. v. Train, 2 B. & S. 640: 110 Eng. Com. L. 640; Elliott Roads and Streets (2d ed.), §§ 801, 803.

[3] See Hickey v. Chicago &c. R. Co. 6 Bradw. (Ill.) 172; Atchison St. R. Co. v. Missouri &c. Co., 31 Kan. 661; 3 Pac. 284; Atchison St. R. Co. v. Nave, 38 Kan. 744; 17 Pac. 587; 5 Am. St. 800; People v. Thompson, 98 N. Y. 6; Indianola v. Gulf, Western &c. R. Co. 56 Tex. 594; State v. Jacksonville &c. St. R. Co. 29 Fla. 590; 10 So. 590, 593; Yates v. West Grafton, 34 W. Va. 783; 12 S. E. 1075. Elliott Roads and Streets (2d ed.), § 740. See, also, Collier v. Union R. Co. 113 Tenn. 96; 83 S. W. 155; Illinois Cent. R. Co. v. Chicago, 173 Ill. 471; 50 N. E. 1104; affirmed in 176 U. S. 646; Keeseville &c. R. Co. In re, 101 N. Y. S. 237. Power may be given by the legislature to the municipality to grant such a right to use its streets, or its unauthorized exercise of the power may be ratified by statute. Pierce Railroads, 247; Clarke v. Blackmar, 47 N. Y. 150;

In the case of commercial railroads, however, while cities and towns through which they run usually have power to make proper regulations for their operation therein, the interest of the general public is practically so much greater than in the case of street railways—which are used mostly by residents of the municipality—and the prohibition by the municipality of the right to use its streets might be so detrimental to the best interests of the public, that it is not unusual for the legislature to grant this right directly to railroad companies rather than to leave it solely to the municipalities to grant or withhold.[4] Where general authority over its highways is conferred upon a municipal corporation, and there is no statute authorizing their use by a railroad, they cannot be so used without the consent of the municipality.[5] Authority to so use municipal streets may sometimes, however, be inferred from the provisions of the charter or act of incorporation;[6] but where the power is clearly delegated to the municipal corporation, mere general words in the charter or act for the incorporation of railroad companies will not be construed to confer a right to occupy the streets of the municipality without its consent, and a general grant of authority to construct a railroad from one point to another does not, in such a case, as a rule, at least, in-

Brown v. Duplessis, 14 La. Ann. 842; Chicago &c. R. Co. v. People, 91 Ill. 251; McCartney v. Evanston &c. R. Co. 112 Ill. 611; Cairo &c. R. Co. v. People, 92 Ill. 170; Denver &c. Co. v. Londoner, 20 Colo. 150; 37 Pac. 723; 1 Am. & Eng. R. Cas. (N. S.) 124, and note; Koch v. North Ave. &c. R. Co. 75 Md. 222; 23 Atl. 463; 15 L. R. A. 377n; 50 Am. & Eng. R. Cas. 401. See, also, Stockdale v. Rio Grande &c. R. Co. 28 Utah, 201; 77 Pac. 849.

[4] See Ingraham v. Chicago &c. R. Co. 34 Iowa, 249; Canton v. Canton &c. Co. 84 Miss. 268; 36 So. 266; 65 L. R. A. 561.

[5] Commonwealth v. Central &c. R. Co. 52 Pa. St. 506; Savannah &c. R. Co. v. Savannah, 45 Ga. 602; Hine v. Keokuk &c. Co. 42 Iowa, 636; St. Louis &c. R. Co. v. St. Louis, 92 Mo. 160; 4 S. W. 664; Chicago &c. R. Co. v. Chicago, 121 Ill. 176; 11 N. E. 907; Pennsylvania Company's Appeal, 116 Pa. St. 55; 8 Atl. 914.

[6] Denver &c. Co. v. Domke, 11 Colo. 247; 17 Pac. 777; St. Paul &c. Co. v. Minneapolis, 35 Minn. 141; 27 N. W. 500; 24 Am. & Eng. R. Cas. 309; Wheat v. Alexandria, 88 Va. 742; 14 S. E. 672; Canton v. Canton &c. Co. 84 Miss. 268; 36 So. 266; 65 L. R. A. 561. See, also, Hamline v. Southern R. Co. 76 Miss. 410; 25 So. 295; New Castle v. Lake Erie &c. R. Co. 155 Ind. 18; 57 N. E. 516; Southern Pac. R. Co. v. Ferris, 93 Cal. 263; 28 Pac. 828; 18 L. R. A. 510n; Wayzata v. Great Northern R. Co. 67 Minn. 385; 69 N. W. 1073; Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325; 94 Am. Dec. 84.

clude the right to use such streets for railroad purposes without the license or consent of the local authorities.[7] As we have elsewhere stated, the right to cross streets and roads may be inferred from a general grant of authority from which no such inference could be drawn as to the right to take them longitudinally.[8] The right to place rails upon a road or street and use it in the operation of a railroad can only be granted expressly or by necessary implication,[9] and the use must be reasonable and such as was clearly contemplated.[10] Thus, the right to construct a track along a street and run trains over it does not authorize an exclusive use of the street for a freight yard, or the like.[11] But it has been held that authority

[7] Chicago &c. Co. v. Chicago, 121 Ill. 176; 11 N. E. 907; Pennsylvania Company's Appeal, 116 Pa. St. 55; 8 Atl. 914; Springfield v. Connecticut &c. R. Co. 4 Cush. (Mass.) 63; Ruttles v. Covington (Ky.) 10 S. W. 644; Clinton v. Cedar Rapids &c. R. Co. 24 Iowa, 455. See, also, Delaware &c. R. Co. v. Buffalo, 158 N. Y. 266; 53 N. E. 44.

[8] Ante, §§ 41, 922; Burt v. Lima &c. Co. 21 N. Y. S. 482; Chicago &c. Co. v. Dunbar, 100 Ill. 110. Right to cross any public road or way includes right to cross city streets without consent of city. Canton v. Canton &c. Co. 84 Miss. 268; 36 So. 266; 65 L. R. A. 561, 566. But not to lay the track longitudinally along a street. New Castle v. Lake Erie &c. R. Co. 155 Ind. 18; 57 N. E. 516. See, also, Pittsburg &c. R. Co. v. Hood, 94 Fed. 618; Western R. Co. v. Alabama &c. R. Co. 96 Ala. 272; 11 So. 483; 14 L. R. A. 474; Cook County v. Great Western R. Co. 119 Ill. 218; 10 N. E. 564; Louisville &c. R. Co. v. Whitley County Ct. 95 Ky. 215; 24 S. W. 604; 44 Am. St. 220.

[9] Commonwealth v. Erie &c. R. Co. 27 Pa. St. 339; Daly v. Georgia &c. Co. 80 Ga. 793; 7 S. E. 196; 12 Am. St. 286; 36 Am. & Eng. R. Cas. 20; Chicago &c. R. Co. v. Chicago, 121 Ill. 176; 11 N. E. 907; Columbus &c. R. Co. v. Witherow, 82 Ala. 190; 3 So. 23; Virginia &c. R. Co. v. Lynch, 13 Nev. 92; State v. Vermont Cent. R. Co. 27 Vt. 103; Trustees v. Milwaukee &c. Co. 77 Wis. 158; 45 N. W. 1086.

[10] Long Branch Comrs. v. West End R. Co. 29 N. J. Eq. 566; Glick v. Baltimore &c. R. Co. 21 D. C. 363; Commonwealth v. Frankfort, 92 Ky. 149; 17 S. W. 287. See, also, Atlantic &c. R. Co. v. Montezuma, 122 Ga. 1; 49 S. E. 738.

[11] Gahagan v. Boston &c. R. Co. 1 Allen (Mass.) 187; 79 Am. Dec. 724; Owensborough &c. R. Co. v. Sutton (Ky.) 13 S. W. 1086; Allegheny v. Ohio &c. R. Co. 26 Pa. St. 355; Lackland v. North Missouri &c. R. Co. 31 Mo. 180; Chapman v. Oshkosh &c. R. Co. 33 Wis. 629; Atlantic &c. R. Co. v. Montezuma, 122 Ga. 1; 49 S. E. 738; Corby v. Chicago &c. R. Co. 150 Mo. 457; 52 S. W. 282. See, also, Louisville &c. R. Co. v. Downey, 18 Ind. App. 140; 47 N. E. 494; Chicago &c. R. Co v. Jefferson, 14 Ill. App. 615; Bussian v. Milwaukee &c. R. Co. 56 Wis. 325; 14 N. W. 452; Stevenson v.

to construct and operate a railroad in a street includes the power to make a switch or turnout to a station on the street.[12] So it has been held that trains may be made up in the street, provided the street is so used only to a reasonable extent and with due regard to its use for ordinary highway purposes,[13] and that cars may be stopped temporarily in the highway, in which the tracks are lawfully laid, for the purpose of loading and unloading freight as well as passengers.[14]

§ 1077. Implied authority of municipalities to grant right to use streets.—The power of municipalities to authorize railroads to use their streets may be derived either from an express grant or by necessary implication. It is a question of some doubt as to whether the general authority over streets which is usually given to them empowers them to grant to street railway companies the right to use their streets, but the better rule seems to be that it does.[15] It is

Missouri Pac. R. Co. (Mo.) 31 S. W. 793; State v. Jersey City, 52 N. J. L. 65; 28 Am. & Eng. Corp. Cas. 182; Hopkins v. Baltimore &c. R. Co. 6 Mackey (D. C.) 311; Thompson v. Pennsylvania R. Co. 45 N. J. Eq. 870; 14 Atl. 897; 19 Atl. 622.

[12] New Orleans &c. R. Co. v. Second Municipality, 1 La. Ann. 128; Knight v. Carrollton R. Co. 9 La. Ann. 284; Black v. Philadelphia &c. Co. 58 Pa. St. 249. But see Concord v. Concord Horse R. 65 N. H. 30; 18 Atl. 87. In Chicago &c. R. Co. v. Eisert, 127 Ind. 156; 26 N. E. 759, it was held that an ordinance giving the company the right of way along a certain street gave it a right to construct an additional track when its business demanded it. See, also, Philadelphia v. River &c. R. Co. 133 Pa. St. 134; Romer v. St. Paul City R. Co. 75 Minn. 211; 77 N. W. 825; 74 Am. St. 455. So, it has been held that, unless limited to a particular part of the street, the company may, in good faith, place its track on such part of the street as its interest demands. Campbell v. Metropolitan St. R. Co. 82 Ga. 320; 9 S. E. 1078.

[13] Gahagan v. Boston &c. R. Co 1 Allen (Mass.) 187; State v. Vermont Cent. R. Co. 27 Vt. 103; compare Glick v. Baltimore &c. R. Co. 21 D. C. 363.

[14] Matthews v. Kelsey, 58 Me. 56. See State v. Morris &c. R. Co. 23 N. J. L. 360; 25 N. J. L. 437.

[15] Atchison St. R. Co. v. Missouri Pac. R. Co. 31 Kan. 66; 3 Pac. 284; Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628; 26 L. R. A. 667; 1 Am. & Eng. R. Cas. (N. S.) 71; State v. Corrigan &c. St. R. Co. 85 Mo. 263; 55 Am. R. 361; 29 Am. & Eng. R. Cas. 591. See, also, Brown v. Duplessis, 14 La. Ann. 842; Michigan City v. Boeckling, 122 Ind. 39; 23 N. E. 518; Indianapolis &c. Co. v. Citizens' &c. Co. 127 Ind. 369, 389; 24 N. E. 1054; 26 N. E. 893; 8 L. R. A. 539n; Davis v. Mayor, 14 N. Y. 506; 67 Am. Dec. 186n; 2

believed, however, that the ordinary powers of municipal corporations to regulate and improve their streets and prevent their obstruction are not in themselves sufficient to enable municipalities to grant the right to use their streets to ordinary commercial railroads,[16] although it has been held that a city may grant such a right where it is given sole and exclusive control of its streets.[17] It is clear that it cannot grant such a right where the railroad is for the mere private use of an individual.[18] It has also been held that it cannot devote a street entirely to the use of a railroad company,[19] and that, although the city is given authority to grant the right to use its streets to such companies, and to permit temporary and reasonable obstruction thereof, an ordinance giving the right to stand cars at the intersection of certain streets for not more than thirty minutes is unreasonable and invalid.[20]

Dillon Munic. Corp. §§ 719, 724. But compare Eichels v. Evansville &c. R. Co. 78 Ind. 261; 41 Am. R. 561; Newell v. Minneapolis &c. R. Co. 35 Minn. 112; 27 N. W. 839; 59 Am. R. 303. Much, of course, depends upon the language of the particular charter under consideration. See Schaper v. Long Island &c. R. Co. 124 N. Y. 630; 26 N. E. 311; Forman v. New Orleans &c. R. Co. 40 La. Ann. 446; 4 So. 246; Covington St. R. Co. v. Covington, 9 Bush. (Ky.) 127; Booth Street Railways, § 15.

[16] Ruttles v. Covington (Ky.), 10 S. W. 644; Daly v. Georgia &c. Railroad Co., 80 Ga. 793; 7 S. E. 146; 12 Am. St. 286; Savannah &c. R. Co. v. Shiels, 33 Ga. 601; State v. Corrigan &c. St. R. Co. 85 Mo. 263; 55 Am. St. 361; 29 Am. & Eng. R. Cas. 591; Newell v. Minneapolis &c. R. Co. 35 Minn. 112; 27 N. W. 839; 59 Am. R. 303; Stanley v. Davenport, 54 Iowa, 463; 16 N. W. 706; 37 Am. R. 216; 2 Dillon Munic. Corp. §§ 705, 724. See, also, Strasser v. New York, &c. R. Co. 128 N. Y. 157 and 623; 28 N. E. 640; 14 L. R. A. 133.

[17] Kistner v. Indianapolis, 100 Ind. 210; Chicago &c. R. Co. v. Quincy, 136 Ill. 489; 27 N. E. 232. But compare Eichels v. Evansville St. R. Co. 78 Ind. 261; 41 Am. R. 561.

[18] Glaessner v. Anheuser-Bush &c. Assn. 100 Mo. 508; 13 S. W. 707; 33 Am. & Eng. Corp. Cas. 483; Heath v. Des Moines &c. R. Co. 61 Iowa, 11; 15 N. W. 573; 10 Am. & Eng. R. Cas. 313; State v. Trenton, 36 N. J. L. 79; Marine &c. Ins. Co. v. St. Louis &c. R. Co. 41 Fed. 643; Gustafson v. Hamm, 56 Minn. 334; 57 N. W. 1054; 22 L. R. A. 565; Fanning v. Osborne, 102 N. Y. 441; 7 N. E. 307; Hartman &c. Co.'s Appeal (Pa.), 18 Atl. 553; See, also, Hibbard & Co. v. Chicago, 173 Ill. 91; 50 N. E. 256; 40 L. R. A. 621; Ligare v. Chicago, 139 Ill. 46; 28 N. E. 934; 32 Am. St. 179.

[19] Sherlock v. Kansas City &c. R. Co. 142 Mo. 172; 43 S. W. 629; 64 Am. St. 551.

[20] J. K. & W. H. Gilcrest Co. v.

§ 1078. How and by whom grant should be made or consent given.—The authority vested in a municipality to grant to a railroad company the right to use its streets must be exercised by the proper officers or body. Thus, where it is vested in the common council it cannot be delegated to a board or officer having mere ministerial powers.[21] So, where it was vested in the "mayor and assembly" it was held that it could only be exercised by an ordinance duly enacted for that purpose.[22] But it has also been held that the recognition by a city of the validity of such an ordinance for a long period of time raises a "sufficient presumption" of every fact necessary to its validity, "including approval by the mayor and publication."[23] In many states it is provided by constitution or statute that no street railway shall be constructed on any street without the consent of the "local authorities having control of the street or highway proposed to be occupied;" in others it is provided that consent must be given by ordinance, while in others the consent of the owner of a certain percentage of the abutting land must also be obtained.[24]

§ 1079. Nature and effect of grant by municipality.—Questions

Des Moines, 128 Ia. 49; 102 N. W. 831. So is an ordinance granting the right to construct tracks, spurs, sidings, and switches, and erect and maintain permanent buildings on a street, as the company may deem necessary. Chicago &c. Ry. Co. v. People, 222 Ill. 427; 78 N. E. 790. See, also, Pennsylvania Co. v. Chicago, 181 Ill. 289; 54 N. E. 825; 53 L. R. A. 223.

[21] Citizens' St. R. Co. v. Jones, 34 Fed. 579; State v. Bell, 34 Ohio St. 194. See, also, 1 Dillon's Munic. Corp. § 274; Schwede v. Hemrich Bros. Brew. Co. 29 Wash. 21; 69 Pac. 362.

[22] Lockwood v. Wabash R. Co. 122 Mo. 86; 26 S. W. 698; 24 L. R. A. 516; 43 Am. St. 547; 1 Am. & Eng. R. Cas. (N. S.) 16. See McHale v. Easton &c. Co. 169 Pa. 416; 32 Atl. 461.

[23] Santa Rosa &c. R. Co. v. Central St. R. Co. (Cal.) 38 Pac. 986; 1 Am. & Eng. R. Cas. (N. S.) 105. See, also, Spokane St. R. Co. v. Spokane Falls, 6 Wash. 521; 33 Pac. 1072. But a rehearing has been granted in the case first cited in this note.

[24] See Booth St. Rys. §§ 18, 28. In Nebraska the consent of the majority of the electors of the city is required. State v. Bechel, 22 Neb. 158; 34 N. W. 342. See, as to the manner of giving consent by "local authorities" of township, Pennsylvania R. Co. v. Montgomery &c. R. Co. 167 Pa. St. 62; 31 Atl. 468; 27 L. R. A. 766; 46 Am. St. 659; 1 Am. & Eng. R. Cas. (N. S.) 190. As to consent of abutting owners, see White v. Manhattan &c. R. Co. 139 N. Y. 19; 34 N. E. 887; 8 Lewis' Am. R. & Corp. 739, and note.

sometimes arise, at least in street railway cases, as to whether the grant is a franchise or more in the nature of a license. The right granted by a municipality to use its streets in such cases is frequently called a franchise, but it is a franchise in the secondary rather than the primary sense of that term. Indeed, it seems to us that it is more in the nature of a license which may be revoked at any time before its acceptance, and which vests no right in the licensee, until it is "accepted and used."[25] A valid grant of such a right by ordinance, however, upon an adequate consideration, when accepted and acted upon by the grantee becomes an irrevocable and binding contract.[26] Unless the right to repeal or amend is reserved, the city cannot revoke the ordinance, nor, by a subsequent ordinance, without the consent of the company, impose upon it further and additional burdens.[27] But the right to do so may be reserved,[28] and, as we shall hereafter show, the city cannot thus surrender or alienate its governmental and police powers.[29] In a recent case it was held,

[25] Atchison St. R. Co. v. Nave, 38 Kan. 744; 17 Pac. 587; 5 Am. St. 800n; Galveston City R. Co. v. Gulf City &c. R. Co. 63 Tex. 529; 26 Am. & Eng. R. Cas. 114; Gulf City &c. Co. v. Galveston &c. Co. 65 Tex. 502; Detroit v. Detroit City R. Co. 37 Mich. 558; Chicago &c. R. Co. v. People, 73 Ill. 541; Belleville v. Citizens' &c. Co. 152 Ill. 171; 38 N. E. 584; 26 L. R. A. 681; Booth St. Ry. § 10; 2 Beach Pub. Corp. § 1218. Ante, § 65. But see State v. Madison St. R. Co. 72 Wis. 612; 40 N. W. 487. See post, § 1096n.

[26] Belleville v. Citizens' Horse R. Co. 152 Ill. 171; 38 N. E. 584; People v. Chicago &c. R. Co. 18 Ill. App. 125; Asheville St. R. Co. v. Asheville, 109 N. Car. 688; 14 S. E. 316; Arcata v. Arcata &c. R. Co. 92 Cal. 639; 28 Pac. 676; People v. O'Brien, 111 N. Y. 1; 18 N. E. 692; 7 Am. St. 684; 2 L. R. A. 255; State v. Noyes, 47 Me. 189; Commonwealth v. Proprietors, 2 Gray (Mass.), 339; Baltimore &c. Co. v. Mayor of Baltimore, 64 Fed. 153; Africa v. Board, 70 Fed. 729; St. Louis v. Western U. Tel. Co. 63 Fed. 68, and authorities there cited; Mason v. Ohio River R. Co. 51 W. Va. 183; 41 S. E. 418, 420 (citing text). Compare Lake Roland &c. R. Co. v. Baltimore, 77 Md. 352; 26 Atl. 510; 7 Lewis' Am. R. & Corp. 619, and see authorities cited by Mr. Lewis in note criticising that case.

[27] People v. Chicago &c. R. Co. 118 Ill. 113; 7 N. E. 116; Electric R. Co. v. Grand Rapids, 84 Mich. 257; 47 N. W. 567; Western Pav. & Supply Co. v. Citizens' St. R. Co. 128 Ind. 525; 26 N. E. 188; 28 N. E. 88; 25 Am. St. 462n; Coast Line R. Co. v. Savannah, 30 Fed. 646; Easton &c. R. Co. v. Easton, 133 Pa. St. 505; 19 Atl. 486; 19 Am. St. 658.

[28] Medford &c. R. Co. v. Somnerville, 111 Mass. 232. See Lake Roland El. R. Co. v. Baltimore, 77 Md. 352; 26 Atl. 510; 7 Lewis' Am. R. & Corp. 619, and note.

[29] See post, § 1082.

under a statute providing that any street railway company might use the streets of any city with the consent of the corporate authorities given by ordinance, that "the power to consent is in and of itself the power to grant an easement. The 'consent' is an easement, and the act of consenting to the use of the streets for street railway purposes is the act of granting an easement in the streets."[30]

§ 1080. Construction of grant—Illustrative cases.—Grants by a municipality of the privilege or right to use its streets are strictly construed against the grantee.[31] But notwithstanding this rule, the construction should be reasonable with reference to the subject-matter and the purpose of the grant. A brief statement of the facts involved and the questions decided in some of the recent cases will serve to show the extent and limits of the rule. On the one hand it has been held that an ordinance authorizing a company to construct its tracks "on, over, and along" certain alleys does not authorize their construction on other land at the side of such alleys;[32] that a grant by a city to a railroad company of the right to construct its road "across, or along such streets as it might find expedient to use," and to occupy so much thereof as "may be necessary for the construction of its track, siding, and branches," does not give the company the right to the exclusive use of such streets.[33] On the other hand, it has been held that a grant of authority to construct a railroad or railroads upon any public road or highway in the city or extending therefrom does not limit such construction to one continuous and di-

[30] Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628, 643; 1 Am. & Eng. R. Cas. (N. S.) 71.

[31] Wabash R. Co. v. Defiance, 52 Ohio St. 262; 40 N. E. 89; Indianapolis &c. St. R. Co. v. Citizens' &c. St. R. Co. 127 Ind. 369; 24 N. E. 1054; Citizens' St. R. Co. v. Jones, 34 Fed. 579; Chicago &c. R. Co. v. Chicago, 121 Ill. 176; 11 N. E. 907; North Eastern R. Co. v. Payne, 8 Rich. L. (S. C.) 177; Heath v. Des Moines &c. R. Co. 61 Iowa, 11; 15 N. W. 573; Stein v. Bienville Water Co. 141 U. S. 67; 11 Sup. Ct. 892; Elliott Roads and Streets (2nd ed.), § 806. Ante, § 38.

[32] Heath v. Des Moines St. R. Co. 61 Iowa, 11; 15 N. W. 573. See, also, Galveston Wharf Co. v. Gulf, &c. R. Co. 81 Tex. 494; 17 S. W. 57.

[33] Pennsylvania &c. R. Co. v. Philadelphia &c. R. Co. 157 Pa. St. 42; 27 Atl. 683. See, also, Dubach v. Hannibal &c. R. Co. 89 Mo. 483; 1 S. W. 86; Lockwood v. Wabash R. Co. 122 Mo. 86; 26 S. W. 698; 24 L. R. A. 516; 43 Am. St. 547. Ante, § 39.

rect street or highway;[34] that authority to extend its lines on streets south of a specified street, west of another, north of another, and east of another, does not limit the company to the streets within the boundaries specified, but authorizes it to use streets beyond such boundaries;[35] that an ordinance granting the right to construct a track on a certain street does not limit the construction of the track to the roadway as distinguished from the sidewalk,[36] and that an electric street railway company, authorized to erect trolley wires, has a right to top the branches of trees along the way when reasonably necessary to its construction and operation.[37] Other illustrative cases will be found in the note below.[38]

§ 1081. Right of municipality to impose conditions.—When a municipal corporation has the power to grant or refuse a railroad company the right to use its streets as it sees fit, or when its consent is required before any company can so use them, it has, as we think, authority to prescribe the terms and conditions upon which the company shall have the right to construct and operate a railway in its streets.[39] Thus, it may require the company to repair, to pay a li-

[34] West Jersey &c. Co. v. Camden &c. R. Co. 52 N. J. Eq. 452; 29 Atl. 333; 1 Am. & Eng. R. Cas. (N. S.) 132.

[35] Commonwealth v. Union &c. R. Co. 163 Pa. St. 22; 29 Atl. 711.

[36] Knapp &c. Co. v. St. Louis R. Co. 126 Mo. 26; 28 S. W. 627.

[37] Dodd v. Consolidated Traction Co. 57 N. J. L. 482; 31 Atl. 980. See, also, Southern &c. Tel. Co. v. Francis, 109 Ala. 224; 19 So. 1; 31 L. R. A. 193; 55 Am. St. 930; Miller v. Detroit &c. R. Co. 125 Mich. 171; 84 N. W. 49; 51 L. R. A. 955; 84 Am. St. 569.

[38] Chicago &c. R. Co. v. Joliet, 79 Ill. 25; Bishop v. Union R. Co. 14 R. I. 314; 51 Am. R. 386; Chicago v. Chicago &c. R. Co. 105 Ill. 73; West End &c. R. Co. v. Atlanta St. R. Co. 49 Ga. 151; State v. Newport St. R. Co. 16 R. I. 533; 18 Atl. 161.

[39] Union &c. Co. v. Southern Co. 105 Mo. 562; 16 S. W. 920; Pacific R. Co. v. Leavenworth City, 1 Dillon (U. S. C. C.), 393, 398; Northern &c. Co. v. Mayor &c. 21 Md. 93; Allegheny v. Millville &c. Co. 159 Pa. St. 411; 28 Atl. 202; Mager v. Grima, 8 How. (U. S.) 490, 494; St. Louis R. Co. v. Southern Co. 105 Mo. 562; 16 S. W. 960; 46 Am. & Eng. R. Cas. 1, citing Elliott Roads and Streets, 565. See, also, Kinsman St. R. Co. v. Broadway &c. R. Co. 36 Ohio St. 239; 5 Am. & Eng. R. Cas. 327; Indianapolis v. Consumers' Gas Trust Co. 140 Ind. 107, 116; 39 N. E. 433, 436; 27 L. R. A. 514; 49 Am. St. 183, citing Elliott Roads and Streets, 565; Houston v. Houston City St.

cense fee for the use of the streets, or the like.[40] So, it may prescribe a reasonable rate of fare for the carriage of passengers by a street railway company,[41] the location and character of its tracks, poles, and wires, and the like,[42] and, in general, it may impose any reasonable conditions as to the terms upon which its consent shall be given so long as they are not repugnant to the grant of the franchise to the company by the legislature, or to any constitutional or statutory provision upon the subject.[43] If the company accepts an ordinance granting the consent of the municipality upon certain conditions therein stated, it must, we think, take it "in its integrity," with its burdens as well as its privileges.[44] If the consent is clearly made to depend upon the conditions the company cannot justly claim that it has such consent and at the same time repudiate the condi-

R. Co. 83 Tex. 548; 19 S. W. 127; 29 Am. St. 679; 6 Lewis' Am. R. & Corp. 106; Plymouth Tp. v. Chestnut Hill &c. Co. 168 Pa. St. 181; 32 Atl. 19; St. Louis &c. R. Co. v. Kirkwood, 159 Mo. 239; 60 S. W. 110, 113; 53 L. R. A. 300, 304 (citing text); Blair v. Chicago &c. R. Co. 201 U. S. 400; 26 Sup. Ct. 427, 439 (citing text and holding that the right to impose terms and conditions includes the right to limit and agree upon the period of the grant).

[40] New Orleans v. New Orleans &c. Co. 40 La. Ann. 587; 4 So. 512; Newport v. South Covington &c. R. Co. 89 Ky. 29; 11 S. W. 954; Detroit v. Detroit City R. Co. 37 Mich. 558; Pittsburgh &c. R. Co. v. Birmingham, 51 Pa. St. 41. But see Hodges v. Western Un. Tel. Co. 72 Miss. 910; 18 So. 84: 29 L. R. A. 770. See, also, Memphis v. Postal Tel. &c. Co. 145 Fed. 602.

[41] People v. Barnard, 110 N. Y. 548; 18 N. E. 354; 36 Am. & Eng. R. Cas. 70; Forman v. New Orleans &c. R. Co. 40 La. Ann. 446; 4 So. 246; 36 Am. & Eng. R. Cas. 38.

[42] Electric R. Co. v. Grand Rapids, 84 Mich. 257; 47 N. W. 567; Detroit v. Detroit City R. Co. 37 Mich. 558.

[43] People v. Barnard 110 N. Y. 548; 18 N. E. 354; Kings County El. R. Co. In re, 105 N. Y. 97; 13 N. E. 18; Harrisburg &c. R. Co. v. Harrisburg 149 Pa. St. 465; 24 Atl. 56. See, also, Providence v. Union R. Co. 12 R. I. 473; Philadelphia v. Ridge Ave. R. Co. 143 Pa. St. 444; 22 Atl. 695; Cain v. Chicago &c. R. Co. 54 Ia. 255; 6 N. W. 268; Owensboro v. Owensboro &c. R. Co. (Ky.) 40 S. W. 916. But see Kentucky &c. Bridge Co. v. Krieger, 93 Ky. 243; 19 S. W. 738.

[44] Allegheny v. Millville &c. Co. 159 Pa. St. 411; 28 Atl. 202. See, also, Philadelphia v. Lombard &c. Co. 3 Grant's Cas. (Pa.) 403; Bristow v. Whitmore, 9 H. L. Cas. 391; Fort Worth &c. R. Co. v. Rosedale, 68 Tex. 163; 7 S. W. 381; Tudor v. Chicago &c. R. Co. 154 Ill. 129; 39 N. E. 136; 1 Am. & Eng. R. Cas. (N. S.) 340; Detroit v. Detroit City R. Co. 37 Mich. 558.

tions,[45] and it has been held that if the consent of the municipality is not obtained the whole grant will fail.[46]

§ 1082. Municipal regulation and control.—A municipal corporation cannot, by contract, surrender or alienate its governmental and police powers, which the public welfare demands that it should exercise.[47] All rights granted by the municipality or contracts made by it with reference to the use of its streets are subject to its exercise of such powers, and a railroad company which secures the right to use the streets of a city takes such right subject to all reasonable regulations and ordinances enacted by the city in the exercise of its police power.[48] Thus, it has been held that a municipality may enact

[45] Allegheny v. Millville &c. Co. 159 Pa. St. 411; 28 Atl. 202, 203; Peoples' Railroad v. Memphis Railroad, 10 Wall. (U. S.) 38; Long Island R. Co. v. Brooklyn, 8 N. Y. S. 805; Tiedeman v. Munic. Corp. § 302.

[46] Peoples' v. Memphis Railroad, 10 Wall. (U. S.) 38; Peoples' &c. R. Co. v. Memphis (Tenn.), 16 S. W. 973; Oakland R. Co. v. Oakland &c. R. Co. 45 Cal. 365; 13 Am. R. 181; Rochester &c. R. Co. In re, 123 N. Y. 351; 25 N. E. 381; 46 Am. & Eng. R. Cas. 157; Larimer &c. R. Co. v. Larimer &c. Co. 137 Pa. St. 533; 20 Atl. 570; Musser v. Fairmount &c. R. Co. 7 Am. L. Reg. (O. S.) 284. See, also, Pennsylvania R. Co. v. Montgomery &c. R. Co. 167 Pa. St. 62; 31 Atl. 468; 27 L. R. A. 766; 46 Am. St. 659; Pittsburg &c. R. Co. v. Hood, 94 Fed. 618; Tudor v. Chicago &c. R. Co. 154 Ill. 129; 39 N. E. 136; Chicago &c. R. Co. v. Chicago, 183 Ill. 341; 55 N. E. 648; Joy v. St. Louis, 138 U. S. 1; 11 Sup. Ct. 243; Elliott Roads and Streets, § 804.

[47] Thorpe v. Rutland &c. R. Co. 27 Vt. 140; 62 Am. Dec. 625; Indianapolis &c. Co. v. Kercheval, 16 Ind. 84; Louisville City R. Co. v. Louisville, 8 Bush (Ky.), 415; Horn v. Atlantic &c. Co. 35 N. H. 169; Bulkley v. New York &c. Co. 27 Conn. 479; Westbrook's Appeal, 57 Conn. 95; 17 Atl. 368; 37 Am. & Eng. R. Cas. 446; Pennsylvania Co. v. Riblet, 66 Pa. St. 164; 5 Am. R. 360; Macon &c. R. Co. v. Macon, 112 Ga. 782; 38 S. E. 60; Wabash R. Co. v. Defiance, 167 U. S. 88; 17 Sup. Ct. 748; New York &c. R. Co. v. Bristol, 151 U. S. 556; 14 Sup. Ct. 437; Elliott Roads and Streets, § 805; 1 Dillon Munic. Corp. § 97; Tiedeman Munic. Corp. § 302. It is also held in a recent case that a municipality cannot contract with a railroad company for a viaduct to be maintained wholly by the city for all time. Vandalia R. Co. v. State (Ind.), 76 N. E. 980. See, also, State v. Minnesota &c. R. Co. 80 Minn. 108; 83 N. W. 32; 50 L. R. A. 656; State v. St. Paul &c. R. Co. (Minn.) 108 N. W. 261.

[48] State v. Hoboken, 41 N. J. L. 71; Detroit v. Fort Wayne &c. R. Co. 90 Mich. 646; 51 N. W. 688; Pittsburgh &c. R. Co. v. Chicago, 159 Ill. 369; 42 N. E. 781; Frankford &c. Co. v. Philadelphia, 58 Pa. St.

and enforce an ordinance requiring a street railway company to keep down the dust by sprinkling its tracks;[49] that it may, by ordinance, require the company to have some employe or agent on each car in addition to the driver,[50] or to remove snow thrown up by the snow-plows of the company;[51] that it may temporarily remove the tracks of a street railway company, when necessary, in order to construct a sewer or culvert,[52] or even require a change of the track from one

119; 98 Am. Dec. 242; State v. Trenton, 53 N. J. L. 132; 20 Atl. 1076; 11 L. R. A. 410; Clinton v. Clinton &c. R. Co. 37 Iowa, 61; San Jose v. San Jose &c. R. Co. 53 Cal. 475; New Orleans &c. Co. v. Louisiana &c. Co. 115 U. S. 650; 6 Sup. Ct. 252; People v. Geneva &c. Trac. Co. (N. Y.) 78 N. E. 1109; Macon &c. R. Co. v. Macon, 112 Ga. 782; 38 S. E. 60 (citing Elliott Roads & Sts. § 807); New Castle v. Lake Erie &c. R. Co. 155 Ind. 18, 20; 57 N. E. 516 (citing text). But where the powers of a municipality are expressly specified in the statute it has been held that the municipality, where no such power is specified, cannot compel a railroad company at its own expense to erect and maintain safety gates at street crossings. Pennsylvania R. Co. In re, 213 Pa. St. 373; 62 Atl. 986.

[49] City &c. R. Co. v. Savannah, 77 Ga. 731; 4 Am. St. 106.

[50] State v. Trenton, 53 N. J. L. 132; 20 Atl. 1076; 11 L. R. A. 410. See, also, Baltimore &c. Co. v. Mali, 66 Md. 53; 5 Atl. 87. But see Brooklyn &c. R. Co. v. Brooklyn, 37 Hun (N. Y.), 413; Toronto v. Toronto &c. R. Co. 15 Ont. App. 30; 36 Am. & Eng. R. Cas. 44. Air or electric brakes may be required. People v. Detroit &c. R. 134 Mich. 682; 97 N. W. 36; 63 L. R. A. 746: 104 Am. St. 626. In State v. Heidinhain, 42 La. Ann. 483; 7 So. 621; 21 Am. St. 388, it was held that the city might pass an ordinance prohibiting smoking in street cars, and in St. Louis v. St. Louis &c. R. Co. 89 Mo. 44; 1 S. W. 305; 58 Am. R. 82, it was held that the city might limit the number of passengers to be carried in each car.

[51] Broadway &c. R. Co. v. New York 49 Hun (N. Y.), 126; 1 N. Y. S. 646. See, also, Wallace v. Detroit City R. Co. 58 Mich. 231; 24 N. W. 870; Bowen v. Detroit City R. Co. 54 Mich. 496; 20 N. W. 559; 52 Am. R. 822. So, it has been held that the city may change the grade of street and compel the company to make its tracks conform thereto. Ashland St. R. Co. v. Ashland, 78 Wis. 271; 47 N. W. 619; North Chicago &c. R. Co. v. Lake View, 105 Ill. 183. See, also, Albany v. Watervliet &c. Co. 108 N. Y. 14; 15 N. E. 370; Indianapolis &c. R. Co. v. State, 37 Ind. 489; Water Comrs. of Jersey City v. Hudson, 13 N. J. Eq. 420.

[52] Kirby v. Citizens' R. Co. 48 Md. 168; 30 Am. R. 455; North Pennsylvania R. Co. v. Stone, 3 Phila. 421. See, also, Middlesex R. Co. v. Wakefield, 103 Mass. 261; National &c. Co. v. City of Kansas, 28 Fed. 921. But see Eddy v. Ottawa &c. Co. 31 Upper C. Q. B. 569; Des Moines City R. Co. v. Des Moines, 90 Iowa, 770; 58 N. W. 906; 26 L. R. A. 767. In

part of a street to another,[53] or a bridge to be removed,[54] or a tunnel to be lowered,[55] and that such a company may be enjoined from digging into the street and rebuilding without the consent of the city authorities where the city has authority to prescribe the manner in which corporations shall exercise any privileges granted them in the use of its streets.[56] So, as we have elsewhere shown, a municipal corporation may enact reasonable ordinances limiting the rate of speed at which trains shall be run,[57] and prohibiting the obstruction of its streets by either commercial or street railway companies.[58] It is a well-established general rule, however, that where an ordinance is based upon a general power and its provisions are more specific than the expression of the power granted, the courts will inquire into its reasonableness and hold it invalid if clearly unreasonable;[59] but

Detroit v. Fort Wayne &c. R. Co. 90 Mich. 646; 51 N. W. 688; 50 Am. & Eng. R. Cas. 447, a writ of mandamus was awarded to compel the company to remove the projecting ends of its ties in order to enable the city to properly improve the street.

[53] Macon &c. R. Co. v. Macon, 112 Ga. 782; 38 S. E. 60; West Philadelphia &c. R. Co. v. Philadelphia, 10 Phila. (Pa.) 70.

[54] Wabash R. Co. v. Defiance, 167 U. S. 88; 17 Sup. Ct. 748.

[55] West Chicago St. R. Co. v. People, 214 Ill. 9; 73 N. E. 393.

[56] Trenton v. Trenton &c. R. Co. (N. J.), 27 Atl. 483. But see State v. Latrobe, 81 Md. 222; 31 Atl. 788.

[57] Crowley v. Burlington &c. Railroad Co., 65 Iowa, 658; 20 N. W. 467; 22 N. W. 918; Merz v. Missouri Pac. R. Co., 88 Mo. 672; 1 S. W. 382; Whitson v. Franklin, 34 Ind. 392; Chicago &c. R. Co. v. Haggerty, 67 Ill. 113; Richmond &c. R. Co. v. Richmond, 96 U. S. 521; Weyl v. Chicago &c. R. Co., 40 Minn. 350; 42 N. W. 24; Cleveland &c. R. Co. v. Harrington, 131 Ind. 426; 30 N. E. 37; 49 Am. & Eng. R. Cas. 358; State v. Wisconsin Cent. Ry. Co. (Wis.) 107 N. W. 295;

[58] Duluth v. Mallett, 43 Minn. 204; 45 N. W. 154; State v. Jersey City, 27 N. J. L. 493; Birmingham v. Alabama &c. R. Co. 98 Ala. 134; 13 So. 141; 46 Am. & Eng. Corp. Cas. 631. So, it may require a flagman at a grade crossing. State v. East Orange, 41 N. J. L. 127; Toledo &c. Co. v. Jacksonville, 67 Ill. 37; 16 Am. R. 611. See, also, Hayes v. Michigan &c. R. Co. 111 U. S. 228; 4 Sup. Ct. 369; St. Louis &c. R. Co. v. Belleville, 122 Ill. 376; 12 N. E. 680. But compare Red Wing v. Chicago &c. R. Co. 72 Minn. 240; 75 N. W. 223; 71 Am. St. 482. See, also, as to compelling company to light streets. Shelbyville v. Cleveland &c. R. Co., 146 Ind. 66; 44 N. E. 929; Cleveland &c. R. Co. v. Connersville, 147 Ind. 277; 46 N. E. 579; 37 L. R. A. 175; 62 Am. St. 418; Louisville &c. R. Co. v. Bessemer, 108 Ala. 238; 18 So. 880.

[59] State v. Trenton, 53 N. J. L. 132; 20 Atl. 1076; 11 L. R. A. 410; Ah You, In re, 88 Cal. 99; 25 Pac.

the presumption is that such an ordinance is reasonable.[60] Where part of the ordinance is reasonable and valid and part unreasonable, if that part which is reasonable can be separated from that which is unreasonable,[61] so as to be capable of enforcement as complete in

974; 11 L. R. A. 408; 22 Am. St. 280; Chicago v. Trotter, 136 Ill. 430; 26 N. E. 359; 17 Am. & Eng. Ency. of Law, 248, and authorities there cited; Des Moines City R. Co. v. Des Moines, 90 Iowa, 770; 58 N. W. 906; 26 L. R. A. 767; 1 Am. & Eng. R. Cas. (N. S.) 215, and note; Cooley's Const. Lim. (4th Ed.) 243; 1 Elliott Gen. Pr. § 436; Pittsburg &c. R. Co. v. Crown Point, 146 Ind. 421; 45 N. E. 587; 35 L. R. A. 684; Southern Ind. Ry. Co. v. Bedford, 165 Ind. 272; 75 N. E. 268. In Evison v. Chicago &c. R. Co. 45 Minn. 370; 48 N. W. 6; 11 L. R. A. 434, an ordinance limiting the rate of speed to four miles an hour was held to be unreasonable and void under the circumstances of the case. So, in Burg v. Chicago &c. R. Co. 90 Iowa, 106; 57 N. W. 680; 48 Am. St. 419. And see Southern Ind. Ry. Co. v. Bedford, 165 Ind. 272; 75 N. E. 268, holding an ordinance invalid which required a flagman at a switch during hours when it was never used. It may be unreasonable for making an unjust discrimination between different companies where the circumstances are the same. Lake View v. Tate, 130 Ill. 247; 22 N. E. 791; 6 L. R. A. 268; Soon Hing v. Crowley, 113 U. S. 703; 5 Sup. Ct. 730. See, also, 1 Dillon Munic. Corp. §§ 319, 322, 328. In some cities street cars and automobiles, which are not confined to any track, and are more dangerous to ordinary travelers on that account, are not limited as to speed or are allowed by ordinance to run from ten to twenty miles an hour, while commercial railroad trains, though they carry perishable freight, passengers, or even the United States mail, are limited by ordinance to six, and even four miles an hour. Ordinances limiting the speed to four miles an hour have been upheld, but such an ordinance would require an hour or more for the train to get outside of the limits of some of our cities, and might interfere very seriously with interstate commerce. So there seems to us to be no just foundation for the discrimination made against commercial railroads in many instances, and, under modern conditions, we doubt whether the courts will continue to go as far in upholding such ordinances under all circumstances as most of the courts have done in the past.

[60] Birmingham v. Alabama &c. R. Co. 98 Ala. 134; 13 So. 141; 46 Am. & Eng. Corp. Cas. 631; Indianapolis v. Bieler, 138 Ind. 30. See, also, People v. Detroit &c. R. 134 Mich. 682; 97 N. W. 36; 104 Am. St. 626n; St. Louis v. Western Union Tel. Co. 63 Fed. 68; Illinois Cent. R. Co. v. Chicago, 169 Ill. 329; 48 N. E. 492; Larkin v. Burlington &c. R. Co. 85 Ia. 492; 52 N. W. 480. Doubt resolved in favor of the ordinance: Stafford v. Chippewa &c. R. Co. 110 Wis. 331; 85 N. W. 1036.

[61] Paxson v. Sweet, 13 N. J. L. 196; Van Hook v. Selma, 70 Ala. 361; 45 Am. R. 85; New York v. Dry Docks, etc. R. Co. 133 N. Y. 104; 30 N. E. 563; 28 Am. St. 609.

itself, it may be upheld and enforced, although the unreasonable part is held invalid.

§ 1082a. Conformity to grade—Change of grade.—Cities when their consent is required may, as a condition, impose upon the company the duty not only of making its track conform to the existing grade, but also of making it conform, in a proper case, to a change of grade. So, under the police power and authority usually given cities, it has been held that they may require a change of grade when reasonable and proper.[62] But an ordinance requiring such a change may be held invalid when unreasonable and oppressive.[63] Such changes are often required at crossings, and the law applicable thereto will be considered in another section. It may be said here, however, that it has been held that, although a change of grade to conform to streets which the track crosses necessitates a change of the grade between crossings, this is not of itself sufficient to prevent the municipality from requiring such change;[64] but it might be reasonable to require a change at one or more particular crossings, and wholly unreasonable to require a general change in the entire city trackage, at least where the circumstances vary, and the safety and welfare of the public do not require such an extensive change.[65]

§ 1083. Rights of rival companies in streets.—The effect of a grant to use a designated part of a street is to license or give a right

See, also, Detroit v. Ft. Wayne &c. R. Co. 95 Mich. 456; 54 N. W. 958; 20 L. R. A. 79; 35 Am. St. 580; St. Louis v. St. Louis R. Co. 89 Mo. 44; 58 Am. R. 82. But not if indivisible and incapable of severance. Southern Ind. R. Co. v. Bedford, 165 Ind. 272; 75 N. E. 268.

[62] Houston &c. R. Co. v. Dallas, 98 Tex. 396; 84 S. W. 648; 70 L. R. A. 850. See, also, Snouffer v. Cedar Rapids &c. R. Co. 118 Ia. 287; 92 N. W. 79; Karst v. St. Paul &c. R. Co. 22 Minn. 118; Reading v. United Trac. Co. 202 Pa. St. 571; 52 Atl. 106; Macon &c. R. Co. v. Macon, 112 Ga. 782; 38 S. E. 60; Ashland St. R. Co. v. Ashland, 78 Wis. 271; 47 N. W. 619.

[63] See Seattle v. Columbia &c. R. Co. 6 Wash. 379; 33 Pac. 1048; Houston &c. R. Co. v. Dallas, 98 Tex. 396; 84 S. W. 648; 70 L. R. A. 850, and note; Des Moines City R. Co. v. Des Moines, 90 Ia. 770; 58 N. W. 906; 26 L. R. A. 767; Oxanna v. Allen, 90 Ala. 468; 8 So. 79.

[64] Houston &c. R. Co. v. Dallas, 98 Tex. 396; 84 S. W. 648; 70 L. R. A. 850.

[65] State v. Indianapolis Union R. Co. 160 Ind. 45; 66 N. E. 163; 60 L. R. A. 831.

to the company first in point of time to occupy and use the designated space.[66] This may, in a sense, create a monopoly of the portion of the street occupied, but it does not create a monopoly of the business, for competing companies may be granted the right to use other parts of the same street.[67] If the company having the first grant actually occupies the streets it is authorized to use, its right to the part so occupied and used is, of necessity, paramount and exclusive; but it cannot obtain such an exclusive right by a mere colorable possession for the purpose of keeping out rival companies without taking any steps to provide accommodation for the public or to carry out the purpose for which the grant was made, and where each of two or more companies has the right to lay tracks in a street, the company which first, in good faith, takes possession and enters upon the construction of its system, although it may not have manual possession of all the streets embraced in the system, acquires a right to occupy each and all of such streets superior to that of the other companies which have not yet occupied any of such streets or made their location therein.[68] Notwithstanding the general rule that the grant

[66] Elliott Roads and Streets (2d Ed.), § 746. See, also, West Jersey &c. Co. v. Camden &c. R. Co. 52 N. J. Eq. 452; 29 Atl. 333; 1 Am. & Eng. R. Cas. (N. S.) 132; Indianapolis Cable &c. R. Co. v. Citizens' St. R. Co. 127 Ind. 369; 24 N. E. 1054; 26 N. E. 893; 8 L. R. A. 539n; Hamilton Trac. Co. v. Hamilton &c. Co. 69 Ohio St. 402; 69 N. E. 991.

[67] North Baltimore &c. R. Co. v. Baltimore, 75 Md. 247; 23 Atl. 470, 471; 36 N. E. 857; Indianapolis Cable &c. R. Co. v. Citizens' St. R. Co. 127 Ind. 369, 389, 391; 24 N. E. 1054; 26 N. E. 893; 8 L. R. A. 539n, citing Elliott Roads and Streets, 566, 567. To the same effect are Fort Worth St. R. Co. v. Rosedale &c. R. Co. 68 Tex. 169; 4 S. W. 534; Jackson &c. Horse R. Co. v. Intertstate &c. Co. 24 Fed. 306; Henderson v. Ogden City R. Co. 7 Utah, 199; 26 Pac. 286; New Orleans &c. R. Co. v. Crescent City R. Co. 12 Fed. 308; Omaha Horse R. Co. v. Cable Tramway Co. 30 Fed. 324; Booth Street Ry's, § 108.

[68] This is substantially the rule laid down in Elliott Roads and Streets, 570, which is quoted with approval in Indianapolis &c. St. R. Co. v. Citizens' St. R. Co. 127 Ind. 369; 24 N. E. 1054; 26 N. E. 893; 8 L. R. A. 539; 43 Am. & Eng. R. Cas. 234; and in Africa v. Board, 70 Fed. 729. See, also, Fidelity Trust &c. Co. v. Mobile St. R. Co. 53 Fed. 687; Railway Co. v. Alling, 99 U. S. 463; Norristown &c. R. Co. v. Citizens' &c. R. Co. 3 Montg. (Pa.) 119; Omnibus R. Co. v. Baldwin, 57 Cal. 160; Waterbury v. Dry Dock &c. R. Co. 54 Barb. (N. Y.) 388; Titusville &c. R. Co. v. Warren &c. R. Co. 12 Phila. (Pa.) 642; Morris &c. R. Co. v. Blair, 9 N. J. Eq. 635; Hamilton &c. Trac. Co. v. Hamilton &c. Co. 69 Ohio St. 402; 69 N. E. 991, 994. In Homestead St.

to one company of the right to lay its track in certain streets does not prevent a grant to other companies to use the same streets, where the street is too narrow for more than one company it would seem that the company first in point of time must, of necessity, have a "physical monopoly" of the street as against other companies, and the second company, in any case, will not be allowed to so construct and operate its road as to impair the vested rights of the prior company without being held responsible therefor.[69] So, it has been said that a city "cannot so multiply street railway tracks in a particular street as to interfere with the rights of the public in the street."[70]

§ 1084. Right of one company to use another's track.—Although, as we shall hereafter show, the tracks of a street railway company may be used by the general public for ordinary travel with vehicles in common with the rest of the street, without compensation,[71] yet a rival company cannot, without authority and without paying compensation, run its own cars up and along such tracks[72] and it has even been held that a rival omnibus line could not so run its vehi-

R. Co. v. Pittsburgh &c. Co. 166 Pa. St. 162; 27 L. R. A. 383, it was held, under the Pennsylvania statute, that the consent of a municipality given to one company before its incorporation was of no effect as against a company which was already incorporated and which, within a reasonable time thereafter, proceeded to obtain consent to occupy the same street.

[69] See, Fort Worth St. R. Co. v. Rosedale St. R. Co. 68 Tex. 169; 4 S. W. 534; 32 Am. & Eng. R. Cas. 283; Omaha Horse R. Co. v. Cable &c. Co. 32 Fed. 727; Union Pass. R. Co. v. Continental R. Co. 11 Phila. (Pa.) 321.

[70] Grand Rapids St. R. Co. v. West Side St. R. Co. 48 Mich. 433; 12 N. W. 643. To the same effect is Canal &c. St. R. Co. v. Crescent City R. Co. 41 La. Ann. 561; 6 So. 849; 40 Am. & Eng. R. Cas. 329. See, also, Dooly Block v. Salt Lake &c. Co. 9 Utah, 31; 33 Pac. 229; 24 L. R. A. 610; 8 Lewis' Am. R. & Corp. 327.

[71] See Booth St. Ry's, § 110; Pacific R. Co. v. Wade, 91 Cal. 449; 27 Pac. 768; 13 L. R. A. 754; 25 Am. St. 201; Smedis v. Brooklyn &c. R. Co. 88 N. Y. 13; Elliott Roads and Streets, 765. This is subject, however, to the company's superior right of passage.

[72] Evansville &c. Trac. Co. v. Henderson Bridge Co. 134 Fed. 973, 978 (citing text). It may be enjoined from so doing. Metropolitan R. Co. v. Quincy R. Co. 12 Allen (Mass.), 262; Louisville &c. R. Co. v. Central &c. R. Co. 87 Ky. 223; 8 S. W. 329; 36 Am. & Eng. R. Cas. 463; Brooklyn &c. R. Co. v. Brooklyn City R. Co. 33 Barb. (N. Y.) 420; Central &c. R. Co. v. Fort Clark &c. R. Co. 81 Ill. 523; Cottam v. Guest, L. R. 6 Q. B. Div. 70; 1 Am. & Eng. R. Cas. 474, note.

cles.[73] Under its reserved power to amend or repeal, the legislature, or, when empowered to do so, the municipality may authorize one company to make a joint use of the tracks of another.[74] So, it has been held that one company may acquire the right to use the tracks of another by the exercise of the power of eminent domain.[75] But compensation must be made to the company whose tracks are so used or condemned.[76] The entire matter, however, including the procedure and method of ascertaining the compensation, is largely regulated by express statutory provisions in most of the states.[77]

§ 1085. Rights of abutters—Generally.—The owner of land abutting upon a highway has, in addition to such rights to its use as be-

[73] Citizens' Coach Co. v. Camden &c. R. Co. 33 N. J. Eq. 267; 36 Am. R. 542.

[74] Kinsman &c. R. Co. v. Broadway &c. R. Co. 36 Ohio St. 239; 5 Am. & Eng. R. Cas. 227; Toledo &c. R. Co. v. Toledo &c. R. Co. 50 Ohio St. 603; 36 N. E. 312; 1 Am. & Eng. R. Cas. (N. S.) 230; Metropolitan R. Co. v. Highland St. R. Co. 118 Mass. 290; South Boston R. Co. v. Middlesex R. Co. 121 Mass. 485; Canal &c. St. R. Co. v. Crescent &c. R. Co. 41 La. Ann. 561; 6 So. 849; 40 Am. & Eng. R. Cas. 329; New Bedford &c. R. Co. v. Aclushnet St. R. Co. 143 Mass. 200; 9 N. E. 536; Sixth Ave. R. Co. v. Kerr, 45 Barb. (N. Y.) 138; North Baltimore &c. R. Co. v. Baltimore, 75 Md. 247; 23 Atl. 470; Union Depot Co. v. Southern R. Co. 105 Mo. 562; 16 S. W. 920 (upheld as an exercise of the police power).

[75] Sixth Ave. R. Co. v. Kerr, 72 N. Y. 330; Canal &c. R. Co. v. Orleans &c. R. Co. 44 La. Ann. 54; 10 So. 389; 50 Am. & Eng. R. Cas. 369; Metropolitan &c. R. Co. v. Chicago &c. R. Co. 87 Ill. 317; Metropolitan &c. R. Co. v. Quincy R. Co. 12 Allen (Mass.), 262; Covington R. Co. v. Covington &c. R. Co. 19 Am. L. Reg. (N. S.) 765; Pennsylvania R. Co. v. Baltimore &c. R. Co. 60 Md. 263; Toledo &c. R. Co. v. Toledo &c. R. Co. 50 Ohio 603; 36 N. E. 312; 1 Am. & Eng. R. Cas. (N. S.) 230.

[76] Metropolitan R. Co. v. Highland St. R. Co. 118 Mass. 290; Second &c. St. R. Co. v. Green &c. R. Co. 3 Phila. (Pa.) 430; Louisville &c. R. Co. v. Central &c. R. Co. 87 Ky. 223; Pacific R. Co. v. Wade, 91 Cal. 449; 27 Pac. 768; 13 L. R. A. 754; 25 Am. R. 201; Jersey City &c. R. Co. v. Jersey City &c. R. Co. 20 N. J. Eq. 61; 2 Dillon's Munic. Corp. § 727; Booth Street Ry's, § 114, and authorities cited in preceding notes.

[77] See Booth St. Ry's, § 115, and notes; Orleans &c. R. Co. v. Jefferson &c. R. Co. 51 La. Ann. 1605; 26 So. 278; Metropolitan R. Co. v. Quincy R. Co. 12 Allen (Mass.), 263; Lexington &c. R. Co. v. Fitchburg &c. R. Co. 14 Gray (Mass.), 266; Concord &c. R. Co. v. Boston &c. R. Co. 68 N. H. 519; 39 Atl. 1073; Pennsylvania R. Co. v. Baltimore &c. R. Co. 60 Md. 263.

long to the members of the public generally, certain peculiar rights which belong only to abutters.[78] Where he owns the fee—which he is always presumed to own, in the absence of anything to the contrary, to the center of the street upon the side upon which his land abuts—he has in general, subject only to the public easement, all the rights and remedies of the owner of a freehold.[79] He also has, whether he owns the fee or not, a right of ingress and egress, or, as it is sometimes called, an "easement of access" to his premises.[80] This is so far in the nature of private property that it cannot be taken away or materially impaired, even by the legislature, without compensation.[81] So, the New York courts, and others, following the

[78] Elliott Roads and Streets (2d ed.), § 690; O'Brien v. Central &c. Co. 158 Ind. 218; 63 N. E. 302; 57 L. R. A. 508; 92 Am. St. 305; South Bound R. Co. v. Burton, 46 S. Car. 340; 46 S. E. 340; Long v. Wilson, 119 Ia. 267; 93 N. W. 282; 60 L. R. A. 720; 97 Am. St. 315; Willamette Iron Works v. Oregon R. Co. 26 Oreg. 224; 37 Pac. 1016; 29 L. R. A. 88; 46 Am. St. 620.

[79] Stevenson v. Mayor, 20 Fed. 586; 4 Am. & Eng. Corp. Cas. 503; Western Un. Tel. Co. v. Williams, 86 Va. 696; 11 S. E. 106; 8 L. R. A. 429n; 19 Am. St. 908; Jackson v. Hathaway, 15 Johns. (N. Y.) 447; 8 Am. Dec. 263; Robert v. Sadler, 104 N. Y. 229; 10 N. E. 428; 58 Am. R. 498n; State v. Laverack, 34 N. J. L. 201; Pemberton v. Dooley, 43 Mo. App. 176; Perley v. Chandler, 6 Mass. 453; 4 Am. Dec. 159; Stackpole v. Healy, 16 Mass. 33; 8 Am. Dec. 121; Cole v. Drew, 44 Vt. 49; 8 Am. R. 363; Cox v. Louisville &c. R. Co. 48 Ind. 178; Overman v. May, 35 Iowa, 89; Goodtitle v. Alker, 1 Burr. 133. But see Paquet v. Mt. Tabor &c. Railway Co. 18 Ore. 233; 22 Pac. 906; McQuaid v. Portland &c. Railway Co. 18 Ore. 237; 22 Pac. 899; Chicago &c. R. Co. v. Milwaukee &c. R. Co. 95 Wis. 561; 70 N. W. 678, 680; 37 L. R. A. 856; 60 Am. St. 137 (citing text). See, also, note to Wright v. Austin, 101 Am. St. 102.

[80] New York El. R. Co. In re, 36 Hun (N. Y.), 427; Rennselaer v. Leopold, 106 Ind. 29; 5 N. E. 761; Grafton v. Baltimore &c. R. Co. 21 Fed. 309; Rigney v. Chicago, 102 Ill. 64; Hussner v. Brooklyn City R. Co. 114 N. Y. 433; 21 N. E. 1002; 11 Am. St. 679; Elizabethtown &c. R. Co. v. Combs, 73 Ky. 382; 19 Am. R. 67; Everett v. Marquette, 53 Mich. 450; 19 N. W. 140; Railroad Co. v. Schurmeir, 7 Wall. (U. S.) 272; Branahan v. Hotel Co. 39 Ohio St. 333; 48 Am. R. 457; Elizabethtown &c. R. Co. v. Combs, 73 Ky. 382; 19 Am. R. 67, and authorities cited in the following notes. See, also, "An Abutter's Rights in a Street," 24 Cent. L. J. 51; Elliott Roads and Streets (2d ed.), § 695.

[81] Haynes v. Thomas, 7 Ind. 38; Ross v. Thompson, 78 Ind. 90, 94; Common Council v. Croas, 7 Ind. 9; Indianapolis v. Kingsbury, 101 Ind. 200, 211; 51 Am. R. 749; Kincaid v. Indianapolis &c. Co. 124 Ind. 577; 24 N. E. 1066; 19 Am. St. 113; Theo-

decisions in that state, have justly recognized an easement of light and air in the abutter, and have held that "above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner."[82] The right to occupy a street does not extend beyond such a reasonable occupancy and use as shall not unnecessarily interfere with its use as a highway. And for an

bold v. Louisville &c. R. Co. 66 Miss. 279; 6 So. 230; 14 Am. St. 564; Macon v. Wing, 113 Ga. 90; 38 S. E. 392; Crawford v. Delaware, 7 Ohio St. 459; Burlington &c. R. Co. v. Reinhackle, 15 Neb. 279; 18 N. W. 69; 48 Am. R. 342; Transylvania University v. Lexington, 3 B. Mon. (Ky.) 25; 38 Am. Dec. 173; Brakken v. Minneapolis &c. R. Co. 29 Minn. 41; Abendroth v. Manhattan R. Co. 122 N. Y. 1; 25 N. E. 496; 19 Am. St. 461; Moose v. Carson, 104 N. Car. 431; 10 S. E. 689; 7 L. R. A. 548; 17 Am. St. 681; Adams v. Chicago &c. R. Co. 39 Minn. 286; 39 N. W. 529; 1 L. R. A. 493n; 12 Am. St. 644; Broome v. New York &c. Tel. Co. 42 N. J. Eq. 141; 7 Atl. 851; Kane v. New York El. R. Co. 125 N. Y. 164; 26 N. E. 278; Buffalo v. Pratt, 131 N. Y. 293; 30 N. E. 233; 27 Am. St. 592; McCraffrey v. Smith, 41 Hun (N. Y.), 117. But see Textor v. Baltimore &c. R. Co. 59 Md. 63; 43 Am. R. 540.

[82] Story v. New York El. R. Co. 90 N. Y. 122; 43 Am. R. 146; Lahr v. Metropolitan &c. R. Co. 104 N. Y. 268, 288; 10 N. E. 528; Dill v. Camden Board, 47 N. J. Eq. 421; 20 Atl. 739; 10 L. R. A. 276, and note; Paterson R. Co. v. Grundy, 51 N. J. Eq. 213; 26 Atl. 788; Hobart v. Milwaukee &c. R. Co. 27 Wis. 194; 9 Am. R. 461; New York Elevated R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 440; 10 Sup. Ct. 743; Adams v. Chicago &c. R. Co. 39 Minn. 286; 39 N. W. 629; 12 Am. St. 644; First Nat. Bank v. Tyson (Ala.), 39 So. 560; Willamette Iron Works v. Oregon R. &c. Co. 26 Ore. 224; 37 Pac. 1016; 46 Am. St. 620, citing Elliott Roads and Streets, 526, 536; Henderson &c. R. Co. v. De Champ, 95 Ky. 219; 24 S. W. 605; De Geofroy v. Merchants' &c. R. Co. 179 Mo. 698; 79 S. W. 386; 64 L. R. A. 959; 101 Am. St. 524; notes in 41 Am. St. 325; 25 Am. St. 479; 101 Am. St. 102. In the recent case of Muhlker v. New York &c. R. Co. 197 U. S. 544; 25 Sup. Ct. 522, the Supreme Court of the United States (several members of the court, however, dissenting) not only seemed to approve this doctrine on principle, but also held that an abutter who had acquired his right when the state court had decided that he had an easement of light and air which could not be taken from him without compensation, is entitled to be protected against the impairment of such easement notwithstanding the railroad company had thereafter built an elevated structure at the command of the state in place of its surface roadbed, and the judgment of the state court holding the contrary and attempting to distinguish the "Elevated Railroad Cases" was held unsound and reversed. See, also, McKeon v. New York &c. R. Co. 75 Conn. 343; 53 Atl. 656; 61 L. R. A. 730, 733; Cullen v. New York &c. R. Co. 66

injurious interference arising from improper construction[83] or operation[84] of the road, an abutting owner who suffers special damage may recover.[85]

§ 1086. Rights of land-owners other than abutters.—Although there are many authorities which hold that one who purchases property with reference to a map or plat showing certain streets, has a right as against the donor or grantor to have all such streets kept open, we suppose no such extensive right exists as against the general public, and that the land-owner has special rights, under ordinary circumstances, only in the street upon which his property abuts. Whether that right extends, in any way, to other portions of the street than that upon which his property directly abuts is a disputed question. The vacation of a street in such a manner as to prevent access to the property of an abutting owner is held in many jurisdictions, in accordance with what we regard as the better rule, to be a taking within the rule requiring compensation; but there are authorities to the contrary, and in New York it is held that the clos-

Conn. 211; 33 Atl. 910, to the effect that compulsion does not prevent liability from attaching. Contra, Garrett v. Lake Roland &c. Co. 79 Md. 277; 29 Atl. 830; 24 L. R. A. 396.

[83] Cadle v. Muscatine Western R. Co. 44 Iowa, 11; Brewer v. Boston &c. R. Co. 113 Mass. 52; Jeffersonville &c. R. Co. v. Esterle, 13 Bush (Ky.), 667; ante, § 1057. See, also, Beseman v. Pennsylvania R. Co. 50 N. J. L. 235; 13 Atl. 164; Cogswell v. New York &c. R. Co. 103 N. Y. 10; 8 N. E. 537; 57 Am. R. 701; Ellich v. Mason City &c. R. Co. 75 Ia. 443; 39 N. W. 700.

[84] Atchison &c. R. Co. v. Garside, 10 Kan. 552; Frith v. Dubuque, 45 Iowa, 406; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316; 7 Atl. 432; 56 Am. R. 1; Baltimore &c. R. Co. v. Fifth Baptist Church, 108 U. S. 317; 2 Sup. Ct. 719; Central &c. R. Co. v. Twine, 23 Kan. 585; 33 Am. R. 203; White v. Chicago &c. R. Co. 122 Ind. 317; 23 N. E. 782; 7 L. R. A. 257; Union Pacific R. Co. v. Foley, 19 Colo. 280; 35 Pac. 542; Louisville &c. Co. v. Jacobs, 109 Tenn. 727; 72 S. W. 954; 61 L. R. A. 188; Chicago &c. R. Co. v. First Methodist Church, 102 Fed. 85; 50 L. R. A. 488.

[85] Authority to lay a railroad track in a street does not authorize the erection of a passenger depot or other structure therein by which adjoining property is especially damaged. Barney v. Keokuk, 4 Dill. (U. S.) 593, affirmed 94 U. S. 324; Higbee v. Camden &c. R. Co. 19 N. J. Eq. 276; 20 N. J. Eq. 435; Chicago &c. R. Co. v. O'Connor, 42 Neb. 90; 60 N. W. 326; 1 Am. & Eng. R. Cas. (N. S.) 51; Maysville &c. R. Co. v. Ingram (Ky.), 30 S. W. 8; Tate v. Missouri &c. R. Co. 64 Mo. 149. See, also, Louisville &c. R. Co. v. Lellyett, 114 Tenn. 368; 85 S. W. 881; 1 L. R. A. (N. S.) 49, and note.

ing of one public way to his property is no such taking as requires compensation, provided another way is left open.[86] It seems clear to us, however, that, upon principle, the land-owner's easement of access must, as a general rule, include the right to have so much of the street kept open, at least, as will give him an outlet to some connecting street, and it follows, therefore, that where a railroad is built across the mouth of a *cul de sac* so as to deprive him of his only means of access, he is entitled to damages, although his property does not abut upon that portion of the street where the railroad is constructed.[87] It would seem also, upon principle, that where the easement of access is seriously impaired, although not destroyed, and a material depreciation in value of the property is caused by the permanent obstruction of a street, the owner suffers a special injury and is entitled to damages, even though his property does not abut directly upon that portion of the street.[88] The great weight of author-

[86] This subject is considered and the conflicting authorities are cited in Elliott Roads and Streets (2d ed.), §§ 877, 878. See, also, Davis v. County Comrs. 153 Mass. 218; 26 N. E. 848; 11 L. R. A. 750; 55 Amer. & Eng. R. Cas. 52; Cram v. Laconia, 71 N. H. 41; 51 Atl. 635; 57 L. R. A. 282; Smith v. St. Paul &c. R. Co. 39 Wash. 355; 81 Pac. 84; 70 L. R. A. 1018; 109 Am. St. 889n.

[87] Brakken v. Minneapolis &c. R. Co. 29 Minn. 41; 11 N. W. 124; Brakken v. Minneapolis &c. R. Co. 32 Minn. 425; 21 N. W. 414; Pennsylvania Co. v. Stanley, 10 Ind. App. 421; 37 N. E. 288. See, also, Johnston v. Old Colony R. Co. 18 R. I. 642; 29 Atl. 594; 49 Am. St. 800; Jackson v. Kiel, 13 Colo. 378; 22 Pac. 504; 6 L. R. A. 254n; 16 Am. St. 207.

[88] In Lewis' Eminent Domain, § 227, the author, comments on the case of Rude v. St. Louis 93 Mo. 408; 6 S. W. 257, as follows: "If the plaintiff's premises were depreciated in value by reason of the obstruction complained of, then, it seems to us, both the premise and conclusion of the court are wrong. When property is so situated with respect to a public way that its permanent obstruction depreciates its market value, then the owner of the property suffers a special and peculiar damage by reason of such obstruction, different from that of the public generally. It is tactily conceded by the Missouri court, and is unquestionably the law, that, if the plaintiff's damages were special and peculiar, then he had a right to action under the constitutional provision in question. The right to damages can not be reduced to a question of distance, but depends upon the fact of the market value of the premises being actually depreciated by reason of the obstruction or improvement. The point was fully considered in McCarthy v. Metropolitan Board, etc. [L. R. 8 C. P. 119, 210] and in reference to it Justice Bramwell says: 'If it is to be asked where the line is to be

ity, however, is to the effect that the owner of property abutting on the street at a distance from the point obstructed suffers no special or peculiar damage, and cannot recover for any depreciation in the value of his property caused thereby, even where the railroad company is required by law to compensate the owner for all property damaged.[89] But in some jurisdictions, in most of which constitutional or statutory provisions exist requiring compensation where property is "injured" or "damaged," it has been held that a property-owner may be entitled to damages, although the obstruction is not

drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place ten miles away, if there was no other within twenty of the premises affected.'" See, also, Fritz v. Hobson, 19 Am. L. Reg. (N. S.) 615, and note; Melon St. In re, 182 Pa. St. 397; 38 Atl. 482; 38 L. R. A. 275; Chicago v. Burcky, 158 Ill. 103; 42 N. E. 178; 29 L. R. A. 568; 49 Am. St. 142; Chicago v. Baker, 98 Fed. 830; Long v. Wilson, 119 Ia. 267; 93 N. W. 282; 60 L. R. A. 720; 97 Am. St. 315.

[89] Buhl v. Ft. St. &c. Co. 98 Mich. 596; 57 N. W. 829; 23 L. R. A. 292; Little Rock &c. R. Co. v. Newman, 73 Ark. 1; 83 S. W. 653; 108 Am. St. 17; 9 Lewis' Am. R. & Corp. 173; Rochette v. Chicago &c. R. Co. 32 Minn. 201; 20 N. W. 140; Shaubut v. St. Paul &c. R. Co. 21 Minn. 502; Dantzer v. Indianapolis Union R. Co. 141 Ind. 604; 39 N. E. 223; 34 L. R. A. 769; 50 Am. St. 343; 11 Lewis' Am. R. & Corp. 249; Rude v. St. Louis, 93 Mo. 408; 6 S. W. 257; State v. Elizabeth, 54 N. J. L. 462; 24 Atl. 495; Morgan v. Des Moines &c. R. Co. 64 Iowa, 589; 21 N. W. 96; 52 Am. R. 462; Stanwood v. Malden, 157 Mass. 17; 31 N. E. 702; 16 L. R. A. 591; McGee's Appeal, 114 Pa. St. 470; 8 Atl. 237; East St. Louis v. O'Flynn, 119 Ill. 200; 10 N. E. 395; 59 Am. R. 795; Parker v. Catholic Bishop, 146 Ill. 158; 34 N. E. 473; Glasgow v. St. Louis, 107 Mo. 198; 17 S. W. 743; Smith v. Boston, 7 Cush. (Mass.) 254; Shaw v. Boston &c. R. Co. 159 Mass. 597; 35 N. E. 92; Whitsett v. Union &c. R. Co. 10 Colo. 243; 15 Pac. 339; Houck v. Wachter, 34 Md. 265; 6 Am. R. 332; Polack v. Trustees, 48 Cal. 490; Gerhard v. Seekonk &c. Commissioners, 15 R. I. 334; 5 Atl. 199; Kings Co. &c. Insurance Co. v. Stevens, 101 N. Y. 411; 5 N. E. 353; Coster v. Mayor &c. 43 N. Y. 399; Barr v. Oskaloosa, 45 Iowa, 275; Heller v. Atchison &c. R. Co. 28 Kan. 625; Meyer v. Richmond, 172 U. S. 82; 19 Sup. Ct. 106; Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264; 62 N. E. 341, 345; 87 Am. St. 600 (citing text). See, also, Austin v. Augusta &c. R. Co. 108 Ga. 671; 34 S. E. 852; 47 L. R. A. 755; Smith v. St. Paul &c. R. Co. 39 Wash. 335; 81 Pac. 840; 70 L. R. A. 1018; 109 Am. St. 889. See, generally, Louisville &c. Co. v. Lellyett, 114 Tenn. 368; 85 S. W. 881; 1 L. R. A. (N. S.) 49, and note; Atchison &c. R. Co. v. Armstrong, 71 Kans. 366; 80 Pac. 978; 1 L. R. A. (N. S.) 113.

directly in front of his premises, and, in some instances, even though his property may not directly abut upon the street.[90]

§ 1087. Commercial railroad is an additional burden.—It is generally conceded that the use of a street by an ordinary commercial railroad may, under certain circumstances, constitute an additional servitude or burden for which the abutters are entitled to compensation. But the courts differ widely as to when it should be so considered. Some of them regard the ownership of the fee as the test, and seem to hold that the abutter is not entitled to compensation when the fee of the street is in the public;[91] but this is in conflict

[90] See Rigney v. Chicago, 102 Ill. 64; Chicago &c. R. Co. v. Darke, 148 Ill. 226; 35 N. E. 750; Lake Erie &c. R. Co. v. Scott, 132 Ill. 429; 24 N. E. 78. But see City of Chicago v. Union &c. Asso. 102 Ill. 379; 40 Am. R. 598; Aldrich v. Metropolitan &c. R. Co. 195 Ill. 456; 63 N. E. 155; 57 L. R. A. 237; Columbus &c. R. Co. v. Gardner, 45 Ohio St. 309; 13 N. E. 69; Lake Roland &c. R. Co. v. Webster, 81 Md. 529; 32 Atl. 186; 1 Am. & Eng. R. Cas. (N. S.) 360; Atchison &c. R. Co. v. Boerner, 34 Neb. 240; 51 N. W. 842; 33 Am. St. 637; Jackson v. Kiel, 13 Colo. 378; 22 Pac. 504; 6 L. R. A. 254; 16 Am. St. 207; Kearney v. Metropolitan &c. R. Co. 13 N. Y. 608. But see Mooney v. New York &c. R. Co. 16 Daly (N. Y.), 145; 9 N. Y. S. 522; Morgan v. Des Moines &c. R. Co. 64 Iowa, 589; 21 N. W. 96; 52 Am. R. 462. Ante, § 978. And in many cases where the provision for the payment of damages is not limited to those arising solely from the construction of the road, injuries from smoke, vibration, noise and the like, have been held proper elements of damage. Omaha &c. R. Co. v. Janecek, 30 Neb. 276; 46 N. W. 478; 27 Am. St. 399; Gainesville &c. R. Co. v. Hall, 78 Tex. 169; 14 S. W. 259; 9 L. R. A. 298; 22 Am. St. 42n; Henderson &c. R. Co. v. Dechamp, 95 Ky. 219; 24 S. W. 605; Chicago &c. R. Co. v. Loeb, 118 Ill. 203; 8 N. E. 460; 59 Am. R. 341n. See, also, Pennsylvania &c. R. Co. v. Walsh, 124 Pa. St. 544; 17 Atl. 186; 10 Am. St. 611, distinguishing Pennsylvania R. Co. v. Lippincott, 116 Pa. St. 472; 9 Atl. 871; 2 Am. St. 618; Abendroth v. Manhattan R. Co. 122 N. Y. 1; 25 N. E. 496; 11 L. R. A. 634; 1 Am. St. 461, and other New York elevated railway cases therein cited. But see Pennsylvania Co. v. Pennsylvania &c. R. Co. 151 Pa. St. 334; 25 Atl. 107; 31 Am. St. 762.

[91] Harrison v. New Orleans &c. R. Co. 34 La. Ann. 462; 44 Am. R. 438; Hatch v. Vermont Cent. R. Co. 28 Vt. 142; Garnett v. Jacksonville &c. R. Co. 20 Fla. 889; Railroad v. Bingham, 87 Tenn. 522; 11 S. W. 705; 4 L. R. A. 622n; Houston &c. R. Co. v. Odum, 53 Tex. 343; Sweet v. Buffalo &c. R. Co. 13 Hun (N. Y.), 643. Other cases are reviewed in Spencer v. Point Pleasant &c. R. Co. 23 W. Va. 407; 20 Am. & Eng. R. Cas. 125. In many of the states where this doctrine was once held

with the rules laid down in the preceding section, and when the "easement of access" is destroyed or materially impaired, the abutter, as correctly held in most of the more recent cases, is entitled to compensation, whether he owns the fee or not.[92] Some of the other courts seem to hold that a railroad is not, in either case, an additional burden, for which the abutters are entitled to compensation.[93] It is

It is now overruled. Carson v. Central R. Co. 35 Cal. 325, overruled in Southern Pacific R. Co. v. Reed, 41 Cal. 256; Savannah &c. R. Co. v. Shiels, 33 Ga. 601, overruled in South Carolina R. Co. v. Steiner, 44 Ga. 546; Moses v. Pittsburgh &c. R. Co. 21 Ill. 516, apparently overruled in Indianapolis &c. R. Co. v. Hartley, 67 Ill. 439; 16 Am. R. 624, and Chicago &c. R. Co. v. Ayres, 106 Ill. 511. (But see Ill. Cent. R. Co. v. Turner, 194 Ill. 575; 63 N. E. 798.) Atchison &c. R. Co. v. Garside, 10 Kan. 552, apparently overruled in Central Branch Union Pac. R. Co. v. Twine, 23 Kan. 585; 33 Am. R. 203; Houston & T. Co. R. Co. v. Odum, 53 Tex. 343, overruled in Gulf &c. R. Co. v. Eddins, 60 Tex. 656; Milburn v. Cedar Rapids, 12 Iowa, 246, no longer expresses the law in Iowa. See Kucheman v. Chicago &c. R. Co. 46 Iowa, 366, and Pratt v. Des Moines &c. R. Co. 72 Iowa, 249; 33 N. W. 666.

[92] Dillon Munic. Corp. (4th Ed.) § 704; Elliott Roads & Streets (2d ed.) § 697; Fulton v. Short Route &c. Co. 85 Ky. 640; 4 S. W. 332; 7 Am. St. 619; Hot Springs R. Co. v. Williamson, 136 U. S. 121; 10 Sup. Ct. 955; Lamm v. Chicago &c. R. Co. 45 Minn. 71; 47 N. W. 455; 10 L. R. A. 268; 46 Am. & Eng. R. Cas. 42; McQuaid v. Portland &c. R. Co. 18 Ore. 237; 22 Pac. 899; 1 Lewis' Am. R. & Corp. 34, and note; Kaufman v. Tacoma &c. R. Co. 11 Wash. 632; 40 Pac. 137; Dooly Block v. Salt Lake &c. Co. 9 Utah, 31; 33 Pac. 229; Reining v. New York &c. R. Co. 128 N. Y. 157; 28 N. E. 640; 14 L. R. A. 133; Egerer v. New York &c. R. Co. 130 N. Y. 108; 29 N. E. 95; 14 L. R. A. 381n; Atchison &c. R. Co. v. Davidson, 52 Kan. 739; 35 Pac. 787; Pennsylvania Co. v. Stanley, 10 Ind. App. 421; 37 N. E. 288; Western R. Co. v. Alabama &c. R. Co. 96 Ala. 272; 11 So. 483; 17 L. R. A. 474. Other authorities are cited in the notes to the preceding section.

[93] Struthers v. Dunkirk &c. R. Co. 87 Pa. St. 282; Philadelphia &c. R. Co. In re, 6 Whart. (Pa.) 25; Peddicord v. Baltimore &c. R. Co. 34 Md. 463; Perry v. New Orleans &c. R. Co. 55 Ala. 413; 28 Am. R. 740; Morris &c. R. Co. v. Newark, 10 N. J. Eq. 352; O'Brien v. Baltimore &c. R. Co. 74 Md. 363; 22 Atl. 141; Nottingham v. Baltimore &c. R. Co. 3 McArthur (D. C.) 517; Gaus &c. Co. v. St. Louis &c. R. Co. 113 Mo. 308; 20 S. W. 658; 18 L. R. A. 339; 35 Am. St. 706; Lockwood v. Wabash R. Co. 122 Mo. 86; 26 S. W. 698; 24 L. R. A. 516; 43 Am. St. 547; 1 Am. & Eng. R. Cas. (N. S.) 16; Montgomery v. Santa Ana &c. R. Co. 104 Cal. 186; 37 Pac. 786; 25 L. R. A. 654; 43 Am. St. 89. See, also, Fobes v. Rome &c. R. Co. 121 N. Y. 505; 24 N. E. 919; People

held in still another line of decisions that the use of streets by a commercial railroad is not an ordinary street use, and that the abutters are entitled to compensation regardless of the ownership of the fee.[94]

v. Kerr, 27 N. Y. 188; Pierce Railroads, 234, 238. But compare Pennsylvania R. Co. v. Walsh, 124 Pa. St. 544; 10 Am. St. 611, as to the present rule in Pennsylvania.

[94]White v. Northwestern &c. R. Co. 113 N. Car. 610; 18 S. E. 330; 22 L. R. A. 627; 37 Am. St. 639; Theobald v. Louisville &c. R. Co. 66 Miss. 279; 6 So. 230; 4 L. R. A. 735; 14 Am. St. 564; Omaha &c. R. Co. v. Rogers, 16 Neb. 117; 19 N. W. 603; 20 Am. & Eng. R. Cas. 79; Burlington &c. R. Co. v. Reinhackle, 15 Neb. 279; 18 N. W. 69; 48 Am. R. 342; Reichert v. St. Louis &c. R. Co. 51 Ark. 491; 11 S. W. 696; 5 L. R. A. 183n; 38 Am. & Eng. R. Cas. 453; Schurmeier v. St. Paul &c. R. Co. 10 Minn. 82; 88 Am. Dec. 59; Denver v. Bayer, 7 Colo. 113; 2 Pac. 6; 2 Am. & Eng. Corp. Cas. 465; Springfield v. Connecticut River R. Co. 4 Cush. (Mass.) 63; South Carolina R. Co. v. Steiner, 44 Ga. 546; South Bound R. v. Burton, 67 S. Car. 515; 46 S. E. 340; Stewart v. Ohio River &c. R. Co. 38 W. Va. 438; 18 S. E. 604; Railway Co. v. Lawrence, 38 Ohio St. 41; 43 Am. R. 419; St. Paul &c. Co. v. Schurmeier, 7 Wall. (U. S.) 272; Chicago &c. R. Co. v. Milwaukee &c. R. Co. 95 Wis. 561; 70 N. W. 678, 682; 37 L. R. A. 856; 60 Am. St. 137 (citing text); Rische v. Texas &c. Co. 27 Tex. Civ. App. 33; 66 S. W. 324. See, also, Williams v. New York &c. R. Co. 16 N. Y. 97; 69 Am. Dec. 651; New Orleans &c. R. Co. v. Delamore, 114 U. S. 501; 5 Sup. Ct. 1009; Indianapolis &c. R. Co. v. Hartley, 67 Ill. 439; 16 Am. R. 624; Kucheman v. Chicago &c. Railway Co. 46 Iowa, 366; Enos v. Chicago &c. R. Co. 78 Ia. 28; 42 N. W. 575; note in 1 Lewis' Am. R. Corp. Cas. 48, et seq.; note in 6 Lewis' Am. R. & Corp. Cas. 315, et seq.; Imlay v. Union &c. R. Co. 26 Conn. 249; 68 Am. Dec. 392, and note; Grand Rapids &c. R. Co. v. Heisel, 38 Mich. 62; 31 Am. R. 306; 2 Dillon Munic. Corp. (4th Ed.) § 704; Parrott v. Cincinnati &c. R. Co. 10 Ohio St. 624; Lawrence Railroad Co. v. Williams, 35 Ohio St. 168; Gulf &c. R. Co. v. Eddins, 60 Tex. 656; Weyl v. Sonoma Valley &c. Co. 69 Cal. 202; Southern Pac. R. Co. v. Reed, 41 Cal. 256; Central Branch Union Pac. v. Andrews, 30 Kan. 590; 2 Pac. 677; Hanlin v. Chicago &c. R. Co. 61 Wis. 515; 21 N. W. 623; Carl v. Sheboygan &c. R. Co. 46 Wis. 625; Henderson v. New York Central R. Co. 78 N. Y. 423; Fanning v. Osborne & Co. 34 Hun (N. Y.) 121; Wager v. Troy Union R. Co. 25 N. Y. 526; Chamberlain v. Elizabethport &c. Co. 41 N. J. Eq. 43; 2 Atl. 775; Starr v. Camden &c. R. Co. 24 N. J. L. 592; Bork v. United N. J. R. &c. Co. 70 N. J. L. 268; 57 Atl. 412; 103 Am. St. 808; Phipps v. Western M. Co. 66 Md. 319; 7 Atl. 556; Hartz v. St. Paul &c. R. Co. 21 Minn. 358; Harrington v. St. Paul &c. R. Co. 17 Minn. 215; Kucheman v. Chicago &c. R. Co. 46 Iowa, 366; Cox v. Louisville &c. R. Co. 48 Ind. 178; Nicholson v. New York &c. R. Co. 22 Conn. 74; 56 Am. R. 390. The opposite view seems to be still held

This, we are inclined to regard as the better rule. The use of a street by a commercial railroad, upon which freight is carried, and which is not for the local use of those living or having occasion to travel upon the street, is certainly not in furtherance of the ordinary use of the street, for which compensation may be presumed to have been made, but is necessarily a detriment to ordinary local travel and the use and value of property along the street.

§ 1088. Change of tracks or use—Additional use.[95]—There is apparently some difference of opinion as to whether the laying of an additional track, a change from a narrow gauge to a standard gauge, the grant of the right to another company also to run trains over the road, or the like, constitutes an additional servitude, but we think most of the decisions can be reconciled. It has been held, on

in some of the states, at least under some circumstances. Garnett v. Jacksonville &c. R. Co. 20 Fla. 889; Snyder v. Pennsylvania R. Co. 55 Pa. St. 340; Parry v. New Orleans &c. R. Co. 55 Ala. 413; 28 Am. R. 740; Hill v. Chicago &c. R. Co. 38 La. Ann. 599; Elizabethtown &c. R. Co. v. Thompson, 79 Ky. 52; McLauchlin v. Charlotte &c. Railroad Co. 5 Rich. L. (S. Car.) 583; Cross v. St. Louis &c. R. Co. 77 Mo. 312; Struthers v. Dunkirk &c. R. Co. 87 Pa. St. 282. But see Pennsylvania &c. R. Co. v. Walsh, 124 Pa. St. 544; 17 Atl. 186; 10 Am. St. 611; De Geofroy v. Merchants' &c. R. Co. 179 Mo. 698; 79 S. W. 386; 64 L. R. A. 659; 101 Am. St. 524. The rule stated in the text is certainly the better rule where the "easement of access" is destroyed or materially impaired, but several of the courts have held that when it is not taken, as, for instance, where the road is constructed on the opposite side of the street, the abutter is not entitled to compensation. Indiana &c. R. Co. v. Eberle, 110 Ind. 542; 11 N. E. 467; 59 Am. R. 225; Terre Haute &c. R. Co. v. Bissell, 108 Ind. 113; 9 N. E. 144; Haslett v. New Albany &c. R. Co. 7 Ind. App. 603; 34 N. E. 845; Kansas &c. R. Co. v. Cuykendall, 42 Kan. 234; 21 Pac. 1051; 16 Am. St. 479; Atchison &c. R. Co. v. Leuning, 52 Kan. 732; 35 Pac. 801; Cosby v. Owensboro &c. R. Co. 10 Bush. (Ky.) 288; Elizabethtown &c. R. Co. v. Thompson, 79 Ky. 52; Lexington &c. R. Co. v. Applegate, 38 Ky. 289, 302; 33 Am. Dec. 497; Trustees First Con. Church v. Milwaukee &c. R. Co. 77 Wis. 158; 45 N. W. 1086; 43 Am. & Eng. R. Cas. 182; Florida Southern R. Co. v. Brown, 23 Fla. 104; 1 So. 512; Fogg v. Nevada &c. R. Co. 20 Nev. 429; 23 Pac. 840; 43 Am. & Eng. R. Cas. 105.

[95] This section has been substituted for the original section bearing the same number, and that section has been transferred to the chapter on Street Railways.

the one hand, that the laying of additional tracks will constitute an additional servitude,[96] and, on the other hand, that it will not.[97] This, however, must depend upon the circumstances of the particular case, such as the extent of the right originally acquired for which the abutter was compensated, or deemed to have been compensated, or, in some instances, the location of the tracks and effect on abutting property, so that there is not, necessarily, any real conflict among the decisions upon this question. It has also been held that a change from a narrow to a standard gauge does not entitle the abutter to further damages;[98] that the grant by one company to another of the right to use its tracks,[99] or the laying of a double track instead of a single track,[100] does not create an additional servitude. But we think the use of the right of way of one company by another might, under exceptional circumstances, constitute an additional burden,[101] and so as to the laying of a double track in place of a single track. It has, indeed, been held that the laying of an additional track by another company will entitle the abutter to additional damages, notwithstanding he was compensated by the first company.[102]

[96] Bond v. Pennsylvania Co. 171 Ill. 508; 49 N. E. 545; Rock Island &c. Co. v. Johnson, 204 Ill. 488; 68 N. E. 549; Stephens v. New York &c. R. Co. 175 N. Y. 72; 67 N. E. 119; Chesapeake &c. R. Co. v. Gross (Ky.), 43 S. W. 203; Dooly Block v. Salt Lake &c. Co. 9 Utah, 31; 33 Pac. 229; 24 L. R. A. 610. See, also, Noblesville v. Lake Erie &c. R. Co. 130 Ind. 1; 29 N. E. 484; Workman v. Southern Pac. R. Co. 129 Cal. 536; 62 Pac. 185, 316.

[97] Davis v. Chicago &c. R. Co. 46 Ia. 389; White v. Chicago &c. R. Co. 122 Ind. 317; 23 N. E. 782; 7 L. R. A. 257; Chicago &c. R. Co. v. Eisert, 127 Ind. 156; 26 N. E. 759. As to when additional tracks cannot be laid, see Savannah &c. R. Co. v. Woodruff, 86 Ga. 94; 13 S. E. 156; Pennsylvania &c. R. Co. v. Philadelphia &c. R. Co. 157 Pa. St. 42; 27 Atl. 683. See, also, Hileman v. Chicago &c. R. Co. 113 Ia. 591; 85 N. W. 800; Chicago &c. R. Co. v. O'Connor, 42 Neb. 90; 60 N. W. 326.

[98] Kakeldy v. Columbia &c. Co. 37 Wash. 675; 80 Pac. 205. See, also, Denver &c. R. Co. v. Domke, 11 Colo. 247; 17 Pac. 777.

[99] Miller v. Green Bay &c. R. Co. 59 Minn. 169; 60 N. W. 1006; 26 L. R. A. 443.

[100] Reid v. Norfolk &c. R. Co. 94 Va. 117; 26 S. E. 428; 36 L. R. A. 274; 64 Am. St. 708. See, also, Ransom v. Citizens' R. Co. 104 Mo. 375; 16 S. W. 416.

[101] See Ft. Worth &c. Co. v. Jennings, 76 Tex. 373; 13 S. W. 270; 8 L. R. A. 180; Platt v. Pennsylvania Co. 43 Ohio St. 228; 1 N. E. 420. And see note in 25 Am. St. 477.

[102] Southern Pac. R. Co. v. Reed,

§ 1089. Railroads in narrow streets.—Where a street is too narrow to admit of more than one track, it would seem that the company which lawfully constructs and operates its road therein has, of necessity, a practical monopoly as against other companies, unless some valid provision exists for the use of the same track by more than one company. The width of the street may also be of importance, in some cases, in determining the rights of the company as against the abutters or the public. Thus, in a recent case decided by a court which has steadily refused to consider a commercial railroad in a street an additional burden under ordinary circumstances, it was held that a city could not legally authorize the construction and operation of such a road in a street so narrow that its use as a public thoroughfare would thereby be destroyed, and that an abutting owner whose easement of access was thus impaired might enjoin the railroad company from making such unlawful use of the street.[103] So, in our opinion, neither a commercial railroad nor a street railway can lawfully be constructed and operated in a street so narrow as not to admit of the passage of cars and other vehicles at the same time, without compensation to the abutting property-owners.[104] As every municipality, even if it owns the fee, holds its

41 Cal. 256. See, also, Platt v. Pennsylvania Co. 43 Ohio St. 228; 1 N. E. 420.

[103] Lockwood v. Wabash R. Co. 122 Mo. 86; 26 S. W. 698; 24 L. R. A. 516; 43 Am. St. 547; 1 Am. & Eng. R. Cas. (N. S.) 16; Schulenburg &c. Co. v. St. Louis &c. R. Co. 129 Mo. 455; 31 S. W. 796. See, also, Dubach v. Hannibal &c. R. Co. 89 Mo. 483; 1 S. W. 86; Commonwealth v. Frankfort, 92 Ky. 149; 17 S. W. 287; Dooly Block v. Salt Lake &c. Co. 9 Utah, 31; 33 Pac. 229; 24 L. R. A. 610; 8 Lewis' Am. R. & Corp. 327; Kansas &c. R. Co. v. Cuykendall, 42 Kan. 234; 21 Pac. 1051; 16 Am. St. 479; Nichols v. Ann Arbor &c. R. Co. 87 Mich. 361; 49 N. W. 538; 16 L. R. A. 371; Detroit City R. Co. v. Mills, 85 Mich. 634; 48 N. W. 1007.

[104] See McQuaid v. Portland &c. R. Co. 18 Ore. 237; 22 Pac. 899; 1 Lewis' Am. R. & Corp. 34; Detroit City R. Co. v. Mills, 85 Mich. 634, 659; 48 N. W. 1007; Carli v. Union Depot St. R. Co. 32 Minn. 101; 20 N. W. 89; Campbell v. Metropolitan R. Co. 82 Ga. 320; 9 S. E. 1078; Mobile &c. R. Co. v. Middleton, 139 Ala. 610; 36 So. 782; Ross v. Montreal St. R. Co. (Can.) 24 L. C. Jur. 60; Limburger v. San Antonio &c. St. R. Co. (Tex. Civ. App.) 27 S. W. 198. But see San Antonio &c. St. R. Co. v. Limburger, 88 Tex. 79; 30 S. W. 795; 53 Am. St. 730; Cooley Const. Lim. (7th Ed.) 677. Contra, Kellinger v. Forty-second St. &c. Co. 50 N. Y. 206. And see authorities cited in note 103, supra. We remember to have noticed a suggestion in one

streets in trust for the public, it is questionable, indeed, if it has any authority or power to authorize the construction and operation of a railroad of any kind in a street so narrow that the general public could not use it at the same time, as the effect would be to practically devote the street to the exclusive use of the railroad company.[105] But where there is room for other vehicles to pass at the same time, so that the abutter's easement of access is not materially impaired, the construction and operation of a street railway will not be enjoined merely because the track is so close to the curb that drays, express wagons and the like cannot be placed at right angles with the sidewalk while being loaded and unloaded.[106]

§ 1090. Obstruction of highways—Nuisance.—The construction of a railroad upon a street, without authority, is a nuisance.[107] So,

case that the abutter could not be materially injured, because, if he had driven up in front of his premises first, the car would be compelled to wait a reasonable time for his to load or unload and get out of the way. See Rafferty v. Central Trac. Co. 147 Pa. St. 579; 23 Atl. 884; 30 Am. St. 763, 772, 773. See, also, San Antonio &c. St. R. Co. v. Limburger, 88 Tex. 79; 30 S. W. 533; 53 Am. St. 730. But the general rule is that the cars have the right of way on the track, and the suggestion made is in many respects both contrary to principle and impracticable. Under the circumstances referred to in the text an abutter could not safely drive on the street at all, for he might meet a car at any time, nor could he leave his horse hitched, or get in and out of his vehicle, or load or unload goods without interruption and danger. It seems to us that his easement of access would be seriously impaired, and that, in many cases, the value of his property might be greatly lessened, especially in a wholesale or other great business locality.

[105] See Detroit City R. Co. v. Mills, 85 Mich. 634, 659; 48 N. W. 1007. Ante, § **1083**, and supra, first note to this section.

[106] Louisville &c. Co. v. Central &c. Co. 95 Ky. 50; 23 S. W. 592; 44 Am. St. 203; Hogencamp v. Paterson &c. R. Co. 17 N. J. Eq. 83; Hobart v. Milwaukee &c. R. Co. 27 Wis. 194; 9 Am. R. 461; Taylor v. Bay City St. R. Co. 101 Mich. 140; 59 N. W. 447; 1 Am. & Eng. R. Cas. (N. S.) 165. (Abutter not entitled to damages.) See, also, Louisville &c. R. Co. v. Orr, 91 Ky. 109; 15 S. W. 8; Cosby v. Owensboro &c. Co. 10 Bush. (Ky.) 288. In People v. Fort Wayne &c. R. Co. 92 Mich. 522; 52 N. W. 1010; 16 L. R. A. 752, it was held by a divided bench that eight feet seven and one-half inches was sufficient space.

[107] Booth Street Railways, § 3; Commonwealth v. Old Colony R. Co. 14 Gray (Mass.) 93; Hart v. Buckner, 54 Fed. 925; Chicago &c. R. Co. v. Loeb, 118 Ill. 203; 8 N. E. 460;

if the authority be exceeded and the railroad is so constructed or operated as to obstruct travel or cause an abutter special injury.[108] Thus, as elsewhere shown,[109] a temporary obstruction by leaving cars in or across a street for an unreasonable time, may constitute a nuisance.[110] And the unauthorized use of steam as a motor has been held to be a nuisance.[111] So, as held in many of the authorities already cited, and as elsewhere shown, the nuisance or obstruction of a highway, when caused by the negligence of the company, will gen-

59 Am. R. 341; Attorney-General v. Lombard &c. R. Co. 10 Phila (Pa.) 352; Fanning v. Osborne, 102 N. Y. 441; 7 N. E. 307; Pittsburgh &c. R. Co. v. Reich, 101 Ill. 157; State v. Troy &c. R. Co. 57 Vt. 144; Pittsburgh &c. R. Co. v. Hood, 94 Fed. 618; 36 C. C. A. 423; Louisville &c. R. Co. v. Mobile &c. R. Co. 124 Ala. 162; 26 So. 895. Ante, § **718, 719, 1056.** See, also, Illinois Cent. R. Co. v. Commonwealth (Ky.), 96 S. W. 467.

[108] Evans v. Chicago &c. R. Co. 86 Wis. 597; 57 N. W. 354; 39 Am. St. 908; Welcome v. Leeds, 51 Me. 313; Attorney-General v. Chicago &c. R. Co. 112 Ill. 520; Alabama &c. R. Co. v. Bloom, 71 Miss. 247; 15 So. 72; Brown v. Cayuga &c. R. Co. 12 N. Y. 486; Cogswell v. New York &c. R. Co. 103 N. Y. 10; 8 N. E. 537; 57 Am. R. 701; Hussner v. Brooklyn City R. Co. 114 N. Y. 433; 21 N. E. 1002; 11 Am. St. 679; Randle v. Pacific R. Co. 65 Mo. 325; Gustafson v. Hamm, 56 Minn. 334; 57 N. W. 1054; Union Pacific R. Co. v. Foley, 19 Colo. 280; 35 Pac. 542; Northern Central R. Co. v. Commonwealth, 90 Pa. St. 300; State v. Louisville &c. R. Co. 91 Tenn. 445; 19 S. W. 229; 50 Am. & Eng. R. Cas. 161; Regina v. Great Northern &c. R. Co. 9 Q. B. 315; Stamford v. Stamford &c. Co. 56 Conn. 381; 15 Atl. 749; Regina v. Toronto St. R. Co. 24 Up. Can. Q. B. 454. Notes in 17 Am. & Eng. R. Cas. 172, and 19 Am. & Eng. R. Cas. 433. See, also, Cleveland &c. R. Co. v. Pattison, 67 Ill. App. 351; Frankle v. Jackson, 30 Fed. 398; Louisville &c. Co. v. Lellyett 114 Tenn. 368; 85 S. W. 881; 1 L. R. A. (N. S.) 49, and note.

[109] Ante, §§ **718, 719.**

[110] Rauch v. Lloyd, 31 Pa. St. 358; 72 Am. Dec. 747; Murray v. South Carolina R. Co. 10 Rich. (S. Car.) 227; 70 Am. Dec. 219; Marine Ins. Co. v. St. Louis &c. R. Co. 41 Fed. 643, 650; Brownell v. Troy &c. R. Co. 55 Vt. 218; State v. Vermont Cent. R. Co. 27 Vt. 103; Cleveland &c. R. Co. v. Wynant, 114 Ind. 525; 17 N. E. 118; 5 Am. St. 644; note to Callahan v. Gilman, 1 Am. St. 843. See, also, Brumit v. Virginia &c. Co. 106 Tenn. 124; 60 S. W. 505.

[111] North Chicago &c. R. Co. v. Lake View, 105 Ill. 207; 44 Am. R. 788; 2 Am. & Eng. Corp. Cas. 6; State v. Tupper, Dudley (S. Car.), 135; Jones v. Festiniog R. Co. L. R. 3 Q. B. 733; Smith v. Stokes, 4 B. & S. 84; Reg. v. Chittenden, 15 Cox C. C. 725; 49 J. P. 503; Commonwealth v. Allen, 148 Pa. St. 358; 23 Atl. 1115; 16 L. R. A. 148; 33 Am. St. 830. But see Macomber v. Nichols, 34 Mich. 212; 22 Am. R. 522; Wabash &c. R. Co. v. Farver, 111 Ind. 195; 12 N. E. 296.

erally support an action by an abutter who is specially injured, even though it may not constitute a taking of his property.[112]

§ 1091. Bridges, viaducts and approaches.—The subject of crossings is elsewhere treated, and the right and duties of railroad companies in regard to highway crossings are there fully considered.[113] But we propose in this section to treat briefly of the rights of abutters and the rights and liabilities of a company which constructs a bridge or viaduct in a street. It may be stated as a general rule that "any structure on a street which is subversive of and repugnant to its use and efficiency as a public thoroughfare is not a legitimate street use, and imposes a new servitude on the rights of abutting owners, for which compensation must be made.[114] Applying this rule to the facts before the court, it was held in the case referred to that the construction by a railroad company of a bridge approach thirty feet wide in a street sixty-six feet wide, although under legislative and municipal authority, imposed a servitude for which the abutters were entitled to compensation, and that its continuance might be enjoined. So, in another case, it was held that a city was liable in damages for an injury to abutting property caused by a viaduct which it had built in a street over a railroad so as to obstruct access to the premises.[115] But in some other jurisdictions it has been held

[112] Ante, § 1085, and post, § 1096.

[113] Post, chapters XLIII, XLVI.

[114] Willamette Iron Works v. Oregon &c. R. Co. 26 Ore. 224; 37 Pac. 1016; 1 Am. & Eng. R. Cas. (N. S.) 36, citing Elliott Roads and Streets, 526; Tiedeman Munic. Corp. 301; Lewis' Em. Dom. § 126; Booth St. Ry. Law, §§ 80, 81; 2 Dill. Munic. Corp. §§ 711, 712, 723c; McQuird v. Portland &c. R. Co. 18 Ore. 237; 22 Pac. 899; 40 Am. & Eng. R. Cas. 308; Story v. New York R. Co. 90 N. Y. 122; 43 Am. R. 146; 7 Am. & Eng. R. Cas. 596; Lahr v. Metropolitan &c. R. Co. 104 N. Y. 268; 10 N. E. 528; Reining v. New York &c. R. Co. 128 N. Y. 157; 28 N. E. 640; 14 L. R. A. 133; Kane v. New York &c. R. Co. 125 N. Y. 164; 26 N. E. 278; 11 L. R. A. 640; Corning v. Lowerre, 6 Johns. Ch. (N. Y.) 439; Barney v. Keokuk, 94 U. S. 324; State v. Jersey City, 52 N. J. L. 65; 18 Atl. 586, 696. See, also, Jones v. Erie &c. R. Co. 151 Pa. St. 30; 25 Atl. 134; 17 L. R. A. 758; 31 Am. St. 722; Jones v. Erie &c. R. Co. 169 Pa. St. 333; 32 Atl. 535; 47 Am. St. 916; but compare Hartman v. Pittsburgh &c. Co. 159 Pa. St. 442; 28 Atl. 145.

[115] Pueblo v. Strait, 20 Colo. 13; 36 Pac. 789; 46 Am. St. 273. The constitution, however, provided that property should not be taken or damaged without just compensation. To the same effect are Rigney v. Chicago, 102 Ill. 64; Chicago v. Burcky, 158 Ill. 103; 42 N. E.

that the construction by a city of a viaduct or an approach to a bridge, occupying the full width of the street, is in effect a mere change of grade, for which the abutters are not entitled to damages or compensation as for a taking of property.[116] So, it has been held that the construction by a railroad company of a causeway, to carry its track over another railroad, within ten feet of the curb, does not constitute a taking of the abutter's property.[117] The plaintiff in the case last referred to did not own the fee of the street, but it was apparently conceded that the access to his premises was seriously interfered with, as well as the light and air, and it seems to us that the decision is of doubtful soundness, to say the least.

§ 1092. Duty of company to restore and repair street.—It is generally provided by statute that railroad companies which cross a highway or lay their tracks therein must restore it as far as may be to its former condition of usefulness and safety, and it is held that this duty rests upon them even in the absence of any express statutory requirement.[118] This rule applies to street railways as well

178; 29 L. R. A. 568; 49 Am. St. 142, and Chicago v. Taylor, 125 U. S. 161; 8 Sup. Ct. 820; Cohen v. Cleveland, 43 Ohio St. 190; 1 N. E. 589. See, also, Wead v. St. Johnsbury &c. Co. 64 Vt. 52; 24 Atl. 361; Harrington v. Iowa Cent. R. Co. 126 Ia. 388; 102 N. W. 139. But see Selden v. Jacksonville, 28 Fla. 558; 10 So. 457; 14 L. R. A. 370; 29 Am. St. 278. Street railway company held liable in Spencer v. Metropolitan &c. Co. 120 Mo. 154; 23 S. W. 126; 22 L. R. A. 668.

[116] Colclough v. Milwaukee, 92 Wis. 182; 65 N. W. 1039, and authorities there cited. See, also, Willis v. Winona, 59 Minn. 27; 60 N. W. 814; 26 L. R. A. 142; Home &c. Co. v. Roanoke, 91 Va. 52; 27 L. R. A. 551; Brand v. Multnomah County, 38 Ore. 79; 60 Pac. 390; 62 Pac. 209; 50 L. R. A. 389; 84 Am. St. 772; Selden v. Jacksonville, 28 Fla. 558; 10 So. 457; 14 L. R. A. 370; 29 Am. St. 278; Hurt v. Atlanta, 100 Ga. 274; 28 S. E. 65. Compare Lewis v. New York &c. R. Co. 162 N. Y. 202; 56 N. E. 540, and Bennett v. Long Island R. Co. 181 N. Y. 431; 74 N. E. 418.

[117] Garrett v. Lake Roland &c. R. Co. 79 Md. 277; 29 Atl. 830; 24 L. R. A. 396; 10 Lewis' Am. R. & Corp. 39.

[118] Northern R. Co. v. Baltimore, 46 Md. 425; People v. Chicago &c. R. Co. 67 Ill. 118; Indianapolis &c. R. Co. v. State, 37 Ind. 489, 502. See, also, Palatka &c. R. Co. v. State, 23 Fla. 546; 3 So. 158; 11 Am. St. 395; Kyne v. Wilmington &c. R. Co. 8 Houst. (Del.) 185; 14 Atl. 922; Zanesville v. Fannan, 53 Ohio St. 605; 42 N. E. 703, 705, citing Elliott Roads and Streets, 600; State v. Dayton &c. R. Co. 36 Ohio St. 434; Fash v. Third Ave R.

as to commercial railroads.[119] Unless otherwise provided, however, it seems that, although there may be a duty to restore or repair, there is no duty to repave and improve that portion of the street occupied by the company, at its own expense, although this admits of much doubt.[120] The duty to repair is usually imposed by statute or by the municipality, as a condition annexed to the right to use its streets,[121]

Co. 1 Daly (N. Y.) 148; Worster v. Forty-second St. &c. R. Co. 50 N. Y. 203; Tiedeman Munic. Corp. § **306**; post, § **1104**; Mason v. Ohio River R. Co. 51 W. Va. 183; 41 S. E. 418, 420, 421 (citing text).

[119] Memphis &c. R. Co. v. State, 87 Tenn. 746; 11 S. W. 946; Harrisburg v. Harrisburg &c. R. Co. 1 Pears. (Pa.) 298; Cline v. Crescent City R. Co. 41 La. Ann. 1031; 6 So. 851; Elliott Roads and Streets, 772.

[120] See Western Pav. &c. Co. v. Citizens' St. R. Co. 128 Ind. 525; 26 N. E. 188; 28 N. E. 88; 10 L. R. A. 770; 25 Am. St. 462; 46 Am. & Eng. R. Cas. 176; State v. Jacksonville &c. R. Co. 29 Fla. 590; 10 So. 590, 595 (citing Elliott Roads and Streets, 594, 595, where the subject is carefully considered). State v. Corrigan &c. R. Co. 85 Mo. 263; 55 Am. R. 361; 29 Am. & Eng. R. Cas. 591; 64 Hun (N. Y.) 635; New York v. New York &c. R. Co. 19 N. Y. S. 67; Chicago v. Sheldon, 9 Wall. (U. S.) 50; Baltimore v. Scharf, 54 Md. 499; Pittsburgh &c. R. Co. v. Birmingham, 51 Pa. St. 41; Booth St. Railways, § **241**, et seq. But see New York v. Harlem &c. R. Co. 186 N. Y. 304; 78 N. E. 1072.

[121] See as to the right to impose such conditions and their construction, State v. Hoboken, 41 N. J. L. 71; Philadelphia v. Ridge Ave Pass. R. Co. 143 Pa. St. 444; 22 Atl. 695; Western Pav. &c. Co. v. Citizens' St. R. Co. 128 Ind. 525; 26 N. E. 188; 28 N. E. 88; 10 L. R. A. 770; 25 Am. St. 462; 46 Am. & Eng. R. Cas. 176; Robbins v. Omnibus R. Co. 32 Cal. 472; Sioux City St. R. Co. v. Sioux City, 78 Iowa, 367, 742; 43 N. W. 224; 36 Am. & Eng. R. Cas. 143, affirmed 138 U. S. 98; 11 Sup. Ct. 226; Louisville &c. R. Co. v. Louisville, 8 Bush (Ky.) 415; Memphis &c. R. Co. v. State, 87 Tenn. 746; 11 S. W. 946; 38 Am. & Eng. R. Cas. 429; Philadelphia v. Empire Pass. R. Co. 3 Brews. (Pa.) 570; New York v. Second Ave R. Co. 102 N. Y. 572; 7 N. E. 905; 55 Am. R. 839; 26 Am. & Eng. R. Cas. 546; McMahon v. Second Ave. R. Co. 75 N. Y. 231; People v. Fort St. &c. R. Co. 41 Mich. 413; 2 N. W. 188; Gulf City &c. Co. v. Galveston, 69 Tex. 660; 7 S. W. 520; 32 Am. & Eng. R. Cas. 300; Fort Wayne &c. R. Co. v. Detroit, 39 Mich. 543; 34 Mich. 78; Pittsburgh &c. Pass. R. Co. v. Pittsburgh, 80 Pa. St. 72; State v. Canal &c. R. Co. 44 La. Ann. 526; 10 So. 940; Fort Worth v. Allen, 10 Tex. Civil App. 488; 31 S. W. 235; 1 Am. & Eng. R. Cas. (N. S.) 282; Philadelphia v. Spring Garden &c. Co. 161 Pa. St. 522; 29 Atl. 286; McKeesport v. McKeesport R. Co. 158 Pa. 447; 27 Atl. 1006; Lehigh &c. Co. v. Intercounty St. R. Co. 167 Pa. 126; 31 Atl. 471; Baumgartner v. Mankato, 60 Minn. 244; 62 N. W. 127; Duluth v. Duluth St. R. Co. 60 Minn. 178; 62 N. W. 267.

and this is not performed by merely restoring the street to the condition in which it was at the time the track was laid, for it is a continuing duty to keep such portion of the street in repair, so as not to unlawfully obstruct or endanger travel.[122] It is generally held that this duty may be enforced by mandamus,[123] and the neglect of the company to properly perform it will render the company liable in damages to one who, without fault on his part, is injured thereby while properly using the highway.[124] The city may also be held liable, in such a case, if it negligently suffers the defect or obstruction to remain in its street.[125] But it may have its remedy over

[122] Fitts v. Cream City R. Co. 59 Wis. 323; 18 N. W. 186; Cooke v. Boston &c. R. Co. 133 Mass. 185; Little Miami R. Co. v. Commissioners, 31 Ohio St. 338; Lake Shore &c. R. Co. v. Wiley, 193 Pa. St. 496; 44 Atl. 583; Reading v. United Trac. Co. (Pa. St.) 64 Atl. 446 (citing Elliott Roads and Streets, 591); Burritt v. New Haven, 42 Conn. 174; Baumgartner v. Mankato, 60 Minn. 244; 62 N. W. 127; Wellcome v. Leeds, 51 Me. 313; Chicago &c. R. Co. v. Moffitt, 75 Ill. 524, and authorities cited in following notes.

[123] State v. Jacksonville &c. R. Co. 29 Fla. 590; 10 So. 590; Oshkosh v. Milwaukee &c. Co. 74 Wis. 534; 43 N. W. 489; 17 Am. St. 175; State v. St. Paul &c. R. Co. 35 Minn. 131; 28 N. W. 3; 59 Am. R. 313; Cummins v. Evansville &c. R. Co. 115 Ind. 417; 18 N. E. 6; Indianapolis &c. R. Co. v. State, 37 Ind. 489; People v. Dutchess &c. R. Co. 58 N. Y. 152; People v. Chicago &c. R. Co., 67 Ill. 118; Halifax City v. R. Co. 1 Russ. Eq. (Nova Scotia) 319; mandatory injunction in Buchholz v. New York &c. R. Co. 148 N. Y. 640; 43 N. E. 76. But see State v. New Orleans &c. R. Co. 37 La. Ann. 589.

[124] Oakland R. Co. v. Fielding, 48 Pa. St. 320; Veazie v. Penobscot R. Co. 49 Me. 119; Masterton v. New York Central R. Co. 84 N. Y. 247; 38 Am. R. 510; Wasmer v. Delaware &c. R. Co. 80 N. Y. 212; 36 Am. R. 608; McMahon v. Second Ave. R. Co. 75 N. Y. 231; Brookhouse v. Union R. Co. 132 Mass. 178; O'Connor v. Boston &c. R. Co. 135 Mass. 352; Louisville &c. R. Co. v. Smith, 91 Ind. 119; 13 Am. & Eng. R. Cas. 608, and note; Evansville &c. R. Co. v. Crist, 116 Ind. 446; 19 N. E. 310; 2 L. R. A. 450; 9 Am. St. 865; Evansville &c. R. Co. v. Carvener, 113 Ind. 51; 14 N. E. 738; Gudger v. Western &c. R. Co. 87 N. Car. 325; Atlanta St. R. Co. v. Walker, 93 Ga. 462; 21 S. E. 48; Kraut v. Frankford &c. R. Co. 160 Pa. St. 327; 28 Atl. 783; Booth Street Railways, § 262; post, § 1176.

[125] Zanesville v. Fannan, 53 Ohio St. 605; 42 N. E. 703; 53 Am. St. 664; Batty v. Duxbury, 24 Vt. 155; Wilson v. Watertown, 3 Hun (N. Y.) 508; Sides v. Portsmouth, 59 N. H. 24; Fink v. St. Louis, 71 Mo. 52; Watson v. Tripp, 11 R. I. 98; 23 Am. R. 420; Hawks v. Northampton, 116 Mass. 420; Campbell v. Stillwater, 32 Minn. 308; 50 Am. R.

against the company.[126] If the company, after due notice, fails to repair, the city may cause the necessary repairs to be made and recover the cost from the company.[127]

§ 1093. Respective rights of the company and of the public.— As a general rule, a railroad company has the exclusive right to use its own track, and one who goes upon it, without an invitation or license from the company, is a trespasser. But this rule does not apply at highway crossings, nor, under ordinary circumstances, where the track is laid longitudinally upon the surface of a street, whether it be that of a commercial or street railroad company.[128] The public, exercising due care, still have a right to use the street. And so,

567; Davis v. Leominster, 1 Allen (Mass.) 182; Norristown v. Moyer, 67 Pa. St. 355; Elliott Roads and Streets (2d Ed.) § 773; 2 Dillon Munic. Corp. § 1037.

[126] Chicago City v. Robbins, 2 Black (U. S.) 418; Eyler v. County Commissioners, 49 Md. 257; 33 Am. R. 249; Portland v. Atlantic &c. Co. 66 Me. 485; Woburn v. Boston &c. R. Co. 109 Mass. 283; Brooklyn v. Brooklyn City R. Co. 47 N. Y. 475; 7 Am. St. 469; Fort Worth v. Allen, 10 Tex. Civ. App. 488; 31 S. W. 235; 1 Am. & Eng. R. Cas. (N. S.) 282; Carty v. London, 18 Ont. R. 122; 43 Am. & Eng. R. Cas. 279; 2 Dillon Munic. Corp. § 1037.

[127] Pennsylvania R. Co. v. Duquesne Borough, 46 Pa. St. 223; Chesapeake &c. R. Co. v. Dyer Co. 38 Am. & Eng. R. Cas. 676; Columbus v. Columbus Street R. Co. 45 Ohio St. 98; 32 Am. & Eng. R. Cas. 292; District of Columbia v. Washington &c. R. Co. 4 Mackey (D. C.) 214; New Haven v. Fair Haven &c. R. Co. 38 Conn. 422; 9 Am. R. 399; Philadelphia &c. R. Co. v. Philadelphia, 11 Phila. (Pa.) 358. But compare Farmers' &c. Co. v. Ansonia, 61 Conn. 76; 23 Atl. 705; New York v. Second Ave. &c. R. Co. 102 N. Y. 572; 7 N. E. 905; 55 Am. R. 839; 26 Am. & Eng. R. Cas. 546. (City cannot recover for extravagant and unreasonable repairs.) As to the necessity for notice, see Reading v. United Trac. Co. (Pa. St.) 64 Atl. 446.

[128] Louisville &c. R. Co. v. Phillips, 112 Ind. 59; 13 N. E. 132; 2 Am. St. 155. (Commercial railroad extending longitudinally upon the street.) Thatcher v. Central Traction Co. 166 Pa. St. 66; 30 Atl. 1048; 45 Am. St. 645. (Electric street railway running along the street.) Rascher v. East Detroit &c. R. Co. 90 Mich. 413; 51 N. W. 463; 30 Am. St. 447; Byrne v. New York &c. R. Co. 104 N. Y. 362; 10 N. E. 539; 58 Am. R. 512; Missouri Pac. R. Co. v. Bridges, 74 Tex. 520; 12 S. W. 210; 15 Am. St. 856; Davis v. Chicago &c. R. Co. 58 Wis. 646; 17 N. W. 406; 46 Am. R. 667; Bennett v. Railroad Co. 102 U. S. 577; Kansas Pacific R. Co. v. Pointer, 9 Kan. 620; Adolph v. Central Park R. Co. 76 N. Y. 530; Bryson v. Chicago &c. R. Co. 89 Iowa, 677; 57 N. W. 430; 60 Am. & Eng. R. Cas. 50.

the railroad company, likewise exercising due care, has also the right to use that portion of the street upon which its track is laid. Their rights are, in most respects, mutual, reciprocal and equal, neither being superior or paramount to the other, except that, as the company cannot so readily stop its trains or cars and is confined to its track, it has the right of way of passage thereon, and persons who are upon the track must leave it and give way until the train or car has passed.[129] Where the track is laid along a street, a traveler, although a pedestrian, in the exercise of due care, may cross it at any point and is not confined to the regular crossings.[130] But an extraordinary and improper use of the track by a member of the general public may subject him to an action for damages for an injury so caused. Thus, where a person engaged in moving a house negligently injured the track, he was held liable in damages at the suit of the company.[131] This rule does not, however, prevent the ordinary use of the street, in a proper manner, even by heavy vehicles.[132]

[129] Moore v. Kansas City &c. R. Co. 126 Mo. 265; 29 S. W. 9, 11, quoting Elliott Roads and Streets, 577; Warner v. People's St. R. Co. 141 Pa. St. 615; Omaha St. R. Co. v. Duvall, 40 Neb. 29; 58 N. W. 531; Ohio &c. R. Co. v. Walker, 113 Ind. 196; 15 N. E. 234; 3 Am. St. 638; Continental &c. Co. v. Stead, 95 U. S. 161; Chicago &c. R. Co. v. Lee, 87 Ill. 454; Baltimore &c. R. Co. v. Sherman, 30 Gratt. (Va.) 602; Black v. Burlington &c. R. Co. 38 Iowa, 515; Hegan v. Eighth Ave R. Co. 15 N. Y. 380; Adolph v. Central Park &c. R. Co. 65 N. Y. 554; Commonwealth v. Temple, 14 Gray (Mass.) 69. The text is quoted with approval in St. Louis &c. R. Co. v. Neely, 63 Ark. 636; 40 S. W. 130; 37 L. R. A. 616. But it is held that a street railway company has no superior right of passage at another street crossing. O'Neil v. Dry Dock &c. R. Co. 129 N. Y. 125; 29 N. E. 84. See, also, Zimmerman v. Hannibal &c. R. Co. 71 Mo. 476; Omaha St. R. Co. v. Cameron, 43 Neb. 297; 61 N. W. 606.

[130] Mitchell v. Tacoma &c. R. Co. 9 Wash. 120; 37 Pac. 341; Louisville &c. R. Co. v. Head, 80 Ind. 117; 4 Am. & Eng. R. Cas. 619; Smedis v. Brooklyn &c. R. Co. 88 N. Y. 13; Frick v. St. Louis &c. R. Co. 75 Mo. 595; 8 Am. & Eng. R. Cas. 280.

[131] Toronto &c. Co. v. Dollery, 12 Ont. App. 679. Such a use may also be restrained by injunction where it would stop the cars an unreasonable time and destroy the wires of an electric railway company. Williams v. Citizens' &c. Co. 130 Ind. 71; 29 N. E. 408; 15 L. R. A. 64; 30 Am. St. 201. See, also, Day v. Green, 4 Cush. (Mass.) 433. One who carelessly drives against a car properly moving upon the track is liable for resulting damages. Chicago &c. R. Co. v. Rend, 6 Bradw. (Ill. App.) 243.

[132] Second &c. St. R. Co. v. Morris, 8 Phila. (Pa.) 304; Booth Street Railways, § 303.

§ 1094. Duty to travelers upon the street.—Where a railroad runs along the surface of a street, the rights of the company and of travelers must each be exercised with a due regard to the rights of the other, in a reasonable and duly careful manner.[133] The general rule in all such cases is that reasonable care must be exercised, but this usually depends very largely upon the peculiar circumstances of each particular case, and, in order to constitute reasonable care under the circumstances, greater care would be required of a railroad company where its cars run along a street which is continually used by travelers than where it has the exclusive use of its track.[134] Thus, it has been held gross negligence to run electric cars around the corners of streets in a populous city at a high rate of speed.[135] It is also said in the same case that greater care is required in the operation of cable and electric cars than in the operation of cars drawn by horses, because the danger is greater.[136] In another recent case a commercial railroad company was held liable to one who, in walking along the track in a street, but not at a crossing, had his foot fastened between a rail of the track and a plank inside the track, and was run over by a train.[137] The court held that he was not a trespasser, and that the company was negligent both in failing to properly construct and maintain the track and in the management of the train.

§ 1095. Liability for negligence—Contributory negligence.—The

[133] Omaha St. R. Co. v. Cameron, 43 Neb. 297; 61 N. W. 606; Connelly v. Trenton &c. Co. 56 N. J. L. 700; 44 Am. St. 424; Lynam v. Union R. Co. 114 Mass. 83; Shea v. Portrero &c. R. Co. 44 Cal. 414; Pendleton St. R. Co. v. Stallman, 22 Ohio St. 1; Unger v. Forty-second St. R. Co. 51 N. Y. 497; O'Neil v. Dry Dock &c. R. Co. 129 N. Y. 125, 130; 29 N. E. 84; 26 Am. St. 512; St. Louis &c. R. Co. v. Neely, 63 Ark. 636; 40 S. W. 130; 37 L. R. A. 616 (citing text).

[134] Lott v. Frankford &c. R. Co. 159 Pa. St. 471; 28 Atl. 299; Gilmore v. Federal St. &c. R. Co. 153 Pa. St. 31; 25 Atl. 651; 34 Am. St. 682. See, also, Heucke v. Milwaukee &c. R. Co. 69 Wis. 401; 34 N. W. 243; Baltimore &c. R. Co. v. McDonnell, 43 Md. 534. But it must exercise reasonable care even where its tracks run through a city on an embankment, which is its own property. McGuire v. Vicksburg &c. R. Co. 46 La. 1543; 16 So. 457.

[135] Cooke v. Baltimore Traction Co. 80 Md. 551; 31 Atl. 329.

[136] See, also, Cincinnati &c. R. Co. v. Whitcomb, 66 Fed. 915.

[137] Louisville &c. R. Co. v. Phillips, 112 Ind. 59; 13 N. E. 132; 2 Am. St. 155. See, also, Gulf &c. R. Co. v. Walker, 70 Tex. 126; 7 S. W. 831; 8 Am. St. 582.

violation on the part of a railroad company of any of the duties to travelers to which we have referred will render it liable in damages for any injury proximately caused thereby to a traveler who is free from contributory negligence. So, although the person injured is himself guilty of negligence, yet if those in charge of the car discover his negligence and danger in time to avoid it by the exercise of reasonable care, but fail to exercise such care, the company may be held liable.[138] Under ordinary circumstances, however, unless it appears that he is an infant or infirm, or that for some reason he cannot get out of the way, they may assume that he will do so.[139] The violation of an ordinance or statute requiring a "lookout" or limiting the speed, or the like, is at least prima facie, if not conclusive, evidence of negligence.[140] And so an excessive rate of speed, or the failure of the driver or motorman to pay attention to his du-

[138] Cincinnati &c. R. Co. v. Whitcomb, 66 Fed. 915; Lake Roland &c. R. Co. v. McKewen, 80 Md. 593; 31 Atl. 797; Little v. Superior &c. R. Co. 88 Wis. 402; 60 N. W. 705; Orr v. Cedar Rapids &c. R. Co. 94 Iowa, 423; 62 N. W. 851; 1 Am. & Eng. R. Cas. (N. S.) 239; Montgomery v. Lansing &c. R. Co. 103 Mich. 46; 61 N. W. 543; 29 L. R. A. 287; Laethem v. Ft. Wayne &c. R. Co. 100 Mich. 297; 59 N. W. 247; Garrett v. People's Ry. Co. (Del.) 64 Atl. 254; Rewitzer v. St. Paul &c. Co. (Minn.) 108 N. W. 271; Indianapolis Trac. &c. Co. v. Kidd, (Ind.) 79 N. E. 347.

[139] Daly v. Detroit &c. R. Co. 105 Mich. 193; 63 N. W. 73; Railroad Co. v. Gladmon, 15 Wall. (U. S.) 401; Bunyan v. Citizens' St. R. Co. 127 Mo. 12; 29 S. W. 842; 1 Am. & Eng. R. Cas. (N. S.) 246, and note; Louisville &c. R. Co. v. Cronbach, 12 Ind. App. 666; 41 N. E. 15; Pennsylvania Co. v. Meyers, 136 Ind. 242; 36 N. E. 32.

[140] Omaha St. R. Co. v. Duvall, 40 Neb. 29; 58 N. W. 531; Hays v. Gainesville &c. R. Co. 70 Tex. 602; 8 S. W. 491; 8 Am. St. 624; Baltimore &c. R. Co. v. McDonnell, 43 Md. 534; Citizens' St. R. Co. v. Steen, 42 Ark. 321; 19 Am. & Eng. R. Cas. 30; Hanlon v. South Boston &c. R. Co. 129 Mass. 310; 2 Am. & Eng. R. Cas. 18; Fath v. Tower Grove &c. R. Co. 105 Mo. 537; 16 S. W. 913; 13 L. R. A. 74; Riley v. Salt Lake &c. R. Co. 10 Utah, 428; 37 Pac. 681; Stafford v. Chippewa &c. R. Co. 110 Wis. 331; 85 N. W. 1036, 1045 (citing text). We think the better rule is that it is prima facie evidence of negligence and if unexplained, may be negligence per se, but when it is said to be negligence per se, it does not necessarily follow that it is actionable negligence and conclusive in the particular case, for the element of proximate cause must also be present and there certainly are cases in which there may be a good excuse for failing to comply with a statute or ordinance at the particular time or under the particular circumstances.

ties or give notice or warning when due care requires, it may constitute negligence even in the absence of any ordinance or statutory provision upon the subject.[141] But, while it is the duty of the driver or motorman to exercise a reasonable degree of watchfulness and care, he is not necessarily negligent because he is not looking at any particular moment directly at the track in front of him.[142] Much necessarily depends upon the peculiar circumstances of each particular case, and the question is usually one of fact for the jury to determine under proper instructions.[143] It is not negligence per se for a cable car to follow a buggy on the track at a reasonable distance, and the question as to the reasonableness of the distance and the rate of speed is usually for the jury.[144] Where the driver of a wagon is unable to escape from an electric or cable car coming at a high rate of speed, because impeded by the efforts of the driver of a vehicle coming in the same direction just ahead of the car, the company is not absolved from liability to the driver of the approaching wagon by the conduct of the driver of the second vehicle, at least

[141] Brooks v. Lincoln St. R. Co. 22 Neb. 816; 36 N. W. 529; Citizens' Pass R. Co. v. Foxley, 107 Pa. St. 537; Collins v. South Boston R. Co. 142 Mass. 301; 7 N. E. 856; 56 Am. R. 675; Mangam v. Brooklyn R. Co. 38 N. Y. 455; 98 Am. Dec. 66; Anderson v. Minneapolis St. R. Co. 42 Minn. 490, 493; 18 Am. St. 525; Sheets v. Connolly St. R. Co. 54 N. J. L. 518; 24 Atl. 483; Stone v. Dry Dock &c. R. Co. 115 N. Y. 104; 21 N. E. 712; Johnson v. Hudson River R. Co. 20 N. Y. 65; 75 Am. Dec. 375; Barksdull v. New Orleans &c. R. Co. 23 La. Ann. 180; Thoresen v. LaCrosse &c. R. Co. 87 Wis. 597; 58 N. W. 1051; 41 Am. St. 64.

[142] Gallaher v. Crescent City R. Co. 37 La. Ann. 288; Kennedy v. St. Louis &c. R. Co. 43 Mo. App. 1; Citizens' St. R. Co. v. Carey, 56 Ind. 396; Thomas v. Citizens' Pass R. Co. 132 Pa. St. 504; 19 Atl. 286; Bulger v. Albany R. Co. 42 N. Y. 459; Johnson v. Reading &c. R. Co. 160 Pa. St. 647; 28 Atl. 1001; 40 Am. St. 752.

[143] O'Flaherty v. Union R. Co. 45 Mo. 70; 100 Am. Dec. 343; Hedin v. City &c. Co. 26 Ore. 155; 37 Pac. 540; Bunyan v. Citizens' R. Co. 127 Mo. 12; 29 S. W. 842; 1 Am. & Eng. R. Cas. (N. S.) 247, and note; Doyle v. West End St. R. Co. 161 Mass. 533; 37 N. E. 741; Shenners v. West Side R. Co. 78 Wis. 382; 47 N. W. 622; Erie City &c. R. Co. v. Schuster, 113 Pa. St. 412; 6 Atl. 269; 57 Am. R. 471; McMahon v. Northern Cent. R. Co. 39 Md. 438; Oldfield v. New York &c. R. Co. 14 N. Y. 310; Weil v. Dry Dock &c. R. Co. 119 N. Y. 147; 23 N. E. 487; Hearn v. St. Charles &c. Co. 34 La. Ann. 160.

[144] Hicks v. Citizens' &c. R. Co. 124 Mo. 115; 27 S. W. 542; 25 L. R. A. 508, and note.

in the absence of malice or negligence on his part.[145] So, it has been held that the negligent stopping of a street car in front of a funeral procession, so as to cause the carriages to stop so suddenly that the pole of the second carriage runs into and injures the first one, is the proximate cause of such injury, and the company is liable therefor.[146] It was also held in the same case that the violation of a penal ordinance against obstructing the street was sufficient proof of the negligence of the company. If the negligence of the plaintiff proximately contributes to his own injury, he cannot, of course, recover. It is the tendency of the modern decisions to hold that it is the duty of a traveler at a regular commercial railroad crossing, as a rule of law, to look and listen, and this rule has been applied in some jurisdictions to those who cross the tracks of a street railway at any place in a street.[147] The care required of one who goes upon the track of a horse railway is not, perhaps, so great as that required of one who goes upon the track of a commercial railroad, because the danger is not so great;[148] but, after all, reasonable care is required

[145] Thatcher v. Central &c. Co. 166 Pa. St. 66; 30 Atl. 1048; 45 Am. St. 645.

[146] Mueller v. Milwaukee &c. R. Co. 86 Wis. 340; 56 N. W. 914; 21 L. R. A. 721.

[147] Booth Street Railways, §§ 312, 315; Kelly v. Hendrie, 26 Mich. 255; Scott v. Third Ave. R. Co. 61 Hun (N. Y.), 627; 16 N. Y. S. 350; Davenport v. Brooklyn City R. Co. 100 N. Y. 632; 3 N. E. 305; Buzby v. Philadelphia &c. R. Co. 126 Pa. St. 559; 17 Atl. 895; 12 Am. St. 919; Bunyan v. Citizens' &c. Co. 127 Mo. 12; 29 S. W. 842; 1 Am. & Eng. R. Cas. (N. S.) 246; Schulte v. New Orleans &c. R. Co. 44 La. Ann. 509; 10 So. 811; Carson v. Federal &c. R. Co. 147 Pa. St. 219; 23 Atl. 369; 15 L. R. A. 257; 30 Am. St. 727; Ward v. Rochester &c. R. Co. 63 Hun (N. Y.), 624; 17 N. Y. S. 427; Murray v. Ponchartrain &c. R. Co. 31 La. Ann. 490; Follett v. Toronto R. Co. 15 Ont. App. 346. See, also, Hickey v. St. Paul &c. R. Co. 60 Minn. 119; 61 N. W. 893. But compare Chicago City R. Co. v. Robinson, 127 Ill. 9; 18 N. E. 772; 11 Am. St. 87; Shea v. St. Paul &c. R. Co. 50 Minn. 395; 52 N. W. 902; Lynam v. Railroad Co. 114 Mass. 83; post, § 1096bq. They are not obliged to stop, before crossing, as a matter of law, unless the circumstances require it in the exercise of reasonable care. Cincinnati &c. R. Co. v. Whitcomb, 66 Fed. 915. A fuller consideration of this subject will be found in the chapter on "Street Railway Negligence." One crossing behind a train must keep a vigilant watch and can not assume that it will not move backward. Bryson v. Chicago &c. R. Co. 89 Iowa, 677; 57 N. W. 430; 60 Am. & Eng. R. Cas. 50.

[148] Mentz v. Second Ave. R. Co. 3 Abbott's App. Dec. (N. Y.) 274; Lynam v. Union &c. R. Co. 114 Mass. 83.

in either case,[149] and one cannot recklessly use the tracks of any kind of a railroad company, or pass in front of a rapidly moving car upon "a nice calculation of the chances," without doing so at his peril.[150] It was also held in a recent case that one who rode a bicycle along the track of an electric railway without looking or listening for the approach of the cars behind him was guilty of contributory negligence as a matter of law.[151] We have simply given an outline of the general subject considered in this section, and it will be treated with special reference to street railways and electric railways in another chapter.

§ 1096. Remedies for unlawful use of street.—As we have elsewhere shown, mandamus will lie, in a proper case, to compel a railroad company to perform its duty to restore and repair a crossing

[149] Text quoted in Marchal v. Indianapolis St. R. Co. 28 Ind. App. 133; 62 N. E. 286, 288.

[150] McClain v. Brooklyn City R. Co. 116 N. Y. 459; 22 N. E. 1062; Barker v. Savage, 45 N. Y. 191; 6 Am. R. 66; Fenton v. Second Ave. R. Co. 126 N. Y. 625; 26 N. E. 967; Sheets v. Connolly St. R. Co. 54 N. J. L. 518; 24 Atl. 483; Bunyan v. Citizens' St. R. Co. 127 Mo. 12; 29 S. W. 842; 1 Am. & Eng. R. Cas. (N. S.) 246, and note; Baltimore &c. R. Co. v. Mali, 66 Md. 53; 5 Atl. 87. See, also, for other cases in which the plaintiff was held guilty of contributory negligence. Mercier v. New Orleans &c. Co. 23 La. Ann. 264; Thomas v. Citizens' &c. Co. 132 Pa. St. 504; 19 Atl. 286; Wood v. Detroit &c. R. Co. 52 Mich. 402; 18 N. W. 124; 50 Am. R. 259; Warner v. People's &c. Co. 141 Pa. St. 615; 21 Atl. 737; Miller v. St. Paul &c. R. Co. 42 Minn. 454; 44 N. W. 533; Brown v. Broadway &c. R. Co. 50 N. Y. Super. Ct. 106; McGrath v. City &c. R. Co. 93 Ga. 312; 20 S. E. 317; Boerth v. West Side R. Co. 87 Wis. 288; 58 N. W. 376. But compare Cross v. California &c. R. Co. 102 Cal. 313; 36 Pac. 673; Patterson v. Townsend, 91 Iowa, 725; 59 N. W. 205; Mills v. Brooklyn &c. Railroad Co. 10 Misc. (N. Y.) 1; 30 N. Y. S. 532; Reilly v. Third Ave. R. Co. 16 Misc. (N. Y.) 11; 37 N. Y. S. 593. As to the care required of children see note in 1 Am. & Eng. R. Cas. (N. S.) 264, where all the recent cases are collected and reviewed.

[151] Everett v. Los Angeles &c. Co. 115 Cal. 105; 43 Pac. 207; 46 Pac. 889; 34 L. R. A. 350; 42 Cent. L. J. 242. See, also, Adolph v. Central Park &c. Co. 76 N. Y. 530; Medcalf v. St. Paul City Ry. Co. 82 Minn. 18; 84 N. W. 633; Bennett v. Detroit Citizens' St. R. Co. 123 Mich. 692; 82 N. W. 518; Nein v. La-Crosse &c. R. Co. 92 Fed. 85; Taylor v. Union Trac. Co. 184 Pa. St. 465; 40 Atl. 159; 47 L. R. A. 289. But compare Louisville R. Co. v. Blaydes (Ky.), 51 S. W. 820.

or other portion of a street which it has rendered unsafe, and to construct and maintain its road upon or across a highway in the manner required by statute.[152] So, if it unlawfully constructs and maintains its road in a highway without authority, or in an unauthorized manner, it may be indicted as for a nuisance,[153] or enjoined, in a proper case, at the suit of one who is specially damaged thereby.[154] But when an abutter has an adequate remedy at law by an action for damages, as, for instance, where there is merely negligence in the construction or operation of the road, by which he is injured, he cannot maintain injunction. The rule is thus stated by the Supreme Court of the United States: "Equitable jurisdiction may be invoked, in view of the inadequacy of the legal remedy, where the injury is destructive, or of a continuous character, or irreparable in its nature; and the appropriation of private property to public use,

[152] Ante, § 1092; post, §§ 1106, 1111.

[153] Ante, §§ 718, 719; Northern Cent. R. Co. v. Commonwealth, 90 Pa. St. 300; Cincinnati Southern R. Co. v. Commonwealth, 80 Ky. 137; Central R. Co. v. State, 32 N. J. L. 220; Commonwealth v. Old Colony R. Co. 14 Gray (Mass.), 93; Palatka &c. R. Co. v. State, 23 Fla. 546; 3 So. 158; 11 Am. St. 395; Regina v. Great North &c. R. Co. 9 Q. B. 315. See, also, Louisville &c. R. Co. v. Mobile &c. R. Co. 124 Ala. 162; 26 So. 895; Kavanagh v. Mobile &c. R. Co. 78 Ga. 271; 2 S. E. 636.

[154] Brainard v. Connecticut River R. Co. 7 Cush. (Mass.) 506; Davis v. New York, 14 N. Y. 506; Clarke v. Blackmar, 47 N. Y. 150; Williams v. New York Cent. R. Co. 16 N. Y. 97; 69 Am. Dec. 651; Harbach v. Des Moines &c. R. Co. 80 Iowa, 593; 44 N. W. 348; 43 Am. & Eng. R. Cas. 115; Pettis v. Johnson, 56 Ind. 139; Lewis v. Pennsylvania R. Co. (N. J.) 33 Atl. 932; Willamette Iron Works v. Oregon &c. Co. 26 Ore. 224; 37 Pac. 1016; 29 L. R. A. 88; 46 Am. St. 620; 1 Am. & Eng. R. Cas. (N. S.) 36; Georgia &c. R. Co. v. Ray, 84 Ga. 376; 11 S. E. 352; Harrington v. St. Paul &c. R. Co. 17 Minn. 215; Taylor v. Bay City St. R. Co. 80 Mich. 77; 45 N. W. 335. But see Clemens v. Connecticut &c. Ins. Co. 184 Mo. 46; 82 S. W. 1; 67 L. R. A. 362; 105 Am. St. 526. A mandatory injunction was granted in Buchholz v. New York &c. R. Co. 148 N. Y. 640; 43 N. E. 76. As to when the municipality may maintain injunction, see Springfield v. Connecticut &c. R. Co. 4 Cush. (Mass.) 63; Town Council of Johnston v. Providence &c. R. Co. 10 R. I. 365; Inhabitants of Greenwich v. Easton &c. R. Co. 26 N. J. Eq. 217; Rio Grande R. Co. v. Brownsville, 45 Tex. 88. As to the right of an abutter to enjoin the taking of property without compensation see the following note, and ante, § 1049. See, also, Clemens v. Connecticut &c. Ins. Co. 184 Mo. 46; 82 S. W. 1; 67 L. R. A. 362; 105 Am. St. 526, and note.

under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded ex debito justitiæ. But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial, and the remedy at law in fact inadequate, before restraint will be laid upon the progress of a public work; and if the case made discloses only a legal right to recover damages, rather than to demand compensation, the court will decline to interfere."[155] An abutter may also maintain ejectment where a railroad is constructed, without authority, upon a highway of which he owns the fee.[156] But he may waive his right to maintain injunction or ejectment or lose it by delay under such cir-

[155] Osborne v. Missouri &c. Railroad Co. 147 U. S. 248; 13 Sup. Ct. 299. See, also, Booth St. R. Law, 189; Elliott Roads and Streets, 536; Tiedeman's Munic. Corp. § 307; 2 Dillon Munic. Corp. § 723d; Story v. New York &c. Railroad Co. 90 N. Y. 122, 179; 7 Am. & Eng. R. Cas. 596; Lahr v. Metropolitan &c. R. Co. 104 N. Y. 268; 10 N. E. 528; Columbus &c. R. Co. v. Witherow, 82 Ala. 190; 3 So. 23; State v. Berdetta, 73 Ind. 185; 38 Am. R. 117; Lorie v. North Chicago &c. R. Co. 32 Fed. 270; Morris &c. Railroad Co. v. Prudden, 20 N. J. Eq. 530; Truesdale v. Peoria &c. Co. 101 Ill. 561; Stetson v. Chicago &c. R. Co. 75 Ill. 74; Norfolk &c. R. Co. v. Smoot, 81 Va. 495; Heath v. Des Moines &c. R. Co. 61 Iowa, 11; 15 N. W. 573; Union Pac. R. Co. v. Foley, 19 Colo. 280; 35 Pac. 542; Kavanagh v. Mobile &c. R. Co. 78 Ga. 271; 2 S. E. 636; Fogg v. Nevada &c. R. Co. 20 Nev. 429; 23 Pac. 840. See, also, Clemens v. Connecticut &c. Ins. Co. 184 Mo. 46; 82 S. W. 1; 67 L. R. A. 362; 105 Am. St. 536, and note. See as to whether one can recover damages who purchases knowing the railroad is already in operation on the street, Galt v. Chicago &c. R. Co. 157 Ill. 125; 41 N. E. 643; Conabeer v. New York &c. R. Co. 156 N. Y. 474; 51 N. E. 402.

[156] Terre Haute &c. R. Co. v. Rodel, 89 Ind. 128; 46 Am. R. 164; Cox v. Louisville &c. R. Co. 48 Ind. 178; Weyl v. Sonoma &c. R. Co. 69 Cal. 202; 10 Pac. 510; Louisville &c. R. Co. v. Liebfried, 92 Ky. 407; 17 S. W. 870; Carpenter v. Oswego &c. R. Co. 24 N. Y. 655; Weisbrod v. Chicago &c. R. Co. 21 Wis. 602; Phillips v. Dunkirk &c. R. Co. 78 Pa. St. 177; Perry v. New Orleans &c. R. Co. 55 Ala. 413; 28 Am. R. 740; Proprietors &c. v. Nashua &c. R. Co. 104 Mass. 1; 6 Am. R. 181. But see Edwardsville R. Co. v. Sawyer, 92 Ill. 377; Montgomery v. Santa Ana &c. R. Co. 104 Cal. 186; 37 Pac. 786; 25 L. R. A. 654; 43 Am. St. 89.

cumstances as to create an estoppel.[157] Many of the cases cited in the note to the last preceding proposition illustrate and show the application of the doctrine.

[157] Porter v. Midland R. Co. 125 Ind. 476; 25 N. E. 556; 46 Am. & Eng. R. Cas. 70; Burkam v. Ohio &c. R. Co. 122 Ind. 344; 23 N. E. 799; Midland R. Co. v. Smith, 113 Ind. 233; 15 N. E. 256; Reichert v. St. Louis &c. R. Co. 51 Ark. 491; 5 L. R. A. 183; 38 Am. & Eng. R. Cas. 453; Denver &c. R. Co. v. Barsaloux, 15 Colo. 290; 25 Pac. 165; 10 L. R. A. 89; Klosterman v. Chesapeake &c. R. Co. 114 Ky. 426; 71 S. W. 6; Hanlin v. Chicago &c. R. Co. 61 Wis. 515; 21 N. W. 623; 20 Am. & Eng. R. Cas. 70; Haskell v. New Bedford, 108 Mass. 208; State v. Atlantic City, 34 N. J. L. 99; Baltimore &c. R. Co. v. Strauss, 37 Md. 237; Merchants' &c. Co. v. Chicago &c. R. Co. 79 Iowa, 613; 44 N. W. 900; Roberts v. Northern Pac. R. Co. 158 U. S. 1; 15 Sup. Ct. 756, 758; Wolford v. Fisher (Oreg.), 84 Pac. 850, 851 (citing text). See, generally, note in 1 L. R. A. (N. S.) 49.

CHAPTER XLIII.

STREET RAILWAYS.

§ 1096a. Definition and characteristics.—A definition of street railways has already been given, and their distinguishing features and characteristics have already been pointed out.[1] The term is usually applied to railways laid upon the surface of streets, or roads and streets, for the purpose of facilitating travel or local use thereof rather than through travel across the country and through various cities and towns, and for the purpose of carrying passengers, or passengers and baggage, rather than heavy freight;[2] but interurban railroads are sometimes classed as street railways, and light freight or express matter is sometimes carried,[3] and it has been held that they may be constructed in part through lands acquired by purchase and outside the limits of streets or roads,[4] and that either an under-

[1] See ante, Vol. I, § 6.

[2] See section cited in last preceding note; also Chicago &c. R. Co. v. Milwaukee &c. El. R. Co. 93 Wis. 561; 70 N. W. 678; 60 Am. St. 136; 37 L. R. A. 856. But compare Montgomery v. Santa Ana &c. R. Co. 104 Cal. 186; 37 Pac. 786; 43 Am. St. 89; 25 L. R. A. 654.

[3] See De Grauw v. Long Island Elec. R. Co. 60 N. Y. S. 163, affirmed in 163 N. Y. 597; 57 N. E. 1108; Cedar Rapids &c. R. Co. v. Cedar Rapids, 106 Ia. 476; 76 N. W. 728. See, also, Fayetteville &c. St. Ry. v. Aberdeen &c. R. Co. (N. Car.) 55 S. E. 345; post, § 1096be.

[4] Pennsylvania R. Co. v. Greensburg &c. St. R. Co. 176 Pa. St. 559; 35 Atl. 122; 36 L. R. A. 839. See, also, Farnum v. Haverhill &c. St. R. Co. (Mass.) 39 N. E. 755; Syracuse &c. R. Co. Matter of, 68 N. Y. S. 881; Cincinnati &c. Elec. St. R. Co. v. Cincinnati &c. R. Co. 12 Ohio Circ. Dec. 113. But compare Baltimore v. Baltimore &c. R. Co. 84 Md. 1; 35 Atl. 17; 33 L. R. A. 508; Hanna v. Metropolitan St. R. Co. 81 Mo. App. 78.

ground or an elevated railroad may be, in a sense at least, a street railway where it is for the accommodation of local travel and subserves or facilitates ordinary street use.[5] In a recent case it is also held that "an electric railway, operating beyond the limits of a city, and into a town incorporated for the mere maintenance of a park adjacent to the city, was a street railway, within a power reserved in the lease of the land used for the park, reserving to the lessors the right to grant a right of way through the land 'for street railway purposes.'"[6] The term "street railway" is neither as definite nor as expressive as is desirable, but it is the term now generally used, and it seems to be the best and most appropriate at command. It will not do to designate a street railroad as a "horse railroad," as is often done, for the power by which the cars are drawn along the tracks is frequently mechanical, and, indeed, there are now comparatively few "horse railroads;" nor will it do to designate a street railway as a "tramway," for that term is not ordinarily used in this country, and a tramway is said to be "a railroad laid along the roads or streets of a town or city on which cars for carriage of goods or passengers are drawn by horses or by some mechanical means," and this definition shows that tramways possess an essential feature that street railways do not ordinarily possess. The term "street" is, perhaps, too restrictive, for it seems that street railways may be operated, in part at least, upon suburban roads. With all its shortcomings and imperfections, however, the term "street railways" seems to be the best that can be used.

§ 1096b. Incorporation—Charter—Powers.—The rules elsewhere stated as to the incorporation, charter and powers of ordinary commercial railroads apply in general to street railways, except in so far as the statutory provisions differ in the particular jurisdiction, or the different nature and purposes of the corporation may make

[5] New York Dist. R. Co. Matter of, 107 N. Y. 42; 14 N. E. 187. See, also, Com. v. Northeastern El. R. Co. 3 Pa. Dist. 593; Doane v. Lake St. El. R. Co. 165 Ill. 510; 46 N. E. 520; 36 L. R. A. 97; 56 Am. St. 265; People's Rapid Transit Co. Matter of, 125 N. Y. 93; 26 N. E. 25; 10 L. R. A. 728; Sears v. Crocker, 184 Mass. 586; 69 N. E. 329; 100 Am. St. 577 (subway for rapid passenger transportation not an additional burden).

[6] Montgomery Amusement Co. v. Montgomery Trac. Co. 139 Fed. 353. But compare Philadelphia v. McManes, 175 Pa. St. 28; 34 Atl. 331.

such rules inapplicable. It has been held that, in the absence of any constitutional provision to the contrary, the legislature may grant to individuals and their assigns the right to construct and operate such a road.[7] But individuals cannot exercise franchises granted only to corporations,[8] although it has been held that they may be a conduit for transmitting them to a corporation as provided by law, and may bid at a foreclosure sale and transmit the franchises, as well as ordinary property, to a corporation authorized to exercise them.[9] It has been said that railway companies "are usually organized under the same laws applicable to railroads generally,"[10] but we think it will be found that in many, if not most, jurisdictions, there are statutes specifically providing for street railways, and it is often a question of some difficulty to determine whether they can be organized under or are governed by statutes relating to railroads generally.[11] In a recent case it is held that a grant by a city to a company organized under the Michigan Train Railway Act, of the right to construct and operate a street railway with all necessary tracks and connections, all tracks to be constructed under the supervision and with the approval of the common council, does not authorize the company to make a connection in the streets of the city with the tracks of a company organized and operating under the general railroad laws, and having no franchise from the city, though in the ordinances granting franchises to such train railway company, and

[7] New York &c. R. Co. v. Forty-second St. &c. Co. 50 Barb. (N. Y.) 309; Kerr, Matter of, 42 Barb. (N. Y.) 119. See also, Budd v. Multnomah St. R. Co. 15 Oreg. 404; 15 Pac. 654; 3 Am. St. 169; Henderson v. Ogden City R. Co. 7 Utah, 199; 26 Pac. 286.

[8] Wilder v. Aurora &c. Trac. Co. 216 Ill. 493; 75 N. E. 194; Goddard v. Chicago &c. R. Co. 202 Ill. 362; 66 N. E. 1066.

[9] Parker v. Elmira &c. R. Co. 165 N. Y. 274; 59 N. E. 81; Nellis Street Surface Railroads, § 2. See, also, Birmingham R. &c. Co. v. Birmingham Trac. Co. 128 Ala. 110; 29 So. 187.

[10] Nellis Street Surface Railroads, § 4. See, also, Wilmington City R. Co. v. People's R. Co. (Del.) 47 Atl. 245.

[11] See ante, Vol. I, § 4. As to presumption that company was organized under general act for incorporation of street railways, see Smith v. Indianapolis St. R. Co. 158 Ind. 425; 63 N. E. 849. As to curative acts and validating attempt to incorporate, see Brown v. Atlanta &c. R. Co. 113 Ga. 462; 39 S. E. 71; Kittinger v. Buffalo Trac. Co. 160 N. Y. 377; 54 N. E. 1081; Louisville Trust Co. v. Cincinnati, 76 Fed. 296; 22 C. C. A. 334; McCartney v. Chicago &c. R. Co. 112 Ill. 611.

to another company organized under the general railroad laws, a connection between them, and transfers from the one to the other, were required; and that such Train Railway Act, providing that companies organized thereunder may make connection with any other railroad, and that when the road of such a company is intersected by any new road it shall unite with such road in making a connection, and grant running and business facilities, does not authorize such a company to make connection, as it pleases, in the streets of a city, with the road of a company organized under the general railroad act, other sections of the act allowing construction of a railroad in the streets of a city only with the consent of, and subject to the conditions imposed by, the city authorities.[12] But although a town was incorporated merely for park purposes, had never been platted, was without streets, and its entire territory had been surrendered to a private corporation as a park, it was still held to be a town which might be legally made the terminus of a street railway; and as the building of such railway into the town not being *ultra vires,* it was held that the railway had a right to acquire a right of way over private property within the town by purchase or lease from the owners, no matter whether it had power to condemn a right of way over property in the town or not.[13] The charter constitutes a contract in the same sense as in the case of an ordinary railroad company,[14] and the rules as to impairing its obligation, as to when it may be amended, repealed or forfeited, and the like, are the same, in general, as those already stated in regard to commercial railroad companies. The subject will also be further considered with special reference to regulation of fare, municipal control, and the exercise of the police power as to street railway companies, in subsequent sections.

§ 1096c. Street railway not ordinarily an additional burden.— As a street railway facilitates local travel and is regarded as a street use, unlike an ordinary through commercial railroad, it does not constitute an additional burden for which abutting property owners

[12] Monroe v. Detroit &c. R. Co. (Mich.) 106 N. W. 704.

[13] Montgomery Amusement Co. v. Montgomery Trac. Co. 139 Fed. 353.

[14] But in the case of a street railway many of the rights of the company are usually acquired by contract with the municipality, ordinarily made by ordinance and its acceptance.

are entitled to compensation, at least as ordinarily constructed upon the surface of the street. This general rule is well settled, with comparatively slight dissent, by the overwhelming weight of authority.[15] And the mere fact alone that the motive power is electricity,[16]

[15] Elfelt v. Stillwater St. R. Co. 53 Minn. 68; 55 N. W. 116; Elliott v. Fair Haven &c. R. Co. 32 Conn. 579; Hinchman v. Paterson Horse R. Co. 17 N. J. Eq. 75; 86 Am. Dec. 252; Jersey City &c. R. Co. v. Jersey City Horse R. Co. 20 N. J. Eq. 61; Newark &c. R. Co. v. Block, 55 N. J. L. 605; 22 L. R. A. 374; 27 Atl. 1067; Cincinnati &c. St. R. Co. v. Cumminsville, 14 Ohio St. 523; Eichels v. Evansville St. R. Co. 78 Ind. 261; 41 Am. R. 561; Chicago &c. R. Co. v. Whiting St. R. Co. 139 Ind. 297; 38 N. E. 604; 47 Am. St. 264; 26 L. R. A. 337; Attorney-General v. Metropolitan R. Co. 125 Mass. 515; 28 Am. R. 264; Birmingham Trac. Co. v. Electric Co. 119 Ala. 137; 24 So. 502; 43 L. R. A. 233; Taylor v. Portsmouth &c. St. R. 91 Me. 193; 39 Atl. 560; 64 Am. St. 216; Louisville R. Co. v. Foster (Ky.), 45 S. W. 235, 236; 50 L. R. A. 815 (citing text); Brown v. Duplessis, 14 La. Ann. 842; Savannah &c. R. Co. v. Mayor, 45 Ga. 602; Hiss v. Baltimore &c. R. Co. 52 Md. 242; 36 Am. R. 371; Texas &c. R. Co. v. Rosedale &c. R. Co. 64 Tex. 80; 53 Am. R. 739; 22 Am. & Eng. R. Cas. 160; State v. Jacksonville &c. R. Co. 29 Fla. 590; 10 So. 590; Randall v. Jacksonville St. R. Co. 19 Fla. 409; 17 Am. & Eng. R. Cas. 184; Rafferty v. Central &c. Co. 147 Pa. St. 579; 23 Atl. 884; 30 Am. St. 763. Contra, Craig v. Rochester &c. R. Co. 39 N. Y. 404; People v. Kerr, 27 N. Y. 188. In New York no distinction seems to be made between commercial and ordinary street railroads, but the right of the abutter to compensation in either case is made to depend upon the effect of the construction and operation of the road, and the ownership of the fee is an important consideration. See Fobes v. Rome &c. R. Co. 121 N. Y. 505; 24 N. E. 919; 8 L. R. A. 453, and note; Peck v. Schenectady R. Co. 170 N. Y. 298; 63 N. E. 357. Mr. Lewis also takes the position that on principle, the distinction between commercial and street railways is unsound, and is inclined to think that both ought to be considered additional burdens.

[16] Ante, § 8. See, also, Green v. City R. Co. 78 Md. 294; 28 Atl. 626; 44 Am. St. 288, and note; Birmingham Trac. Co. v. Electric Co. 119 Ala. 137; 24 So. 502; 43 L. R. A. 233; Canastota Knife Co. v. Newington Tramway Co. 69 Conn. 146; 36 Atl. 1107; Philadelphia &c. Co. v. Wilmington City R. (Del.) 38 Atl. 1067; Southern R. v. Atlanta &c. Ry. 111 Ga. 679; 36 S. E. 873; 51 L. R. A. 125; General Elec. R. v. Chicago &c. R. 184 Ill. 588; 56 N. E. 963; Snyder v. Ft. Madison &c. R. Co. 105 Iowa 284; 75 N. W. 179; 41 L. R. A. 345; Louisville Bagging Mfg. Co. v. Central Pass. R. Co. 95 Ky. 50; 23 S. W. 592; 44 Am. St. 203; Georgetown &c. Traction Co. v. Mulholland, 25 Ky. L. 578; 76 S. W. 148; Taylor v. Portsmouth &c. Co. 91 Me. 193; 39 Atl. 560; 64 Am. St. 216; Howe v.

cable,[17] or the like, usually makes no difference. Thus, in a recent case, it is said: "In determining whether a street railroad is an additional burden upon the land already set aside for public use as a highway, we are to look to the manner of its construction and use, and not to the motive power. The latter may be steam, horse, electric or compressed air power, and the road and its operation be consistent with the common public use for which the street was originally designed, and not violate private rights; and either may be so used, and the road be so constructed and operated as to have the opposite effect. Electric railroads constructed in the usual way and operated by the use of the overhead trolley wire supported by cross-wires fastened to poles set at the curb lines of the street, or otherwise located so as not to materially interfere with the ordinary common use of the street, belong to the former class, as we shall see later; and that has become so firmly established by the courts that it cannot be considered open to serious question."[17a]

§ 1096d. When street railway is an additional burden.[a]—While

West End St. R. Co. 167 Mass. 46; 44 N. E. 386; Younkin v. Milwaukee Trac. Co. 120 Wis. 477; 98 N. W. 215; also note in 2 Am. L. Reg. & Rev. (N. S.) 38; and note in 106 Am. St. 244, 245. But it has been held an additional burden on a country road. Pennsylvania R. v. Montgomery &c. Ry. 167 Pa. St. 62; 31 Atl. 562; 27 L. R. A. 766; 46 Am. St. 659. But see Heilman v. Lebanon &c. R. Co. 145 Pa. St. 23; 23 Atl. 389.

[17] Ante, § 9.

[17a] LaCrosse City R. Co. v. Higbee, 107 Wis. 389; 83 N. W. 701; 51 L. R. A. 923. See, also, Eustis v. Milton St. R. 183 Mass. 586; 67 N. E. 663; Briggs v. Lewiston &c. R. 79 Me. 363; 10 Atl. 47; 1 Am. St. 316 (steam may be used); Nichols v. Ann Arbor &c. St. R. Co. 87 Mich. 361; 49 N. W. 538; 16 L. R. A. 371; Dean v. Ann Arbor St. R. Co. 93 Mich. 330; 53 N. W. 396; Placke v. Union Depot R. Co. 140 Mo. 634; 41 S. W. 915; Roebling v. Trenton Pass. R. Co. 58 N. J. L. 666; 34 Atl. 1090; 33 L. R. A. 129; Budd v. Camden Horse R. Co. 70 N. J. L. 782; 59 Atl. 229; Merrick v. Intramontaine R. Co. 118 N. C. 1081; 24 S. E. 667; Heilman v. Lebanon &c. Co. 145 Pa. St. 23; 3 Atl. 389; Taggart v. Newport St. R. Co. 16 R. I. 668; 19 Atl. 326; 7 L. R. A. 205; Cumberland Tel. &c. Co. v. United Electric R. Co. 93 Tenn. 492; 29 S. W. 104; 27 L. R. A. 236; Reid v. Norfolk City R. Co. 94 Va. 117; 26 S. E. 428; 36 L. R. A. 274; 64 Am. St. 708. See also to the effect that property owners are not ordinarily entitled to enjoin the construction of the road, General Elec. R. Co. v. Chicago &c. R. Co. 184 Ill. 588; 56 N. E. 963; People v. Ft. Wayne &c. R. Co. 92 Mich. 522; 52 N. W. 1010; 16 L. R. A. 752.

[a] This and several subsequent

an ordinary street railway constructed in the usual mode, and so as not to materially impair the easement of access, is not an additional burden, yet, where it is so constructed as to materially impair the rights of the abutter, it seems to us that it should be treated as an additional burden entitling the owner to compensation.[18] If, for in-

sections in this chapter are taken, in the main, from "Roads and Streets."

[18] Nichols v. Ann Arbor &c. St. R. Co. 87 Mich. 361; 49 N. W. 538; 16 L. R. A. 371; McQuaid v. Portland &c. R. Co. 18 Ore. 237; 22 Pac. 899; Craig v. Rochester, 39 N. Y. 404; Story v. N. Y. &c. Co. 90 N. Y. 122; 43 Am. R. 146; Reinnig v. New York &c. R. Co. 128 N. Y. 157; 28 N. E. 640; 14 L. R. A. 133. See, also, Carolina Cent. R. Co. v. Wilmington St. R. Co. 120 N. C. 520; 26 S. E. 914, 919 (citing text); Onset St. R. Co. v. Plymouth Co. Comrs. 154 Mass. 395; 28 N. E. 286. For a collection of the New York cases see 3 Abbott's New Cases, 306 et seq. Upon the general subject the following cases are interesting and instructive: Barnett v. Johnson, 15 N. J. Eq. 481; Bell v. Gough, 3 Zabr. (N. J.) 624; Thurston v. City of St. Joseph, 51 Mo. 511, 514; Codman v. Evans, 5 Allen (Mass.) 308; 81 Am. Dec. 748. In the case of Ottentot v. N. Y. &c. Co. 119 N. Y. 603; 23 N. E. 169; 41 Alb. L. J. 194, the New York court of appeals seems to somewhat limit some of its former decisions. In that case it was held that the city might empower a street railway company to construct an embankment in the street, and that an abutter could not recover damages, no matter how much his property was injured. The reasoning of the court is, that the city had discretionary authority to change the grade, "and it must be immaterial what the causes were which made the change of grade necessary or useful." See, also, Selden v. Jacksonville, 28 Fla. 558; 10 So. 457; 14 L. R. A. 370; 29 Am. St. 278. The rule that municipal corporations may change the grades of streets at pleasure is, at best, not easily defended, and to so extend it as to make it work for the benefit of a private corporation at the expense of a property owner, is giving a harsh rule an application that it should never receive. We do not believe that the discretionary power to change the grades of streets exists where the change is solely for the benefit of a private corporation or an individual. We cannot avoid the conviction that the courts may inquire whether the change is for municipal purposes or exclusively for the benefit of a private corporation, and if they find that it is solely for the benefit of such a corporation they may rightfully interfere. (Quoted with approval in Zehren v. Milwaukee &c. R. Co. 99 Wis. 83; 74 N. W. 538, 541; 67 Am. St. 844; 41 L. R. A. 575.) See, also, Eachus v. Los Angeles &c. Co. 103 Cal. 614; 37 Pac. 750; 42 Am. St. 149. The general subject is considered and many additional authorities are cited, ante, § 1096c,

stance, embankments are raised in the street for the purpose of accommodating the railway company, and not as part of the system for the improvement of the streets, and the access to the abutting property is thus shut off, the owner is entitled to reimbursement for the loss he actually sustains. This doctrine is, as we believe, within the principle asserted in the elevated railway cases and in a number of other kindred cases, and it has a foundation in solid principle.[19] It seems to be a sacrifice of substantial right to an imaginary logical deduction to hold that, because the use is for a street railway, therefore no recoverable loss is sustained by the abutter whose property is lessened in value. It is, in truth, somewhat difficult to entirely and satisfactorily vindicate the doctrine that private corporations may use the streets of a city for their own benefit, but as the question is firmly settled by authority, it is profitless to discuss it now; it is not, however, inappropriate to suggest that the doctrine ought not to be extended,[20] and yet it has been extended in some jurisdic-

and in the notes in 43 L. R. A. 554, and 34 Am. Law Reg. (N. S.) 47–51.

[19] But where a street railway company was authorized to make connections with its power house and car barns it was held that it had power to lay switches and curves upon any of the streets adjoining its barns and was not confined to the streets specified, that they were not an additional burden, and that the maintenance of the barn in the city, with the loud and disagreeable noises incident to its use and the switching of cars was not an actionable nuisance. Romer v. St. Paul &c. R. Co. 75 Minn. 211; 77 N. W. 825; 74 Am. St. 455. And it has been held that so laying the track that passing cars overhang the sidewalks a few inches gives no right of action to an abutter whose access is not impaired. Hester v. Durham Trac. Co. 138 N. Car. 288; 50 S. E. 711; 1 L. R. A. (N. S.) 981. See, also, Campbell v. Metropolitan St. R. Co. 82 Ga. 320; 9 S. E. 1078.

[20] It is to be regretted that Mitchell, J., did not develop the views so well outlined by him in the case of Newell v. Minneapolis &c. Co. 35 Minn. 112; 27 N. W. 839; 59 Am. R. 303, for the suggestions made by him will bear elaboration. "It seems to me," said he, "that the maintenance and operation of defendant's railroad constitutes a servitude additional to, and different from, the use for which the streets were acquired—in short, a new use of the streets, not contemplated at the time of their dedication. I do not see that this road differs from any ordinary commercial railroad except that it uses the entire length of the street as its depot at which it receives and lets off passengers. As operated, it is, to a certain extent, in aid of travel on the street, but this is a secondary and incidental, and not its main and principal purpose."

tions in practice, if not in theory. On the other hand, if, as may, perhaps, be true in the great majority of instances, no injury is done the abutter by the construction and operation of a street railway, then he is not entitled to compensation, but it does not follow that, because there is no injury in the majority of cases, there is no injury in any. It seems to us that whether there is or is not actionable injury in a particular case must depend upon the facts of such case, and that it is not just to turn the sufferer away by affirming that the occupancy of a street by a street railway, in legal contemplation, does the owner of the fee no harm, and therefore he can have no compensation. It is neither logical nor just to conclude that, whatever may be the fact as to actual loss, no compensation can be enforced by law, because a street railway in the eye of the law cannot injure the abutting property. The suggestions above made are not entirely without the support of authority. Thus, where embankments obstruct and materially impair the abutter's easement of access, it has been held that there is an additional burden,[21] or the road may be so constructed and operated as to constitute a nuisance and cause the abutter special damage for which he may be entitled to recover;[22] and where a pole was so placed as to unnecessarily in-

[21] See authorities cited in first note to this section, and particularly Merrick v. Intramontaine R. Co. 118 N. Car. 1081; 24 S. E. 667; Nichols v. Ann Arbor &c. R. Co. 87 Mich. 361; 49 N. W. 538; 16 L. R. A. 371. See, also, Jaynes v. Omaha St. R. Co. 53 Neb. 631; 74 N. W. 67; 39 L. R. A. 751. Abutter held not entitled to damages and no impairment of access by curve in tracks in Hester v. Durham Trac. Co. 138 N. Car. 288; 50 S. E. 711. See, also, Reynolds v. Prendio &c. R. Co. (Cal.) 81 Pac. 1118; Larve v. Northampton St. R. Co. 189 Mass. 254; 75 N. E. 255.

[22] Mahady v. Bushwick &c. R. Co. 91 N. Y. 148; 43 Am. R. 661; Fanning v. Osborne, 102 N. Y. 441; 7 N. E. 307; Limburger v. San Antonio &c. R. Co. (Tex.) 30 S. W. 533; Smith v. Street R. Co. 87 Tenn. 626; 11 S. W. 709; Williams v. City &c. Co. 41 Fed. 556. See, also, ante, § **1085**. The use of a T-rail does not necessarily constitute an additional burden or entitle the abutters to damages. See Nieman v. Detroit &c. St. R. Co. 103 Mich. 256; 1 Am. & Eng. R. Cas. (N. S.) 172; 61 N. W. 519; Easton &c. R. Co. v. Easton, 133 Pa. St. 505; 19 Atl. 486; 19 Am. St. 658; Randall v. Jacksonville St. R. Co. 19 Fla. 409, and compare State v. Madison St. R. Co. 72 Wis. 612; 40 N. W. 487; 1 L. R. A. 771; Louisville R. Co. v. Foster (Ky.), 45 S. W. 235; 50 L. R. A. 813.

terfere with the abutter's property, it was held that he was entitled to a mandatory injunction.[23]

§ 1096e. Street railways as highways.—Street railways and ordinary commercial railroads are, in a general sense, highways,[24] but they are not, in the strict sense, public ways, since their owners possess a private proprietary right in the franchise, and such railways are operated for private gain and not primarily for the public benefit. It is true that the public is incidentally benefited, but this benefit is not the chief purpose of the organization. A street railway cannot be regarded as within a statute prescribing rules and regulations for highways unless it appears from the context, or from the object of the statute, that it was the legislative intention to include that class of highways.[25]

§ 1096f. Right to take property under eminent domain.—The legislature may confer upon a street railway company the right to appropriate private property under the power of eminent domain.[26] This is frequently, but by no means invariably, done. But a street railway company cannot exercise such a right unless it is conferred by the legislature. It is quite clear that a mere grant by a municipal corporation to use its streets would not confer a right to seize private property;[27] and it has even been held that a statute authorizing the condemnation of a right of way by corporations "organized for the

[23] Snyder v. Ft. Madison St. R. Co. 105 Iowa, 284; 75 N. W. 179; 41 L. R. A. 345.

[24] Sun Pub. Ass'n v. Mayor, 152 N. Y. 257; 46 N. E. 499; 37 L. R. A. 788.

[25] Whitaker v. Eighth Ave. R. Co. 51 N. Y. 295. In this case it was said: "It is true also, that every railway for the transportation of persons is for public use. It is, nevertheless, the private property of its owner; and although the highway over which it passes remains a public highway, consistent with the unimpaired use of the railway, the railway itself is, notwithstanding, in the uses for which it was constructed a private road for the accommodation of the public and the profit of its owners, upon which no one but its owners have a right to run a car." See ante, § 33.

[26] Union Depot R. Co. v. Southern R. Co. 105 Mo. 562; 16 S. W. 920; St. Louis &c. R. Co. v. Southern R. Co. 105 Mo. 577; 16 S. W. 960. Petition of Kerr, In re, 42 Barb. (N. Y.) 119; Moran v. Ross, 79 Cal. 159; 21 Pac. 547.

[27] South Beach R. Co. v. Byrnes, 119 N. Y. 141; 23 N. E. 486. See, also, Fayetteville St. R. Co. v. Aberdeen St. R. Co. (N. Car.) 55 S. E. 345.

construction of any railway" did not give street railways such authority.[28] But it has been held that, although some of the purposes of the company as shown by the articles of incorporation are private, if others are public and can be separated, the company, under statutory authority, may condemn for the public purpose, and this, too, even though it may not fully and finally have obtained its franchise or license from the city.[29]

[28] Thompson-Houston Electric Co. v. Simon, 20 Ore. 60; 25 Pac. 147; 23 Am. St. 86. But see Ogden City R. Co. v. Ogden City, 7 Utah, 207; 26 Pac. 288.

[29] State v. Centralia &c. Co. 42 Wash. 632; 85 Pac. 344. In this case it is said: "The relator argues that, inasmuch as the respondent cannot construct its proposed road until it procures these franchises and this right of way, it is not in a position to say that this power will be needed by it at all, and hence it ought not to be permitted to condemn his land until it is certain that the land will be needed. . . . . It seems to us that the respondent had proceeded far enough to show that its immediate purpose was to apply the power it sought to create by the appropriation of the relator's property to a public use. This was its declared purpose, and its acts in so far as it had actually proceeded pointed to that end. Moreover, it is manifest that an enterprise of this character cannot be completed all at once. Being made up of several parts, it must be completed in parts. Why, then, should one part be deemed of more importance than another? Why may not the city as well say that it will not grant the franchise until the respondent has produced the power as the court may say that it will not grant the right to procure the power until the franchise is granted? If the city did so say, and the court should hold with the relator, it is plain that the enterprise has reached a point beyond which it cannot proceed. But we think there is no reason for such a holding. We think that when it is made to appear that a promotor of an enterprise of this kind is proceeding diligently with it, and nothing is shown to have occurred that will prevent its ultimate accomplishment, the court ought not to deny the right to acquire by condemnation an essential part merely because there is a possibility that the enterprise cannot be carried to completion. . . . . There are cases which maintain the doctrine that a statute authorizing the condemnation of property for uses a part of which only are of a public nature is in violation of the rule that private property cannot be taken for private use, and hence cannot be enforced. Gaylord v. Sanitary District of Chicago, 204 Ill. 576; 68 N. E. 522; 63 L. R. A. 582; 98 Am. St. 235; Ryerson v. Brown, 35 Mich. 333; 24 Am. R. 564. And there are cases which deny the right to condemn when the avowed purpose as set out in the petition is to condemn for uses some of which are private. Harding v. Goodlett, 3 Yerg. (Tenn.) 41; 24 Am. Dec. 546. But in this case the respond-

§ 1096g. Legislative sanction required to use streets.—Roads or streets cannot be occupied by street railway tracks without legislative sanction,[30] but the authority is not required to be granted directly by the legislature to the company. In an English case,[31] the

ent asks in its petition to condemn for the public uses only recited in its articles of incorporation, making no mention of those which are purely private. If a private use is combined with a public one in such a way that the two cannot be separated, then unquestionably the right of eminent domain could not be invoked to aid the enterprise; but it has been said, and it seems to us that it is the better reason, that, where the two are not so combined as to be inseparable, the good may be separated from the bad, and the right exercised for the uses that are public. Irrigation Co. v. Klein, 63 Kan. 484; 65 Pac. 684; Brown v. Gerald, 100 Maine, 351; 61 Atl. 785; 70 L. R. A. 472."

[30] Eichels v. Evansville &c. Co. 78 Ind. 261; 41 Am. R. 561; Citizens' R. Co. v. Africa, 100 Tenn. 26; 42 S. W. 485, 489 (citing text); Knoxville v. Africa, 77 Fed. 501, 507; Potts v. Quaker City R. Co. 161 Pa. St. 396; 29 Atl. 108. "In this country no franchise can be held which is not derived from the law of the state." People's R. Co. v. Memphis R. Co. 10 Wall. (U. S.) 38, 51; Davis v. Mayor &c. 14 N. Y. 506; 67 Am. Dec. 186 and note; Coleman v. Second Ave. R. Co. 38 N. Y. 201; Florida Cent. R. Co. v. Ocala St. R. Co. 39 Fla. 306; 22 So. 692; Farmer v. Myles, 106 La. Ann. 333; 30 So. 858, 863; Pittsburg &c. R. Co. v. Hood, 94 Fed. 618 (railway in street a nuisance if unauthorized); ante, § 1076.

[31] Regina v. Train, 2 B. & S. 640, 110 Eng. C. L. R. 640. In this case the court said: "But what has been done here is not making any arrangement for the use of the highway in the ordinary manner of using a highway. On the contrary, it is withdrawing so much of the highway from its ordinary use as such; for it is idle to say that you can use as an ordinary part of this highway the portion taken up by the tramways. A carriage meeting an omnibus running on one of them can not give and take the road. The case is like that of Reg. v. United Kingdom Electric Telegraph Co. (Limited.) (3 F. & F. 73), which we have just disposed of, and others of a similar nature. It also falls within Reg. v. Longton Gas Co. 29 L. J. M. C. 118; 6 Jurist N. S. 601, with which we took a good deal of pains, where a gas company, without being authorized by statute, opened trenches in the streets of a town for the purpose of laying down gas pipes, and this was adjudged a nuisance. If persons wish for power to act as the defendants acted here, they must take the usual regular and constitutional course of getting the protection of the legislature." And in South &c. R. Co. v. Highland Ave. &c. R. Co. 119 Ala. 105; 24 So. 114, it is held that a street railway company can not condemn land for a freight belt road.

governing officers of a parish granted the right to construct a tramway in the highway, and it was held that the grant was void, and that the tramway was a nuisance, the court declaring that such a grant could not be made without legislative authority. The authority must be granted by the legislature directly or through the authorized action of the municipality.[32]

§ 1096h. Delegation to municipality of right to authorize use of streets.—As intimated in the last preceding section, it is not necessary that authority to construct street railways on city streets should be conferred by a direct grant from the legislature, for the power to authorize the use of the streets by a street railway may be delegated to municipal corporations, and this is generally done.[33] Municipal corporations have no general or inherent power to create corpora-

[32] Pittsburg &c. R. Co. v. Hood, 94 Fed. 618.

[33] Ante, § 1076; Booth Street Railways, §§ 3, 12, 13; State v. Jacksonville &c. R. Co. 29 Fla. 590; 10 So. 590, 593. But the power of the municipal corporation to license the use of its streets is derived from the legislature, for independently of legislation it does not possess this power. In granting the franchise the municipality exercises a derivative power and not an inherent one. State v. Hilbert, 72 Wis. 184; 39 N. W. 326; Saginaw &c. Co. v. Saginaw, 28 Fed. 529. See, also, Almand v. Atlanta &c. R. Co. (Ga.) 34 S. E. 6, 9; Detroit Citizens' St. R. Co. v. Detroit, 110 Mich. 384; 68 N. W. 304; 35 L. R. A. 859; 64 Am. St. 350; Horner v. Eaton Rapids, 122 Mich. 117; 80 N. W. 1012. Whether the municipality possesses the power to license the use of its streets for railway purposes must, of course, depend upon the charter or act of incorporation. The dominant power which the state possesses over all its highways vests in the legislature the authority to license the use of the streets of a city without the consent of the municipal authorities. Jersey City v. Railroad Co. 20 N. J. Eq. 360. But, whether the right to use the streets is granted by a city or by the legislature directly, the source of power is always the state, for a franchise in the highways can only be created by legislative grant. "This," says Judge Redfield, "is one of the prerogatives of sovereignty and derivable only through the legislature." Redfield Railways (3d ed.), 317. See, also, 2 Dillon Municipal Corporations (3d ed.), § 792. Municipalities can not grant the right to construct a railroad in a street for merely private use. Mikesel v. Durkee, 34 Kans. 509; 9 Pac. 278; Heath v. Des Moines &c. R. Co. 61 Ia. 11; 15 N. W. 573; Macon v. Harris, 75 Ga. 761; Glaessner v. Anheuser-Busch &c. Co. 100 Mo. 508; 13 S. W. 707. See, also, Swift v. Delaware &c. R. Co. 66 N. J. 34; 57 Atl. 456.

tions, and it is only to such corporations as are created by law that they can grant the franchise of maintaining and operating street railways. Municipal corporations cannot authorize the occupancy of the public streets for railway purposes unless the act of incorporation confers such power, but it is not necessary that the power to authorize the use of the street by railway companies should be granted in express terms, for the right of the municipality to license the use of its streets by street railways may sometimes be inferred or arise by necessary implication.[34] Where full control is vested in a municipality, no street can be used for a railroad without the consent of the municipality, except, of course, where the legislature itself has authorized such a use. The legislature may do so without the consent of the municipality,[35] but in the case of street railways the matter is generally left by the legislature to the municipality to determine. And the general rule is that no one can use the public streets for any other purpose than that of ordinary travel, without the consent of the municipal authorities.[36]

§ 1096i. Consent of municipality or local authorities.—The consent of the municipality is usually required to be by ordinance.[37] But it has been held that, although the consent is required to be by

[34] Ante, §§ 1076, 1077; Booth Street Railways, §§ 13, 15.

[35] See ante, § 1076.

[36] Atchison St. R. Co. v. Missouri &c. Co. 31 Kan. 661; 3 Pac. 284; Atchison St. R. Co. v. Nave, 38 Kan. 744; 17 Pac. 587; 5 Am. St. 800, and note; Indianola v. Gulf &c. R. 56 Tex. 594, 599; People v. Com'rs of Public Works, 98 N. Y. 6; Brooklyn &c. Co. v. Brooklyn, 78 N. Y. 524; Chicago &c. R. Co. v. Chicago, 121 Ill. 176; 11 N. E. 907; Pennsylvania Co. Appeal, 116 Pa. St. 55; 8 Atl. 914. The consent given by a city ordinance to a street railway company is called an easement in Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628, 643; 26 L. R. A. 667.

[37] Holst v. Savannah &c. Co. 131 Fed. 931 (reversed on another point in 132 Fed. 901); Tennessee v. East Tennessee &c. Co. 115 Fed. 305; Board v. De Kay, 148 U. S. 591; 13 Sup. Ct. 706; West Jersey Trac. Co. v. Shivers, 58 N. J. L. 124; 33 Atl. 55. See, also, Thomas v. Inter.-Co. St. Ry. Co. 167 Pa. St. 120; 31 Atl. 476; Tamaqua &c. Co. v. Inter.-Co. St. Ry. Co. 167 Pa. St. 91; 31 Atl. 473, to the effect that it must be given by the authorities and in the manner required. See, also, ante, § 1078. A certificate of public convenience or necessity by commissioners is also required in some states. See People v. Steward Ry. Com'rs, 160 N. Y. 202; 54 N. E. 697; Wood, In re, 181 N. Y. 93; 73 N. E. 561.

ordinance, yet where, in the ordinance granting the consent, the right is reserved to the council to determine and control the location of poles, tracks and the like, the council may, on a mere motion, authorize a change of the location of a curve.[38] Ordinarily, however, the ordinance should show where the tracks are to be laid or over what streets,[39] at least where the termini and route are required to be stated; but when the consent is once properly obtained, it cannot be again required,[40] and cannot be taken away, after it is acted upon, without compensation.[41] It has been held that, where the statute limits the period for which the consent or right to use the streets may be granted, a consent or grant by the municipality without any limitation as to time will not be good, even for the time limited by the statute,[42] and that where the boundaries of a city are extended after the granting of the company's charter, the new portion is subject to the provisions of such charter requiring the consent of the city for the location of tracks and operation of the road.[43] It has also been held in Pennsylvania that if the proposed line passes through one or more boroughs or towns, the company must have the consent of any and all such municipalities or it cannot be built at all.[44] Although a statute provided that no street railroad corporation should construct, extend, or operate its road or tracks in that portion of any street, avenue, road or highway in which a street surface railroad is or shall be lawfully constructed, except for necessary crossings, without first obtaining the consent of the corporation owning or maintaining the same, it was held that "the consent of an existing railroad to the use of streets occupied by it by

[38] Mennel v. Detroit &c. R. 139 Mich. 106; 102 N. W. 633.

[39] Knoxville v. Africa, 77 Fed. 501; West Jersey Trac. Co. v. Camden &c. Co. 53 N. J. Eq. 163; 35 Atl. 49.

[40] Rochester El. R. Co. Matter of, 123 N. Y. 351; 25 N. E. 381.

[41] Detroit Citizens' St. R. Co. v. Detroit R. Co. 171 U. S. 48; 18 Sup. Ct. 732; Coney Island &c. R. Co. v. Kennedy, 44 N. Y. S. 825.

[42] Blaschko v. Wurster, 156 N. Y. 437; 51 N. E. 303. This, however, seems doubtful as a general proposition, and in the case cited the consent appears to have been granted on another theory, and not in pursuance of authority of the governing statute.

[43] Illinois Central R. Co. v. Chicago, 176 U. S. 646; 20 Sup. Ct. 509.

[44] Pennsylvania R. Co. v. Parkersburg &c. St. R. Co. 26 Pa. Sup. Ct. 159; Rahn Twp. v. Tamaqua &c. R. Co. 167 Pa. St. 84; 31 Atl. 472. See, also, West Jersey R. Co. v. Camden &c. Co. 53 N. J. Eq. 163; 35 Atl. 49. But compare Fayetteville St. R. v. Aberdeen &c. R. Co. (N. Car.) 55 S. E. 345.

a competing company was not a condition precedent to the right of such competing company to obtain the consent of local authorities to the use of such streets."[45]

§ 1096j. Consent of property owners.—In some jurisdictions the consent of the abutting property owners is also required, and it is sometimes provided that a petition must be filed by a certain number of such owners or those owning a certain number of feet of property fronting on the street. The requirements of the statute in this regard are material and must be complied with.[46] If the consents are for a single track,[47] or, it seems, a double track,[48] or the time for the construction of the road is limited, or the like,[49] the local authorities, under such statutes, are limited thereby, and cannot authorize something materially different, although, of course, the statute on the subject, if it contains a different provision, will govern.[50] It has been held in New York that the consents of the property owners may be given to individuals, their legal representatives and assigns, and turned over by them to a corporation legally authorized to construct and operate the road;[51] but under the Illinois statute, providing that any company which has been or shall be incorporated under the general laws of the state to construct, maintain or operate, any street railroad may enter on and appropriate any property necessary for the constructon and operation of its road, and the statute providing that the city council shall have no

[45] Electric City Ry. Co. v. Niagara Falls, 95 N. Y. S. 73. And a turnpike company is not a local authority whose consent is required or is sufficient under a statute requiring consent of the local authorities. Rochester El. R. Co. Matter of, 123 N. Y. 351; 25 N. E. 381.

[46] See New York Cable Co. v. Mayor, 104 N. Y. 1; 10 N. E. 332; Merritt v. Port Chester, 71 N. Y. 309; 27 Am. R. 47; Attorney-General v. Chicago &c. R. Co. 121 Ill. 638; 13 N. E. 176; Roberts v. Easton, 19 Ohio St. 78.

[47] Roberts v. Easton, 19 Ohio St. 78.

[48] Burlington v. Burlington St. R. Co. 49 Ia. 144; 31 Am. R. 145. But see Lake Roland El. R. Co. v. Baltimore, 77 Md. 352; 26 Atl. 510; 20 L. R. A. 126.

[49] Tibbetts v. West &c. St. R. Co. 153 Ill. 147; 38 N. E. 664.

[50] See People v. Sutter St. R. Co. 117 Cal. 604; 49 Pac. 736. It is held in Goldstrom v. Interborough &c. Transit Co. 100 N. Y. S. 911, that easements of abutting owners may be acquired by prescription.

[51] Geneva &c. Ry. Co. v. New York &c. R. Co. 163 N. Y. 228; 57 N. E. 498.

power to grant the use of or right to lay down any railroad tracks in any street of the city to any railroad company, whether incorporated under general or special law of the state, except on petition of property owners, an ordinance granting a street railway franchise to individuals is void.[52] It seems that when jurisdiction is obtained, by filing the necessary consents required by statute, it is not lost, in the absence of any condition to the contrary or estoppel, by lapse of time or ineffectual attempt to exercise it in the first instance,[53] and that such consents are not revocable.[54] Decisions showing who may consent and how the consent should be given and evidenced are cited below.[55]

§ 1096k. Selling franchise to bidder.—In some states it is provided that the franchise or right to use the streets shall be sold to the lowest or to the best bidder who will agree to certain conditions, such as paying the city the largest per centum on gross earnings, carrying passengers at the lowest rate of fare, or the like.[56] The statute must be substantially complied with, and the statutory con-

[52] Wilder v. Aurora &c. Trac. Co. 216 Ill. 493; 75 N. E. 194. See, also, Allen v. Clausen, 114 Wis. 244; 90 N. W. 181: It was also held, in the Illinois case, that an assignment by such individuals of their rights to a corporation subsequently organized did not operate as an assignment of the petition so as to authorize the city to pass another ordinance granting a new franchise to the corporation, although a new ordinance amending a void ordinance would not necessarily be invalid because passed as an amendment to a void act. As to the validity of a new grant after necessary consents are obtained, see Sanfleet v. Toledo, 10 Ohio C. C. 460.

[53] Currie v. Atlantic City, 66 N. J. L. 140; 48 Atl. 615, 1116.

[54] Adee v. Nassau El. R. Co. 65 App. Div. (N. Y.) 529; 72 N. Y. S. 992.

[55] See Tibbets v. West &c. St. R. Co. 153 Ill. 147; 38 N. E. 664; Simmons v. Toledo (Ohio C. C.) 1 Toledo Leg. N. 249; Ronnebaum v. Mt. Auburn Cable R. Co. 29 Ohio L. J. 338; St. Michael's &c. Church v. Forty-second St. &c. R. Co. 26 Misc. (N. Y.) 601; 57 N. Y. S. 881; Beesor v. Chicago, 75 Fed. 880 (forged consents); Cortland &c. Horse R. Co. Matter of, 31 Hun (N. Y.), 72, affirmed in 98 N. Y. 336; Sea Beach R. Co. v. Coney Island &c. R. Co. 22 App. Div. (N. Y.) 447; 47 N. Y. S. 981; Chicago City R. Co. v. People, 73 Ill. 541; Paterson &c. R. Co. v. Paterson, 24 N. J. Eq. 158; State v. Bechel, 22 Neb. 158; 34 N. W. 342; Shepard v. East Orange, 70 N. J. L. 203; 57 Atl. 441; Montclair &c. Academy v. North Jersey St. R. Co. 70 N. J. L. 229; 57 Atl. 1050; Paige v. Schenectady R. Co. 178 N. Y. 102; 70 N. E. 213.

[56] See Nellis Street Surface Railroads, § 7.

ditions cannot be modified and changed.[57] But considerable discretion is usually vested in the municipal authorities.[58]

§ 1096l. Time for which franchise may be granted.—It seems clear that, when the statute limits the term or time for which a municipality may grant to a street railway company the so-called franchise or right to use its streets, the grant cannot be made so as to extend beyond such term;[59] but where there is no such limitation, a more doubtful question is presented. In our opinion the better rule is that the ordinary general powers of a municipality over its streets will not authorize it to grant a monopoly or a perpetual right.[60] We

[57] See State v. Bell, 34 Ohio St. 194; Hart v. Buckner, 54 Fed. 925; People v. Barnard, 110 N. Y. 548; 18 N. E. 354; Beekman v. Third Ave. R. Co. 153 N. Y. 144; 47 N. E. 277; Johnson v. New Orleans, 105 La. Ann. 149; 29 So. 355; State v. West Side R. Co. 146 Mo. 155; 47 S. W. 950. See, also, Pacific Elec. R. Co. v. Los Angeles, 194 U. S. 112; 24 Sup. Ct. 586.

[58] See Beekman v. Third Ave. &c. R. Co. 153 N. Y. 144, 161; 47 N. E. 277; Knorr v. Miller, 5 Ohio C. C. 609; Sloane v. People's El. R. Co. 7 Ohio C. C. 84; New Orleans &c. R. Co. v. Watkins, 48 La. Ann. 1550; 21 So. 199; Johnson v. New Orleans, 105 La. Ann. 149; 29 So. 355. See generally Smith v. Indianapolis St. R. Co. 158 Ind. 425; 63 N. E. 849; Kuhn v. Knight, 101 N. Y. S. 1.

[59] A perpetual grant under such a statute has been held not to be valid even for the term limited. Blaschko v. Wurster, 156 N. Y. 437; 51 N. E. 303. See, also, Gas Light &c. Co. v. New Albany, 156 Ind. 406; 59 N. E. 176, and authorities cited.

[60] Louisville City R. Co. v. Louisville, 8 Bush (Ky.) 415; Memphis City R. Co. v. Memphis, 4 Cold. (Tenn.) 406; Nash v. Lowry, 37 Minn. 261; 33 N. W. 787; Lake Roland &c. R. Co. v. Mayor, 77 Md. 352; 26 Atl. 510; 20 L. R. A. 126; Eichels v. Evansville St. R. Co. 78 Ind. 261; 41 Am. R. 561; State v. Trenton, 36 N. J. L. 79; Birmingham &c. St. R. Co. v. Birmingham St. R. Co. 79 Ala. 465; 58 Am. R. 615; Davis v. Mayor, 14 N. Y. 506; 67 Am. Dec. 186, and note; Milhau v. Sharp, 27 N. Y. 611; 84 Am. Dec. 314; Denver &c. R. Co. v. Denver City R. Co. 2 Colo. 673; Boston v. Richardson, 13 Allen (Mass.) 146, 161. See, also, Detroit v. Detroit City R. Co. 64 Fed. 628; 26 L. R. A. 667; 1 Am. & Eng. R. Cas. (N. S.) 71; Altgelt v. San Antonio, 81 Tex. 436; 17 S. W. 75; 13 L. R. A. 383, and note; Houston v. Houston &c. R. Co. 83 Tex. 548; 19 S. W. 127; 29 Am. St. 679, 685; New Orleans &c. R. Co. v. New Orleans, 44 La. Ann. 748; 11 So. 77; Parkhurst v. Capital City R. Co. 23 Ore. 471; 32 Pac. 304; 7 Lewis' Am. Corp. & R. 562; 26 Am. L. Rev. 675. But compare Brown v. Duplessis, 14 La. Ann. 842; State v. Corrigan &c. St. R. Co. 85 Mo. 263; 55 Am. R. 361; 29 Am. & Eng. R. Cas. 591.

have elsewhere considered the subject of monopolies and perpetual grants, however, and it is sufficient, in this connection, to add that where a municipality is given the power to make a perpetual grant of such a character it seems, according to the weight of authority, that the term of such grant may extend beyond the corporate life of the grantee, at least where the grant is assignable.[61] So, on the other hand, it has been held that a street railway company which is given perpetual corporate existence by the statute under which it is incorporated, although subject to the reserved power of the legislature to amend or repeal, acquires a perpetual right to use the streets of a city, notwithstanding a provision of the statute requiring it to first obtain the consent of the city, and notwithstanding it obtained such consent only upon the express condition, embodied in the ordinance which it accepted, that its rights in the streets should be limited to a specified term of years.[62] It seems to us, however, that all that the railway company derived directly from the state by its incorporation under the statute was the right to be a corporation with capacity to receive the right to use the streets of the city upon such terms as the city might consent to grant; that this was an entirely different thing from the so-called franchise or right to use certain streets in a certain city, which, according to the very statute under which it was incorporated, it could never have used at all under any circumstances without the consent of the city; and that as the city could have entirely prohibited such use of its streets, it certainly had the power to impose a condition limiting the time of the use. As we have elsewhere shown, a railroad or other corporation may exist without a right of way or any property whatever. It does not

[61] Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628; 26 L. R. A. 667; 1 Am. & Eng. R. Cas. (N. S.) 71; Detroit v. Detroit Citizens' St. R. Co. 184 U. S. 368; 22 Sup. Ct. 410; People v. O'Brien, 111 N. Y. 1; 2 L. R. A. 255, and note; 7 Am. St. 684, and note. See, also, Union Pac. R. Co. v. Chicago &c. R. Co. 51 Fed. 309; 2 C. C. A. 174; Nicoll v. New York R. Co. 12 N. Y. 121; Milhau v. Sharp, 27 N. Y. 611; 84 Am. Dec. 314; Davis v. Mayor, 14 N. Y. 506; 67 Am. Dec. 186, and note; People v. President of California College, 38 Cal. 166. But compare Turnpike Co. v. Illinois, 96 U. S. 63; Detroit v. Detroit City R. Co. 56 Fed. 867; Augusta &c. R. Co. v. Augusta, 100 Ga. 701; 28 S. E. 126; Louisville Trust Co. v. Cincinnati, 76 Fed. 296.

[62] Citizens' St. R. Co. v. City R. Co. 64 Fed. 647. Per Woods, J. (Dissenting opinion upon this point by Baker, J., Id. 656); Africa v. Board &c. of Knoxville, 70 Fed. 729.

follow, as the courts seem to have thought in the cases referred to, that the grant of a franchise to exist perpetually as a corporation necessarily carries with it a perpetual right to use the streets of a city in the face of a statutory provision that it shall not use such streets at all without the city's consent and an ordinance, accepted by it, which expressly limits such use to a specified time. We content ourselves with citing some of the authorities which lead us to this conclusion, without further comment.[63] Where the grant was directly to the company by the legislature of streets to be selected, it was held that the grant was for the life of the corporation, and could not be limited by the municipality;[63a] but the judgment in the case referred to was reversed by the Supreme Court of the United States.[63b]

§ 1096m. Extension of term.—The term may be extended, or the grant renewed, in a proper case.[64] The continued operation of a street railway is a sufficient consideration for an ordinance extending the

[63] Allegheny v. Millville &c. St. R. Co. 159 Pa. 411; 28 Atl. 202; Andrews v. National &c. Works, 61 Fed. 782; Fort Worth &c. Co. v. Rosedale &c. R. Co. 68 Tex. 169; 4 S. W. 534; Tudor v. Chicago &c. R. Co. 154 Ill. 129; 39 N. E. 136; Grand Rapids &c. Co. v. Prange, 35 Mich. 400; 24 Am. R. 585; Southern &c. Co. v. Orton, 32 Fed. 457; Suburban &c. Co. v. Board, 153 Mass. 200; 26 N. E. 447; 10 L. R. A. 497, and note; Union &c. Co. v. Southern Co. 105 Mo. 562; 16 S. W. 920; Northern &c. Co. v. Mayor, 21 Md. 93; St. Louis &c. Co. v. Southern Co., 105 Mo. 577; 16 S. W. 960; Board v. South Bend &c. Co. 118 Ind. 68; 20 N. E. 499; Pacific Railroad Co. v. Leavenworth City, 1 Dillon (U. S. C. C.) 393; 398; Larimer &c. R. Co. v. Larimer &c. R. Co. 137 Pa. St. 533; 20 Atl. 570; Augusta &c. R. Co. v. Augusta, 100 Ga. 701; 28 S. E. 126; Louisville Trust Co. v. Cincinnati, 76 Fed. 296; Houston v. Houston City St. R. Co. 83 Tex. 548; 19 S. W. 127; 29 Am. St. 679; City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157. See, also, ante, §§ 68, 69, and Blair v. Chicago, 201 U. S. 400; 26 Sup. Ct. 427.

[63a] Govin v. Chicago, 132 Fed. 848.

[63b] Blair v. Chicago, 201 U. S. 400; 26 Sup. Ct. 427.

[64] Houston v. Houston City St. R. Co. 83 Tex. 548; 19 S. W. 127; 29 Am. St. 679; City R. Co. v. Citizens' St. R. Co. 166 U. S. 557; 17 Sup. Ct. 653; Cleveland v. Cleveland Elec. R. Co. 201 U. S. 529; 26 Sup. Ct. 513. As to extensions of road, see West Jersey Trac. Co. v. Camden &c. Co. 53 N. J. Eq. 163; 35 Atl. 49; Citizens' St. R. Co. v. Africa, 100 Tenn. 26; 42 S. W. 485; Beekman v. Third Ave. R. Co. 153 N. Y. 144; 47 N. E. 277; Mt. Auburn Cable Co. v. Neare, 54 Ohio St. 153; 42 N. E. 768; Silsby v. Lyle, 117 Mich. 327; 75 N. W. 886.

term originally fixed, and a city which extends the time, in order to enable the company to refund its bonded debt at a lower rate of interest, is estopped, after the negotiation of the new bonds, on the faith thereof, from attaching such extension for want of consideration.[65] It has also been held, by the Supreme Court of the United States, that municipal extensions of the life of a street railway franchise before the original grant has expired are authorized by the Ohio statute, although the language of the statute is that the council may renew any such grant at its expiration; that an ordinance extending a street railway franchise from the time originally fixed for its termination to the date fixed for the expiration of a franchise granted to another company with which the company operating the former franchise was consolidated, with the consent of the city, does not violate the provision of the Ohio statute that a municipal corporation shall not, during the term of a street railway grant or renewal thereof, release the grantee from any obligation or liability thereby imposed; and that an intention to prolong the life of the franchise of such first company from the date originally fixed for its termination to the date fixed for the expiration of the franchise granted to such other company with which the company operating the former franchise was consolidated, should be inferred from ordinances authorizing the consolidated company to extend its lines and change to electricity as a motive power, the rights under all of which were to terminate with the franchise of the "main line," which was recognized as continuing until that date.[66] But in a still more recent case, where, however, a branch had been kept separate and given a different term of life, and there were other distinguishing facts, it was held by the same court that an extension of the life of one did not extend that of the other; that a grant made to terminate with the grant to the main line meant and was measured by the grant as it then existed, and not any subsequent extension of the term; and that a municipal ordinance consenting to consolidation did not operate to extend the term of all.[67]

[65] City R. Co. v. Citizens' St. R. Co. 166 U. S. 557; 17 Sup. Ct. 653.

[66] Cleveland v. Cleveland Elec. R. Co. 201 U. S. 529; 26 Sup. Ct. 513. It is also held in Cleveland v. Cleveland City R. Co. 194 U. S. 517; 24 Sup. Ct. 757, that the right to extend or renew the grant may be exercised under such statute before the expiration of the original grant.

[67] Cleveland Elec. R. Co. v. Cleveland (U. S.) 27 Sup. Ct. 202.

§ 1096n. Ordinance granting the right is a contract.—The prevailing opinion is that an ordinance proposing conditions and terms to a street railway company becomes an irrevocable contract when it is accepted and acted upon by the company.[68] Indeed, this may be regarded as the well-settled rule. But, while it is true that, in granting a railway company the right to use its streets, a municipal corporation exercises a governmental power delegated to it by the legislature, and the ordinance, when accepted, is in the nature of a contract, it is not a contract entirely beyond municipal or legislative control. And, while the right granted by the municipality to use the streets is frequently called a franchise, it is not, ordinarily at least, a primary franchise, but is more in the nature of a license, which is not irrevocable until accepted.[69]

[68] People v. Chicago &c. Co. 18 Ill. App. 125; People v. O'Brien, 111 N. Y. 1; 7 Am. St. R. 684; 2 L. R. A. 255, and note; State v. Noyes, 47 Me. 189; Commonwealth v. Proprietors &c. 2 Gray (Mass.), 339; Williams v. Citizens' R. Co. 130 Ind. 71, 73; 29 N. E. R. 408, 409 (citing text); 15 L. R. A. 64; 30 Am. St. 201; City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157; City R. Co. v. Citizens' St. R. Co. 166 U. S. 557; 17 Sup. Ct. 653; Belleville v. Citizens' Horse R. Co. 152 Ill. 171; 38 N. E. R. 584; 26 L. R. A. 681 (although a mere license up to that time); Asheville St. R. Co. v. Asheville, 109 N. C. 688; 14 S. E. 316; Arcata v. Arcata &c. Co. 92 Cal. 639; 28 Pac. R. 676. In People v. O'Brien, 111 N. Y. 1; 2 L. R. A. 255, and note; 7 Am. St. 684, and note, it is held that a grant to a street railway company vests property in it in perpetuity, although the corporation is created only for a limited period. The court cited, among others, the cases of People v. Sturtevant, 9 N. Y. 263; 59 Am. Dec. 536; Davis v. Mayor, 14 N. Y. 406; 67 Am. Dec. 186; Milhau v. Sharp, 27 N. Y. 611; 84 Am. Dec. 314. See, also, Detroit v. Detroit &c. Co. 43 Mich. 140; 5 N. W. 275; Commonwealth v. Essex Co. 13 Gray (Mass.), 239; Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628; 26 L. R. A. 667; Citizens' St. R. Co. v. City R. Co. 64 Fed. 647. But compare Turnpike Co. v. Illinois, 96 U. S. 63; Detroit v. Detroit &c. R. Co. 56 Fed. 867. So, the right to use the street may be limited to a shorter period than the life of the company. Louisville &c. R. Co. v. Cincinnati, 76 Fed. 296. As to the right to amend or repeal, see Greenwood v. Freight Co. 105 U. S. 13; Medford &c. R. Co. v. Somerville, 111 Mass. 232; People v. Chicago &c. R. Co. 118 Ill. 113; 7 N. E. 116. Ante, § 1079.

[69] In Govin v. Chicago, 132 Fed. 848, 857, it is said: "'Franchise' is the grant from the state . . . ; 'licenses' are the designation by the council of the streets to be occupied; and 'contracts' are the stipulated arrangements between the companies and the city as to the manner of occupancy. See, also,

§ 1096o. Contract is subject to police power.—No contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public.[70] This is especially true of the police power, for it is incapable of alienation.[71] It cannot be doubted that a company which secures a right to use the streets of a municipal corporation takes it subject to the police power resident in the state as an inalienable attribute of sovereignty.[72] It is upon this principle that it has been held that a municipal corporation may displace the track of a street railway and prevent its operation for a reasonable time when it becomes necessary in order to enable the municipality to construct a sewer.[73] The surrender or alienation of the police power would, it is evident, lead to disastrous consequences, and there can be no doubt that the attempt to surrender or alienate this power, or to so fetter it as to impair its usefulness, would be ineffective; but while this is true, it is also true that it is not possible to accurate-

Belleville v. Citizens' Horse R. Co. 152 Ill. 171; 38 N. E. 584; 26 L. R. A. 681; Atchison St. R. Co. v. Nave, 38 Kans. 744; 17 Pac. 587; 5 Am. St. 800. But compare State v. East Fifth St. R. Co. 140 Mo. 539; 41 S. W. 955; 38 L. R. A. 218; 62 Am. St. 742; Wright v. Milwaukee Elec. R. &c. Co. 95 Wis. 29; 69 N. W. 791; 36 L. R. A. 47; 60 Am. St. 74, and note; Blair v. Chicago, 201 U. S. 400; 26 Sup. Ct. 427.

[70] It has been held by the Supreme Court of the United States, however, that a state may bind itself by a charter in the nature of a contract not to exercise the power of taxation. New Jersey v. Wilson, 7 Cranch (U. S.) 164; McGee v. Mathis, 4 Wall. (U. S.) 143; Farrington v. Tennessee, 95 U. S. 679; University v. Illinois, 99 U. S. 309.

[71] Thorpe v. Rutland &c. R. Co. 27 Vt. 140; 62 Am. Dec. 625; Indianapolis &c. Co. v. Kercheval, 16 Ind. 84; Bradly v. McAtee, 7 Bush (Ky.) 667; 3 Am. R. 309; Brick &c. Church v. Mayor, 5 Cowen (N. Y.) 538; Brimmer v. Boston, 102 Mass. 19; Horn v. Atlantic &c. Co. 35 N. H. 169; Bulkley v. New York &c. R. Co. 27 Conn. 479; Jones v. Galena &c. Co. 16 Iowa, 6; Penna. Co. v. Riblet, 66 Pa. St. 164; 5 Am. R. 360; Westbrook's Appeal, 57 Conn. 95; State v. Trenton, 53 N. J. Law, 132; 20 Atl. 1076; 11 L. R. A. 410; State v. Hoboken, 41 N. J. L. 71; Detroit v. Fort Wayne &c. R. Co. 90 Mich. 646; 51 N. W. 688; New Orleans Gas &c. Co. v. Louisiana &c. Co. 115 U. S. 650; 6 Sup. Ct. 252.

[72] Chicago v. Chicago Union Trac. Co. 199 Ill. 259; 65 N. E. 243, 247; 59 L. R. A. 666 (quoting text).

[73] Kirby &c. Co. v. Citizens' &c. Co. 48 Md. 168; 30 Am. R. 455; Middlesex R. Co. v. Wakefield, 103 Mass. 261; Michigan Tel. Co. v. Charlotte, 93 Fed. 11. See, also, ante, §§ 1082, 1082a. But see Eddy v. Ottawa &c. Co. (Canada), 31 Q. B. 569.

ly define and limit the power.[74] To what extent it prevails as against chartered rights, which are protected as rights flowing from a contract, it is not possible to say with certainty and precision, but we believe that it may be safely affirmed, as it often has been, that the power extends so far as to require the private corporation to yield to the public welfare in the matter of the reasonable regulation of roads and streets.[75]

§ 1096p. Terms and conditions.—A municipal corporation invested with general control over the streets, and having the right to grant or refuse its consent to their use by a street railway company, has authority to prescribe the terms and conditions upon which a railway company may construct and operate a railway in its streets.[76] It may impose conditions and terms as to the repair of the street used by the company;[77] and it has been held that it may exact a license fee for the use of the street;[78] and, in short, it may impose any

[74] The impossibility of accurately defining and stating the limits of this power has often been recognized by the courts. See decisions referred to in 22 Am. & Eng. Ency. of Law (2d Ed.) 915, et seq., where such definitions and distinguishing features as have been noted by the courts are considered.

[75] Fitchburg &c. Co. v. Grand Junction &c. Co. 1 Allen (Mass.) 552; Pittsburgh &c. R. Co. v. S. W. &c. R. Co. 77 Pa. St. 173; Rodemacher v. Milwaukee &c. R. Co. 41 Iowa 297; 20 Am. R. 592; People v. Boston &c. Co. 70 N. Y. 569; Portland &c. R. Co. v. Boston &c. R. Co. 65 Me. 122; Albany &c. Co. v. Watervliet &c. Co. 45 Hun (N. Y.) 442; St. Louis v. Missouri R. Co. 13 Mo. App. 524; Cape May &c. R. Co. v. Cape May, 58 N. J. L. 565; 34 Atl. 397; Indianapolis v. Consumers' &c. Co. 140 Ind. 107; 39 N. E. 433, 436 (citing text); 27 L. R. A. 514; 49 Am. St. 183; Henderson v. Ogden City R. Co. 7 Utah, 199: 26 Pac. 286, 288 (citing text). See, also, Lake Shore &c. R. Co. v. Ohio, 173 U. S. 285, 305; 19 Sup. Ct. 465.

[76] Indianapolis v. Consumers' &c. Co. 140 Ind. 107; 39 N. E. 433, 436 (citing text); 49 Am. St. 183; Union Depot &c. R. Co. v. Southern R. Co. 105 Mo. 652; 16 S. W. 960 (citing text); Allegheny v. Millvalle, 159 Pa. St. 411; 28 Atl. 202; Northern &c. R. Co. v. Mayor, 21 Md. 93; People v. Barnard, 110 N. Y. 548; 18 N. E. 354; Harrisburg &c. R. Co. v. Harrisburg, 149 Pa. St. 465; 24 Atl. 56; Houston v. Houston City R. Co. 83 Tex. 548; 19 S. W. 127; 29 Am. St. 679. But see Citizens' St. R. Co. v. City R. Co. 64 Fed. 647.

[77] City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157; and see ante, § 1081.

[78] New Orleans v. New Orleans &c. R. Co. 40 La. Ann. 587; 4 So. 512; Newport v. South Covington &c. R. Co. 89 Ky. 29; 11 S. W. 954; Detroit v. Detroit City R. Co. 37

conditions not illegal and not forbidden by the statute. What the legislature grants to a street railway company cannot, however, be taken away or abridged by the municipality.[78a] The authorities cited below[79] will serve to show the comprehensive power to impose conditions where the consent of the municipality is required, and, in a very recent decision, it is held by the Supreme Court of the United States that the authority given to the city to fix terms and conditions includes the power to determine and fix the terms of the occupancy of its streets by the company.[80]

Mich. 558. But see Hodges v. Western U. Tel. Co. 72 Miss. 910; 18 So. 84; 29 L. R. A. 770.

[78a] In re Kings County Elevated R. Co. 105 N. Y. 97; 13 N. E. 18. See Frayser v. State, 16 Lea (Tenn.) 671; Galveston &c. R. Co. v. Galveston, 90 Tex. 398; 39 S. W. 96; 36 L. R. A. 33, and note, where the authorities upon the general subject are cited and reviewed. And see further, to the effect that an unlawful or prohibited condition, or one in conflict with the statute, can not be imposed, Central R. Co.'s Appeal, 67 Conn. 197; 35 Atl. 32; Grand Rapids Elec. R. Co. v. Grand Rapids, 84 Mich. 257; 47 N. W. 567; Harrisburg City Pass. R. Co. v. Harrisburg, 149 Pa. St. 465; 24 Atl. 56.

[79] Chouquette v. Southern Elec. R. Co. 152 Mo. 257; 53 S. W. 897; St. Louis &c. R. Co. v. Kirkwood, 159 Mo. 239; 60 S. W. 110; 53 L. R. A. 300; Rapid R. Co. v. Mt. Clemens, 118 Mich. 133; 76 N. W. 318; Nieman v. Detroit Suburban R. Co. 103 Mich. 256; 61 N. W. 519; Grey v. New York &c. Trac. Co. 56 N. J. Eq. 463; 40 Atl. 21; Central R. Co.'s Appeal, 67 Conn. 197; 35 Atl. 32; Newcomb v. Norfolk &c. St. R. Co. 179 Mass. 449; 61 N. E. 42; Detroit v. Detroit Citizens' St. R. Co. 184 U. S. 368; 22 Sup. Ct. 410; People v. Suburban R. Co. 178 Ill. 594; 53 N. E. 349; 49 L. R. A. 650; and see ante, §§ **1081, 1082.** See, also, to the effect that the company accepting the charter takes it subject to the conditions imposed, Cincinnati &c. R. Co. v. Stahle (Ind. App.), 76 N. E. 551; Bly v. Nashua St. R. Co. 67 N. H. 474; 32 Atl. 764; 30 L. R. A. 303; 68 Am. St. 681.

[80] Blair v. Chicago, 201 U. S. 400; 26 Sup. Ct. 427. Several other interesting questions as to grants to street railways and extensions are decided in this case. Upon the point now under consideration it is said, in the course of the able opinion: "Conceding the plenary power of the legislature over the subject at that time, and that franchises, broadly speaking, are rights and privileges conferred by the state, and are derived from a grant of the sovereign power, nevertheless the state, while exercising its authority, might give to the city such measure of right and control in the manner as it saw fit. Dill. Mun. Corp. 3d Ed. § **705**; Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521; 24 L. Ed. 734. The city is the corporate body directly interested in the use and control of the streets. By the charter of 1851 ex-

§ 1096q. Motive power confined to that specified.—Among the terms and conditions that may usually be imposed are such as relate to the motive power. It is competent for a municipal corporation, invested with control of the streets, to prescribe what motive power shall be used in drawing the cars over the track,[81] and when the

clusive control over the streets was given to the council. That it was the intention of the legislature to give effect to the right of municipal control in the act under consideration is shown in its confirmation of terms already fixed by contract between the city and the companies. As to the future, companies were to have no right to the use and occupancy of the streets until they should obtain from the city council authority to that end, under contracts to be agreed upon as to terms and conditions. A more comprehensive plan of securing the city in the control of the use of the streets for railway purposes could hardly be devised. The company must be 'authorized' by the city council before it can lay tracks or operate railways in the streets. This is more than to designate that for which authority has already been given. . . . It is an additional grant of right and power which the legislature requires the corporation to obtain as a condition precedent to its use and occupation of the streets. This power of the city, in the absence of language in the statute excluding the authority and reserving its exercise to the state, necessarily includes the right to fix the time for which the streets may be used (quoting from Louisville Trust Co. v. Cincinnati, 76 Fed. 296, 308, and citing Coverdale v. Edwards, 155 Ind. 374, 381; 58 N. E. 495. See ante, § 1081).

"The act under consideration nowhere assumes to fix the duration of the grant, nor excludes the conclusion that it is embraced in the terms and conditions which are to be fixed by contract with the city. If the franchise to use the streets, without regard to municipal action, was fully conferred by the legislative act under consideration, then the company had only to take possession of the streets, subject to regulations as to running of cars, etc., by the city council. On the contrary, under the terms of this act, the city, by withholding its consent, could prevent the use of the streets by the corporations. No way is pointed out by which this consent could be compelled against the will of the council. That body might, for reasons sufficient to itself, under the terms of this act, by withholding assent, determine that it was undesirable to have the corporations in control of the use of the streets." It is also said, in the same opinion, that the franchise granted by the state was the right to be a corporation for the period named, and to acquire from the city the right to use the streets upon contract terms and conditions to be agreed upon.

[81] Williams v. City Elec. St. R. Co. 41 Fed. 556; Teachout v. Des Moines &c. St. R. Co. 75 Ia. 722; 38 N. W. 145; Louisville &c. R. Co v. Bowling Green R. Co. 110 Ky. 788; 63 S. W. 4; North Baltimore Pass.

ordinance does provide what the motive power shall be, the company cannot use any other. Thus, where the provision is that the cars shall be drawn by horses or mules, the company cannot use steam power, nor can it construct a cable road.[82] Grants are usually construed most strongly against a corporation or company claiming a special franchise or privilege, and under this familiar rule a street railway company cannot successfully assert a right to use any other motive power than that specified in the ordinance licensing it to use the streets of the municipality.[83]

§ 1096r. **Motive power where the kind is not specified.**—Where the charter or ordinance is silent upon the subject, there is also much reason for affirming that only such motive power as was in use by street railway companies at the time of the grant could have been contemplated.[84] But where the right is granted to employ a speci-

R. Co. v. North Ave. R. Co. 75 Md. 233; 23 Atl. 466; Detroit City R. Co. v. Mills, 85 Mich. 634; 48 N. W. 1007; Paterson R. Co. v. Grundy, 51 N. J. Eq. 213; 26 Atl. 788. But not, of course, one prohibited by statute. Farrell v. Winchester Ave. R. Co. 61 Conn. 127; 23 Atl. 757. See, also, North Chicago City R. Co. v. Lake View, 105 Ill. 207; 44 Am. R. 788; Birmingham &c. St. R. Co. v. Birmingham St. R. Co. 79 Ala. 465; 58 Am. R. 615.

[82] People v. Newton, 48 Hun (N. Y.) 477; 1 N. Y. S. 197. See, also, Harris v. Twenty-second St. &c. R. 1 Pa. Dist. 506; Spokane St. R. v. Spokane Falls, 6 Wash. 521; 32 Pac. 456; Indianapolis Cable St. R. Co. v. Citizens' St. R. Co. 127 Ind. 369; 26 N. E. 893; 24 N. E. 1054; 8 L. R. A. 539, and note. And compare Wilmington City R. Co. v. Wilmington &c. Co. (Del.) 46 Atl. 12.

[83] People v. Newton, 112 N. Y. 396; 19 N. E. 831; 3 L. R. A. 174, and note; Denver &c. R. Co. v. Denver &c. R. Co. 2 Colo. 673, 681; Citizens' St. R. Co. v. Jones, 34 Fed. 579; Indianapolis &c. St. R. Co. v. Citizens' St. R. Co. 127 Ind. 369, 393; 24 N. E. 1054; 26 N. E. 893 (citing text); 8 L. R. A. 539, and note. See, also, Birmingham &c. R. Co. v. Birmingham &c. Co. 79 Ala. 465; 58 Am. R. 615; Mayor v. Ohio &c. R. Co. 26 Pa. St. 355; Houston v. Houston &c. R. Co. 83 Tex. 548; 19 S. W. 786; 29 Am. St. 679. Where a petition is required as a condition precedent to construct a track, it must conform to the statute. People's R. Co. In re, 112 N. Y. 578; 20 N. E. 367; Union &c. Co. In re, 112 N. Y. 61; 19 N. E. 664; 2 L. R. A. 359.

[84] North Chicago City R. Co. v. Lake View, 105 Ill. 207; 44 Am. R. 788; State v. Trenton, 54 N. J. L. 92; 23 Atl. 281; Farrell v. Winchester Ave &c. Co. 61 Conn. 127; 23 Atl. 757. See, also, Richmond &c. R. Co. v. Richmond, 26 Gratt. (Va.) 96.

fied motive power and "any other motive power," or the like, any kind then in general use would doubtless be included,[85] and, perhaps, any lawful power subsequently discovered.[86] If the ordinance authorizes the use of steam as a motive power, then, as we suppose, the license cannot be recalled unless the case is an usual one, wherein it appears that steam cannot be used without almost certain danger to life and property.[87] It is possible to conceive a case where changes made by the growth of a city might be so great as to make it impossible to employ steam as a motive power without endangering the lives of those having a right to use the streets,[88] and it seems to us that, in such a case, the municipal authorities might require the company to use some less dangerous motive power. It can hardly be possible that the municipality would be bound to yield its power

[85] Hudson &c. Co. v. Watervliet, 135 N. Y. 393; 32 N. E. 148; 17 L. R. A. 674; 31 Am. St. 838; Taggart v. Newport &c. R. Co. 16 R. I. 668; 19 Atl. 326; 7 L. R. A. 205; Halsey v. Rapid &c. R. 47 N. J. Eq. 380; 20 Atl. 859; Lockhart v. Craig St. R. Co. 139 Pa. St. 419; 21 Atl. 26; Green v. City &c. R. Co. 78 Md. 294; 28 Atl. 626; 44 Am. St. 288.

[86] Detroit City R. Co. v. Mills, 85 Mich. 634; 48 N. W. 1007. See, also, North Baltimore &c. R. Co. v. North Ave. R. Co. 75 Md. 233; 23 Atl. 466; Hoofer v. Baltimore &c. R. Co. 85 Md. 509; 37 Atl. 359; 38 L. R. A. 509; Tonergan v. Lafayette St. R. Co. 3 Am. Electl. Cas. 273; Paterson R. Co. v. Grundy, 51 N. J. Eq. 213; 26 Atl. 788; Booth Street Railroads, §§ 67, 68.

[87] In the case of the North Chicago City R. Co. v. Lake View, 105 Ill. 207; 44 Am. R. 788, it was said: "It is conceded that the company's charter authorizes it to maintain and operate a street railway along and over the street in question, and it is contended that inasmuch as the charter is silent as to the power to be used in propelling the company's cars, the company has the option to use for that purpose either steam or horse power, as it may prefer. We think, in such a case, it would be more reasonable to hold the legislature intended the company should use the motive power in propelling its cars which would be most conducive to the best interests and safety of the public having occasion to use the street as a common highway, and which was then in ordinary use in the state."

[88] North Chicago R. Co. v. Lake View, 105 Ill. 183; North Chicago R. Co. v. Lake View, 105 Ill. 207; 44 Am. R. 788. See, also, Kettering v. Jacksonville, 50 Ill. 39; Fash v. Third Ave. R. Co. 1 Daly (N. Y.) 150; Regina v. Train, 2 B. & S. 640; Henderson v. Central Passenger R. Co. 20 Am. & Eng. R. Cas. 542; Commonwealth v. Allen, 148 Pa. St. 358; 23 Atl. 1115; 16 L. R. A. 148, and note; 33 Am. St. 830; Richmond &c. R. Co. v. Richmond, 26 Gratt. (Va.) 96.

to provide for the safety of its citizens, or that the citizens would be bound to surrender the use of the streets to further the interests of a private corporation. It would undoubtedly require an extraordinarily strong case to warrant the municipality in modifying its license and requiring the licensee to substitute some other motive power for that designated in the grant, but we are inclined to think there may be such a case,[89] and, at all events, the use can be properly regulated under the police power.

§ 1096s. Exclusive right—Monopoly.—There is some conflict in the decided cases upon the question of the power of the legislature to grant an exclusive right to a street railway company to occupy and use a highway, and the question is not free from doubt. Some authorities hold that the legislature cannot create a monopoly by granting an exclusive privilege, and there is much reason for this doctrine,[90] especially under some of the state constitutions. At all

[89] As to the right to authorize or require change of motive power, see, generally, Third Ave. R. Co. In re, 121 N. Y. 536; 24 N. E. 951; 9 L. R. A. 124; Taggart v. Newport St. R. Co. 16 R. I. 668; 19 Atl. 326; 7 L. R. A. 205; Attorney-General v. Chicago &c. R. Co. 112 Ill. 611; People v. Board, 158 N. Y. 711; 53 N. E. 1129, affirming 52 N. Y. S. 908; St. Michael's &c. Church v. Forty-second St. &c. Co. 57 N. Y. S. 831; Hooper v. Baltimore &c. Co. 85 Md. 509; 37 Atl. 359; 38 L. R. A. 509; City R. Co. v. Citizens' &c. Co. 166 U. S. 557; 17 Sup. Ct. 653; Sioux City St. R. Co. v. Sioux City, 138 U. S. 98; 11 Sup. Ct. 226; Potter v. Scranton Traction Co. 176 Pa. St. 271; 35 Atl. 188; Booth Street Railways, § 69.

[90] Citizens' Gas &c. Co. v. Elwood, 114 Ind. 332; 16 N. E. 624; Jackson Co. Horse R. Co. v. Interstate Rapid Transit Co. 24 Fed. 306; Citizens' St. R. Co. v. Jones, 34 Fed. 579; New Orleans City R. Co. v. Crescent City R. Co. 12 Fed. 308; Canal &c. R. Co. v. Crescent City R. Co. 41 La. Ann. 561; 6 So. 849; Kinsman St. R. Co. v. Broadway &c. R. Co. 36 Ohio St. 239; Memphis City R. Co. v. Memphis, 4 Cold. (Tenn.) 406; Birmingham &c. R. Co. v. Birmingham St. R. Co. 79 Ala. 465; 58 Am. R. 615; St. Louis &c. R. Co. v. Belleville, 20 Ill. App. 581. See, also, Teachout v. Des Moines &c. R. Co. 75 Iowa, 722; 38 N. W. 145; Omaha Horse R. Co. v. Cable Tramway Co. 30 Fed. 324; Denver &c. R. Co. v. Denver &c. R. Co. 2 Colo. 673, 681; New York &c. Co. v. Mayor, 1 Hilt. (N. Y. C. P.) 562; Fort Worth &c. R. Co. v. Rosedale &c. R. Co. 68 Tex. 169; 4 S. W. 534; Gulf City R. &c. Co. v. Galveston, 69 Tex. 660; 7 S. W. 520; Fort Worth &c. R. Co. v. Queen City R. Co. 71 Tex. 165; 9 S. W. 94. See, also, Des Moines &c. R. Co. v. Des Moines, 73 Iowa, 513; 33 N. W. 60; 35 N. W. 602; Russell v. Chicago &c. R. Co. 205 Ill. 155;

events, the construction should be liberal in favor of the public and strict as against the corporation claiming an exclusive privilege or monopoly.[91] But it is not every grant that creates a monopoly, although it may, to some extent, be exclusive, for the grant may be of a privilege or franchise that is, of necessity, in some measure of the nature of a monopoly. This is so in many cases, as, for instance, where the grant is to use a patented thing or a copyrighted article. In some degree, at least, this is also true where there is a grant to use a designated part of a street or road for railway purposes. In such cases it is necessity that impresses the grant with its exclusive

68 N. E. 727; Winnetka v. Chicago &c. R. Co. 204 Ill. 297; 68 N. E. 407. The Supreme Court of the United States and many other courts, however, seem to take a different view. New Orleans Gas Co. v. Louisiana Light Co. 115 U. S. 650; 6 Sup. Ct. 252; St. Tammany Waterworks v. New Orleans Waterworks, 120 U. S. 64; 7 Sup. Ct. 405; City R. Co. v. Citizens' St. R. Co. 166 U. S. 557; 17 Sup. Ct. 653; Des Moines &c. R. Co. v. Des Moines, 73 Iowa, 513; 33 N. W. 60; 35 N. W. 602; Wilmington City R. Co. v. Wilmington &c. Co. (Del.) 46 Atl. 12. But however it may be as to the power of the legislature, it is clear that a municipality cannot grant a monopoly or exclusive right unless clearly authorized. Detroit Citizens' St. R. Co. v. Detroit, 110 Mich. 384; 68 N. W. 304; 64 Am. St. 350; 35 L. R. A. 859, affirmed in 171 U. S. 48; 18 Sup. Ct. 732; Florida Cent. &c. R. Co. v. Ocala St. R. Co. 39 Fla. 306; 22 So. 693; Parkhurst v. Capital City R. Co. 23 Ore. 471, 32 Pac. 304; Clarksburg &c. Co. v. Clarksburg, 47 W. Va. 739; 35 S. E. 994, 996 (citing text); 50 L. R. A. 142, and note; Walla Walla v. Walla Walla Water Co. 172 U. S. 1; 19 Sup. Ct. 78, 83, 84, and authorities cited (grant, however, held not exclusive); ante, § 1077, and numerous authorities there cited.

[91] Citizens' St. R. Co. v. Jones, 34 Fed. 579; Indianapolis Cable St. R. Co. v. Citizens' &c. R. Co. 127 Ind. 369; 24 N. E. 1054; 26 N. E. 893; 8 L. R. A. 539, and note; Birmingham &c. R. Co. v. Birmingham &c. R. Co. 79 Ala. 465; 58 Am. R. 615; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Proprietors of Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420; Central Transp. Co. v. Pullman &c. Co. 139 U. S. 24; 11 Sup. Ct. 478; Oregon R. Co. v. Oregonian R. Co. 130 U. S. 1; 9 Sup. Ct. 409; Lehigh Water Co. v. Easton, 121 U. S. 388; 7 Sup. Ct. 916; People v. Broadway R. Co. 126 N. Y. 29; 26 N. E. 961; Detroit v. City R. Co. 56 Fed. 867; Commonwealth v. Erie &c. R. Co. 27 Pa. St. 339; 67 Am. Dec. 471, and note. See, also, Louisville City R. Co. v. Central Pass. R. Co. 87 Ky. 223; 8 S. W. 329; Houston v. Houston City St. R. Co. 83 Tex. 548; 19 S. W. 127; 29 Am. St. 679; Parkhurst v. Capital City R. Co. 23 Oreg. 471; 32 Pac. 304; Nellis Street Surface Railroads, 108; Thurston v. Huston, 123 Ia. 157; 98 N. W. 637.

character, and it must either be conceded that the legislature may grant a privilege or franchise that is in some of its features monopolistic, or else the power of the legislature to make any grant at all in such cases must be denied.

§ 1096t. **Physical monopoly.**—To deny the power of the legislature to make a grant that is of necessity of a monopolistic character would lead to the unwarranted conclusion that in no case can the legislature grant the right to lay and operate a street railway in a road or street, for, if the power to make such a grant be conceded, it necessarily and unavoidably results that the occupancy of the part of the road or street is exclusive, as two railways cannot occupy the same space. But it does not follow from this that a monopoly in the true sense is created, for other parts of the road or street may be granted to competing lines.[92] If, however, the legislature should undertake to grant a right to transport all passengers over a designated highway, a monopoly would be created within the meaning of the constitution. The effect of a grant to use a designated part of a highway is to license the company first in point of time to occupy and use the designated space, but, as already intimated, it does not follow from this that the statute creates a monopoly, since others may occupy other parts of the same highway.[93] There is not, at all events, a monopoly of a business, nor is there a monopoly in the profits of a business. There are many cases in which the right to confer privileges which, in their essential features, are monopolistic, has been asserted. Thus, it has been held that the exclusive right to maintain a market may be granted.[94] The same principle is as-

[92] North Baltimore Pass. R. Co. v. Mayor, 75 Md. 247; 23 Atl. 470, 471 (citing text); Hamilton &c. Trac. Co. v. Hamilton &c. Co. 69 Ohio St. 402; 69 N. E. 991, 994 (quoting text).

[93] Indianapolis Cable &c. R. Co. v. Citizens' St. R. Co. 127 Ind. 369; 24 N. E. 1054; 8 L. R. A. 539, and note; Fort Worth St. R. Co. v. Rosedale R. Co. 68 Tex. 169; 4 S. W. 534; Henderson v. Ogden City R. Co. 7 Utah, 199; 26 Pac. 286; Denver &c. R. Co. v. Denver &c. R. Co. 2 Colo. 673; New Orleans &c. R. Co. v. Crescent City R. Co. 12 Fed. 308; Omaha Horse R. Co. v. Cable Tramway Co. 30 Fed. 324; Jackson &c. R. Co. v. Interstate &c. Co. 24 Fed. 306; Hamilton &c. Trac. Co. v. Hamilton &c. Co. 69 Ohio St. 402; 69 N. E. 991, 994 (quoting text).

[94] Le Claire v. Davenport, 13 Ia. 210, overruling Davenport v. Kelley, 7 Ia. 102, 109; New Orleans v. Guillotte, 12 La. Ann. 818.

serted in the cases which hold that excluding all persons except druggists from selling intoxicating liquors is a rightful exercise of legislative power.[95] A grant of a franchise to maintain a ferry is in its very nature exclusive, and yet such grants have from the earliest years of the common law been recognized as valid; indeed, no court has ever suggested a doubt as to their validity. It is evident that there are many grants which cannot be anything else than exclusive, and the element of exclusiveness is owing, not to the statute which confers them, but to the inherent nature and character of the franchise granted. It is impossible to sever this essential element, for it inheres in the thing granted so firmly and closely that severance is impossible,[96] and it therefore distinguishes the case from that of an unlawful monopoly.[97]

[95] Intoxicating Liquor Cases, 25 Kan. 751; 37 Am. R. 284. In line with the general doctrine of the above case are the cases of Mayor of Hudson v. Thorne, 7 Paige (N. Y.) 261; Ruth, In re, 32 Ia. 250; Chicago v. Rumpff, 45 Ill. 90; 92 Am. Dec. 196. Although there is much conflict in the authorities, it seems that the doctrine asserted in the Slaughter-House Cases, 16 Wall. (U. S.) 36, is the only defensible one.

[96] Mr. Tiedeman, in his discussion of the subject, says: "As long as the question is confined to the case of exceptional franchises, as, for example, ferries, railroads, bridges, and the like, there seems to be no doubt of the power of the state to grant exclusive privileges." Limitations of the Police Power, 316. Judge Cooley discusses the question with care and ability, and says: "Still, the legislature, when it grants special privileges or franchises, may undoubtedly make them exclusive. The distinction seems to be this: The following of the ordinary and necessary employments of life is a matter of right, and cannot be made to depend upon the state's permission or license." He also says: "But when the state gives permission to do something not otherwise lawful, it may, in its discretion, make the gift exclusive. Thus it may grant an exclusive ferry, or an exclusive right to erect a toll bridge, or to set up a lottery, because no one is wronged, because no one had such liberty before, and, therefore, no one is deprived of anything by the grant." Cooley Torts, 328.

[97] A somewhat similar distinction is drawn under statutes providing for competitive bidding, where it is held that a monopoly cannot unnecessarily be created by the authorities, so as to prevent competitive bidding, but that an article which is a natural monopoly, or one from necessity, may be obtained or used, notwithstanding the provision for competitive bidding. Swift v. St. Louis, 180 Mo. 80; 79 S. W. 172. See, also, Field v. Barber &c. Co. 117 Fed. 925; 194 U. S. 618; 24 Sup. Ct. 784; Smith v. Syracuse &c. Co. 161 N. Y. 484; 55 N. E. 1077.

§ 1096u. Limitation of power to create monopoly.—Even though the legislature or municipality may not directly create an exclusive privilege in matters of common right, necessity may do so. It is one thing to restrict the exercise of common right and quite another thing to create an extraordinary right or privilege and make it exclusive. In granting a right to use a highway for a street railway the legislature makes that lawful which, but for the grant, would be unlawful, for no citizen has a right to use a highway in any other than the usual modes, except where the legislature authorizes him to do so. But, as we have indicated, we do not believe that the doctrine we have stated, as to a physical monopoly or monopoly from necessity, can legitimately be pressed so far as to authorize the legislature to confer an exclusive privilege to reap all the profits of transporting passengers, except in cases where necessity produces that result, as it may sometimes do, as, for instance, where it is impossible to operate more than one railway upon the same street. The subject is not free from difficulty, but our conclusions are not without the support of authority.[98]

§ 1096v. General grant does not exclude other companies.—Where the legislature, or the municipal officers, grant a general license or franchise to a street railway to occupy the streets of a city, it is apparent that it may often be difficult to determine the extent and

[98] Brenham v. Brenham Water Co. 67 Tex. 542; 4 S. W. 207; Crescent City &c. Co. v. New Orleans &c. Co. 27 La. Ann. 138; State v. Milwaukee &c. Co. 29 Wis. 454; 9 Am. R. 598; Mayor &c. of Rome v. Cabot, 28 Ga. 50; Livingston v. Pippin, 31 Ala. 542; Mayor &c. of Nashville v. Hagan, 9 Baxter (Tenn.) 495; Morton v. Power, 33 Minn. 521; 24 N. W. 194; State v. Gas Light Co. 18 Ohio St. 262; East St. Louis v. East St. Louis &c. Co. 98 Ill. 415; 38 Am. R. 97; Montgomery v. Montgomery Waterworks, 79 Ala. 233; American Tel. &c. Co. v. Morgan &c. Co. 138 Ala. 597; 36 So. 178; 100 Am. St. 53; Norwich Gas Light Co. v. Norwich &c. Co. 25 Conn. 19; Richmond &c. Co. v. Middletown, 59 N. Y. 228; Jackson Co. Horse Car Co. v. Interstate Rapid Transit Co. 24 Fed. 306; Hovelman v. Kansas City Horse R. Co. 79 Mo. 632; Atchison St. R. Co. v. Mo. Pacific R. Co. 31 Kan. 661; 3 Pac. 284; Davis v. Mayor &c. 14 N. Y. 506; 67 Am. Dec. 186; Indianapolis Cable St. R. Co. v. Citizens' St. R. Co. 127 Ind. 369; 24 N. E. 1054; 8 L. R. A. 539, and note. See ante, § 1096s; also, Murray Hill Land Co. v. Milwaukee &c. Co. 110 Wis. 555; 86 N. W. 199; Birmingham St. R. Co. v. Railway Co. 79 Ala. 465; 58 Am. R. 615; Des Moines St. R. Co. v. Des Moines &c. St. R. Co. 73 Ia. 513; 33 N. W. 610; 35 N. W. 602.

effect of such a general license or grant. Some rights necessarily accrue to the company which secures the first grant, and yet some rights remain in the licensor, for it cannot well be true that a railway company may hold a general franchise and not do anything toward rendering the public the service which forms the principal element that supports the right to grant a special privilege to use a highway. It is only upon the ground that the public welfare is promoted that grants of such privileges can be sustained, for special privileges can only be granted in cases where the public interest will be promoted. Eliminate this element and it is impossible to sustain the grant of a right to construct and operate a railway in a street or road, for such a right is necessarily, to some extent or in some sense, an exclusive one, and, to a great extent, prevents the free use of the highway by all the citizens upon equal terms. In spite of all that can be done, the exercise of such a right does in some measure give the possessor of the right something in the nature of a monopoly, and to justify this it must appear that the public good demands that there should be some abridgment of the general and common right. It must follow that a mere general grant to use the streets of a city does not, of its own force and vigor, operate to exclude other companies and place it in the power of the licensee to use or decline to use the streets at its own pleasure, and at the same time keep others from using them.[99]

§ 1096w. Effect of taking possession.—If the company which secures the first grant actually occupies the streets it is authorized to use, then there is much reason for affirming that its right to the part of the street actually occupied and used is paramount and exclusive. By actually taking possession of the street and using it for the accommodation of the public, the company first in point of time does such acts as vest its rights. But to have this effect, the com-

[99] See City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157. See, also, Koch v. North Ave. R. Co. 75 Md. 222; 23 Atl. 463; 15 L. R. A. 377, and note; Brooklyn City &c. R. Co. v. Coney Island &c. R. Co. 35 Barb. (N. Y.) 364; Henderson v. Ogden City R. Co. 7 Utah, 199; 26 Pac. 286; Wood v. Seattle, 23 Wash. 1; 62 Pac. 135; 52 L. R. A. 369, and note; Omaha Horse R. Co. v. Cable Tramway Co. 30 Fed. 324; Electric City R. Co. v. Niagara Falls, 48 Misc. (N. Y.) 91; 95 N. Y. S. 73; People's Trac. Co. v. Atlantic City, 71 N. J. L. 134; 57 Atl. 972; Western Un. Tel. Co. v. Electric &c. Co. 178 N. Y. 325; 70 N. E. 866.

pany, as it seems to us, must take possession in good faith and for the purpose of constructing and operating such a railway as the grant contemplates. A colorable possession, taken solely for the purpose of keeping out other companies and unaccompanied by acts indicating an intention to furnish reasonable facilities for the accommodation of the public, ought not to be regarded as sufficient to vest a right under the general license. If, however, reasonable facilities are actually furnished, or preparations are in good faith really made for furnishing them, then the fact that one of the reasons which influenced the company is that of excluding other companies ought not to prevent the vesting of the granted right.

§ 1096x. When grant may be made to other companies.—We very much doubt whether a general grant which would prevent the legislature or the municipal authorities from granting privileges to other companies would be valid in cases in which the right to use the highway is left entirely to the licensee. The legislature cannot bind itself not to legislate for the welfare of the public, and it would seem to follow that it cannot rightfully place itself in a position where it cannot make provision for the public necessities. If it cannot do this, then it cannot make a grant which leaves it entirely in the discretion of a private corporation to provide, or decline to provide, the facilities for travel upon the highways which are demanded by the public welfare. We think there is sufficient reason for affirming that the legislature must retain the power to provide for the necessities of the public, and that a general grant to occupy highways is only effective to prevent a grant to another company when something is done vesting the right granted and securing what the public requires. Until something is done vesting the granted privilege, it is within the legislative power to secure the welfare of the public by granting the necessary license to another company, although there may be a prior general grant.

§ 1096y. Effect of commencing work by company having prior grant.—While it is true, as we believe, that some act must be done vesting the inchoate right conferred by a general grant, still we do not regard it as essential that manual possession should be taken of all of the streets or roads embraced in the general grant or license. If the company having the prior right enters upon the work of

constructing a system, and with reasonable diligence and in good faith does actually construct a considerable part of the system, it ought not to lose its rights unless it has failed to comply with a proper demand to complete the system, or has unreasonably delayed its completion. Much must necessarily depend upon the terms of the particular grant, but, nevertheless, there are fundamental principles which cannot be excluded, and the chief of these is that the legislature cannot surrender or barter away any substantial part of the police power.[100]

§ 1096z. Conflicting claims.—Conflicting claims asserted by rival companies claiming under general grants must often be settled by applying the rule that the first to rightfully occupy the street has the better right.[101] This statement, however, cannot be regarded as more than a general expression of the rule, for so much depends upon the facts of each particular case that little more can be done than to state the rule in a very general way. It is true, however, that where there is a general grant, neither perfected nor vested, it becomes vested when a location and an appropriation is made,[102] and it must be

[100] It seems to us that the legislature cannot yield the right, by a mere general grant not fully vested by actual or constructive occupancy, to declare, whenever the public welfare demands, that the company shall not lay tracks in streets covered by the grant; changes may take place which may render it hurtful to the public to permit the use of such streets, and we think that in such cases the grant may be recalled, provided there has been no occupancy or use of the street under it.

[101] Text approved in Indianapolis Cable St. R. Co. v. Citizens' St. R. Co. 127 Ind. 369, 391, 392; 24 N. E. 1054; 26 N. E. 893; 8 L. R. A. 539, and note; City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157; Africa v. Board, 70 Fed. 729. But see Knoxville v. Africa, 77 Fed. 501; Homestead St. R. Co. v. Pittsburg &c. R. Co. 166 Pa. St. 162; 30 Atl. 950; 27 L. R. A. 383.

[102] In the case of Railway Co. v. Alling, 99 U. S. 463, it was said: "When such location and appropriation were made, the title, which was previously imperfect, acquired precision and took effect as of the date of the grant. The settled doctrines of this court would seem to justify that conclusion." Railroad Co. v. Smith, 9 Wall. (U. S.) 95; Schulenberg v. Harriman, 21 Wall. (U. S.) 44; Leavenworth &c. R. Co. v. United States, 92 U. S. 733; Missouri &c. R. Co. v. Kansas Pacific R. Co. 97 U. S. 491; Titusville &c. R. Co. v. Warren &c. R. Co. 12 Phila. (Pa.) 642; Waterbury v. Dry Dock &c. R. Co. 54 Barb. (N. Y.) 388; Christopher &c. R. Co. v. Central Cross-Town R. Co. 67 Barb. (N.

true that a company having a general grant cannot be divested of its rights until it has had a reasonable opportunity for vesting them by actually entering upon the work of constructing its tracks.[103]

§ 1096aa. Grant must be accepted as an entirety.—It has been held, and we think it may be stated as a general rule, that the railway company must accept the grant as an entirety or reject it.[104] This general rule is applied with considerable strictness. The company must conform to the requirements of the ordinance or statute in constructing its road, and a failure to obey the statute will not be excused, although the railway as constructed does not, in fact, injure or obstruct the street to any greater degree than it would have done if it had been constructed in strict accordance with the statute.[105] It is held that the road must be kept and maintained as the statute requires.[106] It must be constructed upon the line designated in the statute or ordinance.[107] But where a railway company is authorized to construct a road along a designated street, it may construct it across all cross streets, although the statue or ordinance may

Y.) 315. See, also, Fayetteville St. Ry. v. Aberdeen &c. R. Co. (N. Car.) 55 S. E. 345.

[103] See West Jersey &c. Co. v. Camden &c. R. Co. 52 N. J. Eq. 452; 53 N. J. Eq. 163; 29 Atl. 333; 35 Atl. 49; Union Pass. R. Co. v. Continental R. Co. 11 Phila. (Pa.) 321; Omaha Horse R. Co. v. Cable &c. Co. 32 Fed. 727. See, also, and compare, Nanticoke &c. St. R. Co. v. People's St. R. Co. 212 Pa. St. 395; 61 Atl. 997.

[104] Allegheny v. Millville, 159 Pa. St. 411; 28 Atl. 202. See, also, Tudor v. Chicago &c. R. Co. 154 Ill. 129; 39 N. E. 136; Fort Worth &c. R. Co. v. Rosedale R. Co. 68 Tex. 163; 7 S. W. 381; People's R. Co. v. Memphis R. Co., 10 Wall. (U. S.) 38; Bristow v. Whitmore, 9 H. L. Cas. 391; Cincinnati &c. Elec. St. R. Co. v. Stahle (Ind. App.) 76 N. E. 561, 562; Chouquette v. Southern Elec. Ry. Co. 152 Mo. 257; 53 S. W. 897; Bly v. Nashua St. R. Co. 67 N. H. 474; 32 Atl. 764; 68 Am. St. 681.

[105] Regina v. Toronto &c. R. Co. 24 Q. B. (U. C.) 454.

[106] Attorney-General v. Toronto &c. R. Co. 14 Grant's Ch. (U. C.) 673.

[107] Metropolitan &c. Co. In re, 111 N. Y. 588; 19 N. E. 645; Citizens' R. Co. v. Africa, 100 Tenn. 26; 42 S. W. 485, 489 (citing text). See, also, State v. Hartford St. R. Co. 76 Conn. 174; 56 Atl. 506; Gardner v. Templeton St. R. 184 Mass. 294; 68 N. E. 340. It has, however, been held that a slight deflection from the designated line will not impair the rights of the company. Commonwealth v. Wilkes Barre R. Co. (Pa.) 38 Am. & Eng. R. Cas. 428n; Concord v. Concord Horse R. 65 N. H. 30; 18 Atl. 87.

except such cross streets.[108] It is held that turn-outs cannot be constructed unless authorized by the ordinance or statute.[109]

§ 1096ab. Mandamus against municipal officers.—Where a street railway company is licensed to use a designated street, and it accepts the grant in the prescribed mode, it is the duty of the ministerial municipal officers, upon proper request, to take such steps as may be necessary to secure to the company the benefit of the privileges and franchises conferred upon it. In the event of the refusal of such an officer to perform his duty under the statute or ordinance, it has been held that the company will be entitled to a writ of mandate to coerce the performance of the duty. Thus, a surveyor whose duty it is to furnish lines and levels for the construction of a railway may be compelled to perform that duty by mandamus.[110]

§ 1096ac. Railway must be constructed within time specified.—The company must construct its road within the time designated, otherwise it will have no right to use the streets. The right conferred by the license does not outlast the time fixed by the licensor for the construction of the railway. If the company fails to construct its railway within the time limited, it generally loses its right and cannot use the streets without a new grant.[111] Where the con-

[108] State v. Newport St. R. Co. 16 R. I. 533; 18 Atl. 161. See, also, Chicago and Western R. Co. v. Dunbar, 100 Ill. 110. It seems to us that the court, in the case last cited, construed the statute too strongly against the public. We think that where a right to locate a railway is given in general terms it does not deprive the municipal officers of the authority to determine what streets shall be used. We believe that the general words cannot be construed to take away all power from the municipality, but that they must be deemed to confer a right to locate under the control of the local authorities. The decision was by a divided court, and it is difficult for us to resist the conviction that the minority views are correct.

[109] Concord v. Concord Horse R. 65 N. H. 30; 18 Atl. 87.

[110] State v. Cochrem, 25 La. Ann. 356. Compare Blocki v. People, 220 Ill. 444; 77 N. E. 172.

[111] Atchison Street R. Co. v. Nave, 38 Kan. 744; 17 Pac. 587; 5 Am. St. 800; G. C. R. Co. v. G. C. S. R. Co. 63 Tex. 529; Detroit v. Detroit City R. Co. 37 Mich. 558; Grand Rapids Street R. Co. v. West Side R. Co. 48 Mich. 433; 12 N. W. 643; 7 Am. & Eng. R. Cas. 95; New York &c. R. Co. v. Railway Co. 50 Barb. (N. Y.) 285; Market St. R. Co. v. Central R. Co. 51 Cal. 583; Chicago v. Chicago &c. R. Co. 105 Ill. 73; Chicago &c. R. Co. v. Story,

dition of the grant is that the company shall have notice that it is required to construct its railway under the grant, then notice is essential in order for the municipal corporation to withdraw the license or to defeat the right of the railway company to use the street. What the notice shall be must, of course, be determined from the terms of the grant.[112] Where an ordinance provides that a railway company shall build a railway upon designated streets within a limited time, the municipality may, it has been adjudged, grant the privilege to another upon the failure of the old company to construct its railway within the time limited by the ordinance.[113] But there

73 Ill. 541; Brooklyn &c. R. Co. Matter of, 72 N. Y. 245; Williamson v. Gordon Heights R. Co. (Del.) 40 Atl. 933; Grey v. New York &c. Co. 56 N. J. Eq. 463; 40 Atl. 21. See, also, Plymouth v. Chestnut Hill &c. R. Co. 168 Pa. St. 181; 32 Atl. 19. But compare Wilmington City R. Co. v. Wilmington &c. Co. (Del.) 46 Atl. 12; Hornbrook v. Elm Grove, 40 W. Va. 548; 28 L. R. A. 416. See, also, Toledo &c. R. Co. v. Johnson, 49 Mich. 148; 13 N. W. 492; Oakland R. Co. v. Oakland &c. Co. 45 Cal. 365; 13 Am. R. 181. Some of the cases hold that the failure to construct the railway within the time limited does not operate to extinguish the franchise, but operates simply as a defeasance, leaving an option in the licensors. Hovelman v. Kansas City &c. R. Co. 79 Mo. 632; People v. President &c. of Manhattan Co. 9 Wend. (N. Y.) 351. It seems to us that the doctrine of Hovelman v. Kansas City &c. R. Co. 79 Mo. 632, is not sound. We think the true doctrine is that asserted in the other cases cited, and that, as said in Atchison St. R. Co. v. Nave, 38 Kan. 744; 17 Pac. 587; 5 Am. St. 800, and note, "Until the license is accepted and used no right vests in the railway company, and it may be revoked by the city council; and after the time within which it may be availed of expires, the license lapses, and no revocation is needed to terminate the same." The only acceptance that can be effective to fasten the right of the grantee is such an acceptance as the grant prescribes, and where use is essential to create a complete right, use must be shown or the grant fails. But much depends upon the provisions of the particular grant as to whether the condition is a condition precedent or subsequent. Booth Street Railways, § 47.

[112] See Nellis Street Surface Railroads, §§ 17, 19. In the case of Fort Worth &c. R. Co. v. Rosedale R. Co. 68 Tex. 163; 7 S. W. 381, it seems to have been assumed that the adoption of an ordinance was sufficient notice.

[113] Fort Worth &c. R. Co. v. Rosedale R. Co. 68 Tex. 163, 169; 7 S. W. 381. The municipal officers may, of course, extend the time for the construction of the railway. McNeil v. Chicago R. Co. 61 Ill. 150. See, also, Omnibus R. Co. v. Baldwin, 57 Cal. 160; 1 Am. & Eng. R. Cas. 316. As to abandonment by non-user, see Henderson v. Passen-

are doubtless cases in which this cannot be done without notice to the old company or proper proceedings to forfeit its rights, or at least giving it an opportunity to comply with the terms of the grant. And it has recently been held that the right to take property of a street railway company remaining in the street at the expiration of its franchise cannot be conferred by the municipality upon another company.[114]

§ 1096ad. Transfer of company's rights.—A street railway company acquires a right in the street it is licensed to occupy which, it has been held, may be sold or transferred.[115] It is the property of the company, and may be mortgaged.[116] A sale upon a decree of foreclosure will vest the franchise in the purchaser.[117] It would seem

ger R. Co. 21 Fed. 358; People v. Broadway R. Co. 126 N. Y. 29, 45; 26 N. E. 961; Louisville Trust Co. v. Cincinnati, 76 Fed. 296; Wright v. Milwaukee &c. Co. 95 Wis. 29; 69 N. W. 791; 36 L. R. A. 47; 60 Am. St. 74.

[114] Cleveland Elec. R. Co. v. Cleveland (U. S.) 27 Sup. Ct. 202.

[115] Knoxville v. Africa, 77 Fed. 501; Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628; 26 L. R. A. 667. See, also, Louisville Trust Co. v. Cincinnati, 76 Fed. 296; Bardstown &c. R. Co. v. Metcalf, 4 Metc. (Ky.) 199; 81 Am. Dec. 541. But compare Clemmens El. &c. Co. v. Walton, 173 Mass. 286; 52 N. E. 132; 53 N. E. 820; State v. Bridgeton &c. Co. 62 N. J. L. 592; 43 Atl. 715; 45 L. R. A. 837; Braslin v. Somerville &c. R. Co. 145 Mass. 64; 13 N. E. 65.

[116] Sixth Avenue R. Co. v. Kerr, 72 N. Y. 330; People v. Sturtevant, 9 N. Y. 263; 59 Am. Dec. 536, and authorities cited in last preceding note. But compare Richardson v. Sibley, 11 Allen (Mass.) 65; 87 Am. Dec. 700.

[117] In the case of New Orleans &c. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, it was held that: "Where there has been a sale of railroad property, under a mortgage authorized by law, covering its franchise, it is now settled that the franchises necessary to the use and enjoyment of the railroad pass to the purchaser." In another case it was said: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders or the purchaser at a foreclosure sale the substantial rights intended to be secured. They acquire the ownership of the railroad and the property incident to it, and the franchise of maintaining and operating it as a road." Memphis &c. R. Co. v. Railroad Com'rs, 112 U. S. 609, 619; 5 Sup. Ct. 299. See, also, People v. Brooklyn &c. R. Co. 89 N. Y. 75; Brooklyn Central R. Co. v. Brooklyn City R. Co. 32 Barb. (N. Y.) 358, 360; Bardstown &c. R. Co. v. Metcalf, 4 Metc. (Ky.) 199; 81 Am. Dec. 541. But see, as to the franchise of being a corporation, ante, § 525.

to follow, from the principle stated, that the purchaser, upon a foreclosure sale, whether the purchase be made by an individual[118] or by a corporation, may operate and maintain the railway upon the same terms and conditions as those upon which the mortgagor held the franchise. But it is a general rule that a railroad company cannot voluntarily, and without legislative authority, sell or mortgage its franchise of being a corporation and operating and maintaining a railroad.[119] It is also the general rule that a sale of a part of a railway cannot be made upon execution, and this rule must obtain to a great extent in sales upon decrees of foreclosure, since the public are interested in the existence of the railway, and the franchise is essentially an indivisible right.[120] It is probably true that there may be cases where the railway is severable and parts may be sold, but such cases, if any such there are, must be deemed exceptional ones.[121]

§ 1096ae. Police power.—It may be said, generally, that the state, or its duly authorized municipality, may lawfully require a street railway company to do whatever is required for the health, safety and

[118] People v. Brooklyn &c. R. Co. 89 N. Y. 75. See, also, Shields v. Ohio, 95 U. S. 319. But compare Abbott v. Johnstown &c. R. Co. 80 N. Y. 27; 36 Am. R. 572.

[119] Coe v. Columbus &c. R. Co. 10 Ohio St. 372; Commonwealth v. Smith, 10 Allen (Mass.) 448; 87 Am. Dec. 672; Fietsam v. Hay, 122 Ill. 293; 3 Am. St. 492; Rollins v. Clay, 33 Me. 132; Oregon R. &c. Co. v. Oregonian R. Co. 130 U. S. 1; 9 Sup. Ct. 409; Thomas v. West Jersey R. Co. 101 U. S. 71; Black v. Delaware &c. Co. 22 N. J. Eq. 130; ante, §§ 67, 70, 71, 488; Booth Street Railways, §§ 422, 423.

[120] Muller v. Dows, 94 U. S. 444; Gue v. Tide Water &c. Co. 24 How. 257; Covington Drawbridge Co. v. Shepherd, 21 How. (U. S.) 112; East Alabama R. Co. v. Doe, 114 U. S. 340; 5 Sup Ct. 869; Thomas v. Railroad Co. 101 U. S. 71; Black v. Delaware &c. Co. 22 N. J. Eq. 130; Midland R. Co. v. Wilcox, 122 Ind. 84; 23 N. E. 506; Louisville &c. R. Co. v. Boney, 117 Ind. 501; 20 N. E. 432; 3 L. R. A. 435, and note.

[121] A purchaser takes it subject to the conditions and burdens of the original grant. Potwin Place v. Topeka R. Co. 51 Kans. 609; 33 Pac. 309; 37 Am. St. 312; Grosse Point Twp. v. Detroit &c. R. Co. 130 Mich. 363; 90 N. W. 42; Louisville Trust Co. v. Cincinnati, 73 Fed. 716; 76 Fed. 296; 78 Fed. 307. See, also, Bridgeton v. Bridgeton &c. Trac. Co. 62 N. J. L. 592; 43 Atl. 715; 45 L. R. A. 837. Compare Bonham v. Citizens' St. R. Co. 158 Ind. 106; 62 N. E. 996; Stafford v. Chippewa &c. R. Co. 110 Wis. 331; 85 N. W. 1036.

welfare of the community, for the authority to enact measures for this purpose never passes from the sovereign, no matter what grants it may make. All corporations take their rights and privileges subject to this general power which permanently resides in the state.[122] Under the police power it is competent for the state, or one of its duly authorized municipalities, to compel a street railway company to so manage and operate its railway as to prevent danger to life or property. Under the wide sweep of the general power are necessarily embraced many incidental and subsidiary powers. Much in the matter of detail and upon questions of expediency and necessity must be left to the governing power. Whether it is necessary or expedient to require new or additional precautions is intrinsically a legislative and not a judicial question. When a regulation is prescribed by the legislature itself the courts can do no more than ascertain whether or not any constitutional provision is violated, and if they find that no constitutional right has been invaded, the statute must be upheld. Where the regulation is prescribed by a municipal corporation the field of judicial duty is larger, for the courts must ascertain whether there is a constitutional statute authorizing the act of the municipality, whether the act is within the scope of the statute and is performed in the mode prescribed, and whether the regulation is a reasonable one. In determining whether the municipal by-law or resolution is reasonable, the courts do, it seems to us, exercise a power essentially legislative, for whether an act is or is not reasonable is a question, as a general rule, for the legislature. and it does not lose its inherent character by delegation to a political

[122] Ante, § 1096o. See, also, Mason v. Ohio River R. Co. 51 W. Va. 183; 41 S. E. 418; People v. Detroit &c. R. 134 Mich. 682; 97 N. W. 36; 63 L. R. A. 746; 104 Am. St. 626, and note. In the case of Westbrook's Appeal, 57 Conn. 95; 16 Atl. 724, it was held that the enactment of a statute abolishing grade crossings was a valid exercise of the police power. It was said by the court, in the course of the opinion, that: "We might stop here, but we will add that the act in question is an exercise of the police power of the state. Its object is to change or remove certain conditions, lawful in themselves, but which have become a source of danger to life and property. The remedy consists in requiring those charged with the duty of maintaining highways to change the conditions, and hereafter discharge their duties in such a manner as to avoid danger." See, also, Ridge Ave &c. R. Co. v. Philadelphia, 181 Pa. St. 592; 37 Atl. 910; State v. St. Paul City R. Co. 78 Minn. 331; 81 N. W. 200.

corporation. It is, perhaps, difficult to vindicate the doctrine that courts may overthrow the by-laws or ordinances of governmental subdivisions upon the ground that they are unreasonable, since what is or is not reasonable is not a question to be determined by fixed rules, and local officers are, as a general rule, in a position quite as favorable for reaching a satisfactory conclusion as the judges. But the rule that the courts may overturn such ordinances and by-laws as they find to be unreasonable is too firmly settled to be shaken.[123]

§ 1096af. **Municipal control.**—Under the police power, a municipal corporation may enact ordinances or by-laws prohibiting a street railway company from running its cars at such a rate of speed as to endanger the safety of persons rightfully using the streets. But under the rule that by-laws will be condemned if unreasonable the courts may prevent the enforcement of a by-law or ordinance that unreasonably restricts the rate of speed.[124] Courts should interfere with the judgment of the municipal officers only in clear cases, however, for some discretion is unquestionably committed to them, and as long as they act within the scope of their authority, and do not abuse their discretion, they are free from judicial control. We suppose it clear that a municipal corporation may, within reasonable limits, regulate the places of stopping cars so as to prevent the unnecessary hindrance of travel, and that it may also prevent the unnecessary obstruction of the streets. These rights of the municipality cannot, however, extend so far as to permit it to unnecessarily limit or restrict the operation of the railway, nor can they extend so far as to authorize any act that will destroy the franchise of the company.

§ 1096ag. **Illustrative cases.**—It has been held, under a municipal charter granting a city council power to "make, ordain and establish such by-laws, ordinances and regulations as shall appear to them requisite and necessary for the security, welfare and convenience of said city, and for preserving health, peace and good govern-

[123] See ante, § 1082; 1 Elliott Gen. Pr., § 436.

[124] See Evison v. Chicago &c. R. Co. 45 Minn. 370; 48 N. W. 6; 11 L. R. A. 434. See, also, ante, § 1082. In Licznerski v. Wilmington City R. Co. (Del.) 62 Atl. 1057, an ordinance limiting the speed of railroad cars is held not to apply to street cars. See, also, Bonham v. Citizens' St. R. Co. 158 Ind. 106; 62 N. E. 996.

ment within the limits of the same," that the council may lawfully enact and enforce an ordinance requiring a street railway company to keep down the dust by sprinkling its track,[125] and to remove snow thrown up by its snow-plows.[126] It has also been held, as elsewhere shown, that street railway companies take the privilege granted to them subject to the municipal authority to regulate the use of the streets as the necessities of the public may require, and that this authority extends so far as to vest in the municipality a right to change the track of the railway from one part of the street to another.[127]

[125] City &c. R. Co. v. Savannah, 77 Ga. 731; 4 Am. St. 106; State v. Canal &c. R. Co. 50 La. Ann. 1189; 24 So. 265; 56 L. R. A. 287. The doctrine of the cases cited will be found, on examination, to be well supported by the decisions in analogous cases, for the power to protect life, health, and property is very comprehensive. Railroad Co. v. Chenoa, 43 Ill. 209; Robertson v. Railroad Co. 84 Mo. 119; Gahagan v. Railroad Co. 1 Allen (Mass.) 187; 79 Am. Dec. 724, and note; Knobloch v. Railway Co. 31 Minn. 402; 18 N. W. 106; Whitson v. Franklin, 34 Ind. 392; Merz v. Railway Co. 14 Mo. App. 459; Railroad Co. v. Jersey City, 47 N. J. L. 286. But see State v. New Orleans &c. R. Co. 49 La. Ann. 1571; 22 So. 839; 39 L. R. A. 618, and note; Fielders v. New Jersey St. R. Co. 68 N. J. 343; 53 Atl. 404; 54 Atl. 822; 59 L. R. A. 455; 96 Am. St. 552. It is held that an ordinance of a municipality regulating the speed of trains may control their movement in the yards of the company. Crowley v. Railroad Co. 65 Iowa, 658; 20 N. W. 467; Green v. Canal Co. 38 Hun (N. Y.) 51. Contra, State v. Jersey City, 29 N. J. L. 170.

[126] Broadway &c. R. Co. v. Mayer, 1 N. Y. Supp. 646. See, also, Bowen v. Detroit City R. Co. 54 Mich. 496; 20 N. W. 559; 52 Am. R. 822; Chicago v. Chicago &c. Trac. Co. 199 Ill. 259; 65 N. E. 243; 59 L. R. A. 666.

[127] West Philadelphia Passenger R. Co. v. Philadelphia, 10 Phila. (Pa.) 70; Macon St. R. Co. v. Macon, 112 Ga. 782; 38 S. E. 60, 61 (citing text). "Private corporations," said the court, in the first case cited, "take their rights subject to the rights of individuals and communities; and the strong presumption of law is always against unconditional adverse privileges." It was also said: "To this must be added the general principle that, where a private corporation accepts the grant of a franchise upon a highway over which a municipality possesses a general power of regulation and control for public purposes, it accepts its special privileges upon the implied condition that it holds them subject to the reasonable and necessary exercise of the general power of the municipality. 'Until the legislature overrides the local authorities, their jurisdiction is not ousted.' Philadelphia v. Lombard &c. R. Co. 3 Grant (Pa.) 403, 405." See, also, Detroit v. Fort Wayne &c. R. Co. 90 Mich. 646; 51 N. W. 688. But

In accordance with the principle which we have heretofore stated, it has been adjudged that a municipal corporation may temporarily remove the tracks of a street railway company if necessary to enable the municipal officers to construct a culvert under one of the streets of the city.[128] In an Iowa case it is held that where the ordinance grants authority to lay down two tracks, the city cannot limit the company to one track, but it is intimated in the opinion that if the second track wrought an injury, the city might require its removal.[129] In another case the general question of the nature and extent of municipal control was elaborately discussed, and it was held that compelling a street railway company to number each of its cars and pay a designated license fee for each of them was a valid exercise of the police power vested in the municipality.[130] It has also been

compare Des Moines City R. Co. v. Des Moines, 90 Iowa, 770; 58 N. W. 906; 26 L. R. A. 767.

[128] North Pennsylvania Railroad v. Stone, 3 Phila. (Pa.) 421.

[129] Burlington v. Burlington St. R. Co. 49 Iowa, 144; 31 Am. R. 145. In that case it was said: "It is urged that the city, in the exercise of its police power, may forbid the laying of the double track. The question presented by this position is not in the case, for the reason that it is not shown in the pleadings that the proposed double track would operate to the inconvenience of the public or would work an injury to the city or any of the people. It is not claimed that the proposed improvement would be a nuisance, nor is it shown that the best interests of the city or the people require it to be forbidden. If, therefore, the city retains, in the exercise of the police power, the authority to forbid the construction of the double track, the facts present no case for the exercise of that power." The question suggested by the line of reasoning adopted by the court is delicate and difficult. Who shall determine what is required by the necessities of the public or the welfare of the community? If the question is a legislative one, then, clearly enough, the courts cannot interfere, nor can they interfere if the power is a discretionary one. We have no doubt that the courts may prevent an abuse of power, but where there are facts invoking the exercise of discretion in deciding what is and what is not required by the public welfare, we should seriously doubt the right of the courts to control or direct the exercise of that power.

[130] Frankford &c. Co. v. Philadelphia, 58 Pa. St. 119; 98 Am. Dec. 242. "But the grant," said the court, "of a privilege to carry passengers in cars over the streets does not necessarily involve exemption from liability to municipal regulation. It is not the bestowal of a right superior to the rights enjoyed by passenger carriers generally, whether such carriers be natural or artificial persons. The facilities for the use of the right may be greater, but the right itself can be neither

held that smoking in street cars may be prohibited;[131] that the number of passengers to be carried in each car may be limited;[132] that an employe may be required on each car in addition to the driver or motorman,[133] and that all cars shall have suitable fenders in front to prevent accident,[134] and be equipped with air or electric brakes.[135] So, it has been held that "contract obligations are not impaired by compelling a street railway company, at its own expense, to lower, or, at its option, remove, a tunnel constructed by it under the Chicago river, which, though not an obstruction to navigation when constructed, has since become such by reason of the increased size of the vessels plying on that river, where the municipal ordinance under which such tunnel was constructed contains no

more nor less than a natural person possesses. It is to be presumed that when the legislature creates a corporation, and authorizes it to carry on a specified business within the limits of a municipal corporation, the business is intended to be conducted under the restrictions, rules and regulations that govern the same business when transacted by others within the corporate limits." The court referred to the cases of Com'rs v. Northern Liberties Gas Co. 2 Jones, 318, and Trenton Water Works Company's Cases, 6 Pa. Law. J. 32, with approval, and, to some extent, denied the doctrine asserted in the case of Mayor v. Second St. R. Co. 32 N. Y. 261. See, also, Fort Smith v. Hunt, 72 Ark. 556; 82 S. W. 163; 66 L. R. A. 238; 105 Am. St. 51; New Orleans v. New Orleans &c. R. Co. 40 La. Ann. 587; 4 So. 512; Newport v. South Covington &c. R. Co. 89 Ky. 29; 11 S. W. 954. But compare Cape May v. Cape May Transp. Co. 64 N. J. L. 80; 44 Atl. 948.

[131] State v. Hiedenhain, 42 La. Ann. 483; 7 So. 621; 21 Am. St. 388.

[132] St. Louis v. St. Louis &c. R. Co. 89 Mo. 44; 1 S. W. 305; 58 Am. R. 82.

[133] State v. Trenton, 53 N. J. L. 132; 20 Atl. 1076; 11 L. R. A. 410. But see Brooklyn &c. R. Co. v. Brooklyn, 37 Hun (N. Y.), 413; Toronto v. Toronto &c. Co. 15 Ont. App. 30.

[134] State v. Cape May (N. J.), 36 Atl. 696, 698, where the authorities are reviewed and other illustrative cases are cited. And that the company shall furnish a sufficient number of cars to prevent overcrowding, and heated to a certain reasonable temperature. Chicago v. Chicago City R. Co. 222 Ill. 560; 78 N. E. 890. See, also, State v. Elizabeth, 58 N. J. L. 619; 34 Atl. 146; 32 L. R. A. 170; State v. Smith, 58 Minn. 35; 59 N. W. 1098; 25 L. R. A. 759, and note. But see for ordinance held invalid as delegating authority and vesting arbitrary discretion. Elkhart v. Murray, 165 Ind. 304; 75 N. E. 593; 1 L. R. A. (N. S.) 940.

[135] People v. Detroit United R. 134 Mich. 682; 97 N. W. 36; 63 L. R. A. 746; 104 Am. St. 626, and note.

stipulation that the city will not exert any power it possesses to deepen the channel and improve navigation, and it was adopted while a state statute was in force which, as construed by the state courts, made it a condition of the construction of such a tunnel that navigation should not be unnecessarily interrupted," and that compelling the company to so lower or remove the tunnel, under such circumstances, is not a taking of property without due process of law.[136]

§ 1096ah. **Regulation of fare.**—It has been held not only that the legislature has the power to reasonably regulate the rate of fare on street cars, but also that a city has no power to enter into any contract which would prevent the legislature from regulating the fare,[137] and that a municipality cannot contract away the right to compel or assess the company for street improvements, even though the assent of the city is required before a street can be used by the company, no matter whether such an assessment is an exercise of the taxing power or of the police power.[138] It has also been held that the requirement of the Texas statute of 1903 that street railway companies shall issue half-fare tickets to school children does not impair the obligation of any contract with the municipality, fixing the rates which such company might charge, entered into after the adoption of the Constitution of Texas in 1876, which subjects to the control of the legislature all privileges and franchises granted by it or created under its authority; and that any contract exemption from legislative regulation of rates, possessed by a street railway company chartered before the adoption of such constitution, "was lost by the sale of its property on foreclosure, and the acquisition of its franchise, under a municipal ordinance, together with that of another company, by a new corporation, incorporated since the adoption of such Constitution, although such ordinance provides that all the rights and privileges previously granted to the old corporations were conferred on the new one, including all the limitations, contracts

[136] West Chicago St. R. Co. v. People, 201 U. S. 506; 26 Sup. Ct. 518.

[137] Indianapolis v. Navin, 151 Ind. 139; 47 N. E. 525; 51 N. E. 80; 41 L. R. A. 337. See, also, Chicago &c. R. Co. v. Railroad Commission (Ind. App.), 78 N. E. 338.

[138] Rochester v. Rochester R. Co. 182 N. Y. 99; 74 N. E. 953; 70 L. R. A. 773.

and obligations."[139] But, as elsewhere shown, the well-settled general rule is that an ordinance granting the right to a street railway company to use the city streets upon authorized terms and conditions therein stated, when accepted by the company, constitutes a binding contract, and, upon this principle, it is correctly held that the city cannot thereafter lower the rate of fare authorized in such ordinance to be charged by the company as against the objection of the company, and that to permit it to do so would be to impair the obligation of the contract.[140] This rule was applied where ordinances had been passed and accepted for the consolidation of certain street railway lines and extensions, and the city afterwards undertook to reduce the rate of fare over a portion of the consolidated lines under the alleged authority of a right to regulate fares, which had been reserved by it in an ordinance adopted before consolidation, granting a renewal franchise to the corporation which then owned such portion of the lines.[141] And the right to regulate the fare, even if it is not or cannot be taken away from the legislature, does not include the power to compel the company to carry passengers without reward, or for such sum as would amount to a confiscation or taking of its property without compensation or due process of law.[142] But it has been held that a statute requiring street railway companies to carry pupils of the public schools, going to and from school, at rates not exceeding half the regular fare charged by the company for the transportation of other passengers between the same points, and leaving unchanged the previous law exempting a certain elevated railroad company, is constitutional and valid.[143]

[139] San Antonio Trac. Co. v. Altgelt, 200 U. S. 304; 26 Sup. Ct. 261.

[140] Cleveland v. Cleveland City R. Co. 194 U. S. 517; 24 Sup. Ct. 756; Detroit v. Detroit Citizens' St. R. Co. 184 U. S. 368; 22 Sup. Ct. 410. See, also, Knoxville Water Co. v. Knoxville, 189 U. S. 434; 23 Sup. Ct. 531.

[141] Cleveland v. Cleveland City R. Co. 194 U. S. 517; 24 Sup. Ct. 756.

[142] See Chicago &c. R. Co. v. Iowa, 94 U. S. 155; Chicago &c. R. Co. v. Minnesota, 134 U. S. 418; 10 Sup. Ct. 462, 702; Budd v. New York, 143 U. S. 517; 12 Sup. Ct. 464; Brass v. North Dakota, 153 U. S. 391; 14 Sup. Ct. 857; Covington Bridge &c. Co. v. Kentucky, 154 U. S. 204, 213, 214; 14 Sup. Ct. 1087; Attorney Gen. v. Old Colony R. Co. 160 Mass. 62; 35 N. E. 252; 22 L. R. A. 112; State v. Fremont &c. R. Co. 23 Neb. 117; 36 N. W. 305.

[143] Commonwealth v. Interstate &c. St. R. Co. 187 Mass. 436; 73 N. E. 530. The soundness of this decision is not entirely free from question.

§ 1096ai. Duty of company to repair.—It is no more than just that a street railway company which secures a right to use a public road or street should maintain the part so used in as good repair, at least, as it was at the time possession was taken by the company, except in cases where it is otherwise provided by the ordinance or resolution which grants the franchise.[144] It is, indeed, not easy to find any solid ground upon which it can be held that the street or road can be subjected to a use which, as matter of common knowledge, every one knows greatly increases the wear and tear, and, consequently, the expense of maintaining the way, and yet individual property owners be compelled to bear the increased burden. The benefit which accrues from the use is enjoyed by the company and not the property owners, and it seems, upon the salutary equitable doctrine that "he who derives the advantage ought to sustain the burden," the company should bear the burden of keeping the way in as good condition, at least, as it was when it entered upon the enjoyment of its franchise. The company is unquestionably bound to use ordinary care and diligence to keep the space it occupies in a reasonably safe condition for ordinary travel in so far as its own use and acts are concerned, and there is reason for extending the doctrine, for the company secures a special privilege in a highway, and in consideration of the grant of such a privilege it ought to be held bound to keep the space it occupies in a reasonably convenient condition for travel. The principle upon which we base our conclusion is one that has been long established and often enforced, for it is the principle which is asserted in cases of the crossing or occupancy of highways by ordinary steam railroads.[145] It is compe-

[144] Memphis &c. R. Co. v. State, 87 Tenn. 746; 11 S. W. 946; North Hudson &c. Co. v. Hoboken, 41 N. J. L. 71. See generally to the effect that the company must lay its tracks in a proper manner and keep the same in repair. Worater v. Forty-second St. R. Co. 50 N. Y. 203; Western Pav. &c. Co. v. Citizens' St. R. Co. 128 Ind. 525; 26 N. E. 188; 28 N. E. 883; 10 L. R. A. 770; 25 Am. St. 462, and note; Keitel v. St. Louis Cable &c. Co. 28 Mo. App. 657; Sioux City St. R. Co. v. Sioux City, 78 Iowa, 742; 39 N. W. 498; 43 N. W. 224; Houston City R. Co. v. Delesdermier, 84 Tex. 82; 19 S. W. 366. As to change of tracks to conform to grade, see Little Rock v. Citizens' St. R. Co. 56 Ark. 28; 19 S. W. 17; Ashland St. R. Co. v Ashland, 78 Wis. 271; 47 N. W. 619; Karst v. St. Paul &c. Co. 22 Minn. 118.

[145] Louisville &c. Co. v. State, 3 Head (Tenn.), 523; 75 Am. Dec. 778; People v. Chicago &c. Co. 67

tent for the municipal officers to make it the duty of the street railway company licensed to occupy the public streets to maintain the streets in good repair by inserting a provision to that effect in the ordinance or resolution conferring the franchise. Where there is a provision in the ordinance or resolution imposing the duty of repairing upon the company, the duty is held to be a continuing one, and it is not discharged by a simple restoration of the streets to the condition they were in at the time possession was taken.[146] This doctrine is clearly right. We are strongly inclined to the opinion that the duty exists as a continuous one, although there may be no express provision in the grant creating it, since the implication is, where no provision is made to the contrary, that a company which acquires a right to use a highway for its special benefit will keep it in reasonable repair. The case falls within the rule that it is the act done for its own benefit, and to advance its own interests, that makes repairs necessary, and, therefore, it is equitable that it should bear the burden of maintaining the highway in repair.[147] It has also been held that an ordinance requiring street railway companies to keep in good repair all that part of the street occupied by their tracks includes additional tracks thereafter laid,[148] and that a city, as a condition of a grant to use electric motors and erect and place poles and wires in the street, may require the company to pave the parts of the street between and adjoining the tracks.[149]

Ill. 118; Eyler v. Allegheny County, 49 Md. 257; 33 Am. R. 249; post, § 1105, et seq.

[146] Burritt v. New Haven, 42 Conn. 174; State v. Minneapolis &c. R. Co. 39 Minn. 219; 39 N. W. 153; State v. St. Paul &c. Co. 35 Minn. 131; 28 N. W. 3; 59 Am. R. 313. See, also, McKeesport v. Pittsburg &c Ry. Co. 213 Pa. St. 542; 62 Atl. 1075; Cambria Iron Co. v. Union Trust Co. 154 Ind. 292; 55 N E. 745; Dist. of Columbia v. Washington &c. R. Co. 4 Mackey (D C.). 214; Conway v. Rochester, 157 N. Y. 335; 1 N. E. 395; State v. Jacksonville &c. R. Co. 29 Fla. 590; 10 So. 590; Reading v. United Trac. Co. 202 Pa. St. 571; 52 Atl. 106.

[147] Queen v. Isle of Ely, 15 Q. B. 827; King v. Lindsey, 14 East, 318; King v. Kerrison, 3 Maule & S. 526; Leopard v. Chesapeake & Ohio Canal, 1 Gill (Md.), 222; Northern Central R. Co. v. Baltimore, 46 Md. 425; Paducah &c. Co. v. Commonwealth, 80 Ky. 147; People v. Chicago & Alton &c. R. Co. 67 Ill. 118; Trenton Water Power Co. In re, 20 N. J. L. 659. See also, Johnston v. Providence &c. Co. 10 R. I. 365; People v. Dutchess &c. 58 N. Y. 152.

[148] Montgomery St. R. Co. v. Smith (Ala.), 39 So. 757.

[149] Trenton v. Trenton St. R. Co. (N. J.) 63 Atl. 1.

§ 1096aj. Liability of company for failure to repair.—If the street railway company refuses to repair, mandamus will lie to compel it to perform that duty.[150] It has been held that if the company fails or refuses to perform its duty by making the necessary repairs, the municipal authorities may make them and collect the expense from the company.[151] If the railroad company negligently fails to perform its duty, and injury is thereby caused to travelers, the municipal corporation may recover from the company the damages it has been compelled to pay to the injured person.[152] The undertaking of a street railway company to maintain the streets in repair does not relieve the municipal corporation from the general duty imposed upon it by law; but where a street railway company is the primary wrong-doer, the municipal corporation may compel the company to reimburse it for all damages and costs that it has been compelled to pay.[153] It has also been held that a street railway company

[150] State v. St. Paul &c. R. Co. 35 Minn. 131; 28 N. W. 3; 59 Am. R. 313; Halifax v. City R. Co. 1 Russ. Eq. (Nova Scotia) 319; State v. Jacksonville St. R. Co. 29 Fla. 590; 10 So. 590, 597. See, also, Detroit v. Ft. Wayne &c. R. Co. 90 Mich. 646; 51 N. W. 688; Oshkosh v. Milwaukee &c. R. Co. 74 Wis. 534; 43 N. W. 489; 17 Am. St. 175. But compare Benton Harbor v. St. Joseph &c. St. R. Co. 102 Mich. 386; 60 N. W. 758; 26 L. R. A. 245; 47 Am. St. 553.

[151] Philadelphia &c. Co. v. Philadelphia, 11 Phila. 358; Columbus v. Columbus St. R. Co. 45 Ohio St. 98; 12 N. E. 651; 32 Am. & Eng. R. Cases, 292; New Haven v. Fair Haven &c. Co. 38 Conn. 422; 9 Am. R. 399. See also, Washington &c. R. Co. v. Dist. of Columbia, 108 U. S. 522; 2 Sup. Ct. 868; Lincoln St. R. Co. v. Lincoln, 61 Neb. 109; 84 N. W. 802; Ashland St. R. Co. v. Ashland, 78 Wis. 271; 47 N. W. 619. The municipal authorities must proceed in the ordinary way, and they have no right to make extravagant or unreasonable repairs. New York City v. Second Ave. R. Co. 102 N. Y. 572; 7 N. E. 905; 55 Am. R. 839. See generally, Gulf City &c. Co. v. Galveston, 69 Tex. 660; 7 S. W. 520; 32 Am. & Eng. R. Cas. 300; State v. Ingram, 5 Ired. (N. Car.) 441; Rutland v. Dayton, 60 Ill. 58.

[152] As to whether a passenger can recover because of failure of the company to perform such duty, see Fielders v. North Jersey R. Co. 68 N. J. L. 343; 53 Atl. 404; 54 Atl. 822; 59 L. R. A. 455; 96 Am. St. 552, reversing 67 N. J. L. 76; 50 Atl. 533; Nellis St. R. Acc. Law, 35, 57, 223. Both sides of the question are forcibly presented and the authorities are reviewed by both courts and in the principal and dissenting opinions in the New Jersey case above cited.

[153] People v. Brooklyn, 65 N. Y. 349; Brooklyn v. Brooklyn City R. Co. 47 N. Y. 475; 7 Am. R. 469; Brooklyn v. Brooklyn City R. Co. 57 Barb. (N. Y.) 497.

which negligently fails to keep the part occupied by it in repair may be indicted for a nuisance, and it was further held that, upon failure to abate the nuisance, the obstructions created by it might be removed.[154] In a comparatively recent case the supreme court of Wisconsin held that a railway company might be compelled by mandatory injunction to restore a public street, which it had torn up, to its former condition of usefulness.[155]

§ 1096ak. When company is bound to improve.—It is competent for the municipal corporation which grants a street railway company the privilege of using its streets to require the company, as a condition of the consent or grant which the municipality is authorized to give or withhold, to pave or otherwise improve the streets.[156] It has been held with much reason that where the ordinance under which company claims provides that it shall keep the streets in perpetual repair, it may be compelled to repave or otherwise improve the streets.[157] Where there is a general undertaking to keep the street

[154] Memphis, Prospect Park and Belt R. Co. v. State, 87 Tenn. 746; 11 S. W. 946.

[155] Oshkosh v. Milwaukee &c. R. Co. 74 Wis. 534; 43 N. W. 489; 17 Am. St. 175. It was held that a county may sue to compel a restoration of a highway, in Greenup County v. Maysville &c. R. Co. 88 Ky. 659; 11 S. W. 774.

[156] McKeesport v. Pittsburg &c. R. Co. 23 Pa. St. 542; 62 Atl. 1075. See also, St. Louis v. Missouri R. Co. 13 Mo. App. 524; Kettle v. Dallas, 35 Tex. Civ. App. 632; 80 S. W. 874; Fair Haven &c. R. Co. v. New Haven, 75 Conn. 442; 53 Atl. 960; Trenton v. Trenton St. R. Co. (N. J.) 63 Atl. 1.

[157] Pittsburg &c. R. Co. v. Birmingham, 51 Pa. St. 41; District of Columbia v. Washington &c. R. Co. 1 Mackey (D. C.), 361, 379; Philadelphia v. Ridge Ave. Pass. R. Co. 143 Pa. St. 442; 22 Atl. 695; Conway v. Rochester, 157 N. Y. 33; 51 N. E. 395. In Trenton v. Trenton St. R. Co. (N. J.) 63 Atl. 1, it is held that under a statute providing that any street railway company may use electric motors as the propelling power of its cars, instead of horses, provided it shall first obtain the consent of the municipal authorities, the city might make it a condition that the company should pave between and adjacent to the tracks, and that a contract whereby the city gave the street railroad company the right to use electric motors on condition that it should pave certain parts of streets was not ultra vires. And it was also held that a statute providing for the taxation of all the property and franchises of corporations using or occupying public streets, and that the franchise tax provided by that act shall be in lieu of all other franchise taxes, did not relieve the company of its duty to pave certain parts

in repair it seems to us that the duty should be regarded as a continuing one, and that the company must make repairs to correspond with the changed and improved condition of the street. Decisions in analogous cases give support to this conclusion.[158] If it be true that the company is not bound under the continuing duty to make repairs to correspond with the improved or changed condition of the street, then the practical result would be that it would be entirely released from its duty, since it is quite clear that repairs of any other character would be without value or service to the public. Nor is it unreasonable or unjust to hold that the company accepted its franchise under the implied condition that changes and improvements required by progress and growth would be made, for, certainly, neither the municipality nor the company can be presumed to have intended that no progress should be made nor any changes be required. There is more reason for holding that the company is bound to improve, by repaving or otherwise, the space used by it, than there is for holding that the duty to repair extends no further than to require the company to keep the space in the condition it was at the time it took possession. Our conclusion is that where there is a clearly expressed requirement binding the company to repair, the duty is a continuing one, and the repairs must be so made as to correspond with the changed condition of the street wrought by the improvement made under the direction of the municipality. In affirming that it is the general duty of the street railway company to repair by restoring the street to the condition in which it was when possession was taken, or by restoring it to the condition in which it is subsequently placed by the municipal government, we are, as we believe, fully within the authorities. There are, indeed, strongly reasoned cases which, pressing the doctrine further, hold that it is the duty of the company to improve as well as to repair.

of streets imposed as a condition to its right to use electric motors, as above stated.

[158] The principle was asserted by the supreme court of Pennsylvania in the case of Phoenixville v. Phoenixville Iron Co. 45 Pa. St. 135, 137, where it was said: "It is a fair presumption the legislature never intended to give away public rights or to impose burdens upon any local community without compensation. This is a continuing obligation upon the company to keep up the bridge." See, also, Pennsylvania R. Co. v. Duquesne, 46 Pa. St. 223, 224; Oconto v. Chicago &c. R. Co. 44 Wis. 231, 238; Mayor v. Harlem Bridge &c. Co. 186 N. Y. 304; 78 N. E. 1072.

§ 1096al. Company not generally bound to improve.—As much as can be safely affirmed in the present state of the decided cases is that the private corporation is bound to repair, but is not, perhaps, bound to improve.[159] It is bound to restore, but is not, according to the weight of authority, bound to change, where no such duty is imposed by statute or in granting the consent or right to use the streets. We do not, however, think that the duty to repair is to be so narrowed as to require no more than that the private corporation shall restore the street to the condition in which it was when possession was taken; we think the duty extends much beyond that limit. The duty to repair requires that the street shall be so kept as to correspond with its general condition at the time the repairs are required. To illustrate our meaning: If a street paved with wooden blocks is subsequently paved with stone, it would be the duty of the company, when it became necessary to repair after the improvement by paving with stone, to make repairs to correspond with the changed condition of the street.[160] It would not, as we interpret the rule sustained by the weight of authority, be compelled to make the new pavement, but it would be its duty, in making repairs after the new pavement was laid, to make them to correspond to the new pavement. Any other rule would make the duty to repair practically valueless, and not only this, but it would tend to check the growth and development of towns and cities without just reason or excuse.

§ 1096am. Conflict of authority.—The question whether a street railway company can be required to improve a street where that duty is not imposed upon it by the terms of its grant is one upon which the decisions are in conflict. It is maintained by some of the courts, with much force and plausibility, that the franchise of a street railway company is property, and should be assessed for the expense of the improvement.[161] The franchise of the company is unquestionably

[159] State v. Jacksonville St. R. Co. 29 Florida, 590; 10 So. 590, 595 (citing text); Western Pav. &c. Co. v. Citizens' St. R. Co. 128 Ind. 525; 26 N. E. 188; 28 N. E. 88; 10 L. R. A. 770, and note; 25 Am. St. 462, 466 (quoting text). Compare Lightner, v. Peoria, 150 Ill. 80; 37 N. E. 69.

[160] See Conway v. Rochester, 157 N. Y. 33; 51 N. E. 395; Philadelphia v. Thirteenth St. &c. Co. 169 Pa. St. 269; 33 Atl. 126; Mayor v. Harlem Bridge &c. Co. 186 N. Y. 304; 78 N. E. 1072.

[161] Chicago City R. Co. v. Chicago, 90 Ill. 573; 32 Am. R. 54; Chicago

property, and the improvement benefits that property to a greater extent in most cases than it does the property of abutting lot-owners, and, as the foundation of the right to assess private property for the cost of a public improvement is the theory that the benefit is the equivalent of the assessment, there is no little strength in the position that the railway company is liable to assessment; but this doctrine is denied by able courts.[162] The question must, perhaps, be regarded as settled by the decision of the Supreme Court of the United States in the case referred to in the note so far as it affects cases in which the ordinance simply binds the company to repair, for to that extent the question is a federal one. But the question of construction remains an open one, and that can only be determined from the language of the ordinance or resolution involved in the particular case, for various provisions are made in such municipal enactments to which diverse constructions have been given.[163]

v. Baer, 41 Ill. 306; Columbus v. Columbus St. R. Co. (Ohio), 32 Am. & Eng. R. Cas. 292. See, also, Fair Haven &c. R. Co. v. New Haven, 75 Conn. 442; 53 Atl. 960; Pittsburg &c. R. Co. v. Taber (Ind.) 77 N. E. 741; Erie R. Co. v. Paterson, (N. J.) 59 Atl. 1031. But see Lightner v. Peoria, 150 Ill. 80; 37 N. E. 69; Harris v. Macomb, 213 Ill. 47; 72 N. E. 762; McChesney v. Chicago, 213 Ill. 592; 73 N. E. 368; Ware v. Willis, 45 Ala. 120; West Chicago &c. R. Co. v. Chicago, 178 Ill. 339; 53 N. E. 112. In other cases a somewhat similar doctrine is laid down, but the decisions turn upon the language of the grant. Fort Wayne &c. St. R. Co. v. Detroit, 34 Mich. 78; Fort Wayne &c. St. R. Co. v. Detroit, 39 Mich. 543; and see ante, § 786, et seq.

[162] Chicago v. Sheldon, 9 Wall. (U. S.) 50; State v. Corrigan Consol. R. Co. 85 Mo. 263; 55 Am. R. 361; Baltimore v. Scharf, 54 Md. 499; Philadelphia v. Empire Passenger R. Co. 7 Phila. (Pa.) 321; Galveston v. Galveston City R. Co. 46 Tex. 435; Galveston City R. Co. v. Nolan, 53 Tex. 139. See, also, Western Pav. &c. Co. v. Citizens' St. R. Co. 128 Ind. 525; 26 N. E. 188; 28 N. E. 88; 10 L. R. A. 770, and note; 25 Am. St. 462; Springfield v. Springfield St. R. Co. 182 Mass. 41; 64 N. E. 577; Ft. Dodge Elec. &c. Co. v. Ft. Dodge, 115 Iowa, 568; 89 N. W. 7; Oskaloosa St. R. Co. v. Oskaloosa, 99 Iowa, 496; 68 N. W. 808; Philadelphia v. Philadelphia Pass. R. Co. 177 Pa. St. 379; 35 Atl. 720; Shreveport v. Shreveport Belt &c. Co. 104 La. Ann. 260; 29 So. 129; Dean v. Paterson, 67 N. J. L. 199; 50 Atl. 620.

[163] Pittsburgh &c. R. Co. v. Pittsburgh, 80 Pa. St. 72; Philadelphia &c. Co. v. Philadelphia, 11 Phila. 358; McMahon v. Second Avenue R. Co. 75 N. Y. 231; Robbins v. Omnibus R. Co. 32 Cal. 472. See, also, Philadelphia v. Thirteenth St. &c. R. Co. 169 Pa. St. 269; 33 Atl. 126. But compare Philadelphia v. Hestonville &c. R. Co. 177 Pa. St. 371;

§ 1096an. Duty to improve or repair—Conclusion.—We think that it is safe to affirm that the assumption should be, where there is nothing evidencing the contrary, that the local authorities did not intend to relieve the private corporation from the duty of repairing, for in the absence of a provision relieving it from that duty the law would imply that it exists.[164] It is not to be forgotten that in cases where the expense of improving a street must be borne by private property owners, neither the legislature nor the municipal corporation can entirely disregard the rights of such owners. It is impossible to successfully deny that in many instances the use of a street by a railway company lessens the special benefits which accrue to abutting property, whereas, in almost every instance, the street railway company profits from the improved condition of the street. But it is probably true that, under the rule as now declared by the majority of the cases, as much as can be safely said is, that the railway company is under a general and continuous duty to repair, but is not bound to improve. The contract, however, is controlling, and by the rights and duties of the parties are to be measured and determined.[165]

§ 1096ao. Limitation of rights of company.—Under the rule to which we have often referred, a street railway company takes under

35 Atl. 718; Baltimore v. Scharf, 54 Md. 499; Dean v. Paterson, 67 N. J. L. 199; 50 Atl. 620.

[164] This is in harmony with the general principle that a corporation which uses a highway for its special benefit must restore it to its former condition and maintain it in reasonable repair. Roberts v. Chicago &c. R. Co. 35 Wis. 679; People v. Chicago and Alton R. Co. 67 Ill. 118; People v. New York Central R. Co. 74 N. Y. 302; Little Miami &c. Co. v. Com'rs, 31 Ohio St. 338; Eyler v. County Com'rs, 49 Md. 257; 33 Am. R. 249; Gear v. Chicago &c. R. Co. 43 Iowa, 83; Cooke v. Boston &c. R. Co. 133 Mass. 185. The duty is continuous, and an action to enforce is not barred by the statute of limitations. Hatch v. Syracuse &c. Co. 50 Hun (N. Y.) 64; 4 N. Y. S. 509; Little Miami &c. Co. v. Com'rs, 31 Ohio St. 338.

[165] But where the legislature has reserved the power to impose further conditions, it may require the company to pave beyond the rails of its track, although the original ordinance required the company to pave only between the rails. Sioux City St. R. Co. v. Sioux City, 138 U. S. 98; 11 Sup. Ct. 226; Sioux City St. R. Co. v. Sioux City, 78 Iowa, 367; 39 N. W. 498; 43 N. W. 224; Lincoln St. R. Co. v. Lincoln, 61 Neb. 109; 84 N. W. 802; Wood v. Binghamton, 56 N. Y. S. 105.

its charter or license only such rights as are expressly conferred or are clearly implied, and it therefore acquires only a right to use the road or street for the purpose of moving its cars or transporting passengers. It does not acquire any right, under a general grant, to use a highway for the storage of its cars, or other similar purposes.[166] As we have seen, street railway companies are allowed to use highways upon the ground that they furnish means of travel, and thus promote the public welfare and convenience. To permit them to use the streets or roads for any other purpose would be an invasion of the public right as well as an infringement of the private rights of abutting owners.[167] It is the duty of a street railway company to so maintain and operate its railway as not to unnecessarily impede travel or obstruct the highway. It has no right to use more of the highway than is reasonably necessary to enable it to conduct its legitimate business, nor has it any right to unnecessarily interfere with the easement of access of the adjoining lot-owners.[168] In short, a railway company ordinarily acquires such rights, and such rights only, as are necessary to enable it to enjoy in a reasonable mode the franchise granted to it.

§ 1096ap. Illustrative cases.—The general doctrine stated in the last preceding section is illustrated by a case in which it was held that the company was liable for so negligently removing snow from its track as to make the street unsafe.[169] In another case the ques-

[166] See ante, § 1076.

[167] It has also been said that a city "cannot so multiply street railway tracks in a particular street as to interfere with the rights of the public in the street." Grand Rapids St. R. Co. v. West Side St. R. Co. 48 Mich. 433; 12 N. W. 643; and to the same effect see Canal &c. St. R. Co. v. Crescent City R. Co. 41 La. Ann. 561; 6 So. 849; Dooly Block v. Salt Lake &c. Co. 9 Utah, 31; 33 Pac. 229; 24 L. R. A. 610; Sherlock v. Kansas City &c. R. Co. 142 Mo. 172; 43 S. W. 629; 64 Am. St. 551.

[168] Prime v. Twenty-third St. R. Co. 1 Abbott New Cases (N. Y.) 63; Hussner v. Brooklyn City R. Co. 114 N. Y. 433; 21 N. E. 1002; 11 Am. St. 679.

[169] Wallace v. Detroit City R. Co. 58 Mich. 231; 24 N. W. 870. It was said by the court that: "As it was decided in Bowen's case (Bowen v. Detroit City R. Co. 54 Mich. 496; 20 N. W. 559; 52 Am. R. 822), we think that any disposition of the snow must be made with due reference to the rights of travel upon the highway." See, also, Dixon v. Brooklyn City &c. R. Co. 100 N. Y. 170; 3 N. E. 65; West Chicago St. R. Co. v. O'Connor, 85 Ill. App. 278;

tion as to the duty of a street railway company was considered at some length, and it was held, in substance, that it must exercise its privileges with a due regard to the rights of the public to travel the highway.[170] In a Maryland case it was held that a street railway company has no right to throw masses of snow into a gutter and thus so obstruct the flow of water as to cast it upon private property.[171] It was, however, declared in the case referred to, that the company was not bound to haul the snow away in any event, although it was bound to exercise ordinary care. We think the doctrine was too broadly stated when it was affirmed that the company was not bound to remove the snow, for, as we believe, the company was bound to do whatever ordinary care and diligence made necessary in order to enable the public to use the street in a reasonable manner. We do not believe that a street railway company can clear away its track and bank up the snow so as to make it dangerous to use the street, or so as to prevent travelers from leaving the track with safety in order to make way, as it is their duty to do, for the passage of the cars. A street railway company which accepts a grant

Smith v. Nashua St. Ry. Co. 69 N. H. 504; 44 Atl. 133; Gerrard v. La Crosse City R. Co. 113 Wis. 258; 89 N. W. 125; 57 L. R. A. 465.

[170] Bowen v. Detroit City R. Co. 54 Mich. 496; 20 N. W. 559; 52 Am. R. 822. "Although the legislature," said the court, "by implication granted the right to the defendant to deposit the snow on the street, the company notwithstanding was bound to exercise the right conferred with the rights of the community in the use of the street, and it was also bound to use the highest degree of care to prevent injury to persons and property of those affected by its acts." The rule, as the court states it, is perhaps rather more stringent than the doctrine of analogous cases warrants, for, as it seems to us, if a street railway company uses ordinary care and diligence to prevent injury to travelers and property it will not be liable.

[171] Short v. Baltimore Passenger R. Co. 50 Md. 73; 33 Am. R. 298. In speaking of the duty of the company the court said: "It was obliged to exercise ordinary care and prudence, not only in removing the snow from the track, but also in throwing it on the street." This, as we think, may be accepted as an accurate statement of the general rule, but, as we have endeavored to show in the text, the court unduly restricted the operation of the principle it laid down as the ruling one. As the question presents itself to our minds, it seems clear that the company was bound to do whatever ordinary care required, and if ordinary care required the removal of the snow, then it was the duty of the company to remove it.

or license impliedly agrees that it will use due care not to unnecessarily impede travel or to make the use of the street hazardous.[172] The burden which it assumes in conjunction with the benefit which it obtains is a continuing one, and it must bear it, although to do what due care and diligence requires may sometimes entail considerable expense. We know of no principle which will permit a railway company licensed to use the public roads or streets to clear away its tracks and do no more, although in doing this it may make the use of the street dangerous. If the work of clearing its track necessarily obstructs passage, then the company must do all that ordinary care requires to remove the obstruction and prevent injury to persons or property. Where the track is cleared for its own convenience it must do what is reasonably necessary to make the part of the street not occupied by its tracks reasonably safe, for it can not for its own accommodation obstruct it so as to endanger travelers. The privileges secured by the company are not so far reaching or so exclusive as to exempt them from using due care; on the contrary, the privileges are granted upon the implied condition that they shall be used with due regard to the rights of the public in the highway.[173]

[172] See Grover v. Louisville R. Co. 109 Ky. 76; 58 S. W. 508; 52 L. R. A. 448, and note.

[173] What has been said in the text is a just deduction from the adjudged cases. In People v. Batchellor, 53 N. Y. 128; 13 Am. R. 480, it is held that a corporation, aside from the privilege of transporting passengers, possesses only private rights, and it is quite clear that the right to transport passengers does not carry the right to encumber or obstruct the street. After a full use of the street for the movement of cars, "a further use becomes an obstruction, and it is the duty on the part of the person causing the obstruction to remove it." People v. Cunningham, 1 Denio (N. Y.) 524; 43 Am. Dec. 709; Prime v. Twenty-third St. R. Co. 1 Abbott's N. C. (N. Y.) 63, 71. In the case last mentioned, it was said: "The use of no more of the street is granted than is necessary for the operation of the railway. After the snow has been cleared from the track, its remaining on the street on the side has nothing to do with it, and does not in any way affect the operation of the railway, using that term in whatever way it may be used. The deposit of the snow on the side has the same relation to the corporation that a deposit elsewhere would have, and no other. The use of the side has no other relation to the full existence of the franchise than the stables for the horses and the houses for the cars." It was also said: "The convenience and inexpensiveness of using the street at the side of the track for a permanent place for snow do not of themselves create any necessity

§ 1096aq. Rights of company superior to those of travelers.— The grant of a right to use the streets of a city gives the company rights in some respects superior to those of persons riding or driving along the street.[174] A street railway company must necessarily possess greater rights than those of the ordinary traveler, for, as is very evident, the cars of the company cannot give and take the road but must move upon the track. It is, therefore, the duty of those traveling in the ordinary mode to leave the track in order that the movement of the cars may be unimpeded. It is held almost without dissent that, although the rights of the company and of travelers may be, in a sense, equal or reciprocal, to the cars of the company must be yielded the right of passage, and that horsemen and vehicles must usually leave the track when cars approach.[175] The rights of the company are not exclusive for travelers have a right to go upon the track or right of way in the street when and where it is not occupied by a car and use it as they use other parts of the street. In this sense their rights may, perhaps, be said to be equal, but not in the sense that a traveler may unnecessarily go or remain upon the

that this use of the street is a part of the grant." See, also, Ogsden v. Aberdeen &c. Co. L. R. 1 H. L. 111; Cape May &c. Co. v. Cape May, 60 N. J. L. 224; 34 Atl. 397; 35 L. R. A. 609 (as to compelling removal and necessity for notice). And see authorities cited in first note of this section.

[174] Moore v. Kansas City &c. R. Co. 126 Mo. 265; 29 S. W. 9, 11 (citing text); Brown v. Wilmington City R. Co. Pennewill (Del.) 332; 40 Atl. 936. See, also, Jersey City &c. R. Co. v. Jersey City &c. R. Co. 20 N. J. Eq. 61; West Chicago St. R. Co. v. Levy, 82 Ill. App. 202; Government St. R. Co. v. Hanlon, 53 Ala. 70, 81; De Lon v. Kokomo &c. St. R. Co. 22 Ind. App. 377; 53 N. E. 847; Flenelling v. Lewiston &c. R. Co. 89 Me. 585; 36 Atl. 1056.

[175] Hegan v. Eighth Ave. R. Co. 15 N. Y. 380; Whitaker v. Eighth Ave. R. Co. 51 N. Y. 295; Adolph v. Central Park R. Co. 65 N. Y. 554; Wilbrand v. Eighth Ave. R. Co. 3 Bosw. (N. Y.) 314; Chicago &c. Co. v. Bert, 69 Ill. 388; Daniels v. Bay City Trac. &c. Co. (Mich.) 107 N. W. 94; Hicks v. Railroad Co. 124 Mo. 115; 27 S. W. 542, 544; 25 L. R. A. 508, and note; Ehrisman v. Railroad Co. 150 Pa. St. 180; 24 Atl. 596; 17 L. R. A. 448; O'Neil v. Dry Dock &c. Co. 129 N. Y. 125; 29 N. E. 84 (holding, however, that rights are equal at crossing) 26 Am. St. 512. See, also, Cincinnati St. R. Co. v. Whitcomb, 66 Fed. 915; Hot Springs St. R. Co. v. Johnson, 64 Ark. 420; 42 S. W. 833; Bailey v. Market St. Cable R. Co. 110 Cal. 320; 42 Pac. 914; Orange &c. R. Co. v. Ward, 47 N. J. L. 560; 4 Atl. 331.

tracks so as to interfere with the running of the cars. At street intersections and crossings their rights are said to be equal.[176]

§ 1096ar. Liability of persons who injure the tracks.—The right vested in a street railway company is of such a nature as to make it wrongful for any one to so negligently use that part of the street occupied by its tracks as to unnecessarily injure them. An extraordinary use of that part of the street upon which the tracks are laid may subject the person who so uses it, and who fails to exercise ordinary care to protect the tracks from injury, to an action. Thus, where a person engaged in moving a house negligently injured the track of a street railway, it was held that he must respond in damages, [177] and in another case the owner of a house was enjoined from moving it across the company's track in such a manner as to injure its property and interrupt traffic for many hours.[178]

§ 1096as. Liability of traveler for injuring cars.—It is the duty of persons using a road or street occupied by a street railway to use ordinary care and diligence to avoid injuring the cars or other prop-

[176] O'Neil v. Dry Dock &c. R. Co. 129 N. Y. 125; 29 N. E. 84; 26 Am. St. 512; McClain v. Brooklyn City R. Co. 116 N. Y. 459; 22 N. E. 1062; Clark v. Bennett, 123 Cal. 275; 55 Pac. 908; Omaha St. R. Co. v. Cameron, 43 Neb. 297; 61 N. W. 606; Nashville &c. R. Co. v. Norman, 108 Tenn. 324; 67 S. W. 479; Earle v. Consolidated Trac. Co. 64 N. J. L. 573; 46 Atl. 613. See, also, Ashley v. Kanawha &c. Trac. Co. (W. Va.) 55 S. E. 1016.

[177] Toronto &c. Co. v. Dollery, 12 Ontario Appeal, 679. In this case it was held that an owner who employed an independent contractor to move the house was liable, and that the case fell within the rule respondeat superior. The case is an instructive one, and cites Peachey v. Rowland, 13 C. B. 182; Overton v. Freeman, 11 C. B. 868; Ellis v. Sheffield Gas Co. 2 E. & B. 769; Hole v. Sittingbourne R. Co. 6 H. & N. 488; Hughes v. Percival, L. R. 8 H. L. 443; Angus v. Dalton, L. R. 6 H. L. 740; Tarry v. Ashton, L. R. 1 Q. B. D. 318; Day v. Green, 4 Cush. (Mass.) 437. The case last named was one against a person for moving a house, and the court held, Shaw, C. J., delivering the opinion, that there was no common law right to move a house along public streets, but that it might be done under a license from a municipal corporation, provided reasonable care was used to prevent the obstruction of the streets.

[178] Williams v. Citizens' R. Co. 130 Ind. 71, 75; 29 N. E. 408, 410 (citing text); 15 L. R. A. 64; 30 Am. St. 201. See, also, Eureka v. Wilson, 15 Utah, 53; 48 Pac. 41, 44 (citing text and holding valid a municipal ordinance prohibiting the moving of houses along the streets without permission). Compare Dulaney v. United Rys. &c. Co. (Md.) 65 Atl. 45.

erty of the company. It has accordingly been held that one who carelessly drives against a car moving upon the track of a street railway is liable for damages which proximately result from his wrongful act.[179]

§ 1096at. Rights of travelers—Rival companies.—Subject to the superior right of passage, the public may freely use the street or road occupied by the tracks of a street railway company. In using the street for the purpose of travel in the ordinary mode, travelers are in no sense trespassers, no matter what the motive power employed in drawing the cars may be. The public retains its right to make the ordinary use of the street or road, and its grantee or licensee takes the privileges granted upon the implied condition that this right of the public shall not be unnecessarily impaired or lessened. This is the general rule as declared by all of the decided cases.[180] But in a case which was strongly contested and very fully considered, it was held that a street railway company was not bound to permit the use of the space covered by its tracks by a rival omnibus line, although it was bound to permit it to be used by ordinary travelers.[181] We suppose that the rule declared in the case referred to

[179] Chicago &c. R. Co. v. Rend, 6 Bradwell (Ill. App.) 243.

[180] Smedis v. Brooklyn &c. R. Co. 88 N. Y. 13; Adolph v. Central Park &c. R. Co. 65 N. Y. 554; Frick v. St. Louis &c. R. Co. 75 Mo. 595; Kansas Pacific R. Co. v. Pointer, 9 Kan. 620; Louisville &c. R. Co. v. Phillips, 112 Ind. 59; 13 N. E. 132; 2 Am. St. 155; Campbell v. Boyd, 88 N. C. 129; 43 Am. R. 740; Kay v. Pennsylvania R. Co. 65 Pa. St. 269; 3 Am. R. 628; Davis v. Chicago &c. Co. 58 Wis. 646; 17 N. W. 406; 46 Am. R. 667; Bennett v. Railroad Co. 102 U. S. 577; Rascher v. East Detroit &c. R. Co. 90 Mich. 413; 51 N. W. 463; 30 Am. St. 447; note to Thatcher v. Central Traction Co. 45 Am. St. 649.

[181] Citizens' Coach Co. v. Camden Horse R. Co. 33 N. J. Eq. 267; 36 Am. R. 542. Beasley, C. J., said: "I have no idea that by having thus laid the track such company acquired the exclusive right to use the space so occupied, or any part of such space. That space still remained part of the public street, open, in its entire area, to the use in the ordinary way of every citizen. Such citizens, under such conditions, could use as a part of the street, either transversely or longitudinally, the rails so laid. I would refer only so far to the authorities as to say, that, with almost entire unanimity, they maintain this right in the public as against such chartered rights as the one now in question." Other cases maintain the right of a street railway company to exclude rivals. Brooklyn Central &c. R. Co. v. Brooklyn City

can only apply where the competing line uses the street longitudinally, for we can conceive no reason why it can be held to apply to crossings. The doctrine is not one to be extended, although it is probably true that in the particular instance a just rule was laid down and correctly applied. We suppose that a railroad track is property, but we suppose, also, that if the tracks are laid in a road or street the owners of them must submit to the use of the street in the ordinary modes of travel, although the effect may be to injure their property by wear and tear. It is probably true that a rival company cannot continuously use the property, but we do not believe that it follows from this that a competing omnibus or stage line may not use the same street and occasionally drive upon the track in order to enable other vehicles to pass. It is only when the rival stage or omnibus lines makes a continuous use of the space occupied by the track that its owners can be justly deemed wrong-doers. We should hesitate to assent to a rule which would enable a street railway company to practically drive a competing omnibus line from the street, although we incline to the opinion that it might prevent the competing line from continuously using the space occupied by its track. The firmly settled rule is that a street railway company takes its franchise subject to the right of the public to use the street in the ordinary mode, and there is fair reason, at least, for holding that any one, whether the owners of omnibuses or not, may use the street, provided no special or continuous use is intentionally made of the space occupied by the tracks of the railway company.

§ 1096au. Right of one company to use another's track.—Although the tracks of a street railway company may be used by the general public for ordinary travel with vehicles, in common with the rest of the street, without compensation,[182] yet a rival company cannot, without authority and without paying compensation, run its own cars upon and along such tracks.[183] Under its reserved power to amend

R. Co. 32 Barb. (N. Y.) 358; Metropolitan R. Co. v. Quincy R. Co. 12 Allen (Mass.) 262; Cottam v. Guest, 1 Am. & Eng. R. Cas. 474n.

[182] See Booth St. Rys. § 110; Pacific R. Co. v. Wade, 91 Cal. 449; 27 Pac. 768; 13 L. R. A. 754; 25 Am. St. 201; ante, § 765. This is subject, however, to the company's superior right of passage.

[183] It may be enjoined from so doing. Metropolitan R. Co. v. Quincy R. Co. 12 Allen (Mass.) 262; Louisville &c. R. Co. v. Central &c. R. Co. 87 Ky. 223; 8 S. W. 329; 36 Am. & Eng. R. Cas. 463; Brooklyn &c.

or repeal, the legislature, or, when empowered to do so, the municipality, may authorize one company to make a joint use of the tracks of another.[184] So, it has been held that one company may acquire the right to use the tracks of another by the exercise of the power of eminent domain.[185] But compensation must be made to the company whose tracks are so used or condemned.[186] The entire matter, however, including the procedure and method of ascertaining the compensation, is largely regulated by express statutory provisions in most of the states.[187] And, as elsewhere shown, traffic arrangements are frequently authorized and made by the companies.

R. Co. v. Brooklyn City R. Co. 33 Barb. (N. Y.) 420; Central &c. R. Co. v. Fort Clark &c. R. Co. 81 Ill. 523; Cottam v. Guest, L. R. 6 Q. B. Div. 70; 1 Am. & Eng. R. Cas. 474, note.

[184] Kinsman &c. R. Co. v. Broadway &c. R. Co. 36 Ohio St. 239; 5 Am. & Eng. R. Cas. 327; Toledo &c. R. Co. v. Toledo &c. R. Co. 50 Ohio St. 603; 36 N. E. 312; 1 Am. & Eng. R. Cas. (N. S.) 230; Metropolitan R. Co. v. Highland St. R. Co. 118 Mass. 290; South Boston R. Co. v. Middlesex R. Co. 121 Mass. 485; Canal &c. St. R. Co. v. Crescent &c. R. Co. 41 La. Ann. 561; 6 So. 849; 40 Am. & Eng. R. Cas. 329; New Bedford &c. R. Co. v. Achusnet St. R. Co. 143 Mass. 200; 9 N. E. 536; Sixth Ave. R. Co. v. Kerr, 45 Barb. (N. Y.) 138; North Baltimore &c. R. Co. v. Baltimore, 75 Md. 247; 23 Atl. 470; Union Depot Co. v. Southern R. Co. 105 Mo. 562; 16 S. W. 920 (upheld as an exercise of the police power). See, also, State v. King, 104 La. Ann. 735; 29 So. 359.

[185] Sixth Ave. R. Co. v. Kerr, 72 N. Y. 330; Canal &c. R. Co. v. Orleans &c. R. Co. 44 La. Ann. 54; 10 So. 389; 50 Am. & Eng. R. Cas. 369; Metropolitan &c. R. Co. v. Chicago &c. R. Co. 87 Ill. 317; Metropolitan R. Co. v. Quincy R. Co. 12 Allen (Mass.) 262; Covington R. Co. v. Covington &c. R. Co. 19 Am. L. Reg. (N. S.) 765; Pennsylvania R. Co. v. Baltimore &c. R. Co. 60 Md. 263; Toledo &c. R. Co. v. Toledo &c. R. Co. 50 Ohio St. 603; 36 N. E. 312; 1 Am. & Eng. R. Cas. (N. S.) 230. See, also, Mercantile Trust &c. Co. v. Collins Park &c. R. Co. 101 Fed. 347.

[186] Metropolitan R. Co. v. Highland St. R. Co. 118 Mass. 290; Second &c. St. R. Co. v. Green &c. R. Co. 3 Phila. (Pa.) 430; Louisville &c. R. Co. v. Central &c. R. Co. 87 Ky. 223; 8 S. W. 329; Pacific R. Co. v. Wade, 91 Cal. 449; 27 Pac. 768; 13 L. R. A. 754; 25 Am. St. 201; Jersey City &c. R. Co. v. Jersey City &c. R. Co. 20 N. J. Eq. 61; Mercantile Trust &c. Co. v. Collins Park &c. R. Co. 101 Fed. 347; 2 Dillon Munic. Corp. § 727; Booth Street Railways, § 114, and authorities cited in preceding notes.

[187] See Booth Street Railways, § 115, and note; Ingersoll v. Nassau &c. R. Co. 157 N. Y. 453; 52 N. E. 545; 43 L. R. A. 236; Toledo Consolidated St. R. Co. v. Toledo &c. St. R. Co. 12 Ohio C. C. 367; People's R. Co. v. Grand Ave. R. Co. 149 Mo. 245; 50 S. W. 829.

CHAPTER XLIV.

INTERURBAN RAILROADS.

§ 1096ba. **Definition.**—A definition of interurban railroads has already been given,[1] but it seems advisable, in this connection, to call attention to definitions given or suggested by others. The subject is a comparatively new one, and few attempts have been made, either by text writers or by the courts, to define interurban railroads. Judge Baldwin says: "Interurban railroads are those connecting dis-

[1] Ante, § 9a.

tant communities, which are laid mainly on highways, and as to so much of as lie within each of these communities are built upon its streets and operated so as to promote local convenience and make these streets more serviceable to the public."[2] The Iowa statute provides that "any railway operated upon the streets of a city or town by electric or other power than steam, which extends beyond the corporate limits of such city or town to another city, town or village, or any railway operated by electric or other power than steam, extending from one city, town or village, to another city, town or village, shall be known as an interurban railway." The definition is said by the Supreme Court of Iowa to accord with the common understanding. "Both agree that an interurban line is one extending from within the limits of one city or town to and within the limits of another city or town."[3] No better definition, perhaps, has been suggested.[4]

§ 1096bb. Nature and characteristics.—Interurban railroads seem to be of a somewhat mixed or hybrid character. They partake, to some extent, of the nature both of street railways and of commercial railroads. In some instances the track is not only laid in city streets but also in country highways throughout all or a part of the course, but in most instances, especially in case of the newer roads, such companies have their own right of way through the country, outside of the cities and towns, and do not use the country highways. The motive power usually, if not always, consists of electricity, and such companies are common carrriers of passengers, and, perhaps, in some instances, also of freight. Some companies carry only passengers, or passengers and their baggage, but many also carry express matter

[2] Baldwin Am. Railroad Law, 9.

[3] Cedar Rapids &c. R. Co. v. Cummins, 125 Ia. 430; 101 N. W. 176, 177, 178.

[4] The term has no exact legal or technical meaning, and it is such a new one that it has as yet been given only the general meaning indicated by the word itself. Railroads differing considerably from one another in their features may all be called interurban railroads in a broad sense, and some suburban railroad companies, and companies operating a road and cars by steam, but running only from within one town to another, or others, a comparatively short distance away, have called themselves interurban railroad or railway companies. At present, however, the term is ordinarily understood, we think, as meaning an electric traction road or railway from within one city or town to another or others.

and light freight. The tendency, indeed, is growing to carry freight of many kinds and even to run some cars, not only separately but together as a train, for freight alone. Most of such companies also run limited or through cars as well as local cars. All this makes it difficult to determine, in some instances, whether such a company is within a statute relating to railoads or a statute relating to street railways, and whether a rule as to commercial railroads applies or a rule governing street railways. Interurban railroads are doubtless the result or outgrowth of the development of street railways and the application of electricity as a motive power.[5] In cities and municipalities generally the rails of the tracks are usually laid in

[5] In Montgomery Amusement Co. v. Montgomery Traction Co. 139 Fed. 350, 357, it is said: "Street railways superseded state coaches, omnibus lines, and, in large measure, hacks, in carrying passengers to and from points in cities and towns to suburban places. They went originally only to points reached by public highways. The public convenience and safety alike demanded that the grade of such highways should not be altered to meet the needs of a new method of conveyance, which used these highways jointly with travelers by other modes. They did not need to go upon private property. The law did not contemplate that they should. Besides, the value of private property adjacent to these highways practically forbade its acquisition, if the law had permitted it, for use as a right of way. Being thus limited in their sphere of operation and powers, the term 'street railway,' in legal and popular acceptation, at first included only surface roads built upon streets and public highways for the carriage of passengers in and about cities and towns and adjacent suburban places. Under the influence of changed conditions of population and social life, these surface roads on the streets and highways began to serve the wants of the people in places not in any city or town, but in the vicinity thereof, and sometimes reached out to places not upon any public highway. The legislature of this state, recognizing the usefulness of street railways, and the changed conditions which had grown up, conferred upon them larger discretion as to their termini, and gave them in some instances the power to condemn private property for rights of way to reach their termini. So, in this state, at least, the meaning of the phrase 'street railway' gradually broadened until it included not only surface roads for passengers on streets and highways, but also what are now known as 'trolley lines,' which reach out from cities to the adjoining country, and frequently run off the public roads—a policy the public authorities now encourage—in order to reach points in the vicinity of cities and towns, though outside of their boundaries, and off the public highways, wherever passenger traffic encourages street railway service."

the streets at grade, and stops are made to take on and let off passengers and thus accommodate local traffic in much the same manner as in the case of ordinary street railways. In these respects there is comparatively little, if any, difference between the interurban railroad and the ordinary street railway. But in some other respects, the interurban railroad is much more like the ordinary commercial railroad. As already stated, interurban railroads frequently have their own rights of way in the country, often carry freight of some kinds at least, and may, and do sometimes, operate substantially as a through railroad from one city to another, miles away.[6] Indeed, the day seems not far distant when one may go, by such roads, almost across the continent, and the better and faster cars are devoted more and more to through travel from one large city to another rather than to the accommodation of local traffic between or in the smaller places. It seems to us, therefore, that the prevailing tendency to treat them almost altogether as street railways is questionable, and that they constitute a class by themselves.

§ 1096bc. Mixed nature—Illustrative cases.—The mixed or peculiar character of interurban railroads is shown in some of the decisions. In one case, although an interurban electric railroad was classed as a street railway by the statute, it was held that while it was subject to the same regulations and had the powers of a street railway, so far as applicable, and while the law as to negligence in standing on the platform of a moving street car was applicable to it within the city, the law of negligence in so doing outside of the city limits was the same as in the case of steam or commercial railroad cars. The court, therefore, concluded that where a rule of the company prohibited passengers from standing on the platform and was properly posted, or the passenger, being duly requested, refused to enter the car, in which there were vacant seats, the passenger remained on the platform at his peril, and there could be no recovery of damages for his death caused by falling off the platform even

[6] In Malott v. Collinsville &c. R. Co. 108 Fed. 313, 318, it is said: "These electrical roads, in the speed of their trains, in the distances traveled, and in their capabilities for transportation, are well within the field of public utilities hitherto occupied by the steam railroads alone. . . . Nor does their incidental function as street railways, in the towns or cities traversed, lift them out of the railroad statutes." See Chicago &c. R. Co. v. Hunt (Ind. App.), 79 N. E. 927, 928.

though the car was derailed.[7] It is certainly somewhat anomalous that rights, duties, and liabilities should change and a different rule become applicable on crossing a line at the city limits; but the decision seems to be supported in reason and has been approved by more than one writer,[8] and, upon the somewhat analogous question as to the duties of travelers at crossings, it is held that the rules applicable to crossings of commercial railroads apply in the country,[9] while in the city a different rule obtains in many, if not most, jurisdictions as to street railways and interurban railroads.[10] In another case, in which, however, the question was as to the right to assess the railroad or railway for taxation, under a statute, it was said that it was "not conceivable" that the legislature meant to provide "that an interurban line is not an interurban line save only from city or town limit to city or town limit," but did mean to recognize a difference in the matter of regulation; and in the course of the opinion it is said: "As we read the statute it means that as to those portions of its line being within city or town limits a corporation operating a railway shall, in respect of the operation of its line, be held to the rights and obligations of a street railway only. The character of the lines as an interurban railway is not changed, but it is to be 'subject to the laws governing street railways.' The statute simply recog-

[7] Cincinnati &c. R. Co. v. Lohe, 68 Ohio St. 101; 67 N. E. 161; 67 L. R. A. 637. In the course of the opinion the court said: "It seems reasonably clear that, while operating the cars of an interurban railroad within a municipality, the regulations and powers of a street railroad company are applicable; but when it comes to running cars of such railroads in the open country, upon a track substantially the same as the track of a steam railroad, and at a high rate of speed, it would seem that the same rules as to negligence and contributory negligence should prevail as are applicable to steam railroads, and that a passenger standing upon the platform of an interurban car in the open country should be held to the same rules as if he were standing on the platform of a steam car. The danger is the same in either case, and where there is no difference in danger there should be no difference in the care required, nor in the rights and liabilities flowing from the neglect to observe the proper care."

[8] It is approved by the annotator in 67 L. R. A. 637, and apparently by Judge Baldwin in Baldwin Am. Railroad Law, 9, 310.

[9] McNab v. United Railways &c. Co. 94 Md. 719; 51 Atl. 421.

[10] See post, § 1096bq; also Robbins v. Springfield St. R. Co. 165 Mass. 30; 42 N. E. 334; Fairbanks v. Bangor &c. R. Co. 95 Me. 78; 49 Atl. 421.

nizes the necessary existence of differences in the matter of regulation between urban and suburban districts; and this by general law, or, in the case of the former, by municipal ordinance."[11]

§ 1096bd. Statutory classification.—In some of the states interurban railroads are expressly classified by statute as street railways rather than as commercial railroads, especially so far as they operate in cities.[12] But they must necessarily have powers to obtain rights of way and operate outside the city limits that street railways do not ordinarily have and that cannot well be given by the municipality. Nor can municipal ordinances and regulations ordinarily apply to them outside the jurisdiction of the municipality. It would be better, it seems to us, to cover the subject, as fully as possible by a statute relating particularly to interurban railroads as a class by themselves and in some states this has been attempted, in some measure at least, but even where this is true it has been found almost impossible to cover the subject completely, and questions still arise as to whether some statute or some rule of law applicable to commercial railroads or some statute or rule of law applicable to street railways does or does not govern in the absence of a statutory provision upon the subject specifically applying to interurban railroads.[13]

[11] Cedar Rapids &c. R. Co. v. Cummins, 125 Ia. 430; 101 N. W. 176.

[12] See Cincinnati &c. R. Co. v. Lohe, 68 Ohio St. 101; 67 N. E. 161; 67 L. R. A. 637; Cleveland &c. R. Co. v. Urbana &c. R. Co. 26 Ohio Cir. Ct. 180; Cincinnati &c. St. R. Co. v. Cincinnati &c. 12 Ohio Circ. Dec. 113; Cedar Rapids &c. Ry. Co. v. Cummins, 125 Ia. 430; 101 N. W. 176; Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 625, 635, 636; 72 N. E. 145; Mordhurst v. Ft. Wayne &c. Trac. Co. 163 Ind. 268; 71 N. E. 642. In Waterloo &c. Transit Co. v. Board (Ia.), 108 N. W. 316, a company owned street railway systems in two cities, connected by an interurban line, and it was held that the entire system should be taxed as an interurban line. See, as to Kansas statutes, not generally including street railways in using the term "railroads," State v. Cain, 69 Kans. 186; 76 Pac. 443.

[13] In some states interurban railroads are included among those over which the railroad commissioners have jurisdiction. In Indiana they are expressly excluded, except as to one matter. See Chicago &c. Ry. Co. v. Hunt (Ind. App.), 79 N. E. 927, 928. In Kansas it is held that the statute, by giving the commissioners supervision over steam railroads, impliedly excludes electric railroads. Kansas City &c. R. Co. v. Board of R. Com'rs (Kans.), 84 Pac. 755.

§ 1096be. Whether an additional burden.—We have elsewhere shown that ordinary commercial railroads usually constitute an additional burden and that street railways usually do not. As interurban railroads partake somewhat of the nature of both commercial railroads and street railways the question as to whether interurban railroads are an additional burden is more difficult and there is sharp conflict among the decisions. It seems to us that, while electric railways are not necessarily additional burdens in a city street,[14] where they serve the local public, the better doctrine is that an interurban electric railroad may be, and usually is, an additional burden upon a country road,[15] and that, in some instances at least, it may constitute additional burden upon a street.[16] The urban railway has developed into the interurban railway, and is even now developing into the interstate railway. The small car carrying only local passengers has become almost, if not quite, as large as the ordinary railway coach in size, "and has become a part perhaps, of a train which sweeps across the country from one city to another, bearing its load of passengers ticketed through, with an occasional local passenger picked up on the highway," and often carrying express matter and freight. "The purely city purpose which the urban railway subserved has developed into, or been supplanted by, an entirely different purpose, namely the transportation of passengers (and through freight, perhaps) from city to city over long stretches of intervening country." The rails and cars are of such a size and character as to be much more like those of the ordinary commercial railroad than they are

[14] See ante, § 1096c.

[15] Pennsylvania R. Co. v. Montgomery &c. R. Co. 167 Pa. St. 62; 31 Atl. 468; 27 L. R. A. 766; 46 Am. St. 659; Fidelity &c. Co. v. Philadelphia &c. Co. 6 Pa. Dist. 737; Thompson v. Citizens' Trac. Co. 181 Pa. St. 131; 37 Atl. 205; Schaaf v. Cleveland &c. R. Co. 66 Ohio St. 215; 64 N. E. 145. See, also, Goddard v. Chicago &c. R. Co. 104 Ill. App. 533, and authorities cited in following note.

[16] Wilder v. Aurora &c. Trac. Co. 216 Ill. 493; 75 N. E. 194; Chicago &c. R. Co. v. Milwaukee &c. Co. 95 Wis. 561; 70 N. W. 678; 37 L. R. A. 856; 60 Am. St. 136; Abbott v. Milwaukee &c. Co. 126 Wis. 634; 106 N. W. 523; 4 L. R. A. (N. S.) 202, and note; Younkin v. Milwaukee &c. Trac. Co. 120 Wis. 477; 98 N. W. 215; Rische v. Texas Transp. Co. 27 Tex. Civ. App. 33; 66 S. W. 324. See, also, Merrick v. Intramontaine R. Co. 118 N. Car. 1081; 24 S. E. 667; Nichols v. Ann Arbor &c. R. Co. 87 Mich. 361; 49 N. W. 538; 16 L. R. A. 371; Humphreys v. Ft. Smith &c. Co. 71 Ark. 152; 71 S. W. 662.

to those of the old street railway, and, in many instances the road is built for a great part of the distance upon a grade on the company's own right of way, and is operated mainly to obtain through travel from city to city, and only incidentally to take up a passenger here and there, perhaps, at a highway crossing or in a country town. This through travel is composed of people who would otherwise travel on the ordinary steam railroad, if at all, and would not use the highway. "Thus, the operation of this newly developed street railway (so called) upon the country road is precisely opposite to the operation of the urban railway upon the city street. It burdens the road with travel which would otherwise not be there, instead of relieving it by the substitution of one vehicle for many. However we regard this development of the urban into the interurban railway, it seems utterly impossible and illogical to say that it is essentially the same in its purpose or effects as the mere street railway."[17] It has been held, however, that an interurban street passenger railway, though authorized to transport light express matter and United States mails, does not impose any additional burden upon the street, entitling abutting owners to compensation.[18] It has also been held that an electric railroad upon a country highway is not an additional burden,[19] and this view is taken in a strongly reasoned article in one

[17] Zehren v. Milwaukee Elec. R. &c. Co. 99 Wis. 83; 74 N. W. 538; 41 L. R. A. 575; 67 Am. St. 844. And for somewhat similar reasoning, see West Jersey R. Co. v. Camden &c. R. Co. 52 N. J. Eq. 31; 29 Atl. 423. See, also, 64 Cent. L. J. 283.

[18] Mordhurst v. Ft. Wayne &c. Co. 163 Ind. 268; 71 N. E. 642; 106 Am. St. 222; 66 L. R. A. 105. The court said that such railroads were very different in their equipment, operation and effect, from ordinary steam railroads; that the dedication of a street must be presumed to have been made for all public purposes, prospective as well as present, consistent with its character as a public highway, and not actually detrimental to abutting real estate, and for the convenience of the public at large as well as the local public. See, also, Birmingham Trac. Co. v. B. & R. Elec. R. Co. 119 Ala. 137; 24 So. 502; 43 L. R. A. 233; Montgomery v. Santa Ana &c. R. Co. 104 Cal. 186; 43 Am. St. 89; 25 L. R. A. 654; 37 Pac. 786; Canastota Knife Co. v. Newington Tramway Co. 69 Conn. 146; 36 Atl. 1107; Newell v. Minneapolis &c. R. Co. 35 Minn. 112; 27 N. W. 839; 59 Am. R. 303; Southern R. Co. v. Atlanta R. Co. 111 Ga. 679; 36 S. E. 873; 51 L. R. A. 125, and cases cited in following note.

[19] Floyd v. Rome R. Co. 77 Ga. 614; 3 S. E. 3; Southern R. Co. v. Atlanta R. Co. 111 Ga. 679; 36 S. E. 876; 51 L. R. A. 125; Ehret v. Camden &c. R. Co. 60 N. J. Eq. 246; 46

of the law periodicals.[20] But the argument in support of this doctrine proceeds upon the theory that the use of a street or country road by an interurban railroad is in furtherance of local traffic and is, therefore, a street or highway use, and does not materially interfere with the property of the abutters or the use of the highway by other travelers in the ordinary mode. As elsewhere stated, we are inclined to the opinion that there is a difference between streets and country highways in regard to the servitude and purpose of their use, but, however that may be, if the interurban railroad does not further local travel and use, or if it does so only incidentally and is primarily for through travel, and runs for a great part of the way through the country on its own private right of way, far from any ordinary highway, and, perhaps, does not stop its cars for travelers on such country road or part of a country as it does use, the argument is wholly without foundation, and it seems clear that the railroad would be an additional burden on such highway. So, if it carries through passengers and freight, running part of the distance, perhaps, on the private right of way, with heavy trains or cars, to and upon town or city streets, and especially if it does not stop in such city or town, or only stops at one place therein, it would seem almost equally clear that such railroad would constitute an additional burden upon such streets. It is, perhaps, true that all these conditions in regard to the construction and operation of the road exist in comparatively few instances, but it is a fact that they do exist in some instances. Between such roads and the short suburban road, or the road running to a neighboring town or city, carrying only passengers, and stopping at various places in each town or city and on the country road or roads over which it runs, to take on and discharge passengers, there is a wide field. These are the two extremes, and most interurban railroads occupy a middle ground. The true doctrine, therefore, would seem to be that the question as to whether a particular interurban railroad constitutes an additional burden in a particular case must depend somewhat on circumstances, such as the nature, location, construction, and operation of the road, and the

Atl. 578; 61 N. J. Eq. 171; 47 Atl. 562. See, also, Lonaconing v. Midland &c. R. Co. 95 Md. 630; 53 Atl. 420; Georgetown &c. Trac. Co. v. Mulholland, 25 Ky. L. 578; 76 S. W. 148; Ashland &c. R. Co. v. Faulkner (Ky.) 45 S. W. 235; 51 S. W. 806; 43 L. R. A. 554; Ranken v. St. Louis &c. R. Co. 98 Fed. 479.

[20] 57 Cent. Law Jour. 5, 227.

franchise and powers given to the company; and that it cannot be laid down as an absolute rule, on the one hand, that every interurban railroad is, in all states, an additional burden in every instance, merely because it is an interurban railroad, nor on the other hand, that no interurban railroad can be an additional burden.

§ 1096bf. Incorporation and franchises.—As elsewhere stated, corporations must derive their franchise to be a corporation from the state. In most of the states special charters are no longer granted, and interurban railroad companies, like other corporations, must be incorporated under a general law authorizing such incorporation. These general laws usually prescribe what is necessary to be done in order to incorporate, and state, more or less specifically, what shall be the powers and duties of such corporations. Being general, they leave, and usually require, the location and termini of the road to be stated in the articles or certificate of incorporation. The right to use streets in municipalities is usually left to the municipal authorities to determine, and, outside of such municipalities the right to use country highways is usually left to the county authorities, or, under some systems, to the township supervisor or other designated authorities,[21] to determine. Thus, in a recent case, it is held that consent of a board of county commissioners to operate an interurban railroad, called a street railway, on and over a certain highway in the county, does not give such company authority to operate the road on and over such portion of the highway as lies within the limits of a city or town, without the consent of the municipal authorities.[22]

[21] In Smith v. Jackson &c. Trac. Co. 137 Mich. 20; 100 N. W. 121, the company had obtained the consent of the township board, and it was held that the county commissioner could not maintain proceedings to disfranchise it.

[22] Wheeling &c. R. Co. v. Triadelphia (W. Va.) 52 S. E. 499; 4 L. R. A. (N. S.) 321. It is also held in this case that an ordinance of the town granting such right, and accepted by the company, constituted a contract; that the right might be forfeited for failure to comply with the ordinance in the manner of constructing the road where the ordinance expressly gave the right to forfeit for such cause; but that a declaration of forfeiture by the town council, effected by repeal of the ordinance, did not have the force and effect of a judicial determination, nor preclude the company from resorting to the courts, and, by injunction, preventing the town authorities from removing or disturbing its track, if no cause of forfeiture existed. Consent, or a petition by a certain proportion of the

And it has been held that a provision of an ordinance granting the right to use certain streets which requires the company to pave, having been accepted and acted on by the company, cannot be successfully claimed by the company to be ultra vires[23] and that the city might also impose a license fee as a condition which could not be questioned by the company after accepting the ordinance.[24] But it it has been held on the other hand, that the Indiana Act of 1901, authorizing interurban companies, in addition to powers already granted, to transport persons and property and to regulate the time, manner and compensation is not objectionable as extending the powers of such a company over the streets of a city without its consent.[25] In a number of states, until very recently, there were no statutes specifically authorizing the incorporation of interurban railroad companies or expressly referring to them in any way, and this is still the case in some states. The question has, therefore, arisen, and may still arise, in some states at least, as to whether such a company can be incorporated under a general railroad law or under an act providing for the incorporation of street railways.[26]

§ 1096bg. Incorporation—When under railroad law.—Even a street railway is, in a sense, a railroad, and while many statutes relating to railroads have been rightly held not to apply to street railways, some statutes relating to railroads have been held to include and apply to street railways as well as ordinary commercial railroads.[27] There is at least equal reason, we think, for affirming that an interurban railroad may be included within the meaning of some of the general railroad statutes, especially where there is no other statute under which they could come. Of course there may be

abutters, is also required under some statutes. See, for instance, Wilder v. Aurora &c. Traction Co. 216 Ill. 493; 75 N. E. 194; Mercer &c. Trac. Co. v. United &c. Co. (N. J. L.); 61 Atl. 461; Rahn Twp. v. Tamaqua &c. R. Co. 167 Pa. St. 84; 31 Atl. 472.

[23] Rutherford v. Hudson River Traction Co. (N. J.); 63 Atl. 84; Trenton v. Trenton St. R. Co. (N. J.); 63 Atl. 1. See, also, Blodgett v. Worcester &c. R. Co. (Mass.); 78 N. E. 222.

[24] Jersey City v. Jersey City &c. R. Co. 70 N. J. L. 360; 57 Atl. 445.

[25] Roberts v. Terre Haute &c. Co. (Ind. App.); 76 N. E. 323.

[26] In State v. Milwaukee &c. R. Co. 116 Wis. 142; 92 N. W. 546, it is held that an ordinary commercial railroad company has no power to obtain and accept a street railway franchise from a city.

[27] See ante, § 1096b.

railroad laws that clearly could not apply, and, perhaps, statutes relating to the incorporation, organization, powers and duties of railroad companies, especially where the legislative enactments in the particular state have expressly or clearly used the term "railroad companies" as meaning only commercial steam railroads, should be construed as not including interurban railroads even though the same term under other circumstances and in statutes of a different character might include them.[28] But there are cases in which it has been held that interurban railroad companies might lawfully be incorporated under the general railroad law,[29] and others in which this proposition seems to have been assumed, or, at least, in which such companies were so incorporated without objection.

§ 1096bh. Incorporation—When under street railway law.—Although interurban railroads are frequently classed as street railways, we are of the opinion, as already indicated, that they belong in a class by themselves; and there is an additional reason, in some instances at least for holding that a statute relating to the incorporation, organization and powers of street railways cannot so readily apply or be available to them as does one relating to railroads, in that street railway statutes may not grant the power of eminent domain nor authorize the construction or operation of the road in the country. But, perhaps, the company might get authority from some other sources to use country highways to purchase their own right of way in the country. At all events, such companies have been incorporated and organized, in some instances, under street railway statutes,[30] and some of the statutes, as already shown, expressly classify

[28] See suggestion to this effect in Egan v. Cheshire St. R. Co. 78 Conn. 291; 61 Atl. 950, 952, where it is held a mechanic's lien law applying to railroads included street railways.

[29] Malott v. Collinsville &c. R. Co. 108 Fed. 313. See, also, Lieberman v. Railroad Co. 141 Ill. 140; 30 N. E. 544; Wilder v. Aurora &c. Traction Co. 216 Ill. 493; 75 N. E. 194; Diebold v. Kentucky Traction Co. 117 Ky. 146; 77 S. W. 674; 63 L. R. A. 637; 111 Am. St. 230; Elizabethtown &c. R. Co. v. Ashland &c. St. R. Co. 96 Ky. 347, 355; 26 S. W. 181. See, also, Indiana R. Co. v. Hoffman, 161 Ind. 593; 69 N. E. 399; Washington St. &c. R. Co. In re, 115 N. Y. 442; 22 N. E. 356; De Grauw v. Long Island &c. R. Co. 60 N. Y. S. 163.

[30] See Chicago &c. R. Co. v. Whiting &c. St. Ry. Co. 139 Ind. 297; 38 N. E. 604; 47 Am. St. 264; 26 L. R. A. 337; Cedar Rapids &c. Ry. Co. v. City of Cedar Rapids, 106 Ia. 476; 76 N. W. 728; Nichols v. Ann Arbor

them as street railways, permit them to be incorporated as street railways and grant them the right to extend their lines into the country, with additional powers. The whole matter necessarily depends very largely upon the language and purpose of the particular statute under which incorporation is sought, and, to some extent, upon the nature and purpose of the particular company. The general railroad law of one state may authorize it and that of another may not, and so the street railway law of one state may authorize the company to be incorporated as a street railway company and that of another may not, or it is possible that such a company might be incorporated under either statute, or, under a general statute for incorporation. So, a statute might be broad enough to authorize such a company to be incorporated, and yet, at the same time, it might fail to grant some power deemed vital to the complete and successful construction and operation of the road as desired and contemplated. Thus, for instance, even though it might be incorporated as a street railway, and constructed and operated as such in a city, under a street railway statute, yet if the company had no right to use country highways, or did not desire to do so, and if the street railway statute did not authorize the exercise of the power of eminent domain, and landowners would not sell the company a right of way, it is evident that the company could not successfully operate as an interurban railroad company.

§ 1096bi. Franchises—Right to use streets and highways.—The right to exist as a corporation is granted directly by the legislature, and so, as a rule, is the right to construct and operate the road, carry passengers, receive tolls or compensation, exercise the power of eminent domain, and the like. But what may be called secondary franchises, licenses or privileges, are usually left largely to the local authorities to grant or withhold in the proper exercise of their duties, or to impose conditions in their grant of the right to use the streets

&c. R. Co. 87 Mich. 361; 49 N. W. 538; 16 L. R. A. 371; Hartshorn v. Illinois Valley Traction Co. 210 Ill. 609; 71 N. E. 612. There are also many cases in Pennsylvania in which traction companies organized as street railway companies, and called street railways in the opinions, extended from one city or town, or through different boroughs or townships to another, although, as shown in the next section, it was held that the law did not authorize them to be built and operated across the country and off of the highway.

and highways.[31] In Pennsylvania certain railways running from one city, town or borough to another are called street railways, but it is said that street railways must be located in streets or highways, and "that a street railway may, like a steam railway, locate its route, not for the accommodation of local travel along the highways, but to reduce time and distance for passengers traveling from city to city or town to town across the country, is a proposition not to be entertained. It involves a perversion of the character and object of street railways."[32] And in another Pennsylvania case it is held that neither the act of 1878 nor the act of 1889 authorized the construction of electric lines traversing country roads and connecting widely separated cities and towns, for the reason, among others, that such acts did not confer upon the companies the power of eminent domain.[33] But, under the New Jersey Act of March 14, 1893, author-

[31] See Mordhurst v. Ft. Wayne &c. Traction Co. 163 Ind. 268, 270-273; 71 N. E. 642; 66 L. R. A. 105; 106 Am. St. 222; Mercer County Traction Co. v. United &c. Co. (N. J.); 61 Atl. 461; Mercer County Traction Co. v. United &c. Co. 64 N. J. Eq. 588; 54 Atl. 819; Nanticoke &c. R. Co. v. People's St. R. Co. 212 Pa. St. 395; 61 Atl. 997; Berks County v. Reading City &c. Co. 167 Pa. St. 453; 31 Atl. 474. But compare Roberts v. Terre Haute &c. Co. (Ind. App.); 76 N. E. 323. In St. Louis &c. R. Co. v. Kirkwood, 159 Mo. 239; 60 S. W. 110; 53 L. R. A. 300 (quoting 3 Elliott Railroads, § 1081), it is held that a city, in whose streets the company cannot be operated without the city's consent, may, in granting the consent, limit the use to the carriage of passengers, and acceptance of the terms will be binding on the company, even though its charter from the state gives it power to carry freight as well as passengers. See, also, Allegheny City v. Millville &c. R. Co. 159 Pa. St. 411; 28 Atl. 202. See generally, as to consent and conditions, Little Rock R. &c. Co. v. North Little Rock, (Ark.); 88 S. W. 826, 1026; Topping Avenue, In re, 187 Mo. 146; 86 S. W. 190; Dunbar v. Old Colony St. R. Co. 188 Mass. 180; 74 N. E. 352; Cleveland &c. R. Co. v. Cleveland, 137 Fed. 111.

[32] Rahn Twp. v. Tamaqua &c. R. Co. 167 Pa. St. 84; 31 Atl. 472. See, also, Hartshorn v. Illinois Valley Traction Co. 210 Ill. 609; 71 N. E. 612. Compare both principal and dissenting opinions in Canastota Knife Co. v. Newington Tramway Co. 69 Conn. 146; 36 Atl. 1107; and see, under later Pennsylvania law, Pennsylvania R. Co. v. Greensburg &c. Co. 176 Pa. St. 559; 35 Atl. 122; 36 L. R. A. 839.

[33] Pennsylvania R. Co. v. Montgomery &c. R. Co. 167 Pa. St. 62; 31 Atl. 468; 46 Am. St. 659. "The trouble," said the court, "is that the supposed needs of the country have outgrown its legislation, and an effort is now being made to adapt

izing the incorporation of traction companies, and giving them power to enter upon any street or highway upon which any street railway is constructed, with the consent of the persons operating the same, it has been held that an interurban traction company which so enters and operates its road with the consent of and under lease from a street railway company, which had obtained the consent of the municipal authorities and had laid the tracks, is entitled to maintain the tracks in the street even though, at the time of the lease, the term for which the lessor was incorporated had expired.[34] And in Maryland it has been held that a municipality may permit an electric railway company to lay tracks connecting its lines with the warehouse of an express company engaged in carrying all kinds of portable freight and express matter, and that such electric railway company may limit its express business to a single express company, if it thereby affords reasonable express facilities to the public.[35]

§ 1096bj. Forfeiture of charter or franchise.—As shown in another part of this work a corporation may forfeit its franchises or rights, and even its charter, by failure to construct or operate its road within the designated time, or by failure to perform certain other conditions, but, in the absence of a statutory declaration or provision to that effect, a judicial declaration of forfeiture is usually necessary, and third persons cannot, as a rule in such cases, take advantage of a mere cause for forfeiture in a collateral action.[36] In a recent case it is held that a municipal corporation may forfeit the right of a street or interurban railway company to use a street for failure to comply with the ordinance granting the right, where the ordinance so provides, and that such action is of an exercise of the police power and not judicial in character, but that relief might be had in equity from such a forfeiture in an

street railways to purposes for which they were never intended, and for which the legislation relating to them was not framed." But see Montgomery Amusement Co. v. Montgomery Traction Co. 139 Fed. 353; Gettysburg &c. Assn. v. Electric R. Co. 2 Pa. Dist. 659; Syracuse &c. R. Co. Matter of, 33 Misc. (N. Y.) 510, 514; 68 N. Y. S. 881.

[34] Jersey City v. North Jersey St. R. Co. (N. J. L.); 63 Atl. 906.

[35] Dulaney v. United Rys. &c. Co. (Md.); 65 Atl. 45.

[36] See, generally, ante, § 47, et seq.; 800, et seq.; 942; et seq.; Newport News &c. R. &c. Co. v. Hampton Roads &c. Co. 102 Va. 795; 47 S. E. 839.

inequitable and oppressive manner.[37] Ordinarily, however, at least where there is no such provision in the ordinance it is held that there must be a judicial determination of some sort and not merely arbitrary action by the municipality without giving the company an opportunity to be heard.[38] In a recent case in New York the question arose as to whether a provision in the general railroad law, to the effect that if any domestic railroad corporation should not, within five years after the filing of its certificate of incorporation, begin the construction of its road, its corporate existence and powers should cease, applied to a so called street railroad company, and the court held that it did, and that it was self-executing and worked a forfeiture without any proceedings for that purpose, notwithstanding a statute applying only to street railways provided that in case any street railway company should not commence the construction of its road within one year after the consent of the local authorities and property owners its rights and franchises in respect thereto might be forfeited.[39]

§ 1096bk. Collateral attack.—As elsewhere shown, the general rule is that the corporate organization cannot be collaterally attacked,[40] and, in many jurisdictions, the legality of the incorporation of a de facto railroad corporation can not be questioned even in condemnation proceedings.[41] So, it has been held that the right of an interurban railroad company to carry freight without the consent of

[37] Wheeling &c. R. Co. v. Triadelphia, (W. Va.); 52 S. E. 499; 4 L. R. A. (N. S.) 321. See, also, Belleville v. Citizens' Horse R. Co. 152 Ill. 171; 38 N. E. 584; 26 L. R. A. 681; Stewart v. Ashtabula, 98 Fed. 516; Brooklyn &c. R. Co. Matter of, 72 N. Y. 245.

[38] Jersey City &c. Co. v. Passaic, 68 N. J. L. 110; 52 Atl. 242; North Jersey St. R. Co. v. South Orange Twp. 58 N. J. Eq. 83; 43 Atl. 53; Akron &c. R. Co. v. Bedford, 6 Ohio N. P. 276. See, generally, as to when there may or may not be a forfeiture or loss of rights by failure to perform condition, Millcreek Twp. v. Erie &c. R. Co. (Pa. St.); 64 Atl. 901; Edwards v. Pittsburg &c. R. Co. (Pa. St.); 64 Atl. 798. In West Bloomfield Twp. v. Detroit &c. R. Co. (Mich.); 109 N. W. 258, a company was compelled by mandamus proceedings to comply with its franchise to provide cars with water tanks and toilet rooms and sell tickets of a certain kind on the cars.

[39] Brooklyn &c. R. Co. In re. (N. Y.); 77 N. E. 994. In other words, the court held that such provisions of both statutes applied, one supplementing the other. See, also, Brooklyn &c. R. Co. Matter of, 72 N. Y. 245; Millcreek Twp. v. Erie &c. St. R. 209 Pa. St. 300; 58 Atl. 613.

[40] See ante, § 18, note, and § 20.

[41] Ante, § 957. But see Brooklyn &c. R. Co. Matter of, 72 N. Y. 245.

municipal authorities cannot be questioned in an action for injuries to a person run into by one of the company's cars while such person was using a city street.[42] And, in another case, which was an action to recover damages for injuries inflicted upon a child by a car operated by electricity, it was held that the question as to the right of the company to use such motive power and as to whether such operation of cars was contrary to its franchise could not be raised.[43]

§ 1096bl. Consolidation, leases and mortgages.—The general subjects of this section have been elsewhere treated in this work. We, therefore, refer to the chapter upon each of these subjects[44] for the general rules applicable here as elsewhere. It may be a matter of some doubt, however, as to whether the consolidation of interurban companies is authorized by a general corporation statute, a railroad statute or a street railway statute; and the same is true in regard to leases or the exercise of certain other powers. Under some statutes there is no question as to their applicability to interurban railroad companies. In other instances, we suppose the question must be determined largely by the language and purpose of the statute, the view taken in the particular jurisdiction of the nature of such companies, and the sense in which the terms "railroad" or "railroad company" and "street railway" or "street railway company" is used in the legislation of the state. It is often provided, both in the case of ordinary railroads and street railways, that the consolidation must not be of parallel competing lines.[45] In other states, as in Indiana, the right is given to any street railroad company, "or consolidated street railroad company organized under the laws of the state," operating any street railroad, interurban street railroad or suburban street railroad to intersect, join and unite its railroad with any other street railroad, interurban or suburban street railroad at such point as may be mutually agreed upon, and "to merge and consolidate" upon such terms as may be

[42] Roberts v. Terre Haute &c. Co. (Ind. App.); 76 N. E. 323.

[43] Hine v. Bay City &c. Co. 115 Mich. 204; 73 N. W. 116. See, also, Chicago &c. R. Co. v. Chicago City R. Co. 186 Ill. 219; 57 N. E. 822; 50 L. R. A. 734; Taylor v. Portsmouth &c. R. 91 Me. 193; 39 Atl. 560; 64 Am. St. 216. See, also, Fayetteville &c. R. Co. v. Aberdeen &c. R. Co. 142 N. C. 423; 55 S. E. 345.

[44] See chapters XV, XVIII, XIX.

[45] See People v. Boston &c. R. Co. 12 Abb. N. C. (N. Y.) 230; Washington St. &c. R. Co. re, 52 Hun (N. Y.) 311; 5 N. Y. S. 355; 115 N. Y. 442; 22 N. E. 356; ante, § 322.

mutually agreed upon.[46] But it has been held that the phrase, "such terms as they may agree upon," or the like, in a statute authorizing the consolidation of railroad companies, relates merely to administrative details, and confers no substantive powers.[47] The new corporation generally holds its property acquired by the consolidation in its own right and not in trust for the constituent companies,[48] and is generally liable, at least to the extent of the property turned over to it for the debts and obligations of the constituent companies.[49] An assignee or lessee company which accepts the franchises, powers, privileges and immunities of the lessor, and operates the road, is usually bound to perform the duties and obligations that rested upon the lessor, such, for instance, as providing a stated car service required by the statute or ordinance granting the franchise or right to use the street.[50] Where land belonging to a street railway company and used in its business was included in a mortgage of the whole plant and franchises of the company, and was leased by it for nine hundred and ninety-nine years, giving the lessee exclusive rights to the sur-

[46] As amended in 1903, Acts 1903, p 181.

[47] Adams v. Yazoo &c. R. Co. 77 Miss. 194; 24 So. 200; 60 L. R. A. 33, and note.

[48] Greene v. Woodland Ave. &c. R. Co. 62 Ohio St. 67; 56 N. E. 642; Louisville &c. R. Co. v. Boney, 117 Ind. 501; 20 N. E. 432; 3 L. R. A. 435, and note.

[49] See Philadelphia v. Ridge Ave. &c. R. Co. 142 Pa. St. 484; 22 Atl. 695; 24 Am. St. 512; Bohmer v. Haffen, 161 N. Y. 390; 55 N. E. 1047; Wagner v. Atchison &c. R. Co. 9 Kans. App. 661; 58 Pac. 1018; Camden &c. R. Co. v. Lee (Ky.), 84 S. W. 332; Birmingham R. &c. Co. v. Cunningham, 141 Ala. 470; 37 So. 689. This was also stated to be the rule in Birmingham R. &c. Co. v. Enslen (Ala.), 39 So. 74, but it was held, under the statute which also provided that pending suits should not abate, but should proceed in the name of the consolidated company, that, where there was a second consolidation after suit was brought under the name of the company causing the injury, the suit might proceed in that name. See, for case of attempt by minority stockholders to prevent consolidation, Tanner v. Lindell Ry. Co. 180 Mo. 1; 79 S. W. 155; 103 Am. St. 534, and note. See, as to rate of fare, Cleveland v. Cleveland City R. Co. 194 U. S. 517; 24 Sup. Ct. 756.

[50] Potwin Place v. Topeka R. Co. 51 Kans. 609; 33 Pac. 309; 37 Am. St. 312, and note; Reynolds v. Pacific Elec. R. Co. 146 Cal. 261; 80 Pac. 77; Reeves v. Philadelphia Trac. Co. 152 Pa. St. 153; 25 Atl. 516; Wallace v. Ann Arbor Elec. R. Co. 121 Mich. 588; 80 N. W. 572; Prospect Park &c. R. Co. v. Coney Island &c. R. Co. 144 N. Y. 152; 39 N. E. 17; 26 L. R. A. 610. See, also, O'Reilly v. Brooklyn Heights R. Co. 89 N. Y. S. 41.

face of a large portion of the plot and underground privileges, and the railroad reserved a portion of the plot for its surface system, and was entitled to maintain elevated tracks thereon according to the plan accompanying the lease and contract, it was held that the mortgagee might demand relief against the mortgagor or his assigns, owners of the mortgaged premises or lessees thereof, if their acts, if carried out according to their contracts and plans, would depreciate the value of the mortgage security.[51] In another case where a mortgage was antedated in accordance with a resolution of the board giving the authority to execute it, the court held that as between the mortgagor and mortgagee, it should be considered as a conveyance on the day it was dated, and would embrace rights acquired by lease after that date, where it recited the form of bonds it secured and stated that it covered all property, real or personal, and franchises, then owned or thereafter to be acquired by the mortgagor.[52]

§ 1096bm. **Eminent domain.**—Street railway companies are not always given the right to exercise the power of eminent domain, and it is seldom necessary in the case of an ordinary street railway in a city.[53]

[51] Fidelity Trust Co. v. Hoboken &c. R. Co. (N. J. Ch.) 63 Atl. 273. It was also held that the mortgagee could not complain of a lease of part of the land on the ground that the company had thereby debarred itself from enlarging its terminal facilities, but that it could complain if the lease and plan adopted tended to diminish the power of the company to operate under its franchises with profit, and that, when the lease prevented it from so doing, and the lessee proposed to use the land in part to carry passengers in competition, the mortgagee was entitled to relief, notwithstanding some of the directors of the trust company (mortgagee) were also directors in the railway company executing the lease.

[52] Guaranty Trust Co. v. Atlantic Coast Elec. R. Co. 138 Fed. 517. See, also, generally, as to leases, liens and mortgages, Central Trust Co. v. Warren, 121 Fed. 323; Mersick v. Hartford &c. R. Co. 76 Conn. 11; 55 Atl. 664; 100 Am. St. 977; Minersville v. Schuykill Elec. R. Co. 205 Pa. St. 402; 54 Atl. 1053; Lincoln v. Lincoln St. R. Co. 67 Neb. 469; 93 N. W. 766; Chicago Un. Trac. Co. v. Chicago, 199 Ill. 484; 65 N. E. 451; 59 L. R. A. 631.

[53] It has been held that a statute authorizing condemnation proceedings by a corporation organized for the construction of "any railway" does not authorize the exercise of the power of eminent domain by a street and suburban railway operated for the carrying of passengers. Thompson-Houston Elec. Co. v. Simon, 20 Oreg. 60; 25 Pac. 147; 10 L. R. A. 251; 23 Am. St. 86.

It has also been held that even where a statute gives street railway companies the right to exercise the power of eminent domain where necessary, and an interurban railroad company is incorporated under the street railway law, such company cannot exercise the power to obtain a right of way, or part of a right of way, unnecessarily departing from a highway or the line of a highway so that it can not serve the local public.[54] As a rule, however, it has so far been found to the interest of such companies in great part to run along or parallel a highway, and the question in the case above referred to has not often arisen. Some statutes permit, or expressly authorize interurban railroad companies to condemn under a general condemnation or eminent domain act, and others contain provisions specifically applying to such companies. The general subject has already been

[54] Hartshorn v. Illinois Valley Traction Co. 210 Ill. 609; 71 N. E. 612, 618, where it is said: "In considering the rights of these companies we are not to look alone to that which will best promote their financial gain. They are asking for the power of the state to take private property, and it is only upon the theory of a public use that such right can be granted to them, and appellee, in its effort to save distance, and thereby save expense of construction, and in its desire to establish and maintain rapidity of transportation, is, as we think (taking the character of such roads into consideration), departing from the intention of the law-making branch of the government, by which such organizations were organized. So far as they are authorized to travel through the country districts, it is upon the theory that they will be of benefit to the rural inhabitants, and not that only those living in towns, where regular stations shall be maintained, shall be beneficiaries. As was said in the Harvey case, supra, they are presumed to follow the highways, making all the stops necessary for the accommodation of the people living along the highways. . . . If the country districts are so sparsely settled that the traffic along them will not support such roads following them, then their construction is not a public necessity, and the power of eminent domain, upon the theory that they are to exercise a public function, cannot be called into action in their behalf. If they seek to travel across the country, as do steam railroads, disregarding highways, and disregarding the interests and conveniences of the country people, let them organize under the law regulating steam railroads, and be subject to the regulations of the statute and the burdens cast upon such railroads." See, also, Harvey v. Aurora &c. R. Co. 174 Ill. 295; 51 N. E. 163; South Beach R. Co. In re, 119 N. Y. 141; 23 N. E. 486. But see, as to what is a sufficient showing of necessity, Aurora &c. R. Co. v. Harvey, 178 Ill. 477; 53 N. E. 331.

treated, and the statutes vary so much in detail that we can add very little, of general importance, to the treatment elsewhere given the subject, but there are a few questions that may be considered with particular reference to interurban railroads. It has been held that a suburban electric railway company, authorized to condemn land for its "corporate purposes," cannot condemn a lot for a power house and coal pocket five miles from the nearest point of such railroad and in a city in which another company had the exclusive rights to run cars.[55] Other cases involving the question of the right to condemn or the amount that may be taken under particular circumstances, are cited below.[56] The existence of the statutory requirements should be shown, and must usually be alleged in the petition.[57] Inability to agree with the landowner must usuually be shown as in other cases, but it has been held that where one cotenant assumes to act for all and refuses an offer made by the company, inability to agree is sufficiently shown.[58] Under the Indiana statute it is held that damages, in case of condemnation by an interurban railroad company, are to be assessed as in case of the appropriation of land for the use of a commercial railroad company,[59] and that damages should be assessed for the entire tract of which part is actually taken, and no deduction should be made for benefits to the landowner from the construction and operation of the road.[60]

[55] Rhode Island Suburban R. Co. In re, 22 R. I. 591; 48 Atl. 591.

[56] Chicago &c. R. Co. v. Chicago &c. R. Co. 211 Ill. 352; 71 N. E. 1017; Dewey v. Chicago &c. R. Co. 184 Ill. 426; 56 N. E. 804; New York &c. R. Co. v. Long, 69 Conn. 424; 37 Atl. 1070; Williamson v. Gordon Heights R. Co. (N. J. Ch.) 40 Atl. 933; Chicago &c. R. Co. v. Oshkosh, 107 Wis. 192; 83 N. W. 294; Kansas City Interurban R. v. Davis, 197 Mo. 669; 95 S. W. 881.

[57] Colorado &c. R. Co. v. Allen, 13 Colo. 229; 22 Pac. 605; Chicago &c. R. Co. v. Chicago, 132 Ill. 372; 23 N. E. 1036; Rochester R. Co. v. Robinson, 133 N. Y. 242; 30 N. E. 1008; Ames v. Union Co. 17 Oreg. 600; 22 Pac. 118. But see Martin v. Chicago &c. Elec. R. 220 Ill. 97; 77 N. E. 86, with which compare, however, Chicago &c. Elec. R. Co. v. Diver, 213 Ill. 26; 72 N. E. 758. A petition showing that the land is to be used as a right of way for a regularly chartered and organized railroad is held sufficient to show the public use. Kansas City Interurban Ry. Co. v. Nelson, 193 Mo. 297; 91 S. W. 1036.

[58] Trotier v. St. Louis &c. R. Co. 180 Ill. 471; 54 N. E. 487.

[59] Carrell v. Muncie &c. R. Co. (Ind. App.) 78 N. E. 254. See, also, Abbott v. Milwaukee &c. Traction Co. 126 Wis. 634; 106 N. W. 523; 4 L. R. A. (N. S.) 202.

[60] Union Traction Co. v. Pfeil (Ind. App.), 78 N. E. 1052 (citing

§ 1096bn. Fences—Killing stock.—In some states, interurban railroad companies are expressly required by statute to fence their tracks or right of way. In others, however, there is no such statute expressly referring to them, and the question arises as to whether they are within such a statute relating to railroad companies generally. Of course it can not well be contended that such a company must fence the streets along which its road runs or even country highways in all cases. But it is held in several cases that a statute requiring all railroad companies to fence applies to interurban railroad companies,[61] and in the most recent case upon the subject, it is held, in a carefully considered opinion, that such a company is not relieved of this duty even where the road runs along the edge of a country highway and was so built on the right of way of the public road by permission of the county authorities.[62] In Indiana there is a specific statute requiring interurban railroad companies to fence their tracks, and it has been held that to this extent, except that it specifies interurban railroads, it is practically a copy of the statute relating to railroad companies generally, and should be given the same construction.[63] But such statute expressly declares that its provisions requiring fences shall not apply to certain situations, including streets in cities and all public highways on which the road is built, and that nothing contained in the act shall "in any manner affect or change the liability of railroad corporations . . . for stock killed or injured upon their railroad; but such liability shall exist and be governed by laws now in force." In the case referred to, which was an action to recover for injury to a horse that entered

Elliott Railroads, §§ 995, 1038); Indianapolis &c. Traction Co. v. Dunn (Ind. App.), 76 N. E. 269; Indianapolis &c. Traction Co. v. Ramer (Ind. App.), 76 N. E. 808. As to the procedure under such statute, see Morrison v. Indianapolis &c. R. Co. (Ind.) 76 N. E. 961 (also holding that a de facto corporation may exercise the power, and citing numerous authorities to that effect); Douglas v. Indianapolis &c. Traction Co. (Ind. App.) 76 N. E. 892.

[61] Hannah v. Street Railway Co. 81 Mo. App. 78; Riggs v. St. Francois &c. Ry. Co. (Mo. App.) 96 S. W. 707; Iola Elec. R. Co. v. Jackson, 70 Kans. 791; 79 Pac. 662.

[62] Riggs v. St. Francois County Ry. Co. (Mo. App.) 96 S. W. 707. One judge, however, dissented, without writing any opinion, and it seems questionable whether the court did not go too far in holding that a fence should be, or even could be, placed in the highway.

[63] Campbell v. Indianapolis &c. Traction Co. (Ind. App.) 79 N. E. 223.

upon the right of way and track at a place where there was no suitable fence as required by statute, the court held that the one of the paragraphs of the complaint based on negligence was good but that the paragraph based on the statutory liability if good, was not sustained because there was no proof, as required by the statute of an actual striking of the horse by the car.[64] In Arkansas it has been held that the statute making railroad companies responsible

[64] Campbell v. Indianapolis &c. Traction Co. (Ind. App.) 79 N. E. 226. In the course of the opinion it is said: "In our opinion, it is also true, that, by force of the statutes we have been considering, the common law is further modified in relation to railroads, effective to make them liable for injuries to stock negligently inflicted, where, without such statutes, they would be liable only for injuries wantonly and willfully inflicted. Elliott on Railroads, § 1180. Or, in other words, the effect of our conclusion upon the statutory provision here involved, under the theory of this paragraph, is such that appellant's horse cannot be treated as unlawfully upon appellee's track, so as to relieve appellee from the exercise of that care, caution, and diligence which a prudent person would employ to avoid injuring property of others thus exposed to danger. New Orleans &c. R. Co. v. Bourgeois, 66 Miss. 3; 5 South. 629; 14 Am. St. 534; Newman v. Vicksburg &c. R. Co. 64 Miss. 115; 8 South. 172; French v. Western &c. R. Co. 72 Hun (N. Y.) 469; 25 N. Y. Supp. 229; Railway Co. v. Trotter, 37 Ark. 593; Kerwhaker v. Cleveland &c. R. Co. 3 Ohio St. 172; 62 Am. Dec. 214. Under this paragraph, the failure of appellee to fence its track is not alone sufficient to create liability, as would be the case if this were an action under the statute; for the reason, in the latter case, it is unnecessary to aver or prove that the injury was inflicted negligently. . . . While in the case at bar, the plaintiff must also aver and prove the negligent doing of an act by the company, other than its failure to fence, but for which, and without his fault, the injury would not have happened. Southern Indiana R. Co. v. Messick, 35 Ind. App. 676; 74 N. E. 1097; Princeton C. & M. Co. v. Roll, 162 Ind. 115, 118; Duffy v. Gleason, 26 Ind. App. 180; 58 N. E. 729. . . . Upon the theory that the second paragraph is sufficient, as a statutory action, it was incumbent upon appellant to introduce evidence, at least tending to prove that the injury complained of was caused by an actual striking of the horse with the car." It is not altogether certain, but it seems that the court decided, or at least assumed, that the general statute referred to, using the term "any railroad" in creating the statutory liability, includes interurban railroads. And there is additional reason for this view in that such statute makes "any person or corporation" running, controlling or operating the road, liable for stock killed or injured by the "locomotives, cars, or other carriages."

for all damages to property caused by the running of trains does not apply to street railways,[65] and there is no presumption of negligence on the part of such a company from the mere killing, but it may be held liable in a proper case for negligently killing stock.[66]

§ 1096bo. When traveler may use track—Relative rights and duties.—Where tracks are laid in a street, no matter whether they are the tracks of an ordinary commercial railroad, an interurban railroad, or a street railway, they may be used by travelers upon the street as part of the street. The rights of the company and of such travelers are, in a general sense, mutual, reciprocal, and equal; but the company, at least between crossings has the right of way of passage, and persons on the track must give way, in a proper case; until the train or car has passed.[67] Each must act with due regard to the rights of the other.[68] So, where a track is laid in a country highway, travelers upon the highway may go upon the track with-

[65] Little Rock &c. Co. v. Newman, (Ark.), 92 S. W. 864.

[66] Little Rock &c. Co. v. Hicks (Ark.), 96 S. W. 385; Little Rock &c. Co. v. Newman (Ark.), 92 S. W. 864. These cases also hold that permitting stock to run at large outside the "stock limit" is not contributory negligence. See, also, Iola Electric R. Co. v. Jackson, 70 Kan. 791; 79 Pac. 662.

[67] Ante, §§ 1093, 1096aq. See, also, Thatcher v. Central Traction Co. 166 Pa. St. 66; 30 Atl. 1048; 45 Am. St. 645, and note; Moore v. Kansas City &c. R. Co. 126 Mo. 265; 29 S. W. 9, 11; Kerr v. Boston &c. R. Co. 188 Mass. 434; 74 N. E. 669.

[68] Ante, § 1094. See, also, United Rys. &c. Co. v. Watkins, 102 Md. 264; 62 Atl. 234; Garrett v. People's R. Co. (Del.) 64 Atl. 254; Beers v. Metropolitan St. R. Co. 93 N. Y. S. 278. See, also, as to rights of company and a manufacturing company also having a right to cross the street with cars from its plant one side to part of the plant on the other side, Camden &c. Ry. Co. v. United States &c. Co. 68 N. J. Eq. 279; 59 Atl. 523. The subject of injuries to travelers upon a street by electric railways is considered in the chapter on street railways, but we also cite the following recent cases as to collision with animals or vehicles or persons on or near the track to the crossing cases hereinafter cited: Strode v. St. Louis Transit Co. (Mo. App.) 87 S. W. 976; Garvich v. United Rys. &c. Co. 101 Md. 239; 61 Atl. 138; Jordan v. Old Colony &c. Co. 188 Mass. 124; 74 N. E. 315; Hennessey v. Forty-Second St. &c. R. Co. 92 N. Y. S. 1058; Indianapolis St. R. Co. v. Slifer, 35 Ind. App. 700; 74 N. E. 19; Sexton v. West Roxbury &c. R. Co. 188 Mass. 139; 74 N. E. 315; Anniston Elec. &c. Co. v. Elwell, 144 Ala. 317; 42 So. 45; Haynes v. Waterville &c. Co. (Me.) 64 Atl. 614.

out becoming trespassers or mere licensees, and it has been held that one may walk along an electric car track on a country highway;[69] but he must exercise reasonable care under the circumstances in so doing, and it has held that he is bound to be ordinarily vigilant with eye and ear to know of the approach of a car, and to get out of its way, so as not to stop it, or even make it slow up.[70] Where, however, the track of an interurban railroad company is laid on its own private right of way, and not in a highway, we think travelers who walk along it or use it for their own convenience, without any invitation from the company, are trespassers or bare licensees, and that the same rules, in general, apply in such case as in the case of an ordinary commercial railroad constructed on the private right of way of the company.[71]

§ 1096bp. Crossing other roads or highways—Signals.—It has been held, in a jurisdiction in which an interurban railroad is regarded as in the nature of a street railway and not an additional burden, that the right of such a railroad to cross the tracks of an ordinary commercial railroad upon a highway, whether a city street or a country road, is subject to no conditions other than those to

[69] Neary v. Citizens' R. &c. Co. 110 App. Div. (N. Y.) 769; 97 N. Y. S. 420. See, also, Klockenbrink v. St. Louis &c. R. Co. 172 Mo. 678; 72 S. W. 900; Brown v. St. Louis &c. Co. 108 Mo. App. 310; 83 S. W. 310.

[70] Neary v. Citizens' R. &c. Co. 110 App. Div. (N. Y.) 769; 97 N. Y. S. 420.

[71] See Floyd v. Paducah R. &c. Co. (Ky.) 64 S. W. 653; Montgomery v. Alabama &c. R. Co. 97 Ala. 305; 12 So. 170; Haley v. Kansas City &c. R. Co. 113 Ala. 640; 21 So. 357; Camden &c. R. Co. v. Young, 60 N. J. L. 193; 37 Atl. 1013; ante, § 1248, et seq. But compare Williams v. Metropolitan St. R. Co. 114 Mo. App. 1; 89 S. W. 59; Booth v. Union &c. R. Co. 126 Ia. 8; 101 N. W. 147. In a recent case in Missouri it was held that, in an action for personal injuries received by one walking along the track, an officer of the company may testify that it was a private right of way acquired by purchase; and it was also held that a motorman in such case, running over the private right of way, was not bound to keep a lookout for trespassers, although it would be otherwise if from past use and experience trespassers or licensees should have been anticipated. Many of the Missouri decisions are cited, and in that state and a few others the so called "humanitarian" doctrine is sometimes applied in the case of all classes of railroads when it would not be applied in other jurisdictions.

which the general public may be subject in traveling over the highway, and that the commercial railroad company may be enjoined from interfering where the interurban company is proceeding to construct a proper crossing at its own expense.[72] It is evident, however, that even if this rule applies to crossings on country roads, it does not follow that an interurban railway can cross an ordinary commercial railroad,[72a] or vice versa, where neither is on a public highway, without agreement, compensation, or the exercise of the power of eminent domain. This is generally provided for by statute, and the manner of crossing, the use of interlocking appliances, or the like, is usually left largely to railroad commissioners[73] or to some court,[74] but it is held in a recent case in Ohio that the statute authorizing the court of common pleas on application of a railroad to prescribe the manner of crossing does not apply to an electric railroad crossing another street railroad, but applies only to steam railroads.[75] But in Kentucky a statute, or rather, a constitutional provision of a similar character has been held in other jurisdictions, to apply to street railways.[76] We suppose that interurban cars

[72] Chicago &c. Ry. Co. v. Whiting &c. St. R. Co. 139 Ind. 297; 38 N. E. 604; 47 Am. St. 264; 26 L. R. A. 337; Chicago &c. R. Co. v. Hammond &c. R. Co. 151 Ind. 577; 46 N. E. 999. See, also, Chicago &c. R. Co. v. West Chicago &c. R. Co. 156 Ill. 255; 40 N. E. 1008; 29 L. R. A. 485n; Pittsburgh &c. R. Co. v. West Chicago &c. R. Co. 156 Ill. 385; 40 N. E. 1014; Pennsylvania Co. v. Lake Erie &c. R. Co. 146 Fed. 447 (but it cannot change the grade); Cleveland &c. Ry. Co. v. Urbana &c. R. Co. 26 Ohio Cir. Ct. R. 180. See, also, Consolidated &c. Co. v. South Orange &c. Co. 56 N. J. Eq. 569; 40 Atl. 15; Southern R. Co. v. Atlanta R. &c. Co. 111 Ga. 679; 36 S. E. 873; 51 L. R. A. 125. But compare New York &c. R. Co. v. Bridgeport &c. Co. 65 Conn. 410; 32 Atl. 935; 29 L. R. A. 367.

[72a] See Northern Cent. R. Co. v. Harrisburgh &c. Co. 177 Pa. St. 142; 35 Atl. 624; 6 Am. Elect. Cas. 187.

[73] See Chicago &c. R. Co. v. Indianapolis &c. Traction Co. 165 Ind. 453; 74 N. E. 513; Louisville &c. R. Co. v. Bowling Green Ry. Co. (Ky.) 63 S. W. 4; Board of Ry. Comr's v. Market St. R. Co. 132 Cal. 677; 64 Pac. 1065; Nellis Street Surface Railroads, 191.

[74] See Mercer County Traction Co. v. United &c. Co. 68 N. J. Eq. 715; 61 Atl. 461. As to consent of local authorities, see Geneva &c. R. Co. v. New York &c. R. Co. 163 N. Y. 228; 57 N. E. 498, and New Jersey case above cited.

[75] Dayton &c. R. Co. v. Dayton &c. Traction Co. 26 Ohio Cir. Ct. R. I.

[76] Louisville &c. R. Co. v. Bowling Green R. Co. 110 Ky. 788; 63 S. W. 4.

should be required to stop at the crossings of ordinary commercial railroads, where there are no safety devices, the same as the latter may be required to stop before crossing another commercial railroad, and that courts should be included, if necessary, to "stretch a point," if necessary, to bring the interurban railroad within a statute applying to "railroads." It has been held that a city ordinance, requiring street cars to stop before crossing any railroad track, includes any such track, whether main line or spur.[77] So, it has been held that a statute requiring a stop at railroad crossings, or signals at highway crossings, applies to an electric railroad or a railroad with a dummy engine running into the country.[78]

§ 1096bq. Duty of traveler in crossing—Whether look and listen rule applies.—There is some conflict among the authorities as to whether the strict rule requiring travelers to look and listen as a matter of law before crossing an ordinary commercial railroad track applies with the same strictness to travelers crossing electric railway tracks in a city. In many jurisdictions it is held that the duty of a traveler about to cross an electric railway on a highway is not precisely the same as in the case of a commercial railroad, and that there is no absolute rule of law requiring him in all cases to look and listen and conclusively presuming, in case of injury by collision with a car, that he saw and heard what he might have seen and heard or did not exercise such care as the law requires, but that his duty is simply to use ordinary and reasonable care such as a reasonably prudent man would use under the circumstances.[79] But in a number

[77] Galveston &c. Ry. Co. v. Vollrath (Tex. Civ. App.), 89 S. W. 279. But see Bartholomaus v. Milwaukee &c. Co. (Wis.) 109 N. W. 143.

[78] Louisville &c. R. Co. v. Anchors, 114 Ala. 492; 22 So. 279; 62 Am. St. 116; Birmingham &c. R. Co. v. Jacobs, 92 Ala. 187; 9 So. 320; 12 L. R. A. 830; Birmingham R. &c. Co. v. Baylor, 101 Ala. 488; 13 So. 793; Montgomery St. R. Co. v. Lewis (Ala.), 41 So. 736. See, also, Birmingham &c. R. Co. v. Powell, 136 Ala. 232, 241; 33 So. 875. But compare Dean v. State (Ala.), 43 So. 24.

[79] Connelly v. Trenton &c. Ry. Co. 56 N. J. L. 700; 29 Atl. 438; 44 Am. St. 424; Newark &c. Ry. Co. v. Block, 55 N. J. L. 605; 27 Atl. 1067; 22 L. R. A. 374; Marden v. Portsmouth &c. Ry. Co. 100 Me. 41; 60 Atl. 530; 69 L. R. A. 300; 109 Am. St. 476; Fairbanks v. Bangor &c. Ry. Co. 95 Me. 78; 49 Atl. 421; Finnich v. Boston &c. St. R. Co. 190 Mass. 382; 77 N. E. 500; Robbins v. Railway Co. 165 Mass. 30; 42 N. E. 334; Kelly v. Railway Co.

of jurisdictions the rule is the same as in the case of ordinary commercial railroads and the traveler is required by a rule of law to at least look and listen.[80] In jurisdictions in which this latter view is taken, it seems clear that it must be applied in the case of interurban railroads to substantially the same extent as in the case of ordinary commercial railroads, no matter whether the crossing is in the city or in the country; but in jurisdictions in which the

175 Mass. 331; 56 N. E. 285; Hall v. Ogden &c. R. Co. 13 Utah 243; 44 Pac. 1046; 57 Am. St. 726; Holingren v. St. Paul &c. R. Co. 61 Minn. 85; 63 N. W. 270; Smith v. Minneapolis St. R. Co. 95 Minn. 254; 104 N. W. 16; Capital City Traction Co. v. Lusby, 12 App. (D. C.) 295; Kernan v. Market St. R. Co. 137 Cal. 326; 70 Pac. 87; Louisville R. Co. v. Poe (Ky.) 72 S. W. 6; Roberts v. Spokane St. Ry. Co. 23 Wash. 325; 63 Pac. 506; 54 L. R. A. 184; Indianapolis St. R. Co. v. Schmidt, 35 Ind. App. 202; 71 N. E. 663; 72 N. E. 478; Indianapolis St. R. Co. v. Marschke (Ind.), 77 N. E. 945, 946; Los Angeles Traction Co. v. Conneally, 136 Fed. 104. See, also, South Chicago &c. Ry. Co. v. Kinnare, 216 Ill. 451; 75 N. E. 179; Cincinnati &c. St. R. Co. v. Stahle (Ind.), 76 N. E. 551; 77 N. E. 363; McGrath v. Metropolitan St. R. Co. 93 N. Y. S. 519; Evansville St. R. Co. v. Gentry, 147 Ind. 408; 44 N. E. 311; 37 L. R. A. 378; 62 Am. St. 421; Shea v. Railway Co. 50 Minn. 395; 52 N. W. 902; Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197; 43 N. E. 207; 32 L. R. A. 276; Cincinnati &c. St. R. Co. v. Whitcomb, 66 Fed. 915.

[80] Cawley v. La Crosse City R. Co. 101 Wis. 145; 77 N. W. 179; McNab v. United Railways &c. Co. 94 Md. 719; 51 Atl. 421; Young v. Citizens' St. R. Co. 148 Ind. 54; 44 N. E. 927; 47 N. E. 142 (but see Indiana cases cited in last preceding note); McGee v. Consolidated St. Ry. Co. 102 Mich. 107; 60 N. W. 293; 26 L. R. A. 300 and note; 47 Am. St. 507; Rissler v. St. Louis Transit Co. 113 Mo. App. 120; 87 S. W. 578; Hornstein v. United Rys. Co. 195 Mo. 440; 92 S. W. 884, 887, 889; Hoelzel v. Crescent City R. Co. 49 La. Ann. 1302; 22 So. 330; 38 L. R. A. 708; Dieck v. New Orleans &c. R. Co. 51 La. Ann. 262; 25 So. 71; Snider v. New Orleans &c. R. Co. 48 La. Ann. 1; 18 So. 695. See, also, Omslaer v. Traction Co. 168 Pa. St. 519; 32 Atl. 50; 47 Am. St. 901; 51 Atl. 742; Wheelahan v. Philadelphia Traction Co. 150 Pa. St. 187; 24 Atl. 688; Keenan v. Union Traction Co. 202 Pa. St. 107; 58 L. R. A. 217; Ehrisman v. East Harrisburg &c. R. Co. 150 Pa. St. 180; 24 Atl. 596; 17 L. R. A. 448; Hickey v. St. Paul &c. R. Co. 60 Minn. 119; 61 N. W. 893; Read v. Brooklyn &c. R. Co. 53 N. Y. S. 209; Fancher v. Fonda &c. R. Co. 97 N. Y. S. 666; Citizens St. R. Co. v. Helvie, 22 Ind. App. 515; 53 N. E. 191; Kansas City &c. R. Co. v. Gallagher, 63 Kans. 424; 75 Pac. 469; 64 L. R. A. 344; Highland Ave. R. Co. v. Sampson, 112 Ala. 425; 20 So. 566; Davidson v. Denver &c. Co. 4 Colo. App. 283; 35 Pac. 920; Cincinnati St. R. Co. v. Whitcomb, 66 Fed. 915; Smith v. Railroad Co. 29 Oreg. 539; 46 Pac.

first view is taken, namely, that there is no absolute rule of law requiring travelers in all cases to look and listen and making it negligence per se to fail to do so, it would seem that the locality and surroundings may have a very important bearing upon the determination of the question. Where, therefore, the crossing of the interurban railroad is in the country, especially if it is where the company has its own right of way and does not run along a highway, we think the same rule that is applied in ordinary commercial railroad crossings should, and probably would, be applied in all jurisdictions.[81]

§ 1096br. Crossing tracks—Miscalculation of chances.—A traveler who sees a rapidly approaching car yet voluntarily and unnecessarily attempts to cross the track in front of it upon a nice calculation of chances assumes the risk, or may be held guilty of contributory negligence, in a proper case, and we suppose the same rule usually applies in substance, especially in the country, in the case of an interurban railroad as in the case of an ordinary commercial railroad.[82] But if the car is a sufficient distance away and the circumstances are such that an ordinarily prudent man might attempt to

136, 780; Electric R. Co. v. Boddy, 105 Tenn. 666; 58 S. W. 646; 51 L. R. A. 885.

[81] In Woiska v. St. Paul City R. Co. 80 Minn. 364; 83 N. W. 386, this distinction was noted, and it was held that while the absolute rule as to looking and listening did not apply in populous parts of a city, the duty to look and listen, as in case of an ordinary commercial railroad crossing, did exist at an interurban railroad crossing in a suburban and sparsely settled part of the city where the street was practically a country road. Other decisions also recognize a difference in the relative rights and duties of such companies and of travelers in sparsely settled or country districts from those in populous parts of cities. See Indianapolis St. R. Co. v. Bolin (Ind. App.), 78 N. E. 210, 212; Indianapolis St. Ry. Co. v. Schmidt, 35 Ind. App. 202; 71 N. E. 663; Phillips v. Washington &c. Ry. Co. (Md.) 65 Atl. 422.

[82] See O'Brien v. St. Paul City R. Co. (Minn.) 108 N. W. 805; Metz v. St. Paul City R. Co. 88 Minn. 48; 92 N. W. 502; Lazar v. New York &c. R. Co. 94 N. Y. S. 9; Furlong v. Metropolitan St. R. Co. 92 N. Y. S. 1008; Criss v. Seattle Elec. Co. 38 Wash. 320; 80 Pac. 525; Griffith v. Denver &c. Co. 14 Colo. App. 504; 61 Pac. 46; Brown v. Elizabeth &c. R. Co. 68 N. J. L. 618; 54 Atl. 824; Gilliland v. Middlesex &c. Traction Co. 67 N. J. L. 542; 52 Atl. 693; Norton v. Interurban St. R. Co. 98 N. Y. S. 216. See, also, Los Angeles Trac. Co. v. Conneally, 136 Fed. 104; Riley v. Shreveport Trac. Co. 114 La. Ann. 135; 38 So. 83; Dechene v. Green-

cross in the exercise of reasonable care, the court can not well say as a matter of law that the risk was assumed and the traveler was guilty of contributory negligence. In cities especially, where cars are run more slowly and their speed is usually limited by ordinance, and they must be run with reference to the rights of those using the streets, and kept under control, and the like, the question of contributory negligence in crossing in front of a car approaching at some distance must usually be left to the jury.[83] And it has been held that the traveler usually has the right to presume that the car will be run in obedience to a governing speed ordinance,[84] and that a jury may well say that he also has a right to assume that it is furnished with means of stopping or reducing its speed.[85]

§ 1096bs. Duty after traveler's peril is discovered.—We have elsewhere considered the question as to the liability of railroad companies for willfulness and their duties after the peril of a traveler is discovered, or after it ought to have been discovered. We have also considered the question as to the duty of motormen and employes in such cases in running street cars, and the liability of the company under the doctrine of the "last clear chance." It is sufficient,

field &c. R. Co. 188 Mass. 423; 74 N. E. 600; Quinn v. Boston &c. R. Co. 188 Mass. 473; 74 N. E. 687; Freeman v. Brooklyn Heights R. Co. 81 N. Y. S. 828.

[83] Kansas City &c. R. Co. v. Gallagher, 63 Kans. 424; 75 Pac. 469; 64 L. R. A. 344; Chicago City R. Co. v. Nelson, 116 Ill. App. 609; Chicago Union Trac. Co. v. Jacobson, 118 Ill. App. 383, affirmed in 217 Ill. 404, 409; 75 N. E. 508; United Rys. &c. Co. v. Watkins, 102 Md. 264; 62 Atl. 234; Hovarke v. St. Louis Transit Co. 191 Mo. 441; 90 S. W. 1142; Omaha St. Ry. Co. v. Mathiesen (Neb.), 103 N. W. 666; Indianapolis St. R. Co. v. Bolin (Ind. App.) 78 N. E. 451; Lawler v. Hartford St. R. Co. 72 Conn. 74; 43 Atl. 545; Consolidated Traction Co. v. Lambertson, 59 N. J. L. 297; 36 Atl. 100; Franco v. Brooklyn Heights R. Co. 95 N. Y. S. 476; Ward v. Marshalltown &c. R. Co. (Ia.) 108 N. W. 323; La Londe v. Traction Co. (Mich.) 108 N. W. 365; Smith v. Minneapolis St. Ry. Co. 95 Minn. 254; 104 N. W. 16. But compare O'Brien v. St. Paul City R. Co. (Minn.) 108 N. W. 805.

[84] Eckard v. St. Louis Transit Co. 190 Mo. 593; 89 S. W. 602. An ordinance limiting speed to six miles an hour has been held reasonable. Cincinnati &c. St. R. Co. v. Stahle (Ind. App.), 76 N. E. 551; 77 N. E. 363.

[85] Kansas City &c. R. Co. v. Gallagher, 63 Kans. 424; 75 Pac. 469; 64 L. R. A. 344, 347, 348. See, also, Dallas &c. R. Co. v. Elliott, 7 Tex. Civ. App. 216; 26 S. W. 455.

therefore, in this connection to merely call attention to the more recent decisions upon the subject.[86]

§ 1096bt. Carriers—Rights, duties and liabilities.—Interurban railroad companies are common carriers of passengers, and, as such, are subject to the duties and liabilities of such carriers. Whether such a company is a common carrier of freight or not must usually depend upon the statute of the particular jurisdiction and the charter and franchises of the particular company, but it may be held liable as a common carrier of goods where it has held itself out as such and has customarily carried such goods.[87] Under some statutes they are expressly authorized to carry property as well as persons.[88]

[86] Cases in which company was held liable or the question for the jury: Williams v. Metropolitan St. R. Co. 114 Mo. App. 1; 89 S. W. 59; Jager v. Metropolitan St. R. Co. 114 Mo. App. 10; 89 S. W. 62; Waddell v. Metropolitan St. R. Co. 113 Mo. App. 765; 88 S. W. 765; Birmingham &c. Co. v. Clarke (Ala.), 41 So. 829; Kramer v. Stockton &c. R. Co. (Cal. App.) 86 Pac. 738; Burns v. Worcester Consol. St. R. Co. (Mass.) 78 N. E. 740; Hawley v. Columbia R. Co. 25 App. D. C. 1; Hanson v. Manchester St. R. Co. 73 N. H. 395; 62 Atl. 595; Indianapolis St. R. Co. v. Bolin (Ind. App.), 78 N. E. 210; Indianapolis St. R. Co. v. Schmidt, 35 Ind. App. 202; 71 N. E. 663, and cases cited. Cases in which company was not liable: Abbott v. Kansas City &c. R. Co. (Mo. App.) 97 S. W. 198; Taylor v. Houston &c. Co. (Tex. Civ. App.) 85 S. W. 1019; Tishacek v. Milwaukee &c. Co. 110 Wis. 417; 85 N. W. 971; Stalenan v. Atlanta Ave. R. Co. 155 N. Y. 511; 50 N. E. 277; 63 Am. St. 698. See generally, Louisville R. Co. v. Edelens (Ky.), 96 S. W. 901; South Covington &c. Ry. Co. v. Herrklotz, 104 Ky. 400; 47 S. W. 265; Hafner v. St. Louis Transit Co. (Mo. App.) 94 S. W. 291; Baxter v. St. Louis Transit Co. (Mo. App.) 95 S. W. 856.

[87] See Levi v. Lynn &c. R. Co. 11 Allen (Mass.), 300; 87 Am. Dec. 713; Thompson-Houston &c. Co. v. Simon, 20 Oreg. 60; 25 Pac. 147; 47 Am. & Eng. R. Cas. (N. S.) 300; 10 L. R. A. 251; 23 Am. St. 86.

[88] Roberts v. Terre Haute &c. Co. (Ind. App.) 76 N. E. 323. See, also, State v. Dayton Traction Co. 64 Ohio St. 272; 60 N. E. 291; Diebold v. Kentucky Traction Co. 117 Ky. 146; 77 S. W. 674; 63 L. R. A. 637; 111 Am. St. 230 (holding that it is a commercial railroad rather than a street railway when it carries freight from a city or town to another). In a number of the cases cited in the section discussing the question as to whether an interurban railroad company is an additional burden, it appeared that the company carried freight as well as passengers, and the effect of that fact was there considered.

And in New York it was said some years ago that companies might be legally formed under the general railroad act for the transportation of passengers or freight, or both, over railroads in the streets of cities even with horses as the motive power.[89] So, under the New York law granting to street surface railroads the power to convey "persons and property in cars for compensation" it is held that they have the right to convey not only passengers with property, or, in other words, passengers and their baggage, but also both passengers and freight, and that they may operate cars designed and intended exclusively for the purpose of carrying express matter and freight.[90] Under the Ohio statute giving interurban companies the right to agree with urban street railway companies for the use of their tracks, in getting into and passing through a municipality, it has been held that the interurban company can not be compelled to accept a transfer given to a passenger of the urban company and good upon the cars of such urban company passing over routes which are in part traversed by the cars of the interurban company.[91] But in Indiana, a street railway company, operating under an agreement with the city to give transfers to all passengers who boarded its cars within the city whose destination might be at any other point upon any of its lines within the city, was held bound to carry a passenger, who tendered a proper transfer, to his destination on its line, although such destination was a place in territory annexed to the city after the agreement between such company and the city was made, and was on the company's interurban line on which it had a franchise entitling it to charge an additional fare out side the city limits as they existed before the annexation.[92] Interurban railroad companies, as carriers of passengers, owe to their

[89] Washington St. &c. R. Co. In re, 115 N. Y. 442; 22 N. E. 356. See, also, Transit Co. v. Dash, 125 N. Y. 93; 26 N. E. 25; 10 L. R. A. 728.

[90] De Grauw v. Long Island &c. R. Co. 60 N. Y. S. 163, affirmed in 163 N. Y. 597; 57 N. E. 1108, and approved in Stillwater &c. St. R. Co. Re, 171 N. Y. 589; 64 N. E. 511; 59 L. R. A. 489. See, also, Aycock v. San Antonio Brewing Ass'n, 26 Tex. Civ. App. 341; 63 S. W. 953; Nichols v. Ann Arbor &c. Co. 87 Mich. 361; 49 N. W. 538; 16 L. R. A. 371. But compare South &c. R. Co. v. Highland Ave. &c. R. Co. 119 Ala. 105; 24 So. 114.

[91] Interurban R. &c. Co. v. Cincinnati (Ohio St.), 79 N. E. 240.

[92] Indiana R. Co. v. Hoffman, 161 Ind. 593; 69 N. E. 399.

passengers the duty of exercising the same high degree of care required of other carriers of passengers.[93] But, as in other cases, a passenger cannot ordinarily recover where his own negligence is the proximate cause of his injury. Although some courts seem to apply a more liberal rule in case of passengers who allow some part of their body to project outside of a street car,[94] than that which is applied in most jurisdictions in the case of steam railroads, yet we think it is correctly held, in a recent case, that substantially the same rule applies in this respect in the case of interurban railroads as in the case of steam railroads, and that it is negligence for a passenger upon a rapidly moving interurban car to intentionally and needlessly project his arm, or a part thereof out of the window of the car.[95] So, as shown in the third section of this chapter, it is held in Ohio that, while it may not be negligence to stand on the platform of a street car or even of an interurban car in the city, it is negligence to so stand on the platform of a rapidly moving interurban car in the country. But standing in the vestibule, in compliance with a rule of the company, has been held not to be contributory negligence precluding a recovery where the passenger is thrown down and injured by a collision of the car with another of the company's cars.[96] It has been said that a street railway company, having no control of a street, is not responsible for its safety, and where a passenger was injured in alighting, by stepping into

[93] Interurban R. &c. Co. v. Hancock (Ohio St.), 78 N. E. 964. See, also, Chicago &c. Traction Co. v. Schritter, 222 Ill. 364; 78 N. E. 820; West Chicago St. R. Co. v. Kromshinsky, 185 Ill. 92; 56 N. E. 1110; Leonard v. Brooklyn Heights R. Co. 67 N. Y. S. 985; Nichols v. Lynn &c. R. Co. 168 Mass. 528; 47 N. E. 427; Reynolds v. Richmond &c. R. Co. 92 Va. 400; 23 S. E. 770; Wabash River Trac. Co. v. Baker (Ind.), 78 N. E. 196. And it has been held that a court will take judicial notice that a domestic company organized and operating a street railway under the laws of the state is a carrier of passengers. Indianapolis St. R. Co. v. Ray (Ind.), 78 N. E. 978.

[94] See Summers v. Crescent City R. Co. 34 La. Ann. 139; 44 Am. R. 419; Dahlberg v. Minneapolis St. R. Co. 32 Minn. 404; 21 N. W. 545; 50 Am. R. 585; Federal St. &c. Co. v. Gibson, 96 Pa. St. 83; Miller v. St. Louis &c. Co. 5 Mo. App. 471.

[95] Interurban &c. Co. v. Hancock, (Ohio St.), 78 N. E. 964.

[96] Goodloe v. Metropolitan &c. Ry. Co. (Mo. App.) 96 S. W. 482. But see as to trespasser, Graham v. Chicago &c. Ry. Co. (Ia.) 107 N. W. 595.

an ordinary gutter, it was held that the company was not liable for failure of the conductor to warn the passenger of its existence.[97] But where a car is stopped for a passenger to alight, he usually has a right to assume, in the absence of anything to the contrary, that it is at a place where he can alight in the exercise of due care, and if it is at a dangerous place as the company knows or ought to know, it is usually the duty of the company to warn him even if it has no control of the street.[98] And this is especially true where it is upon the company's own private right of way.[99]

§ 1096bu. Power to make traffic arrangements—Connections with other roads.—In a comparatively recent case in Ohio it is said that in view of recent developments and the legislation of that state treating interurban as well as city railway companies as street railways and authorizing them to carry freight as well as passengers and to make traffic arrangements, the mere fact that street railway companies have usually been considered as carriers of passengers

[97] Thompson v. Gardner &c. Ry. Co. (Mass.) 78 N. E. 854, citing Creamer v. West End St. R. 156 Mass. 320, 321; 31 N. E. 391; 14 L. R. A. 490; 32 Am. St. 456, and Bigelow v. West End St. Ry. 161 Mass. 393; 37 N. E. 367. See also, Indianapolis Trac &c. Co. v. Pressell (Ind. App.), 77 N. E. 357; Quinlan v. Newton &c. St. R. Co. (Mass.) 77 N. E. 486.

[98] Indiana Union Trac. Co. v. Jacobs (Ind.), 78 N. E. 325; Tilden v. Rhode Island Co. (R. I.) 63 Atl. 675; West Chicago St. R. Co. v. Manning, 170 Ill. 417; 48 N. E. 958; Bass v. Concord St. R. (N. H.) 46 Atl. 1056. For other cases as to injuries received in boarding or alighting, see Davis v. Camden &c. R. Co. (N. J.) 63 Atl. 843; Scott v. Bergen Co. T. Co. 63 N. J. L. 407; 43 Atl. 1060; Moore v. Woonsocket St. R. Co. (R. I.) 63 Atl. 313 (evidence as to the customary stopping place and the like held admissible); South Covington &c. Ry. Co. v. Core (Ky.), 96 S. W. 562; note in 38 L. R. A. 786, et seq; Henry v. Grant St. El. R. Co. 24 Wash. 88; 64 Pac. 137; 85 Am. St. 942; Wabash River Trac. Co. v. Baker, (Ind.) 78 N. E. 196; Hilborn v. Boston &c. R. Co. (Mass.) 77 N. E. 646; Colorado Springs &c. Ry. Co. v. Petit (Colo.), 86 Pac. 121.

[99] Joslyn v. Milford &c. St. Ry. Co. 184 Mass. 65; 67 N. E. 866. For other cases of injury to passengers on interurban railroads, see generally, Indiana Union Trac. Co. v. McKinney (Ind. App.), 78 N. E. 203; Cumberland &c. Ry. Co. v. Thompson, 102 Md. 193; 62 Atl. 243; Verrone v. Rhode Island Suburban R. Co. (R. I.) 62 Atl. 512; Abel v. Northampton Trac. Co. 212 Pa. St. 329; 61 Atl. 915.

and not of freight does not show how that they cannot carry freight under the statute, and it is held that, under such statute an electric railway company owning and operating a road upon a city street and an interurban railway company having a terminus at such place may make a valid traffic arrangement for the carriage of merchandise for hire upon such street.[100] So, in New York it has been held that electric railways are entitled to track connections with intersecting commercial steam railroad companies where the statute gives such right to "every railroad corporation," especially where the incorporation of both classes of roads is provided for in the same statute containing such provision.[101] And in another Ohio case it is held that the right given by statute to "urban and interurban street railroad companies" to agree as to the use by the latter of tracks of the former to enter and pass through the city is not conditional upon an exchange of transfers.[102]

[100] State v. Dayton Traction Co. 64 Ohio St. 272; 60 N. E. 291.

[101] Stillwater &c. St. R. Co. v. Boston &c. R. Co. 171 N. Y. 589; 64 N. E. 511; 59 L. R. A. 489. The electric railway Company in this case was organized under the general railroad law with the right to transport both passengers and freight, and the road extended from one city or town to another. In the course of the opinion it was said: "If one electric road were seeking a connection with another road operated by the same power, it would hardly be claimed that the provisions of sec. 12 did not apply. It is practically conceded that electric roads may be united with other roads of the same character, and operated by the same power. But the statute has not limited the courts to the requiring if intersections and connections between roads of the same character. Very likely, electric roads tendering cars to steam roads for transportation should only offer those properly equipped with brakes and couplers, so that they may be taken and transported readily and safely. It may be that additional regulations will become necessary in order that equal privileges, accommodations, and facilities may be afforded in connecting and intersecting roads, but all this may be controlled by the board of railroad commissioners. It is said that the rights of the public in the streets and highways of our cities, towns, and villages should be protected, and that cars loaded with merchandise and freight should not be permitted to be run over street surface railroads. It may be that additional regulations should be provided, either by statute or by ordinance, limiting the time in which cars of this character should be permitted to run over street surface railroads, especially in cities and large villages; but that the power exists to run such cars is no longer an open question in this court."

[102] Interurban R. &c. Co. v. City

§ 1096bv. Action for death caused by negligence of employe—Statute applied to electric railroads.—In Missouri a statute provides that whenever any person shall die from an injury resulting from, or occasioned by, the negligence of any servant or employe while running, conducting or managing any locomotive, car or train of cars the corporation in whose employ such servant or employe shall be at the time the injury is committed shall forfeit and pay for every person so dying the sum of five thousand dollars. This statute has been held to include and apply to interurban or street railroads.[103] It has also been held that the negligence may be either negligence as defined at common law or that arising from a failure to discharge a duty imposed by statute or municipal ordinance.[104] The ordinary statutes modeled on Lord Campbell's act also apply in the case of interurban railroad companies as in other cases, and recent decisions in such cases relating to interurban or electric railway companies are cited below.[105]

§ 1096bw. Employes and injuries to them—Employer's liability acts.—The doctrines and rules applicable in other railroad cases as between master and servant apply in general as between interurban railway companies and their employes. So does the common law doctrine of fellow servants. It will be sufficient, therefore, to merely refer to a few recent cases of actions by employes against electric

of Cincinnati (Ohio St.), 79 N. E. 240. But see Indiana R. Co. v. Hoffman, 161 Ind. 593; 69 N. E. 399.

[103] McQuade v. St. Louis &c. R. Co. (Mo. App. 98 S. W. 552; Higgins v. St. Louis &c. R. Co. (Mo. App.) 95 S. W. 863. See, also, Lynch v. Railroad, 112 Mo. 420, 441; 20 S. W. 642. But compare Drolshagen v. Union R. Co. 186 Mo. 258; 85 S. W. 344. The statute has since been amended so as to expressly apply to such companies, but the court held that it so applied before the amendment.

[104] McQuade v. St. Louis &c. R. Co. (Mo. App.) 98 S. W. 552.

[105] Abel v. Northampton Traction Co. 212 Pa. St. 329; 61 Atl. 915; Dillon v. Hudson &c. Electric R. Co. 73 N. H. 367; 62 Atl. 93; Ruppel v. United Railroads, 1 Cal. App. 666; 82 Pac. 1073; Austin v. Metropolitan St. R. Co. 95 N. Y. S. 740; North Chicago St. R. Co. v. Brodie, 156 Ill. 317; 40 N. E. 942; Olivier v. Houghton County St. Ry. Co. 138 Mich. 242; 101 N. W. 530; Halverson v. Seattle Elec. Co. 35 Wash. 600; 77 Pac. 1058; Behen v. St. Louis Transit Co. 186 Mo. 430; 85 S. W. 346; Morris v. Spartanburg R. &c. Co. 70 S. Car. 279; 49 S. E. 854.

railroad companies for damages for personal injuries,[106] in addition to the treatment of the general subject elsewhere in this work. But the question arises as to whether employer's liability acts, making changes in the fellow servant doctrine, apply to such companies. As elsewhere shown, it is generally held that such statutes do not apply to street railway companies.[107] There is, perhaps, a little more reason for applying them to interurban railroad companies; but most of such statutes were passed before electric railroads, and especially interurban railroads, were known, and the "mischief to be remedied" was the peculiar danger arising from the operation of commercial steam railroads, and the danger from coupling cars in long trains, switching, running freight trains, and the general method of operation, is not apparently the same, either in kind or degree, in the case of interurban railroads as generally operated at the present day. For these reasons, among others, it would seem that employer's liability acts, relating merely to "railroads," do not ordinarily apply to interurban electric railroads.[108] Certainly, some of the provisions usually found in such acts cannot apply, and an electric car upon such a road is not a "locomotive engine" or "train upon a railway," within the meaning of such a statute.[109]

[106] Moore v. Transit Co. 193 Mo. 411; 91 S. W. 1060; Cole v. Transit Co. 183 Mo. 81; 81 S. W. 1, 138; Lincoln St. R. Co. v. Cox, 48 Neb. 807; 67 N. W. 740; Pierce v. Camden &c. R. Co. 58 N. J. L. 400; 35 Atl. 286; Ladd v. Brockton &c. R. Co. 180 Mass. 454; 62 N. E. 730; Sullivan v. Metropolitan St. Ry. Co. 65 N. Y. S. 842; Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 625; 72 N. E. 145.

[107] See ante, §§ 4, 6, and post, § 1338.

[108] Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 625; 72 N. E. 145; Sams v. St. Louis &c. R. Co. 174 Mo. 53; 73 S. W. 686; 61 L. R. A. 475. See, also, Riley v. Galveston &c. R. Co. 13 Tex. Civ. App. 247; 35 S. W. 826; Funk v. St. Paul City R. Co. 61 Minn. 435; 63 N. W. 1099; 29 L. R. A. 208; 52 Am. St. 608; McLeod v. Chicago &c. R. Co. 125 Ia. 270; 101 N. W. 77; Dresser Employer's Liability, § 80. But see Savannah &c. R. v. Williams, 117 Ga. 414; 43 S. E. 751; 61 L. R. A. 249.

[109] Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 625; 72 N. E. 145; Fallon v. West End St. R. Co. 171 Mass. 249; 50 N. E. 536. See, also, Whatley v. Zenida Coal Co. 122 Ala. 118; 26 So. 124.

CHAPTER XLV.

STREET RAILWAY NEGLIGENCE.

§ 1096ca. Generally—Scope of chapter.—The general duty of street railway companies as to the repair and use of streets has

already been considered. Attention has been called in a general way to the relative rights of the company and of travelers using the streets and a few illustrative cases have been cited as to the liability of the company for negligence causing injuries to travelers.[1] In this chapter an outline of the duties and liabilities of street railway companies to travelers will first be given, and the liabilities of such companies and the rights and duties of travelers under particular circumstances will then be considered somewhat in detail, to which will be added a consideration of the duties and liabilities of such companies as carriers of passengers.

§ 1096cb. Care required generally—Liability for injury to persons using street.—It is the duty of a street railway company to exercise ordinary or reasonable care and diligence not to injure persons lawfully traveling the street or road occupied by its tracks. It is bound to know that the public may use the entire street or road when not in actual use by its cars, and it must employ reasonable means to prevent injury to those who it knows may rightfully so use the road or street, for this knowledge requires that it shall exercise care and diligence to make it reasonably safe to travel the highway in the ordinary mode,[2] or, in other words, that the company shall exercise care and diligence to so lay its track and maintain and operate its road as not to endanger travelers in their proper use of the streets.[3] If the company omits to exercise ordinary care, and

[1] See ante, §§ 1092–1095.

[2] Shea v. Potrero &c. R. Co. 44 Cal. 414; Swain v. Fourteenth St. R. Co. 93 Cal. 179; 28 Pac. 829; Government St. R. v. Hanlon, 53 Ala. 70; Railroad Co. v. Norton, 24 Pa. St. 465; 64 Am. Dec. 672; Rascher v. East Detroit &c. Co. 90 Mich. 413; 51 N. W. 463; 30 Am. St. 447; Winters v. Kansas City R. Co. 99 Mo. 509; 12 S. W. 652; 6 L. R. A. 536, and note; 17 Am. St. 591; Anderson v. Minneapolis St. R. Co. 42 Minn. 490; 44 N. W. 518; 18 Am. St. 525; Muncie St. R. Co. v. Maynard, 5 Ind. App. 372; 32 N. E. 342, 346 (citing text); Citizens' St. R. Co. v. Ballard, 22 Ind. App. 151; 52 N. E. 729; Hall v. Ogden City St. R. Co. 13 Utah, 243; 44 Pac. 1046; 57 Am. St. 726, 732 (quoting text). But not ordinarily to maintain parts of the street not occupied by it. Indianapolis Trac. &c. Co. v. Pressell (Ind. App.), 77 N. E. 357.

[3] Lawler v. Hartford St. R. Co. 72 Conn. 74; 43 Atl. 545; Goldrick v. Union R. Co. 20 R. I. 128; 37 Atl. 635; Fash v. Third Ave. R. Co. 1 Daly (N. Y.) 148; Bradwell v. Pittsburg &c. R. Co. 153 Pa. St. 105; 25 Atl. 623; Houston St. R. Co. v. Delesdernier, 84 Tex. 82; 19 S. W.

thus causes injury to a person in rightful and careful use of the street or road, it must respond in damages. In one case the court instructed the jury that a street railway company "had no right to so occupy the street and use the same with its cars as to make it extremely dangerous to cross the streets at all times," and it was held on appeal that the company could not successfully complain of the instruction.[4] It was also held in the same case that the plaintiff had a right to select a point at which to cross, and that "he had a right to go where he chose." It is held that it is the duty of those in charge of a car to give notice or warning of its approach.[5] In one case it was said to be "gross negligence" for a driver to twist the lines upon the brake, turn his back and give his attention to other matters.[6] Where the ordinance requires a street railway company to keep "a lookout," a negligent failure to comply with the requirement will make the company liable to one who thereby sustains an injury,[7] and, indeed, there may be a liability even in the absence of such an ordinance. So, where an ordinance prohibits a street railway company from running its cars at a greater rate of speed than that prescribed, a disobedience at least furnishes evidence of negligence;[8] but disobedience of such an ordinance has been held not to be conclusive evidence of negligence on the part

366; Groves v. Louisville R. Co. 109 Ky. 76; 58 S. W. 508; 52 L. R. A. 448, and note. See, also, O'Leary v. Brockton St. R. Co. 177 Mass. 187; 58 N. E. 585.

[4] McClain v. Brooklyn City R. Co. 116 N. Y. 459; 22 N. E. 1062.

[5] Johnson v. Hudson River R. Co. 20 N. Y. 65; 75 Am. Dec. 375, and note; Mitchell v. Tacoma &c. Co. 9 Wash. 120; 37 Pac. 341; Consolidated Trac. Co. v. Chenowith, 61 N. J. L. 554; 35 Atl. 1067. See Welsh v. Jackson &c. Co. 81 Mo. 466.

[6] Mangam v. Brooklyn City R. Co. 36 Barb. (N. Y.) 230 (affirmed, 38 N. Y. 455; 98 Am. Dec. 66, and note). See, also, Montfort v. Schmidt, 36 La. Ann. 750; Citizens' St. R. Co. v. Carey, 56 Ind. 396; Baltimore Trac. Co. v. Wallace, 77 Md. 435; 26 Atl. 518; Schnur v. Citizens' Trac. Co. 153 Pa. St. 29; 25 Atl. 650; 34 Am. St. 680; Commonwealth v. Metropolitan R. Co. 107 Mass. 236.

[7] Hays v. Gainesville &c. R. Co. 70 Tex. 602; 8 S. W. 491; 8 Am. St. 624. See, also, Fath v. Tower Grove &c. R. Co. 105 Mo. 537; 16 S. W. 913; 13 L. R. A. 74.

[8] Baltimore &c. R. Co. v. McDonnell, 43 Md. 534; Citizens' St. R. Co. v. Steen, 42 Ark. 321; 19 Am. & Eng. R. Cas. 30. See, also, Weber v. Kansas City &c. R. Co. 100 Mo. 194; 12 S. W. 804; 13 S. W. 587; 7 L. R. A. 819, and note; 18 Am. St. 541, and note in 53 Am. R. 52.

of the company.[9] The Supreme Court of Nebraska has held that the driver of a horse-car on a street railway must sit or stand on the front platform or place provided for him, must keep control of the horse and car, and must exercise a reasonable degree of watchfulness and care to prevent injury to persons traveling on or crossing the street.[10] The duty of a street railway company, as indicated by what has already been said, is not simply to use ordinary care and diligence to avoid injury by collisions with vehicles moving upon the road or street, or with persons walking on the highway, but it must also exercise ordinary care and diligence in conducting its business and in maintaining its tracks so as to prevent injury to persons rightfully using the road or street. If it makes a street dangerous by its own negligent act it is liable; so, if it places objects alongside of its tracks which are likely to frighten horses, it may be compelled to respond in damages to one who sustains an injury from its wrong.[11] It is not held to an extraordinary degree of care in the conduct of its business, but it is held to the exercise of ordinary

[9] Hanlon v. South Boston &c. R. Co. 129 Mass. 310.

[10] Brooks v. Lincoln Street R. Co. 22 Neb. 816; 36 N. W. 529. The cases upon the general subject are quite numerous, and exhibit many peculiar features and disclose some conflict of opinion, but we cannot comment upon them in detail. Hyland v. Yonkers &c. R. Co. 51 Hun (N. Y.) 643; 4 N. Y. S. 305; Brown v. Seventy-third Avenue R. Co. 21 N. Y. St. 475; 4 N. Y. S. 192; Cordes v. Third Avenue R. Co. 21 N. Y. St. 461; 4 N. Y. S. 439; Gallagher v. Coney Island R. Co. 24 N. Y. St. 746; 4 N. Y. S. 870; Wright v. Third Avenue R. Co. 23 N. Y. St. 483; 5 N. Y. S. 707; Lamb v. St. Louis &c. R. Co. 33 Mo. App. 489; Liddy v. St. Louis &c. R. Co. 40 Mo. 506; Meyer v. Lindell St. R. Co. 6 Mo. App. 27; Dunn v. Cass Avenue &c. R. Co. 98 Mo. 652; 11 S. W. 1009; Unger v. Forty-second St. R. Co. 51 N. Y. 497; Pendleton Street R. Co. v. Shires, 18 Ohio St. 255; Pendleton St. R. Co. v. Stallman, 22 Ohio St. 1, 19. See, generally, Buzby v. Philadelphia &c. Co. 126 Pa. St. 559; 17 Atl. 895; 12 Am. St. 919; Griveaud v. St. Louis &c. R. Co. 33 Mo. App. 458; Watson v. St. Paul &c. R. Co. 42 Minn. 46; 43 N. W. 904. As to what damages may be recovered, see Chicago &c. R. Co. v. Ingraham, 131 Ill. 659; 23 N. E. 350. In Mathews v. London St. Tramways Co. 60 L. T. R. 47, a passenger in an omnibus was injured by a collision with a car, and the court held that there might be a recovery notwithstanding the negligence of the driver of the omnibus.

[11] In Smith v. Nashua St. R. Co. 69 N. H. 504; 44 Atl. 133, the company was held liable to one who was thrown out of his sleigh by a pile of snow which the company had left at the side of its track.

care.[12] The quantum of care or the precaution to be taken may vary with the circumstances of the particular case,[13] but, while it is sometimes said that a higher or lower degree of care is required under certain circumstances, we think that all that is meant is what we have just stated, and that the degree of care required as to travelers upon the street is still ordinary or reasonable care under the circumstances.[14]

[12] Fitts v. Cream City R. Co. 59 Wis. 323; 18 N. W. 186; 15 Am. & Eng. R. Cas. 462; Gray v. Second Avenue R. Co. 65 N. Y. 561; Lowrey v. Brooklyn City R. Co. 4 Abbott's New Cases, 32; Wooley v. Grand &c. R. Co. 83 N. Y. 121; McKenna v. Metropolitan &c. R. Co. 112 Mass. 55; Osgood v. Lynn &c. R. Co. 130 Mass. 492; McMahon v. Second Ave. R. Co. 11 Hun (N. Y.) 347; Lee v. Union R. Co. 12 R. I. 383; 34 Am. R. 668; Citizens' Passenger R. Co. v. Ketcham, 122 Pa. 228; 15 Atl. 733; Isaackson v. Duluth St. R. Co. 77 Minn. 27; 77 N. W. 433, 434 (citing text).

[13] See Cincinnati St. R. Co. v. Whitcomb, 66 Fed. 915; Citizens' St. R. Co. v. Steen, 42 Ark. 321; Indianapolis Trac. &c. Co. v. Kidd (Ind.), 79 N. E. 347; Winters v. Kansas City Cable R. Co. 99 Mo. 509; 12 S. W. 652; 6 L. R. A. 536, and note; 17 Am. St. 591; Brown v. Wilmington City R. Co. 1 Pennew. (Del.) 332; 40 Atl. 936; West Chicago St. R. Co. v. Petters, 196 Ill. 298; 63 N. E. 662; Stafford v. Chippewa Valley Elec. R. Co. 110 Wis. 331; 85 N. W. 1036.

[14] In the recent case of Rubinovitch v. Boston El. R. Co. (Mass.) 77 N. E. 895, 896, it is said: "While a common carrier of passengers is held to the highest degree of care commensurate with his undertaking, this principle is applicable only to his conduct towards those who are being transported, or to whom he sustains this relation. Warren v. Fitchburg R. Co. 8 Allen (Mass.) 227; 85 Am. Dec. 700. The defendant, who was lawfully using the street for the operation of its railway, did not owe this duty to the plaintiff, who was a traveler upon a public way, although each owed to the other, while concurrently using the street, the reciprocal obligation of due care. O'Brien v. Blue Hill St. R. Co. 186 Mass. 446; 71 N. E. 951. Consequently it has been said that a motorman in charge of a car which is passing through a street, even if the motive power is electricity, stands on the same footing in regard to his due care, or negligence toward other travelers, as the driver of any vehicle. Scannell v. Boston &c. R. Co. 176 Mass. 170, 173; 57 N. E. 341. Occasions may arise where, in the performance of this duty, the apparent danger of severe bodily injury or death to pedestrians, or travelers by carriage, or other vehicles, may demand of him the exercise of a high degree of care, but even then the requirement in degree is only such prudence and foresight as the jury, upon the evidence, may determine to have been reasonably required under the circumstances. Uggla v. West End St. R. Co. 160 Mass. 351;

§ 1096cc. Injuries caused by obstructions or failure to repair.— The authority lawfully given to a street railway company to construct its track in a street carries with it the right to temporarily obstruct the ordinary use of the street so far as the laying of the track requires it to be done.[15] But due care must be exercised in doing and guarding the work so as not to negligently injure travelers in the proper use of the street.[16] The company is liable for injuries proximately caused to travelers without fault or negligence on their part by obstructions unlawfully or negligently placed or left by it in the street.[17] It is required to use reasonable care not only in constructing its railway[18] but also to maintain it in a reasonably safe condition.[19] Thus, it should so lay its tracks and ties and

35 N. E. 1126; 39 Am. St. 481; O'Leary v. Brockton St. R. Co. 177 Mass. 187; 58 N. E. 585. The imperative duty of safe transportation owed to passengers, which a common carrier operating a street railway engages to perform, from the very nature of the undertaking, does not extend to travelers along the route, and the instructions given accurately and fully stated the true rule, that the measure of care required of the defendant's servant was that of the ordinarily prudent and careful man, when called upon to act under the conditions disclosed by the evidence. Robbins v. Springfield St. R. Co. 165 Mass. 30; 42 N. E. 334."

[15] See Shepherd v. Baltimore &c. R. Co. 130 U. S. 426; 433; 9 Sup. Ct. 598, 601. See, also, Cowan v. Muskegon R. Co. 84 Mich. 583; 48 N. W. 166.

[16] Thomas v. Consolidated Trac. Co. 62 N. J. L. 36; 42 Atl. 1061. See, also, Donovan v. Oakland &c. Co. 102 Cal. 245; 36 Pac. 516; Morhart v. North Jersey St. R. Co. 64 N. J. L. 236; 45 Atl. 812; Indianapolis St. R. Co. v. Walton, 29 Ind. App. 368; 64 N. E. 630.

[17] West Chicago St. R. Co. v. O'Connor, 85 Ill. App. 278; Ford v. Charles Warner Co. 1 Marv. (Del.) 88; 37 Atl. 39; Slayton v. West End St. R. Co. 174 Mass. 55; 54 N. E. 351. But see, as to temporary and reasonable obstruction, and as to the question being one of fact, Adams v. Metropolitan St. R. Co. 82 App. Div. (N. Y.) 354; 81 N. Y. S. 553; Mueller v. Milwaukee St. R. Co. 86 Wis. 340; 56 N. W. 914; 21 L. R. A. 721; George v. Los Angeles R. Co. 126 Cal. 357; 58 Pac. 819; 46 L. R. A. 829; 77 Am. St. 184.

[18] Carpenter v. Central Park &c. R. Co. 11 Abb. Pr. N. S. (N. Y.) 416; Schild v. Central Park &c. R. Co. 133 N. Y. 446; 31 N. E. 327; 28 Am. St. 658; Kane v. West End St. R. Co. 169 Mass. 64; 47 N. E. 501; Delzell v. Indianapolis &c. R. Co. 32 Ind. 45; Wagner v. Pittsburg &c. R. Co. 158 Pa. St. 419; 27 Atl. 1008; Houston City St. R. Co. v. Delesdernier, 84 Tex. 82; 19 S. W. 366; Nellis St. R. Acc. Law, 221; note in 52 L. R. A. 448.

[19] Citizens' St. R. Co. v. Ballard, 22 Ind. App. 151; 52 N. E. 729; Birmingham Un. R. Co. v. Alexander, 93 Ala. 133; 9 So. 525; Wor-

keep them free from projecting spikes, slivers and the like as not to negligently obstruct travel and injure travelers in the proper use of the street.[20] And it is also held, although there is some conflict in regard to the proposition, that the company is liable for an injury caused to a traveler by a rail projecting above the level of the street or by a hole worn by travel notwithstanding the defect is caused by travel or the natural wearing away or sinking of the street from the rails.[21] This would seem to be the true rule at least where the company is under obligation by its charter or contract to keep up such repairs and negligently fails to do so. It is also held in a recent case that even without an ordinance to that effect a street railway company when it takes possession of a portion of a public street for the purpose of building and operating a railway under its franchise, necessarily assumes a duty to the public to keep that part of the street occupied by it free from pitfalls and in a safe condition; and that "the fact that the city engineer is overlooking work done by a street railway in a public street in the course of repairing its tracks does not relieve the railway from the duty resting

ster v. Forty-second St. &c. R. Co. 50 N. Y. 203; Houston City &c. R. Co. v. Medlenka, 17 Tex. Civ. App. 621; 43 S. W. 1028; Bradwell v. Pittsburg &c. R. Co. 153 Pa. St. 105; 25 Atl. 623; note in 52 L. R. A. 448; Nellis St. R. Acc. Law, 221; 2 Thomp. Neg. § 1353.

[20] Cline v. Crescent City R. Co. 43 La. Ann. 327; 9 So. 122; 26 Am. St. 187; Houston City St. R. Co. v. Medlenka, 17 Tex. Civ. App. 621; 43 S. W. 1028; Schild v. Central Park &c. R. Co. 133 N. Y. 446; 31 N. E. 327; 28 Am. St. 658; Bradwell v. Pittsburg &c. R. Co. 153 Pa. St. 105; 25 Atl. 623. See, also, Stratton v. Central &c. St. R. Co. 95 Ill. 25; Woodman v. Metropolitan R. Co. 149 Mass. 335; 21 N. E. 482; 4 L. R. A. 213, and note; 14 Am. St. 427; Bangs v. Lewiston &c. R. Co. 89 Me. 194; 36 Atl. 73; Central R. Co. v. State, 82 Md. 647; 33 Atl. 265; McKillop v. Duluth St. R. Co. 53 Minn. 532; 55 N. W. 739; Halifax St. R. Co. v. Joyce, 22 Can. Sup. Ct. 258.

[21] Groves v. Louisville R. Co. 109 Ky. 76; 58 S. W. 508; 52 L. R. A. 448, and note reviewing authorities on both sides; Citizens' St. R. Co. v. Ballard, 22 Ind. App. 151; 52 N. E. 729; Houston City St. R. Co. v. Medlenka, 17 Tex. Civ. App. 621; 43 S. W. 1028; McLaughlin v. Philadelphia Trac. Co. 175 Pa. St. 565; 34 Atl. 863. But see Rockford City R. Co. v. Matthews, 50 Ill. App. 267; Eagan v. Forty-second St. R. Co. 19 N. Y. St. 676; 4 N. Y. S. 530; Kelly v. Metropolitan St. R. Co. 25 Misc. (N. Y.) 194; 54 N. Y. S. 173; Lowery v. Brooklyn City &c. R. Co. 76 N. Y. 28; Galveston City R. Co. v. Nolan, 53 Tex. 139; Eddy v. Ottawa City Pass. R. Co. 31 U. C. Q. B. 569.

on it to keep such part of the street in a safe condition."[22] Street railway companies have likewise been held liable for injuries caused by holes between the tracks,[23] and for an injury caused by an improper and negligently constructed cable slot.[24]

§ 1096cd. Duty as to employment of servants and equipment of cars.—A street railway company is under a duty to employ or use reasonable care to have a sufficient number of competent servants or employes to operate and control its cars, and may be held liable, in a proper case, to travelers upon the street for injuries caused to them by its negligent failure in this regard.[25] So, it must exercise reasonable care to equip its cars with appliances to control the same and to keep such cars and appliances in proper condition, and for injury caused to those properly using the street by its neglect to do so it may be held liable.[26] But the question as to whether the company had a sufficient number of serv-

[22] Montgomery St. R. Co. v. Smith, (Ala.), 39 So. 757. See, also, Delzell v. Indianapolis &c. R. Co. 32 Ind. 45; Kessel v. Butler, 53 N. Y. 612. But compare Campbell v. Frankford &c. R. Co. 139 Pa. St. 522; 21 Atl. 92; Citizens' Pass. R. Co. v. Ketcham, 122 Pa. St. 228; 15 Atl. 733; Snell v. Rochester R. Co. 64 Hun (N. Y.) 476, 19 N. Y. S. 496; Gray v. Washington &c. Co. 30 Wash. 665; 71 Pac. 206.

[23] Fox v. Wharton, 64 N. J. L. 453; 45 Atl. 793; Worster v. Forty-second St. R. Co. 50 N. Y. 203. See, also, Kraut v. Frankford &c. R. Co. 160 Pa. St. 327; 28 Atl. 783.

[24] Keitel v. St. Louis Cable R. Co. 28 Mo. App. 657. See, also, Brown v. Metropolitan St. R. Co. 60 App. Div. (N. Y.) 184; Humbert v. Brooklyn Cable R. Co. 12 N. Y. St. 172; United Elec. R. Co. v. Shelton, 89 Tenn. 423; 14 S. W. 863 (improperly hung wire).

[25] See Wall v. Helena St. R. Co. 12 Mont. 44; 29 Pac. 721; Swain v. Fourteenth St. R. Co. 93 Cal. 179; 28 Pac. 829; South Covington &c. St. R. Co. v. Herrklotz, 104 Ky. 400; 47 S. W. 265; Holman v. Union St. R. Co. 114 Mich. 208; 72 N. W. 202; Todd v. Second Ave. Trac. Co. 192 Pa. St. 587; 44 Atl. 337; Rice v. Crescent City R. Co. 51 La. Ann. 108; 24 So. 791; Flournoy v. Shreveport &c. R. Co. 50 La. Ann. 635; 23 So. 465.

[26] Little Rock Trac. &c. Co. v. Morrison, 69 Ark. 289; 62 S. W. 1045; Warren v. Manchester St. R. Co. 70 N. H. 352; 47 Atl. 735; Chicao City R. Co. v. Mayer, 185 Ill. 336; 56 N. E. 1058; Musser v. Lancaster City St. R. Co. 176 Pa. St. 621; 35 Atl. 206; Roberts v. Spokane St. R. Co. 23 Wash. 325; 63 Pac. 506; 54 L. R. A. 184; Thompson v. Salt Lake &c. Co. 16 Utah, 281; 52 Pac. 92; 40 L. R. A. 172; 67 Am. St. 621. See, also, Uggla v. West End St. R. Co. 160 Mass. 351; 35 N. E. 1126; 39 Am. St. 481.

ants on the car to control it properly is usually one of fact, and neither the insufficiency nor incompetency of servants[27] nor lack of some appliance nor defect therein[28] would render the company liable for an injury of which it was not the proximate cause but which resulted wholly from some other cause. Nor is such a company obliged to use appliances that are new and untried and not in general use even though they may ultimately prove to be the best.[29]

§ 1096ce. Speed, lookout, signals and warnings.—In the absence of any statute or ordinance regulating the rate of speed, the company has, in general, the right to run its cars at any speed not dangerous to the public,[30] and what is or is not an improper rate of speed depends largely upon the circumstances of the particular case.[31] But it has been held in numerous cases to constitute negligence to run its cars at a speed so great that they cannot be controlled so as to avoid injury to those rightfully and properly using the street.[32] So, the violation of a valid statute, ordinance, or

[27] See Dunn v. Cass Ave. &c. R. Co. 21 Mo. App. 188; Christensen v. Union Trunk Line R. Co. 6 Wash. 75; 32 Pac. 1018; Cunningham v. Los Angeles R. Co. 115 Cal. 561; 47 Pac. 452; Philadelphia City R. Co. v. Henrice, 92 Pa. St. 431; 37 Am. R. 699, and note.

[28] Snider v. New Orleans &c. R. Co. 48 La. Ann. 1; 18 So. 695; Gannon v. New Orleans &c. R. Co. 48 La. Ann. 1002; 20 So. 223.

[29] Hogan v. Citizens' St. R. Co. 150 Mo. 36; 51 S. W. 473; Lorimer v. St. Paul City R. Co. 48 Minn. 391; 51 N. W. 125; Richmond R. &c. Co. v. Garthright, 92 Va. 627; 24 S. E. 267; 32 L. R. A. 220; 53 Am. St. 839; Mullen v. Springfield St. R. Co. 164 Mass. 450; 41 N. E. 664; Atlantic Ave. R. Co. v. Van Dyke, 72 Fed. 458. See, as to complying with ordinance as to appliance, Platt v. Albany R. 170 N. Y. 115; 62 N. E. 1071.

[30] See Citizens' St. R. Co. v. Steen, 42 Ark. 321; Theobald v. St. Louis Transit Co. 191 Mo. 395; 90 S. W. 354. Compare Adolph v. Central Park &c. R. Co. 76 N. Y. 530.

[31] See Rack v. Chicago City R. Co. 69 Ill. App. 656; Chicago City R. Co. v. Roach, 76 Ill. App. 496; Consolidated Trac. Co. v. Glynn, 59 N. J. L. 432; 37 Atl. 66; Gilmore v. Federal St. &c. R. Co. 153 Pa. St. 31; 25 Atl. 651; 34 Am. St. 682; Stanley v. Cedar Rapids &c. R. Co. 119 Ia. 526; 93 N. W. 489; Bittner v. Crosstown St. R. Co. 153 N. Y. 76; 46 N. E. 1044; 60 Am. St. 588.

[32] Birmingham R. &c. Co. v. City Stable Co. 119 Ala. 615; 24 So. 558; 72 Am. St. 955; Lawler v. Hartford St. R. Co. 72 Conn. 74; 43 Atl. 545; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500; 16 S. E. 49; Chicago City R. Co. v. Robinson, 127 Ill. 9; 18 N. E. 772; 4 L. R. A. 126, and note; 11 Am. St. 87; Baltimore Consol. R. Co. v. Rifcowiz, 89 Md.

charter limitation as to speed is at least prima facie evidence of negligence,[33] and according to many authorities, is negligence per se.[34] It is also the duty of the company to keep a reasonably careful lookout ahead,[35] and, in some instances it seems, in other direc-

338; 43 Atl. 762; Carlson v. Lynn &c. R. Co. 172 Mass. 388; 52 N. E. 520; Rascher v. East Detroit &c. R. Co. 90 Mich. 413; 51 N. W. 463; 30 Am. St. 447; Walker v. St. Paul City R. Co. 81 Minn. 404; 84 N. W. 222; 51 L. R. A. 632; Winters v. Kansas City Cable R. Co. 99 Mo. 509; 12 S. W. 652; 6 L. R. A. 536, and note; 17 Am. St. 591; Camden &c. R. Co. v. United States &c. Co. (N. J.) 59 Atl. 523; Newark Pass. R. Co. v. Block, 55 N. J. L. 605; 27 Atl. 1067; 22 L. R. A. 374; Silberstein v. Houston &c. R. Co. 117 N. Y. 293; 22 N. E. 951; Harper v. Philadelphia Trac. Co. 175 Pa. St. 129; 34 Atl. 356; Wilson v. Citizens' St. R. Co. 105 Tenn. 74; 58 S. W. 1066; Richmond R. &c. Co. v. Garthright, 92 Va. 627; 24 S. E. 267; 32 L. R. A. 220; 53 Am. St. 839; Little v. Superior &c. R. Co. 88 Wis. 402; 60 N. W. 705; Tacoma R. &c. Co. v. Hays, 110 Fed. 496; Ewing v. Toronto R. Co. 24 Ont. R. 649.

[33] Hanlon v. South Boston &c. R. Co. 129 Mass. 310; Oates v. Union R. Co. (R. I.) 63 Atl. 675; Hall v. Ogden City St. R. Co. 13 Utah, 243; 44 Pac. 1046; 57 Am. St. 726; Atlanta Consol. St. R. Co. v. Foster, 108 Ga. 223; 33 S. E. 886; Mahan v. Union Depot &c. Co. 34 Minn. 29; 24 N. W. 293. See, generally, as to this subject, and as to whether there is a distinction as to the effect between such a provision in a statute and such a provision in an ordinance, Nellis St. R. Acc. Law, 35.

[34] Highland Ave. &c. R. Co. v. Sampson, 112 Ala. 425; 20 So. 566; Bresee v. Los Angeles Trac. Co. (Cal.) 85 Pac. 152; Clarke v. Bennett, 123 Cal. 275; 55 Pac. 908; Omaha St. R. Co. v. Duvall, 40 Neb. 29; 58 N. W. 531; Cogswell v. West &c. R. Co. 5 Wash. 46; 31 Pac. 411; San Antonio &c. R. Co. v. Watzlavzick (Tex. Civ. App.), 28 S. W. 115. It may also be the duty of the motorman, under particular circumstances, to slacken the speed or stop. Citizens' St. R. Co. v. Lowe, 12 Ind. App. 47; 39 N. E. 165; Ellis v. Boston &c. R. Co. 160 Mass. 341; 35 N. E. 1127; Benjamin v. Holyoke St. R. Co. 160 Mass. 3; 35 N. E. 95; 39 Am. St. 446. See, also, Quincy Horse R. Co. v. Gnuse, 38 Ill. App. 212.

[35] Indianapolis St. Ry. Co. v. Schmidt, 35 Ind. App. 202; 71 N. E. 663; 72 N. E. 479; Duncan v. Rome St. R. Co. 99 Ga. 98; 24 S. E. 953; Swain v. Fourteenth St. R. Co. 93 Cal. 179; 28 Pac. 829; Greene v. Louisville R. Co. 119 Ky. 862; 84 S. W. 1154; South Covington &c. St. R. Co. v. Herrklotz, 104 Ky. 400; 47 S. W. 265; Baltimore Trac. Co. v. Wallace, 77 Md. 435; 26 Atl. 518; Levin v. Metropolitan St. R. Co. 140 Mo. 624; 41 S. W. 968; North Hudson &c. R. Co. v. Isley, 49 N. J. L. 468; 10 Atl. 665; Colabel v. Metropolitan St. R. Co. 74 App. Div. (N. Y.) 505; 77 N. Y. S. 584; Harkins v. Pittsburg &c. Trac. Co. 173 Pa. St. 149; 33 Atl. 1045; Hays v. Gainsville St. R. Co. 70 Tex. 602; 8 S. W. 491; 8 Am. St. 624; Thoresen v.

tions as well,[36] and the fact that the attention of employes is at-

La Crosse City R. Co. 87 Wis. 597; 58 N. W. 1051; 41 Am. St. 64.

[36] In 2 Thomp. Neg. § 1382, the rule is laid down broadly—perhaps too broadly to be taken without some qualification—that, "in view of the great danger which is liable to follow from an omission of it, the law exacts nothing less than that the driver, the motorman, or the gripman shall keep a constant lookout, not only ahead, but also to the right and left, so as to discover persons upon the track in dangerous proximity to the approaching car, or persons approaching the track without discovering or taking heed of the approaching car." Citing Baltimore Traction Co. v. Wallace, 77 Md. 435; 26 Atl. 518; 21 Wash. L. 313; Winters v. Kansas City Cable R. Co. 99 Mo. 509; 12 S. W. 652; 6 L. R. A. 536; 17 Am. St. 591; 40 Am. & Eng. R. Cas. 261; Owens v. People's Pass. R. Co. 155 Pa. St. 334; 26 Atl. 748; 32 W. N. C. 313; Schnur v. Citizens' Traction Co. 153 Pa. St. 29; 25 Atl. 650; 34 Am. St. 680; 23 Pitts. L. J. (N. S.) 437; Lahey v. Central Park &c. R. Co. 51 N. Y. St. 589; 22 N. Y. S. 380; Dallas Rapid Transit R. Co. v. Elliott, 7 Tex. Civ. App. 216; 26 S. W. 455; Thoresen v. La Crosse City R. Co. 87 Wis. 597; 58 N. W. 1051; 41 Am. St. 64; Kestner v. Pittsburgh &c. Traction Co. 158 Pa. St. 422; 27 Atl. 1048; Swain v. Fourteenth Street R. Co. 93 Cal. 179; 28 Pac. 829; Senn v. Southern R. Co. 108 Mo. 142; 18 S. W. 1007; Strutzel v. St. Paul City R. Co. 47 Minn. 543; 50 N. W. 690; 11 Rail. & Corp. L. J. 132; Wells v. Brooklyn City R. Co. 58 Hun (N. Y.) 389; 34 N. Y. St. 636; 12 N. Y. S. 67; Anderson v. Minneapolis Street R. Co. 42 Minn. 490; 44 N. W. 518; 18 Am. St. 525; 43 Am. & Eng. Rail. Cas. 294; Dallas &c. Transit Co. v. Dunlap, 7 Tex. Civ. App. 471; 26 S. W. 877; Barnes v. Shreveport &c. R. Co. 47 La. Ann. 1218; 17 So. 782; 49 Am. St. 400, and note; Jones v. Greensburg &c. St. R. Co. 9 Pa. Sup. Ct. 65; 43 W. N. C. 298; Baltimore &c. R. Co. v. McDonnell, 43 Md. 534, 552 (where this duty is strongly enforced); Pope v. Kansas City &c. R. Co. 99 Mo. 400; 12 S. W. 891; 43 Am. & Eng. R. Cas. 290; Schmidt v. Steinway &c. R. Co. 55 Hun (N. Y.) 496; 29 N. Y. St. 200; 8 N. Y. S. 664, and 9 N. Y. S. 939; Citizens' St. R. Co. v. Merl, 134 Ind. 609; 33 N. E. 1014; Mason v. Atlantic Avenue R. Co. 4 Misc. (N. Y.) 291; 53 N. Y. St. 454; 24 N. Y. S. 139. See, also, Collins v. South Boston R. Co. 142 Mass. 301; 7 N. E. 856; 56 Am. R. 675. It is also said that this duty is especially imperative in case of a cable or electric car. Schnur v. Citizens' Trac. Co. 153 Pa. St. 29; 25 Atl. 650; 34 Am. St. 680; Gilmore v. Federal St. R. Co. 153 Pa. St. 31; 25 Atl. 651; 34 Am. St. 682. But see, as to what will excuse temporary failure to perform it, Citizens' St. R. Co. v. Carey, 56 Ind. 396, 405; Johnson v. Reading R. Co. 160 Pa. St. 647; 28 Atl. 1001; 40 Am. St. 752; Boland v. Missouri R. Co. 36 Mo. 484; Culbertson v. Metropolitan St. R. Co. 140 Mo. 35; 36 S. W. 834. And see, as to qualification of Judge Thompson's rule, Macon &c. St. R. Co. v. Holmes, 103 Ga. 655; 30 S. E. 563.

tracted or directed to other matters does not ordinarily excuse the company where injury is inflicted by failure to perform this duty.[37] Signals and warnings must also be given, by sounding the gong or bell, or the like, in a proper case,[38] and this is frequently prescribed by statute or ordinance.[39] But the rate of speed, or the failure to give a signal or warning will not make the company liable if it was not a proximate cause of the injury,[40] as, for instance, where the injured party already had ample notice of the approach of the car and the rate of speed or failure to give warning had nothing to do with causing the injury.[41]

§ 1096cf. Violation of ordinances.—As elsewhere shown,[42] there

[37] Montgomery v. Johnson, 22 Ky. L. 596; 58 S. W. 476; Barnes v. Shreveport City R. Co. 47 La. Ann. 1218; 17 So. 782; 49 Am. St. 400, and note; Anderson v. Minneapolis St. R. Co. 42 Minn. 490; 44 N. W. 518; 18 Am. St. 525; Saare v. Un. R. Co. 20 Mo. App. 211; Dahl v. Milwaukee City R. Co. 65 Wis. 371; 27 N. W. 185. See, also, Commonwealth v. Metropolitan St. R. Co. 107 Mass. 236. But compare Johnson v. Reading City &c. R. Co. 160 Pa. St. 647; 28 Atl. 1001; 40 Am. St. 752; Culbertson v. Metropolitan St. R. Co. 140 Mo. 35; 36 S. W. 834, showing that momentary diversion of attention may sometimes be excused. See, also, Theobald v. St. Louis Transit Co. 191 Mo. 395; 90 S. W. 354.

[38] Murphy v. Derby St. R. Co. 73 Conn. 249, 253; 47 Atl. 120; Schmidt v. St. Louis R. Co. 163 Mo. 645; 63 S. W. 834; J. F. Conrad &c. Co. v. St. Louis &c. R. Co. 89 Mo. App. 391; Consolidated Trac. Co. v. Chenowith, 61 N. J. L. 554; 35 Atl. 1067; Kleiner v. Third Ave. R. Co. 162 N. Y. 193; 56 N. E. 497; Welsh v. United Trac. Co. 202 Pa. St. 530; 51 Atl. 1026; Citizens' R. Co. v. Holmes, 19 Tex. Civ. App. 266; 46 S. W. 116; Burian v. Seattle Elec. Co. 26 Wash. 606; 67 Pac. 214. But see Theobald v. St. Louis Transit Co. 191 Mo. 395; 90 S. W. 354.

[39] See Driscoll v. Market St. &c. R. Co. 97 Cal. 553; 32 Pac. 591; 33 Am. St. 203; San Antonio &c. R. Co. v. Mechler (Tex. Civ. App.), 29 S. W. 202; Chouquette v. Southern Elec. R. Co. 152 Mo. 257; 53 S. W. 897; Bly v. Nassau St. R. Co. 67 N. H. 474; 32 Atl. 764; 30 L. R. A. 303; 68 Am. St. 681.

[40] Hoffman v. Syracuse &c. Co. 50 N. Y. App. Div. 83; 63 N. Y. S. 442; Anderson v. Metropolitan St. R. Co. 30 Misc. (N. Y.) 104; 61 N. Y. S. 899; Molyneaux v. Southwest &c. R. Co. 81 Mo. App. 25; Holdridge v. Mendenhall, 108 Wis. 1; 83 N. W. 1109; 81 Am. St. 871, and note; Trumbo v. City St. Car Co. 89 Va. 780; 17 S. E. 124.

[41] Hot Springs St. Ry. Co. v. Hildreth, 72 Ark. 572; 82 S. W. 245; Jager v. Coney Island &c. R. Co. 84 Hun (N. Y.) 307; 32 N. Y. S. 304. It is also held, in the case first cited, that there is no presumption in case of collision as to which party negligently caused the injury.

[42] See ante, §§ **711**, **1096az**, and post, § **1310**.

is conflict among the authorities as to whether the violation of an ordinance is negligence per se or merely evidence of negligence. It is at least evidence of negligence, and may justify a recovery where the plaintiff has a right to rely on the ordinance and is injured as the proximate cause thereof without fault on his part; but, as elsewhere pointed out, the violation of an ordinance is not *actionable* negligence in such a sense as to authorize a recovery unless it was a proximate cause of the injury complained of. The general subject is so fully considered elsewhere, however, and so many illustrative cases are referred to in other sections of this chapter, that it will be sufficient here to merely cite a few of the more recent decisions.[43] A rule of a street railway company, merely for its employes, that cars shall not pass engine houses at a speed in excess of four miles an hour does not add to its obligations to the public so as to constitute negligence as to a traveler in case of a collision with his vehicle, and make the company liable therefor when it would not otherwise be liable.[44] And where an ordinance fixed the maximum rate of speed at eight miles an hour, but also required the cars to be operated according to the provisions of the charter, it was held that a company whose franchise provided that its cars might be run at a greater rate of speed was entitled to so run them and that the franchise must be considered part of the charter.[45] There are also

[43] Deitring v. St. Louis Transit Co. 109 Mo. App. 524; 85 S. W. 140; Holden v. Missouri R. Co. 108 Mo. App. 665; 84 S. W. 133; Hutchinson v. Missouri Pac. R. Co. 161 Mo. 246; 61 S. W. 635, 852; 84 Am. St. 710; Hall v. Ogden City St. R. Co. 13 Utah, 243; 44 Pac. 1046; 57 Am. St. 726; Wright v. Malden &c R. Co. 4 Allen (Mass.) 283; Baltimore City &c. Co. v. McDonnell, 43 Md. 534; Denison &c. Ry. Co. v. Powell, 35 Tex. Civ. App. 454; 80 S. W. 1054; Heebe v. New Orleans &c. Co. 110 La. Ann. 970; 35 So. 251; Mueller v. Milwaukee St. R. Co. 86 Wis. 340; 56 N. W. 914; 21 L. R. A. 721. For a case in which the violation of an ordinance by the plaintiff did not defeat a recovery, see Laethem v. Ft. Wayne &c. R. Co. 100 Mich. 297; 58 N. W. 996.

[44] McKernan v. Detroit Citizens' St. R. Co. 138 Mich. 519; 101 N. W. 812; 68 L. R. A. 347. See, also, Fonda v. St. Paul City R. Co. 71 Minn. 438; 74 N. W. 166; 70 Am. St. 341. But compare Dublin &c. R. Co. v. Slattery (L. R.), 3 App. Cas. 1115.

[45] Ruschenberg v. Southern &c. Co. 161 Mo. 70; 61 S. W. 626. But there may be negligence, under particular circumstances, even in running at the ordinance rate. Schmidt v. St. Louis R. Co. 149 Mo. 269; 50 S. W. 921; 73 Am. St. 380; Quincy Horse &c. Co. v. Gnuse, 38

some instances in which an ordinance was held not to create any liability or operate in favor of persons injured from or by the failure of the company to obey it.[46]

§ 1096cg. Injuries by collision between cars and vehicles or travelers on street—Generally.—A street railway company is not bound, as to other travelers upon the street, to use the highest possible degree of care in selecting its employes and appliances and in running its cars, but it should act with reference to the fact that travelers have, in general, equal right to use the street and are to be expected upon it, and should use reasonable care, under the circumstances and in view of the danger to be expected, to have competent servants and appliances and to so run its cars as to avoid collisions and injuries to vehicles and travelers upon the street.[47] As already shown, a proper lookout should be kept, and the car should not be run at a dangerous, unusual and unnecessary rate of speed. It should not exceed the ordinance or statute rate of speed, and even that rate may be negligent under particular circumstances. So, care should be exercised not to collide with vehicles or persons on or near the track or about to cross it. And where one is discovered to be in danger precautions may be required or some act may be demanded, even to constitute reasonable care under the circum-

Ill. App. 212; Heinzle v. Metropolitan St. Ry. Co. 182 Mo. 528; 81 S. W. 848.

[46] Holwerson v. St. Louis &c. R. Co. 157 Mo. 216; 57 S. W. 770; 50 L. R. A. 850; Rockford City R. Co. v. Blake, 173 Ill. 354; 50 N. E. 1070; 64 Am. St. 122. But compare Gebhart v. St. Louis Transit Co. 97 Mo. App. 373; 71 S. W. 448; McLain v. St. Louis &c. R. Co. 100 Mo. App. 374; 73 S. W. 909; Riska v. Union Depot R. Co. 180 Mo. 168; 79 S. W. 445. See Caswell v. Boston &c. R. Co. 190 Mass. 527; 77 N. E. 380.

[47] See Mock v. Los Angeles Trac. Co. 139 Cal. 616; 73 Pac. 455; Zimmerman v. Denver &c. Co. 18 Colo. App. 480; 72 Pac. 607; Dougherty v. Missouri R. Co. 97 Mo. 647; 8 S. W. 900; 11 S. W. 251; Memphis St. R. Co. v. Kartright, 110 Tenn. 277; 75 S. W. 719; 100 Am. St. 807; Ackerman v. Union Trac. Co. 205 Pa. St. 477; 55 Atl. 16; Unger v. Forty-second St. R. Co. 51 N. Y. 497; Pendleton St. R. Co. v. Stallman, 22 Ohio St. 1; Hall v. Ogden City St. R. Co. 13 Utah, 243; 44 Pac. 1046; 57 Am. St. 726. As to liability to laborers and workmen on street, see Pittsburg Elec. R. Co. v. Kelly, 57 Kans. 514; 46 Pac. 945; Owens v. People's Pass. R. Co. 155 Pa. St. 334; 26 Atl. 748; Schmidt v. Steinway &c. R. Co. 132 N. Y. 566; 30 N. E. 389.

stances, that might not be necessary under other circumstances. The subject of collisions with vehicles or persons upon the street, under varying circumstances will be considered more in detail in the following sections.

§ 1096ch. Vehicles going in same direction—Running down vehicles from behind.—There are many cases in which vehicles have been run into from behind by street cars going in the same direction. As already stated, one is not a trespasser merely because he is driving along that part of a street occupied by a street railway track, and, indeed, it is often necessary to drive along a street railway track for a short distance to avoid an obstruction or the like. One who does so has a right, within limits to suppose or assume that a car will not approach dangerously near him from the rear at a high rate of speed, or without a lookout or warning,[48] for the company cannot under ordinary circumstances run him down without being guilty of negligence or willful wrong,[49] and while he, himself must

[48] Indianapolis St. Ry. Co. v. Marschke (Ind.), 77 N. E. 945, where it is said: "A permission granted by the authorities to an electric railroad company to lay tracks on a public street and operate electric cars along the same does not amount to an abandonment in favor of the company of the space occupied by the tracks. As the cars cannot turn out, and as their speed is usually greater than that of many other conveyances, they are entitled to the precedence which the necessity of the situation requires, but their movements should be regulated with a due regard to the situation of the drivers of other vehicles. Com. v. Temple, 14 Gray (Mass.), 69, 78; Vincent v. Norton &c. St. R. Co. 180 Mass. 104; 61 N. E. 822; Benjamin v. Holyoke St. R. Co. 160 Mass. 3; 35 N. E. 95; 39 Am. St. 446; Marden v. Portsmouth &c. R. Co. 100 Me. 41; 60 Atl. 530; 69 L. R. A. 300; Greene v. Louisville Railway Co. 119 Ky. 862; 84 S. W. 1154; Baldwin St. R. Law, 421. . . . It must not be forgotten that a person driving along a street railroad track in broad daylight has a right, at least in some degree, to indulge in the supposition that if a car is approaching from the rear a proper lookout is being maintained thereon, and that ordinary care not to injure him will be exercised. Greene v. Louisville R. Co. 119 Ky. 862; 84 S. W. 1154; Ablard v. Detroit United Railway, 139 Mich. 248; 102 N. W. 741; Memphis Street Railway Co. v. Haynes, 112 Tenn. 712; 81 S. W. 374. See Stringer v. Frost, 116 Ind. 477; 19 N. E. 331; 2 L. R. A. 614; 9 Am. St. 875."

[49] Vincent v. Norton &c. Co. 180 Mass. 104; 61 N. E. 822; Richmond &c. Co. v. Allen, 103 Va. 532; 49 S. E. 656.

exercise reasonable or ordinary care,[50] he is not required to keep a constant lookout behind.[51] "The very fact that a street car drives upon a vehicle which is proceeding ahead of it in the same direction," says Judge Thompson, "furnishes cogent evidence of negligence capable of explanation in very few cases."[52] The driver of the vehicle cannot perform his duty of driving so as to avoid injury to his team, to his load, or to pedestrians or other vehicles on the street, and at the same time constantly look behind him to watch for approaching cars, and he is not required to constantly look behind, but may usually expect the customary signal, and, under ordinary circumstances where he could be easily seen by the motorman it is said, that the driver of a vehicle may be presumed to have known that he could only be run down by carelessness or willfulness on the part of the company or its employes.[53] "Sometimes," says Judge Thompson,[54] "the structure of his vehicle or of his load is such as would prevent him from seeing a car approaching him from behind. He is not driving toward the source of danger, as is generally the case where car and vehicle collide at a street crossing, but he is receding from it and it is pursuing him. On the other hand, the driver, motorman, or gripman in charge of the car is propelling the instrument of danger, and his duty of keeping a lookout in front, and his knowledge based upon his experience, skill, and competency, of the distance within which he can stop his car so as to avoid a collision, tend strongly to put upon him the responsibility in case a collision takes place. When he sees a vehicle on the street a short distance in front of him, it is, therefore, his duty

[50] See Hot Springs St. Ry. Co. v. Hildreth, 72 Ark. 572; 82 S. W. 245; Seele v. Boston &c. St. Ry. Co. 187 Mass. 248; 72 N. E. 971; Union Biscuit Co. v. St. Louis Transit Co. 108 Mo. App. 297; 83 S. W. 288 (must look back at intervals); Schleicher v. Interurban St. R. Co. 91 N. Y. S. 356 (same); Adolph v. Central Park &c. R. Co. 76 N. Y. 530 (same).

[51] Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687; 68 N. E. 609; Richmond &c. Co. v. Allen, 103 Va. 532; 49 S. E. 656; Richmond Trac. Co. v. Clark, 101 Va. 382; 43 S. E. 618; Ablard v. Detroit United Ry. 139 Mich. 248; 102 N. W. 741; Mayes v. Metropolitan St. Ry. Co. (Mo. App.) 97 S. W. 612.

[52] 2 Thomp. Neg. (2d ed.) § 1404.

[53] Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687, 696; 68 N. E. 609; Tunison v. Weadock, 130 Mich. 141; 89 N. W. 703; Vincent v. Norton &c. St. R. Co. 180 Mass. 104; 61 N. E. 822. See, also, Conway v. New Orleans &c. R. Co. 51 La. Ann. 146; 24 So. 780.

[54] 2 Thomp. Neg. (2d ed.) § 1404.

to *reduce his car to control,* and so to manage it as to avoid a collision if this can be done by the exercise of reasonable promptness and energy.[55] He may not rightfully increase the speed of the car, where the person driving in front of him has not left the track upon the sounding of the gong, where he knows or ought to know that such person is not aware of his approach.[56] Nor will he be justified in increasing the speed of his car, after having it under full control, when but a few feet ahead of him is a wagon loaded with bales, and so close to the track as to be rubbed by the car in passing it.[57] Negligence may be imputed to him in failing to stop his car at once upon seeing the wheels of a heavily loaded wagon in front of the car slip on the track while the driver is attempting to get out of the way.[58] To drive upon a vehicle proceeding in front of his car in the same direction without giving any signal, is an act from which a jury will obviously be allowed to infer negligence.[59] . . . Where he makes no effort to avoid a collision with the person driving in front of him, although he knows of the danger, it will be no defense on the part of the company that the driver of the vehicle failed to observe the approach of the car.[60] Whether he was negligent in attempting to pass a horse and wagon driving in the same direction on a narrow bridge, where the space between the car and the wagon was very small, though sufficient if the horse had not swerved,—will present a question for the jury.[61] But negligence is

[55] Citing Flannagan v. St. Paul &c R. Co. 68 Minn. 300; 71 N. W. 379; Consolidated Traction Co. v. Haight, 59 N. J. L. 577; 37 Atl. 135. See, also, South Chicago City R. Co. v. Kinnare, 96 Ill. App. 210; Bruss v. Metropolitan St. Ry. Co. 66 App. Div. (N. Y.) 554; 73 N. Y. S. 256; Baltimore Trac. Co. v. Appel, 80 Md. 603; 31 Atl. 964.

[56] Citing Wilkins v. Omaha &c R. Co. 96 Iowa, 668; 65 N. W. 987.

[57] Citing Blakeslee v. Consolidated St. R. Co. 112 Mich. 63; 70 N. W. 408; 29 Chic. Leg. News, 257; 3 Det. L. N. 844. See, also, Knoll v. Third Ave. R. Co. 46 App. Div. 527; 62 N. Y. S. 16.

[58] Citing Bush v. St. Joseph &c. R. Co. 113 Mich. 513; 71 N. W. 851; 4 Det. L. N. 377.

[59] Citing Fishbach v. Steinway R. Co. 11 App. Div. 152; 42 N. Y. S. 883; Louisville &c. R. Co. v. Stammers, 47 S. W. 341; 20 Ky. L. 688 (not to be rep.). See, also, Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687; 68 N. E. 609; North Chicago St. R. Co. v. Rodert, 203 Ill. 413; 67 N. E. 812; Adams v. Camden &c. R. Co. '69 N. J. 424; 55 Atl. 254; Hanlon v. Milwaukee &c. R. Co. 118 Wis. 210; 95 N. W. 100.

[60] Citing Wilkins v. Omaha &c. R. Co. 96 Iowa, 668; 65 N. W. 987.

[61] Citing Reilly v. Troy City R. Co. 32 App. Div. 131; 52 N. Y. S. 611.

not necessarily imputed to him for following with his cable car after a buggy, which is only two or three feet ahead of him and traveling at the same rate of speed, when he has his car under perfect control, and a collision is caused by a temporary check in the rate of speed of the buggy which the gripman could not foresee."[62] And it has been held that the motorman ordinarily has the right to assume that where warning is duly given or there is an unobstructed view the driver of the vehicle will get out of the way,[63] but he is not always justified in acting on such assumption nor in failing to make an effort to stop after he discovers that the signal is not heeded.[64]

§ 1096ci. Injuries to persons crossing tracks.—At street intersections and crossings there is especial reason for keeping a lookout, running at a proper rate of speed, giving signals or warnings, and having the car under control.[65] The car and travelers upon the street are said to have an equal right to cross, and each must exercise it with reference to that fact and use reasonable care to avoid collision and not to interfere with the right of the other.[66] In a recent text book the following is laid down as a general rule upon the subject: "At the intersection of two streets a pedestrian or the driver of a vehicle has the right to cross the tracks of a street surface railroad, notwithstanding a car is in sight, provided there is a

[62] Citing Hicks v. Citizens' Street R. Co. 124 Mo. 115; 27 S. W. 542; 25 L. R. A. 508.

[63] Morrisey v. Bridgeport Trac. Co. 68 Conn. 215; 35 Atl. 1126; Cawley v. La Crosse City R. Co. 106 Wis. 239; 82 N. W. 197.

[64] White v. Worcester Consol. St. R. Co. 167 Mass. 43; 44 N. E. 1052; North Chicago St. R. Co. v. Rodert, 203 Ill. 413; 67 N. E. 812.

[65] See Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197; 43 N. E. 207; 32 L. R. A. 276; Bernhart v. Rochester R. Co. 68 Hun (N. Y.) 369; 22 N. Y. S. 821; Hall v. Ogden &c. R. Co. 13 Utah, 243; 44 Pac. 1046; 57 Am. St. 726; Haight v. Hamilton St. R. Co. 29 Ont. Rep. 279; Cray v. St. Paul City R. Co. 87 Minn. 280; 91 N. W. 1106; Chicago City R. Co. v. Jennings, 157 Ill. 274; 41 N. E. 629; West Chicago St. R. Co. v. McCallum, 169 Ill. 240; 48 N. E. 424.

[66] See Omaha St. R. Co. v. Cameron, 43 Neb. 297; 61 N. W. 606; O'Neil v. Dry Dock &c. R. Co. 129 N. Y. 125, 130; 29 N. E. 84; 26 Am. St. 512; Chapman v. Atlantic Ave. R. Co. 14 Misc. (N. Y.) 384; 70 N. Y. St. 753; 35 N. Y. S. 1045; Cole v. Central R. Co. 103 Ill. App. 160; Chicago City Ry. Co. v. Mertensen, 100 Ill. App. 306; Strutzel v. St. Paul City R. Co. 47 Minn. 543; 30 N. W. 690; Traver v. Spokane St. R. Co. 25 Wash. 225; 65 Pac. 284.

reasonable opportunity to do so without obstructing the passage of the car unnecessarily; and if for that purpose, it is necessary for the person having charge of the motive power of the car to check its speed, or even to entirely stop the car for a short period, it is his duty to do so, and the person crossing the track has the right, without being necessarily chargeable with contributory negligence, to assume that that duty will be performed; the rights of the pedestrian or the driver of the vehicle and of the person in charge of the motive power of such car, under these circumstances, are reciprocal, and each is bound to use diligence to avoid a collision."[67] The question of negligence and contributory negligence in such cases depends largely upon the relative distance of the car and vehicle attempting to cross, as to which first makes the attempt, and other circumstances of the particular case.[68] The traveler must not attempt to cross upon a nice calculation of chances,[69] but if he reaches the crossing first and apparently has ample time to cross in safety he is not necessarily guilty of countributory negligence in attempting to cross

[67] Nellis St. R. Acc. Law, 252, citing Piercy v. Metropolitan St. R. Co. 30 Misc. (N. Y.) 612; 62 N. Y. S. 867; Schoener v. Metropolitan St. R. Co. 72 App. Div. 23; 76 N. Y. S. 157; West Chicago St. R. Co. v. McCallum, 169 Ill. 240; 48 N. E. 424; Stanley v. Union Depot R. Co. 114 Mo. 606; 21 S. W. 832; Baltimore Trac. Co. v. Wallace, 77 Md. 435; 26 Atl. 518, and other New York cases. See, also, Laufer v. Bridgeport Trac. Co. 68 Conn. 475; 37 Atl. 379; 37 L. R. A. 533; Metropolitan St. R. Co. v. Slayman, 64 Kans. 722; 68 Pac. 624. That the traveler has a right to assume that a motorman coming from behind will give him time to cross after he has started to do so, see Williamson v. Old Colony St. R. Co. 191 Mass. 144; 77 N. E. 655, 656, and other Massachusetts cases there cited.

[68] See Creavin v. Newton St. R. Co. 176 Mass. 529; 57 N. E. 994; Metropolitan St. R. Co. v. Slayman, 64 Kans. 722; 68 Pac. 628; Ryan v. Detroit Citizens' St. R. Co. 123 Mich. 597; 82 N. W. 278; Flannagan v. St. Paul City R. Co. 68 Minn. 300; 71 N. W. 379; North Jersey St. R. Co. v. Schwartz, 66 N. J. L. 437; 49 Atl. 683; Moore v. Charlotte Elec. R. Co. 128 N. Car. 455; 39 S. E. 57; Buhrens v. Dry Dock &c. R. Co. 53 Hun (N. Y.) 571; Curry v. Union Elec. R. Co. 86 Hun (N. Y.) 559; Saunders v. City &c. R. Co. 99 Tenn. 130; 41 S. W. 1031; Teach v. Milwaukee Elec. R. &c. Co. 108 Wis. 593; 84 N. W. 823; 53 L. R. A. 618.

[69] De Lon v. Kokomo City St. R. Co. 22 Ind. App. 377; 53 N. E. 847; South Covington St. R. Co. v. Enslen, 18 Ky. L. 921; 38 S. W. 850. See, also, Ft. Smith &c. Trac. Co. v. Barnes (Ark.), 96 S. W. 976; O'Brien v. St. Paul City R. Co. (Minn.) 108 N. W. 805, 806.

even though he may see the car a comparatively short distance away,[70] and the company may be liable in any event if the motorman discovers his danger in time to avoid injury and does not make reasonable effort to do so; but the company otherwise free from fault is not liable for mere error of judgment on the part of a motorman at a critical moment.[71] A person is not a trespasser, nor is he necessarily guilty of contributory negligence, in crossing the track in the street either on foot or in a vehicle at some other place than a regular street intersection or crossing.[72] But where one suddenly and unexpectedly darts or turns his vehicle across or on to the track such conduct may and often does have an important, and, indeed, controlling bearing upon both the question of negligence and the question of contributory negligence.[73]

§ 1096cj. Crossing street railway tracks—Look and listen rule. —There is considerable conflict among the authorities as to whether the "look and listen" rule, adopted in most jurisdictions in regard to ordinary commercial railroad crossings, applies in the case of one crossing a street railway track. If one crosses directly in front of an approaching street car without looking and listening or if it appears that he must have seen or heard it in time to have avoided injury if he had looked and listened and paid proper attention, he can not, ordinarily, recover for an injury received in crossing where the danger was not or could not have been discovered by the motor-

[70] See Weinberger v. North Jersey St. R. Co. (N. J.) 64 Atl. 1059; Clancy v. New York City R. Co. 100 N. Y. S. 1046; Indianapolis St. R. Co. v. Bolin (Ind. App.), 78 N. E. 210; Cincinnati St. R. Co. v. Snell, 54 Ohio St. 197; 43 N. E. 207; 32 L. R. A. 276.

[71] See Stabenau v. Atlantic Ave. R. Co. 155 N. Y. 511; 50 N. E. 277; 63 Am. St. 698; Bittner v. Crosstown St. R. Co. 153 N. Y. 76; 46 N. E. 1044; 60 Am. St. 588; Lewis v. Long Island R. Co. 162 N. Y. 52; 56 N. E. 548; Bishop v. Bell City R. Co. 92 Wis. 139; 65 N. W. 733.

[72] See Birmingham R. &c. Co. v. City Stable Co. 119 Ala. 615; 24 So 558; 72 Am. St. 955; Wilman v. People's R. Co. 4 Pen. (Del.) 260; 55 Atl. 332; North Chicago St. R. Co. v. Smadraff, 189 Ill. 155; 59 N. E. 527; McFarland v. Consolidated Trac. Co. 204 Pa. St. 423; 54 Atl. 308.

[73] Kessler v. Citizens' St. R. Co. 20 Ind. App. 427; 50 N. E. 891; Young v. Citizens' &c. R. Co. 148 Ind. 54; 44 N. E. 927; 47 N. E. 142; Seele v. Boston &c. St. R. Co. 187 Mass. 248; 72 N. E. 971; Holdridge v. Mendenhall, 108 Wis. 1; 83 N. W. 1109; 81 Am. St. 871, and note; Funk v. Elec. Trac. Co. 175 Pa. St. 559; 34 Atl. 861; ante, § 1095.

man or employe of the company in time to avoid injury by the exercise of reasonable and ordinary care.[74] But the weight of authority is to the effect that the rule does not apply with full strictness as a rule of law measuring the quantum of care to those crossing or going upon street railroad tracks and that the failure to look and listen is not always contributory negligence as a matter of law.[75]

[74] Mathes v. Lowell &c. R. 177 Mass. 416; 59 N. E. 77; Hall v. West End St. R. Co. 168 Mass. 461; 47 N. E. 124; Dooley v. Greenfield &c. St. R. Co. 184 Mass. 204; 68 N. E. 203; Cain v. Macon &c. R. Co. 97 Ga. 298; 22 S. E. 918; Watson v. Mound City St. R. Co. 133 Mo. 246; 34 S. W. 573; Moore v. Lindell R. Co. 176 Mo. 528; 75 S. W. 672; Griffith v. West Chester St. R. Co. 214 Pa. St. 293; 63 Atl. 740; Watkins v. Union Trac. Co. 194 Pa. St. 564; 45 Atl. 321; Lawson v. Metropolitan St. R. Co. 36 Misc. (N. Y.) 824; 74 N. Y. S. 885; Baly v. St. Paul City R. Co. 90 Minn. 39; 95 N. W. 757; McGee v. Consolidated St. R. Co. 102 Mich. 107; 60 N. W. 293; 47 Am. St. 507; 26 L. R. A. 300, and note; Doherty v. Detroit Citizens' St. R. Co. 118 Mich. 209; 76 N. W. 377; 80 N. W. 36; Beem v. Tama &c. R. Co. 104 Ia. 563; 73 N. W. 1045; Warren v. Bangor &c. R. Co. 95 Me. 115; 49 Atl. 609; Robinson v. Rockland &c. St. R. 99 Me. 47; 58 Atl. 57; Highland Ave. &c. R. Co. v. Maddox, 100 Ala. 618; 13 So. 615; Tesch v. Milwaukee &c. R. Co. 108 Wis. 593; 84 N. W. 823; 53 L. R. A. 618; Cawley v. La Crosse City R. Co. 106 Wis. 239; 82 N. W. 197. So, persons have been held guilty of contributory negligence who alighted from one car, or crossed behind one car and stepped upon an adjoining track without looking, and the like. Creamer v. West End St. R. Co. 156 Mass. 320; 31 N. E. 391; 16 L. R. A. 490; 32 Am. St. 456; Greengard v. St. Paul City R. Co. 72 Minn. 181; 75 N. W. 221; Indianapolis St. R. Co. v. Lenner, 32 Ind. App. 311; 67 N. E. 1044; McCarthy v. Detroit Citizens' St. R. Co. 120 Mich. 400; 79 N. W. 631; Blaney v. Electric Trac. Co. 184 Pa. St. 524; 39 Atl. 294; Burgess v. Salt Lake City R. Co. 17 Utah, 406; 53 Pac. 1013.

[75] Evansville St. R. Co. v. Gentry, 147 Ind. 408; 44 N. E. 311; 37 L. R. A. 378; 62 Am. St. 421; Indianapolis St. R. Co. v. Marschke (Ind.), 77 N. E. 945, 946; Kernan v. Market St. R. Co. 137 Cal. 326; 71 Pac. 81; Driscoll v. Market St. Cable R. Co. 97 Cal. 553; 32 Pac. 591; 33 Am. St. 203; Tacoma R. &c. Co. v. Hays, 110 Fed. 496; Terien v. St. Paul City R. Co. 70 Minn. 532; 73 N. W. 412; Burian v. Seattle Elec. Co. 26 Wash. 606; 67 Pac. 214; Chisholm v. Seattle &c. Co. 27 Wash. 237; 67 Pac. 601; Baltimore Consol. R. Co. v. Rifcowitz, 89 Md. 338; 43 Atl. 762; Mitchell v. Third Ave. R. Co. 62 App. Div. (N. Y.) 371; 70 N. Y. S. 1118; Brown v. Twenty-third St. R. Co. 56 N. Y. Sup. Ct. 356; 4 N. Y. S. 192; North Chicago St. R. Co. v. Nelson, 79 Ill. App. 229; Newark Pass. R. Co. v. Block, 55 N. J. L. 605; 27 Atl. 1067; 22 L. R. A. 374; McGrath v. North

§ 1096ck. Collisions between street cars and railroad trains.—It may be said in a general way that where a street car line crosses an ordinary commercial railroad, the relative duties of the street railway company and of the railroad company to exercise care and avoid collision are the same as in the case of ordinary travelers crossing the railroad.[76] The negligence of either one is not imputed to its passengers.[77] There are many cases in which either or both companies may be sued and held liable to a passenger upon the cars of one of them where both companies are guilty of negligence proximately causing the injury complained of;[78] but the duty

Jersey St. R. Co. 66 N. J. L. 312; 49 Atl. 523; Warren v. Bangor &c. R. Co. 95 Me. 115; 49 Atl. 609; Finnick v. Boston &c. St. Ry. Co. 190 Mass. 382; 77 N. E. 500; Kelly v. Wakefield &c. R. Co. 175 Mass. 331; 56 N. E. 285; and see article in 58 Cent. Law Jour. 222. But see Young v. Citizens' St. R. Co. 148 Ind. 54; 47 N. E. 142; Bailey v. Market St. Cable Co. 110 Cal. 320; 42 Pac. 914; Hoelzel v. Crescent City R. Co. 49 La. Ann. 1302; 22 So. 330; 38 L. R. A. 708; McGee v. Consolidated St. R. Co. 102 Mich. 107; 60 N. W. 107; 26 L. R. A. 300, and note; 47 Am. St. 507; Wolf v. City &c. R. Co. 45 Oreg. 446; 72 Pac. 329; 78 Pac. 668; Ehisman v. East Harrisburg &c. R. Co. 150 Pa. St. 180; 24 Atl. 596; 17 L. R. A. 448; Burns v. Metropolitan St. R. Co. 66 Kans. 188; 71 Pac. 244. Where one drove onto a street occupied by a street railroad, and looked and was unable to see any street car approaching, his failure to look when he drove on the track a little later, relying on a warning being given by the motorman, and having poor eyesight, and being in a position where it was inconvenient for him to look, was held to render him guilty of contributory negligence as a matter of law, in Petersen v. St. Louis Transit Co. 114 Mo. App. 374; 89 S. W. 1042. But see McCarthy v. Consolidated R. Co. (Conn.) 63 Atl. 725.

[76] See New York &c. R. Co. v. New Jersey &c. R. Co. 60 N. J. L. 52; 37 Atl. 627; 38 L. R. A. 516; Baltimore &c. R. Co. v. Breinig, 25 Md. 378; 90 Am. Dec. 49; Toledo &c. R. Co. v. Goddard, 25 Ind. 185; Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329; Baltimore &c. R. Co. v. Friel, 77 Fed. 126; post, § **1178.**

[77] Gulf &c. R. Co. v. Pendry, 87 Tex. 553; 29 S. W. 1038; 47 Am. St. 125; Little Rock &c. R. Co. v. Harrell, 58 Ark. 454; 25 S. W. 115; East Tenn. &c. R. Co. v. Markens, 88 Ga. 60; 13 S. E. 855; 14 L. R. A. 281; O'Toole v. Pittsburg &c. R. Co. 158 Pa. St. 99; 27 Atl. 737; 22 L. R. A. 606; 38 Am. St. 830; O'Rourke v. Lindell R. Co. 142 Mo. 342; 44 S. W. 254; Holsab v. New Orleans &c. R. Co. 38 La. Ann. 185; 58 Am. R. 177. See, also, Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602; 65 N. E. 309; Little v. Hackett, 116 U. S. 366; 6 Sup. Ct. 391; post, § **1178.**

[78] See Chicago &c. R. Co. v. Hines, 183 Ill. 482; 56 N. E. 177; Tompkins v. Clay City St. R. Co. 66 Cal.

of a company to its passengers is generally higher than that of the other company to such persons who are not its passengers.[79] The cars of the commercial railroad have the right of way at highway crossings,[80] and it is the duty of the motorman or those in charge of the street car to look and listen and in a proper case, to yield precedence to the railroad train.[81] In many jurisdictions it is also provided by statute or ordinance that the street car must be stopped, and, in some of them, that a man must be sent ahead to look for approaching trains. The violation of such a statute or ordinance is at least evidence of negligence, and, at least in the case of a statute, is generally held to be negligence per se justifying a recovery where it is the proximate cause of the injury complained of.[82] But, in the absence of a statute or ordinance requiring it, a street railway company is not obliged to maintain a watchman or flagman at the crossing,[83] and it has been held that the fact that the street car driver or motorman has been directed by the company to obey the signal of the flagman of the commercial railroad does

163; 4 Pac. 1165; Barrett v. Third Ave. R. Co. 45 N. Y. 628; Schneider v. Second Ave. R. Co. 133 N. Y. 583; 30 N. E. 752; note in 75 Am. Dec. 418; post, § 1178.

[79] Coddington v. Brooklyn &c. R. Co. 102 N. Y. 66; 5 N. E. 797; Selma St. R. Co. v. Owen, 132 Ala. 420; 31 So. 598; Hammond &c. Elec. R. Co. v. Spyzehalski, 17 Ind. App. 1; 46 N. E. 47; Zimmer v. Third Ave. R. Co. 36 App. Div. (N. Y.) 265; 55 N. Y. S. 308; Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91.

[80] Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329; Warner v. New York &c. R. Co. 44 N. Y. 465; Toledo &c. R. Co. v. Goddard, 25 Ind. 185; Black v. Burlington &c. R. Co. 38 Ia. 515.

[81] New York &c. R. Co. v. New Jersey Elec. R. Co. 60 N. J. L. 52; 37 Atl. 627; 38 L. R. A. 516; Gulf &c. R. Co. v. Pendrey, 87 Tex. 553; 29 S. W. 1038; 47 Am. St. 125; Selma &c. R. Co. v. Owen, 132 Ala. 420; 31 So. 598. See, also, West Chicago St. R. Co. v. Martin, 47 Ill. App. 610; Flournoy v. Shreveport Belt R. 50 La. Ann. 491; 23 So. 465; Washington &c. R. Co. v. Hickey, 166 U. S. 521; 17 Sup. Ct. 661; Martus v. Delaware &c. R. Co. 15 Misc. (N. Y.) 248; 36 N. Y. S. 417.

[82] Cincinnati St. R. Co. v. Murray, 53 Ohio St. 570; 42 N. E. 596; 30 L. R. A. 508; West Chicago St. R. Co. v. Martin, 47 Ill. App. 610; Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91; Louisville &c. R. Co. v. Anchors, 114 Ala. 492; 22 So. 279; 62 Am. St. 116; and see post, §§ 1135, 1178. For case in which it was held that the ordinance did not require a complete stop between two tracks, see Bartholomans v. Milwaukee &c. Co. (Wis.) 109 N. W. 143.

[83] Jacquin v. Grand Ave. Cable Co. 57 Mo. App. 320.

not make such flagman an agent of the street railway company so as to render the latter responsible for his negligence.[84]

§ 1096cl. Injuries to children.—It is sometimes said that a street railway company must exercise a greater or higher degree of care to look out for and prevent injury to children than for adults.[85] But, while greater vigilance and caution may be required in such cases,[86] it would seem that the degree of care is still ordinary and reasonable care under the circumstances or in proportion to the danger to be expected or avoided.[87] The street railway employes

[84] Chicago St. R. Co. v. Volk, 45 Ill. 175.

[85] See 2 Thomp. Neg. § 1424; Passamaneck v. Louisville R. Co. 98 Ky. 195; 32 S. W. 620.

[86] See Sample v. Consolidated &c. R. Co. 50 W. Va. 472; 40 S. E. 597; 57 L. R. A. 186; Bergen Co. Trac. Co. v. Heitman, 61 N. J. L. 682; 40 Atl. 651; West Chicago St. R. Co. v. Schwartz, 93 Ill. App. 387; Koersen v. Newcastle &c. R. Co. 198 Pa. St. 30; 47 Atl. 851; Elwood St. R. Co. v. Ross, 26 Ind. App. 258; 58 N. E. 535; Citizens' St. R. Co. v. Stoddard, 10 Ind. App. 278; 37 N. E. 723; Camden Interstate R. Co. v. Broom, 139 Fed. 595, 598.

[87] See San Antonio St. R. Co. v. Mechler, 87 Tex. 628; 30 S. W. 899; Gorman's Adm'r v. Louisville Ry. Co. 24 Ky. L. 1938; 72 S. W. 760; Strutzel v. St. Paul &c. R. Co. 47 Minn. 543; 50 N. W. 690. In Hanley v. Ft. Dodge &c. Co. (Iowa), 107 N. W. 593, 594, it is said: "It is the argument that 'ordinary care is not the criterion where the life of an infant four years old is involved.' We do not so understand the law. The test of negligence in all such cases is ordinary care, or, as the same thought is frequently expressed, reasonable care. True, that which would be regarded as ordinary care in one case might fall far short of answering the test in another. The varying conditions and circumstances are to be considered, and these properly enough take in the age, apparent want of understanding, etc., of the complaining party. From this, and naturally enough, it follows that the expression is to be given interpretation in the light of and as dictated by the peculiar circumstances of each case as it presents itself. And in each case the ultimate question is, did the person complained of act as a person of ordinary prudence and care would have acted under like or similar circumstances? Galloway v. Railway, 87 Iowa, 458; 54 N. W. 447; Murphy v. Railway, 38 Iowa, 539; Rusch v. Davenport, 6 Iowa, 443; Barry v. Railway, 119 Iowa, 62; 93 N. W. 68; 95 N. W. 229; Gorman v. Railway, 72 S. W. 760; 24 Ky. L. 1938. In the case last cited it was said: 'Appellant complains because a higher degree of care was not required of the motorman. He argues that, as to young children, a different and higher degree of care is owing than is to adults under similar circumstances. We believe that

have no right to assume that a child too young to appreciate the danger will get out of the way or not go upon the track when seen closely approaching it,[88] and they must be careful in such cases to bring the car under control and stop it, if apparently necessary to avoid injury.[89] But if there is a mere error of judgment, and

is true. We are also of the opinion that the instruction given by the court in defining 'ordinary care' fairly submitted that idea to the jury, viz.: Ordinary care means the degree of care usually exercised by ordinarily careful and prudent persons under the same or similar circumstances. Negligence is the failure to exercise ordinary care. It might be impossible to lay down a general rule that would apply and minutely define the care to be exercised under every conceivable state of case. Nor would it be wise to attempt it. What would amount to ordinary care toward an adult, under similar circumstances, might be criminal negligence towards an infant of very tender years. So, where the jury were instructed that the motorman must regulate his conduct in operating the car by the standard of conduct and caution usually exercised by ordinary careful and prudent persons in operating electric cars in such neighborhoods where small children were likely to be upon the streets, his full legal duty was stated.' If, as contended for by counsel for appellant, and with much force of reasoning, the tendency following the use of the expression 'ordinary care,' without further explanation, would be to mislead the jury 'by leading them to suppose that the street railway company discharges its duty to children on the street by extending to them the care which ordinary persons use under ordinary circumstances,' still, we think every requirement was met in this case by the giving of the sixth instruction, wherein it was said to be the duty of the person operating the car in question to use ordinary care and diligence in doing all he reasonably could with the appliances at hand, after it was reasonably apparent, or would have been to a reasonably prudent and cautious man, that the child was about to cross the track in front of his car at such place or in such manner that it was reasonably probable that, unless the speed of the car was checked, or the car stopped, the car would collide with the child, to slacken the speed or stop the car to prevent a collision with such child.' "

[88] Chicago City R. Co. v. Tuohy, 95 Ill. App. 314, affirmed in 196 Ill. 410; 63 N. E. 997; 58 L. R. A. 270; Citizens' St. R. Co. v. Hamer, 29 Ind. App. 426; 62 N. E. 658; 63 N. E. 778; Nelson v. Crescent City R. Co. 49 La. Ann. 491; 21 So. 635; Tholen v. Brooklyn City R. Co. 30 N. Y. S. 1081; Jones v. United Trac. Co. 201 Pa. St. 344; 50 Atl. 826; Bamberger v. Citizens' St. R. Co. 95 Tenn. 18; 31 S. W. 163; 28 L. R. A. 486; 49 Am. St. 909; Galveston City R. Co. v. Hewitt, 67 Tex. 473; 3 S. W. 705; 49 Am. St. 909; Artusy v. Missouri &c. R. Co. 73 Tex. 191; 11 S. W. 177.

[89] Authorities cited in last preced-

no willfulness or negligence, the company is not liable;[90] and where a child suddenly and unexpectedly runs upon the track in front of the car or so gets under it, the company is not generally liable.[91]

§ 1096cm. Injuries from wires or electricity.—A street railway company using electricity as a motive power is under a duty to use ordinary and reasonable care in view of the danger and circumstances to maintain as well as construct its plant so as not to cause injury to those who properly use the street. It should know the condition

ing note; also, Fox v. Oakland &c. St. Ry. 118 Cal. 55; 50 Pac. 25; 62 Am. St. 216, 219, 220; Elwood St. R. Co. v. Ross, 26 Ind. App. 258; 58 N. E. 535. The alleged negligence must be the proximate cause of the injury complained of, and such, it has been held, as ought reasonably to have been anticipated. Johnston v. New Omaha &c. Co. (Neb.) 110 N. W. 711.

[90] Bittner v. Crosstown St. R. Co. 153 N. Y. 76; 46 N. E. 1044; 60 Am. St. 588; Slabenan v. Atlantic Ave. R. Co. 155 N. Y. 511; 50 N. E. 277; 63 Am. St. 698.

[91] Leitzel v. Harrisburg Trac. Co. 212 Pa. St. 608; 62 Atl. 102; 62 Cent. L. Jour. 23, 24; Bulger v. Albany R. Co. 42 N. Y. 459; Culbertson v. Crescent City R. Co. 48 La. Ann. 1376; 20 So. 902; Finley v. West Chicago St. R. Co. 90 Ill. App. 368; Kierzenkowski v. Phila. Trac. Co. 184 Pa. St. 459; 39 Atl. 220; Funk v. Elec. Trac. Co. 175 Pa. St. 559; 34 Atl. 861; Holdridge v. Mendenhall, 108 Wis. 1; 83 N. W. 1109; 81 Am. St. 871, and note; Trumbo v. City St. Car Co. 89 Va. 780; 17 S. E. 124. See, also, Rack v. Chicago City R. Co. 173 Ill. 289; 50 N. E. 668; 44 L. R. A. 127; Siaick v. Northern Cent. R. Co. 92 Md. 213; 48 Atl. 149; Campbell v. New Orleans City R. Co. 104 La. Ann. 183; 28 So. 985; Gannon v. New Orleans R. Co. 48 La. Ann. 1002; 20 So. 223 Colomb v. Portland &c. R. Co. 100 Me. 418; 61 Atl. 898; Collins v. South Boston &c. R. 142 Mass. 301; 7 N. E. 856; 56 Am. R. 675. "Without doubt," says the court in Hanley v. Ft. Dodge &c. Co. (Ia.) 107 N. W. 593, 595, "the dictates of ordinary care demand increased watchfulness on the part of a motorman when operating his car along a street, or over public places where children are accustomed to play. But where the presence of a child is observed, and as the car approaches, such child, having crossed the track, is moving away from the zone of danger, there can be no reason why the motorman may not presume that he may go forward with his car in safety. To say otherwise, would be to forbid in a practical sense the operation of cars along such streets and over such places. True enough, it is possible that a child situated as implied in the instruction may suddenly change his course and dart back toward, or upon the track. But there is no consideration of ordinary care that makes requirement of the motorman that he presume that such will occur."

of its wires and make reasonable inspection to keep them properly insulated;[92] and, in some jurisdictions, it is held to even a higher degree of care, and the rule res ipsa loquitur is often applied in case of injury from fallen wires, or the like, charged with electricity.[93] A traveler upon a street generally has the right to assume that live and dangerous electric wires are not lying in it, and the mere fact that he comes into contact with such a wire lying in it, or suspended above it, is not, of itself, conclusive of contributory negligence.[94] The question is usually one of fact for the jury.[95] A Missouri statute requires electric railway trolley wires to be main-

[92] See Nellis St. R. Acc. Law, 232; Joyce Electricity, § 445; Knowlton v. Light Co. 117 Ia. 451; 90 N. W. 818; Schweitzer's Adm'r v. Citizen's &c. Co. 21 Ky. L. 608; 52 S. W. 830; Baltimore City &c. R. Co. v. Nugent, 86 Md. 349; 38 Atl. 779; 39 L. R. A. 161; Denver Consol. Elec. Co. v. Simpson, 21 Colo. 371; 41 Pac. 499; 31 L. R. A. 566; Hamilton v. Bordentown &c. Co. 68 N. J. L. 85; 52 Atl. 290; Commonwealth Elec. Co. v. Melville, 110 Ill. App. 242, affirmed in 210 Ill. 70; 70 N. E. 1052. Reasonable care under such circumstances however, generally requires great precaution and is frequently said to be the utmost or highest degree of care.

[93] See 1 Thomp. Neg. (2d ed.) § 15; Metropolitan St. R. Co. v. Gilbert, 70 Kans. 261; 78 Pac. 807; Topeka City R. Co. v. Higgs, 38 Kans. 375; 16 Pac. 667; 5 Am. St. 754; Norfolk R. and Light Co. v. Spratley, 103 Va. 379; 49 S. E. 502; City Elec. St. R. Co. v. Conery, 61 Ark. 381; 33 S. W. 426; 31 L. R. A. 570, and note; 54 Am. St. 262; Hebert v. Lake Charles &c. Co. 111 La. Ann. 522; 35 So. 721; 100 Am. St. 505, and authorities cited in opinion and note; Boyd v. Portland &c. Co. 40 Oreg. 126; 66 Pac. 576; 57 L. R. A. 619; Trenton Pass. R. Co. v. Cooper, 60 N. J. L. 219; 37 Atl. 730; 64 Am. St. 592; 38 L. R. A. 637; Jones v. Union R. Co. 18 App. Div. (N. Y.) 267; 46 N. Y. S. 321; McLaughlin v. Elec. L. Co. 100 Ky. 173; 37 S. W. 851; 34 L. R. A. 812; Memphis St. R. Co. v. Kartwright, 110 Tenn. 277; 75 S. W. 719; 100 Am. St. 807. But it is not an insurer. Harter v. Colfax &c. Co. 124 Ia. 500; 100 N. W. 508; Citizens' R. Co. v. Gifford, 19 Tex. Civ. App. 631; 47 S. W. 1041.

[94] Brush Elec. &c. Co. v. Kelley, 126 Ind. 220; 25 N. E. 812; 10 L. R. A. 250, and note; Suburban Elec. Co. v. Nugent, 58 N. J. L. 658; 34 Atl. 1069; 32 L. R. A. 700; Hovey v. Michigan &c. Co. 124 Mich. 607; 83 N. W. 600; Devlin v. Beacon Light Co. 192 Pa. St. 188; 43 Atl. 962.

[95] Lloyd v. City &c. R. Co. 110 Ga. 165; 35 S. E. 170. See, also, Texarkana &c. Co. v. Orr, 59 Ark. 215; 27 S. W. 66; 43 Am. St. 30; Regan v. Boston &c. Co. 167 Mass. 406; 45 N. E. 743; Proctor v. San Antonio &c. R. Co. 26 Tex. Civ. App. 148; 62 S. W. 938, 939.

tained at a height of not less than twenty-two feet above a railroad track above which it crosses, and in a recent case, where a brakeman on a railroad train was injured by coming in contact with such a wire it was held "palpable negligence" on the part of the street railway company to permit the wire to hang down so as to strike a brakeman on top of a train and that the jury properly found the brakeman free from contributory negligence.[96] But in another jurisdiction, where a brakeman, knowing the presence of the wire and that it was so low as to interfere with one standing on top of a car, attempted to pass from the top of one car to another, without any necessity, he was held guilty of contributory negligence.[97]

§ 1096cn. Frightening horses.—A street railway company is not liable, as a general rule at least, for injuries caused by horses becoming frightened at its cars or the usual and necessary noises incident to their proper operation.[98] But those operating the car have no right to willfully, or maliciously, and unnecessarily frighten horses, and if they see that a horse has become frightened and likely to

[96] Smedley v. St. Louis &c. R. Co. 118 Mo. App. 103; 93 S. W. 295. As to when railroad commissioners have no power to require wire to be unnecessarily high, see Saginaw Un. &c. R. Co. v. Michigan Cent. R. Co. 91 Mich. 657; 52 N. W. 49.

[97] Danville St. Car Co. v. Watkins, 97 Va. 713; 34 S. E. 884. See as to when company is not negligent, Read v. City &c. R. Co. 115 Ga. 366; 41 S. E. 629; Gross v. South Chicago &c. R. Co. 73 Ill. App. 217; Ludwig v. Metropolitan St. R. Co. 71 App. Div. (N. Y.) 210; 75 N. Y. S. 667. When negligent, see Erslew v. New Orleans &c. R. Co. 49 La. Ann. 86; 21 So. 153; Johnston v. Omaha &c. Co. (Neb.) 110 N. W. 711; Stark v. Muskegon Trac. &c. Co. (Mich.) 104 N. W. 1100.

[98] Marion &c. R. Co. v. Dubois, 23 Ind. App. 342; 55 N. E. 266; Terre Haute Elec. R. Co. v. Yant, 21 Ind. App. 486; 51 N. E. 732; 69 Am. St. 376; Henderson v. Greenfield &c. St. R. Co. 172 Mass. 542; 52 N. E. 1080; Omaha St. R. Co. v. Duvall, 40 Neb. 29; 58 N. W. 531; Doster v. Charlotte St. R. Co. 117 N. Car. 651; 23 S. E. 449; 34 L. R. A. 481, and note; Coughtry v. Willamette St. R. Co. 21 Oreg. 245; 27 Pac. 501; Yingst v. Lebanon &c. St. R. Co. 167 Pa. St. 438; 31 Atl. 687; Hazel v. People's &c. Co. 132 Pa. St. 96; 18 Atl. 1116; Hargis v. St. Louis &c. R. Co. 75 Tex. 23; 12 S. W. 953; Bishop v. Belle City St. R. Co. 92 Wis. 139; 65 N. W. 733. See, also, North Chicago St. R. Co. v. Harms, 59 Ill. App. 374; Wachtel v. East St. Louis &c. Co. 77 Ill. App. 465; McDonald v. Toledo &c. St. R. Co. 74 Fed. 104; Fleherty v. Harrison, 98 Wis. 559; 74 N. W. 360.

cause injury they should take care to avoid it[99] and a duty may arise to even stop the car[100] or delay starting it,[101] or cease from sounding the gong[102] or the like. The question as to what should be done in the exercise of reasonable care and whether they have exercised it in such cases however, is usually for the jury.[103] So, contributory negligence, when a proximate cause of the injury, may relieve the company from liability for mere negligence.[104] Unnecessary and unusual noises, calculated to frighten horses, made in the operation of a car may, however, constitute negligence rendering the company liable for frightening horses and proximately causing injury to travelers, even though there is no malice or willfulness.[105] Thus, we suppose that negligence might at least be inferred where a trolley car

[99] Muncie St. R. Co. v. Maynard, 5 Ind. App. 372; 32 N. E. 343; Lake Erie &c. R. Co. v. Juday, 19 Ind. App. 436; 49 N. E. 843; Ft. Scott Rapid Transit Co. v. Page, 10 Kans. App. 362; 59 Pac. 690; Owensboro City R. Co. v. Lydane, 19 Ky. L. 698; 41 S. W. 578; Lincoln Rapid Transit Co. v. Nichols, 37 Neb. 332; 55 N. W. 872; 20 L. R. A. 853; Myers v. Brantford St. R. Co. 31 Ont. 209. See, also, East St. Louis &c. St. R. Co. v. Wachtel, 63 Ill. App. 181; Joliet R. Co. v. Eich, 96 Ill. App. 240; O'Brien v. Blue Hill St. R. Co. 186 Mass. 446; 71 N. E. 951.

[100] Richter v. Cicero &c. St. R. Co. 70 Ill. App. 196; Louisville &c. Ry. Co. v. Stanger, 7 Ind. App. 179; 34 N. E. 688; Gibbons v. Wilkesbarre &c. R. Co. 155 Pa. St. 279; 26 Atl. 417. See, also, McVean v. Detroit United R. 138 Mich. 263; 101 N. W. 527. But compare Eastwood v. La Crosse City R. Co. 94 Wis. 163; 68 N. W. 651; Motley v. Southwest &c. R. Co. (Mo. App.) 99 S. W. 763.

[101] Philadelphia Trac. Co. v. Lightcap, 61 Fed. 762.

[102] Oates v. Metropolitan St. R. Co. 168 Mo. 535; 68 S. W. 906; 58 L. R. A. 447; Citizens' R. Co. v. Hair (Tex. Civ. App.), 32 S. W. 1050. See, also, Ellis v. Lynn &c. R. Co. 160 Mass. 341; 35 N. E. 1127.

[103] Kankakee Elec. R. Co. v. Lade, 56 Ill. App. 454; Terre Haute Elec. R. Co. v. Yant, 21 Ind. App. 486; 51 N. E. 732; 69 Am. St. 376.

[104] Cornell v. Detroit Elec. R. Co. 82 Mich. 495; 46 N. W. 791; Gray v. Second Ave. R. Co. 65 N. Y. 561. But see Benjamin v. Holyoke St. R. Co. 160 Mass. 3; 35 N. E. 95; 39 Am. St. 446; Flewelling v. Lewiston &c. R. Co. 89 Me. 585; 36 Atl. 1056.

[105] Richmond R. &c. Co. v. Hudgins, 100 Va. 409; 41 S. E. 736. See Hill v. Rome St. R. Co. 101 Ga. 66; 28 S. E. 631; Choctaw &c. R. Co. v. Coker, 77 Ark. 174; 90 S. W. 999; Foster v. East Jordan Lumber Co. (Ia.) 104 N. W. 617; Chicago &c. Ry. Co. v. Prouty, 55 Kans. 503; 40 Pac. 909; Alabama &c. R. Co. v. Fulton, 144 Ala. 332; 39 So. 282; Doran v. Cedar Rapids &c. R. Co. 117 Ia. 442; 90 N. W. 815.

is so run upon a highway at a place where it is likely to frighten horses and cause injury, as to emit sparks and make hissing and crackling noises; and where an electric car was run at the ordinary speed through a pool of water, causing a roaring and hissing noise, by reason of which a horse was frightened and caused to run away and injure the driver, it was held that the jury might infer negligence, and a verdict for the plaintiff was upheld.[106] There are also cases in which the company has been held liable for running a car on a highway with a sprinkler upon it on which waving black coats were hung, without taking any precautions,[107] or trolley poles were negligently so placed in the street that they were likely to, and did, cause injury where a horse shied at an approaching electric car;[108] but it has been held that the company is not liable for injury to a traveler caused by his horse becoming frightened at sudden and unusual noises made by passengers.[109]

§ 1096co. Contributory negligence.—Contributory negligence by a person using a street will defeat a recovery against a street railway company for personal injuries, the same as in other cases, although the company may have been negligent. The general principle is well settled and very easily stated, but the application of the principle is sometimes very difficult. The diversity of opinion as to what will or will not constitute such contributory negligence as will bar an action is so great that it is impossible to extract any general rule from the adjudged cases. It is, indeed, very doubtful whether it can be accurately said that there is any general rule, for the cases are decided, for the most part, upon their own particular facts. It may be said, to be sure, that a man must exercise such care as an ordinarily prudent person would exercise under like circumstances, but this general statement is not, it must be owned, of much real practical value, although it is one generally approved, nor does it go very far toward removing the difficulties that one encounters

[106] Ayars v. Camden &c. R. Co. 63 N. J. L. 416; 43 Atl. 678.

[107] McCann v. Consol. Trac. Co. 59 N. J. L. 481; 36 Atl. 388; 38 L. R. A. 236. See, also, Joyce v. Exeter &c. St. R. Co. 190 Mass. 304; 76 N. E. 1054.

[108] Cleveland v. Bangor St. R. Co. 86 Me. 232; 29 Atl. 1005.

[109] Boatwright v. Chester &c. Elec. R. Co. 4 Pa. Super. Ct. 279; 40 W. N. C. (Pa.) 330.

in exploring the decided cases. The best course, perhaps, that can be pursued is to ascertain and state what the courts have decided on this subject. Decisions as to contributory negligence in particular instances have already been referred to in other sections of this chapter and additional decisions are reviewed in the following section.

§ 1096cp. Illustrative cases on contributory negligence.—In an Illinois case it was held that crossing a street occupied by street railway tracks, without first stopping and looking, is not negligence as matter of law, and that is so "whether the cars accustomed to run thereon are horse-cars or grip-cars."[110] The New York rule has been said to be that a plaintiff is "not at liberty to take even doubtful chances of the consequences of crossing the track in the face of danger or in reliance upon the successful attempt of the driver to slack the speed of the horses."[111] In a Pennsylvania case a person alighted from a cable car, and, without looking, turned sharply around the car, and was struck by a car on another track, and it was held that he was guilty of such contributory negligence as defeated a recovery.[112] The same court held in another case that it was contributory negligence for a man to step from a moving street car with his back towards the street.[113] In still another case in the same court it was adjudged that the plaintiff was guilty of

[110] Chicago City R. Co. v. Robinson, 127 Ill. 9; 18 N. E. 772; 4 L. R. A. 126, and note; 11 Am. St. 87, citing Chicago &c. R. Co. v. O'Conner, 119 Ill. 586; 9 N. E. 263. See Deitring v. St. Louis Transit Co. 109 Mo. App. 524; 85 S. W. 140.

[111] McClain v. Brooklyn City R. Co. 116 N. Y. 459; 22 N. E. 1062; Barker v. Savage, 45 N. Y. 191; 6 Am. R. 66; Belton v. Baxter, 54 N. Y. 245; 13 Am. R. 578; Davenport v. Brooklyn &c. R. Co. 100 N. Y. 632; 3 N. E. 305. See Moebus v. Hermann, 108 N. Y. 349; 15 N. E. 415; 2 Am. St. 440. See, also, Daniels v. Bay City &c. Co. 143 Mich. 493; 107 N. W. 94; Heying v. United Rys. &c. Co. 100 Md. 281; 59 Atl. 667; Goldmann v. Milwaukee &c. Co. 123 Wis. 168; 101 N. W. 384; Hornstein v. Rhode Island Co. 26 R. I. 387; 59 Atl. 71. But compare Doherty v. Metropolitan St. R. Co. 91 N. Y. S. 19.

[112] Buzby v. Philadelphia &c. R. Co. 126 Pa. 559; 17 Atl. 895; 12 Am. St. 919. The court cited Schmidt v. McGill, 120 Pa. St. 412; 14 Atl. 484. See, also, Giardina v. St. Louis &c. R. Co. 185 Mo. 330; 84 S. W. 928; Morice v. Milwaukee &c. Co. (Wis.) 109 N. W. 567. But compare Consolidated Trac. Co. v. Scott, 58 N. J. L. 882; 34 Atl. 1094; 33 L. R. A. 122.

[113] Beattie v. Railroad Co. (Pa.) 1 Atl. 574.

contributory negligence in attempting to get on a car when he saw another approaching and near the one he was attempting to get upon.[114] It has been held that one who stands on the railing of a street car and is struck by a passing car is not necessarily guilty of such contributory negligence as will bar a recovery, but upon this point there is much conflict among the authorities.[115] By some of the courts it is held that, as the cars can not give and take the road, the presumption in cases of collisions where the vehicle is moving side by side with the car is that the plaintiff was guilty of contributory negligence.[116] This presumption certainly cannot be regarded as a conclusive one, for, as we think, the only force that can justly be assigned it is that where no explanatory evidence is given the inference is that the plaintiff was in fault, but when explanatory evidence is adduced the question usually becomes one of fact to be submitted to the jury under proper instructions.[117] It is laid down by many of the cases that the same care is not necessarily required of persons crossing or passing along street railway tracks that is required in the case of persons crossing or walking along the tracks of ordinary railroads;[118] and in a Pennsylvania case it was held that where the owner of a horse carelessly unhitched it he could not recover, although it was frightened by a cable car and caused to run

[114] Rose v. Railway Co. (Pa.) 12 Atl. 78. Compare Stager v. Railway Co. 119 Pa. St. 70; 12 Atl. 821.

[115] Geitz v. Milwaukee City R. Co. 72 Wis. 307; 39 N. W. 866; City Railway Co. v. Lee, 50 N. J. L. 435; 14 Atl. 883; 7 Am. St. 798; Railway Co. v. Lauderbach (Pa.), 3 Atl. 672; Dahlberg v. Railway Co. 32 Minn. 404; 21 N. W. 545; 50 Am. R. 585, and note Neslie v. Railroad Co. 113 Pa. St. 300; 6 Atl 72. In Brown v. Broadway &c. R. Co. 50 N. Y. Super. 106, it was held that the rule of contributory negligence applies to a man marching in a procession. The cases which follow illustrate many and various phases of the general subject. Philadelphia &c. R. v. Bernheimer, 125 Pa. St. 615; 17 Atl. 477; Connolly v. Knickerbocker &c. R. Co. 114 N. Y. 104; 21 N. E. 101; 11 Am. St. 617; Weil v. Dry Dock Co. 5 N. Y. S. 833; Howland v. Union &c. R. Co. 150 Mass. 86; 22 N. E. 434; Omaha Horse R. Co. v. Doolittle, 7 Neb. 481; Tanner v. Louisville &c. R. Co. 60 Ala. 621.

[116] Suydam v. Grand St. &c. R. Co. 41 Barb. (N. Y.) 375; Siegel v. Eisen, 41 Cal. 109.

[117] Lynam v. Union &c. R. Co. 114 Mass. 83.

[118] Mentz v. Second Ave R. Co. 3 Abb. App. Dec. (N. Y.) 274; Lynam v. Union &c. R. Co. 114 Mass. 83. Compare Kelly v. Hendrie 26 Mich. 255.

away and come into collision with the car.[119] It is the duty of a street railway company to run its cars with a due regard to the rights of infirm persons, aged persons and children of tender years, for all classes of citizens have a right to freely use the public streets, and as this is the duty of the company it is liable if it does not use due care to prevent injury to the various classes of persons that may lawfully use the streets. This principle finds its most frequent illustration in case of injuries to children, and it is quite well agreed that the same care is not to be expected from children as from persons of mature years.[120] Other decisions and illustrative cases upon the question of contributory negligence are cited below.[120a]

[119] Philadelphia Traction Co. v. Bernheimer, 125 Pa. St. 615; 17 Atl. 477. It was held in the case cited that the statement of the plaintiff that: "I think the gripman could have stopped the car," was a mere expression of opinion. The court cited upon this point, Fischer v. Ferry Co. 124 Pa. St. 154; 16 Atl. 635.

[120] Mallard v. Ninth Avenue R. Co. 7 N. Y. S. 66; Silberstein v. Houston &c. R. Co. 52 Hun (N. Y.), 611; 4 N. Y. S. 843; Etherington v. Prospect Park &c. Co. 84 N. Y. 641; 4 Am. & Eng. R. Cas. 617; Moore v. Metropolitan &c. R. Co. 2 Mackey (D. C.) 437; Farris v. Cass Avenue R. Co. 8 Mo. App. 588; Indianapolis St. R. Co. v. Schomberg (Ind. App.), 71 N. E. 237; Collins v. South Boston &c. R. Co. 142 Mass. 301; 7 N. E. 856; 56 Am. R. 675; 26 Am. & Eng. R. Cas. 371; Dahl v. Milwaukee &c. Co. 62 Wis. 652; 22 N. W. 755; 19 Am. & Eng. R. Cas. 121; Maschek v. St. Louis R. Co. 71 Mo. 276; Hestonville R. Co. v. Connell, 88 Pa. St. 520; 32 Am. R. 472; Smith v. Hestonville Passenger R. Co. 92 Pa. St. 450; 37 Am. R. 705; Winters v. Kansas Cable R. Co. 99 Mo. 509; 12 S. W. 652; 6 L. R. A. 536, and note; 17 Am. St. 591. See, upon the general subject, Rock v. Indian Orchard Mills, 142 Mass. 522; 8 N. E. 401; Jones v. Old Dominion Cotton Mills, 82 Va. 140; 3 Am. St. 92; Fisk v. Central Pacific R. Co. 72 Cal. 38; 13 Pac. 144; 1 Am. St. 22; Brazil Block Coal Co. v. Young, 117 Ind. 520; 20 N. E. 423; post, Chap. XXXIV.

[120a] Indianapolis St. R. Co. v. Bolin (Ind. App.), 78 N. E. 210, and numerous cases cited in prevailing and dissenting opinions; Harrington v. Los Angeles R. Co. 140 Cal. 514; 74 Pac. 140; 63 L. R. A. 238; 98 Am. St. 85; Montgomery St. R. v. Hastings, 138 Ala. 432; 35 So. 412; Dubiver v. City &c. R. Co. 44 Oreg. 227; 74 Pac. 915; 75 Pac. 693; Indianapolis St. R. Co. v. Darnell, 32 Ind. App. 687; 68 N. E. 609; Solatinow v. Jersey City &c. Co. 70 N. J. L. 154; 56 Atl. 235; Petty v. St. Louis &c. R. Co. 179 Mo. 666; 78 S. W. 1003; Hayden v. Fair Haven &c. Co. 76 Conn. 355; 56 Atl. 613; Baldwin v. Heraty, 136 Mich. 15; 98 N. W. 739; Donovan v. Lynn &c. R. Co. 185 Mass. 533; 70 N. E. 1029; Adams v. Boston &c. St. R. Co. 191 Mass. 486; 78 N. E.

§ 1096cq. Proximate cause—Last clear chance.—The negligence alleged must be the proximate cause of the injury complained of.[121] But it has been held that although a complaint charged negligence in running at a high rate of speed and in failure to sound the gong where it also charged negligence in running the car upon and against the plaintiff's buggy, an instruction submitting the doctrine of last clear chance was not outside the issues.[122] In some cases the failure of the company's employes to take any steps to avoid injury after discovering the peril of the traveler would constitute willfulness and render the company liable on that ground even though the traveler had been guilty of contributory negligence, but in many cases the company may be held liable because negligence on the part of such employes after they have, or should have, discovered the danger is really the proximate cause of the injury.[123] In most jurisdictions, under the doctrine of the "last chance" or "last clear chance"[124] the plaintiff may still recover, notwithstanding he has negligently gone into a place of peril, where he has a right to go without being a trespasser, if the defendant discovered, or ought in the exercise of ordinary and reasonable care to have discovered, his peril in time by the exercise of such care to avoid injury to him and failed to exercise such care by which the injury would have been avoided.[125]

117; Erb v. Boston &c. R. Co. 191 Mass. 482; 78 N. E. 117; Blackwell v. Old Colony St. R. Co. (Mass.) 79 N. E. 335.

[121] See ante, § 711, and post, §§ 1310, 1402n, 1640, 1697, also.

[122] Indianapolis St. R. Co. v. Marschke (Ind.), 77 N. E. 945.

[123] See Bedell v. Detroit &c. R. 131 Mich. 668; 92 N. W. 349; Lee v. Market St. R. Co. 135 Cal. 293; 67 Pac. 765; Indianapolis Trac. Co. v. Kidd (Ind.) 79 N. E. 347; Citizens' St. R. Co. v. Hamer, 29 Ind. App. 426; 62 N. E. 658; 63 N. E. 778; Costello v. Third Ave. R. Co. 161 N. Y. 317; 55 N. E. 897; Roberts v. Spokane St. R. Co. 23 Wash. 325; 63 Pac. 506; 54 L. R. A. 184; Orr v. Cedar Rapids &c. R. Co. 94 Iowa, 423; 62 N. W. 851, 853; Di Prisco v. Wilmington City R. Co. 4 Pen. (Del.) 527; 57 Atl. 906.

[124] For an elaborate note on this doctrine see 55 L. R. A. 418-465. In Schneider v. Mobile &c. Co. (Ala.) 40 So. 761, it is said that "the rights of street cars and citizens traveling in vehicles drawn by horses or other animals in the street being correlative, the motorman of a street car is not bound to stop his car until he is conscious of the fact that the driver of a preceding vehicle is heedless of his danger; but, when he is conscious of such fact, the motorman is bound to use the highest degree of care to stop the car."

[125] Nellis St. R. Acc. Law, 473, 474; Birmingham &c. Co. v. Brant-

The rule as applicable to street railway cases is stated by Judge Thompson in the following words: "Although the driver of a vehicle, a foot-passenger, or a child may, through his own negligence, expose himself to the danger of being run over by a street car,—yet if the driver, gripman or motorman *sees his exposed condition in time,* by the exercise of ordinary or reasonable care in giving him warning or in checking his car, to avoid running over him or injuring him, but nevertheless fails to do so, he is guilty of negligence such as will make the railway company liable for the injury which follows.[125a] A few courts, however, have refused to apply the rule except where it appears that the employes of the company actually

ley, 141 Ala. 614; 37 So. 698; Meng v. St. Louis &c. R. Co. 108 Mo. App. 553; 84 S. W. 213; Memphis St. R. Co. v. Haynes, 112 Tenn. 712; 81 S. W. 374; Richmond &c. Co. v. Gordon, 102 Va. 498; 46 S. E. 772. See, also, Barry v. Burlington &c. Co. 119 Ia. 62; 93 N. W. 68; Citizens' St. R. Co. v. Damm, 25 Ind. App. 511; 58 N. E. 564, and authorities cited in last preceding note and in next following note.

[125a] Baltimore Traction Co. v. Wallace, 77 Md. 435; 26 Atl. 518; Baltimore &c. R. Co. v. Rifcowitz, 89 Md. 338; 43 Atl. 762; Lake Roland R. Co. v. McKewen, 80 Md. 593; 31 Atl. 797; Higgins v. Wilmington St. R. Co. 1 Marv. (Del.) 352; 41 Atl. 86; Will v. West Side R. Co. 84 Wis. 42; 54 N. W. 30; Huerzeler v. Central Crosstown R. Co. 1 Misc. (N. Y.) 136; 48 N. Y. St. 649; 20 N. Y. S. 676; Czezewzka v. Benton-Belfontaine R. Co. 121 Mo. 201; 25 S. W. 911; Fenton v. Second Ave. R. Co. 56 Hun (N. Y.), 99; 29 N. Y. St. 962; 9 N. Y. S. 162; McClain v. Brooklyn &c. R. Co. 116 N. Y. 459; 22 N. E. 1062; 27 N. Y. St. 549; 40 Am. & Eng. R. Cas. 254; Zurfluth v. People's R. Co. 46 Mo. App. 636; Citizens' St. R. Co. v. Steen, 42 Ark. 321; Galveston City R. Co. v. Hewitt, 67 Tex. 473; 3 S. W. 705; 60 Am. R. 32; Central Pass. R. Co. v. Chatterson (Ky.), 14 Ky. L. 663; Owensboro City R. Co. v. Hill, 21 Ky. L. 1638; 56 S. W. 21; Cass v. Third Ave. R. Co. 20 App. Div. 591; 47 N. Y. S. 356; Brachfeld v. Third Ave. R. Co. 60 N. Y. S. 988; 29 Misc. 586; Oliver v. Denver Tramway Co. 13 Colo. App. 543; 59 Pac. 79. The following statement of the rule has been repeatedly approved in Missouri: "It is a settled rule in this state that, though the plaintiff negligently placed himself in a perilous position by driving on or near the track, the motorman operating the car owed the plaintiff the duty of trying to avoid injuring him, and plaintiff's previous negligence did not bar a recovery if the injury resulted from the negligence of the motorman in not stopping or checking the car." Sepetowski v. Transit Co. 102 Mo. App. loc. cit. 110; 76 S. W. 693; Morgan v. Railroad, 159 Mo. 262; 60 S. W. 195; Hutchinson v. Railway, 88 Mo. App. loc. cit. 383; Deitring v. St. Louis Transit Co. 109 Mo. App. 524; 85 S. W. 140, 144.

discovered the exposed situation and danger of the traveler.[126] This may be, and we think is, the better rule as to trespassers upon the track of an ordinary commercial railroad company and the like, but not where, as is usually true in the case of a street railway company, the track is in the street where others have an equal right to go and must be expected. It should be remembered, however, that where there is mere error of judgment on the part of a competent street railway employe there may be no liability, and that such an employe may usually assume up to the last moment, in the absence of anything to the contrary, that one on or near the track or approaching it will heed the signals and get out of the way or not negligently go into danger.[127]

§ 1096cr. Street railways as carriers.—Street railway companies are common carriers of passengers.[128] As such they are required to

[126] See Siek v. Toledo &c. St. R. Co. 9 Ohio C. D. 51; 16 Ohio C. C. 393; Johnson v. Stewart 62 Ark. 164; 34 S. W. 889; Houston &c. R. Co. v. Farrell (Tex. Civ. App.), 27 S. W. 942; Redford v. Spokane St. R. Co. 9 Wash. 55; 36 Pac. 1085; Schoenholtz v. Third Ave. R. Co. 37 N. Y. S. 682; Lyman v. Union R. Co. 114 Mass. 87; Johnson v. Superior &c. R. Co. 91 Wis. 233; 64 N. W. 753, with which, however, compare Little v. Superior &c. R. Co. 88 Wis. 402; 60 N. W. 705.

[127] Schulte v. New Orleans &c. R. Co. 44 La. Ann. 509; 10 So. 811; Doyle v. West End St. R. Co. 161 Mass. 533; 37 N. E. 741; Lyons v. Bay Cities &c. R. Co. 115 Mich. 114; 73 N. W. 139; Morrisey v. Bridgeport Trac. Co. 68 Conn. 215; 35 Atl. 1126; Davidson v. Denver &c. Co. 4 Colo. App. 283; 35 Pac. 920; Houston &c. R. Co. v. Farrell, (Tex. Civ. App.) 27 S. W. 942; Christensen v. Union Trunk Line, 6 Wash. 75; 32 Pac. 1018. But, as will elsewhere be shown, such an assumption can not ordinarily be made in case of a very young child or where the circumstances apparent to the employe forbid it. In Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138; 70 N. E. 995; Elwood St. R. Co. v. Ross, 26 Ind. App. 258; 58 N. E. 535; Bunyan v. Citizens' R. Co. 127 Mo. 12; 29 S. W. 842; Houston &c. R. Co. v. Woodlock (Tex. Civ. App.), 29 S. W. 817; Buttelli v. Jersey City &c. R. Co. 59 N. J. L. 302; 36 Atl. 700. See, also, Tholen v. Brooklyn City R. Co. 30 N. Y. S. 1081, affirmed in 151 N. Y. 627; 45 N. E. 1134.

[128] Nelson v. Metropolitan St. R. Co. 113 Mo. App. 702; 88 S. W. 1119; Fillingham v. Transit Co. 102 Mo. App. 573; 77 S. W. 314; Jackson v. Grand Ave. R. Co. 118 Mo. 199; 24 S. W. 192, 199; Lincoln St. R. Co. v. McClellan, 54 Neb. 672; 74 N. W. 1074; 69 Am. St. 736; Nellis Street Surface Railroads, 414, and authorities cited in following note.

exercise the care and are subject, in most respects, to the rules elsewhere stated in regard to carriers of passengers.[129] "A passenger," it is said, "is one who undertakes, with the carrier's consent, to travel in the carriage of the latter, otherwise than in its service."[130] And, although carried free, the carrier owes him the duty of exercising such skill as it possesses and as is consistent with the situation and service undertaken.[131] "A public common carrier of passengers is distinguished from private carriers by the franchises conferred upon it, and the obligations, restrictions, and liabilities with which it is charged, all flowing from considerations of public policy. It must carry all alike, and for a reasonable compensation, furnish reasonable accommodations, must continuously operate its line, and submit to reasonable regulation. It has the franchise of taking tolls, and, if a street railway corporation, the franchise of laying tracks in the streets, of stringing wires and setting poles, and the right of way over all private means of transportation. Owing these public duties, possessing these public franchises, and having the burden of caring

[129] See post, § 1585, as to their not being insurers but being required to exercise a high degree of care or the utmost practicable care, Nelson v. Metropolitan St. R. Co. 113 Mo. App. 702; 88 S. W. 1119, 1121, and authorities cited. West Chicago St. R. Co. v. Kromshinsky, 185 Ill. 92; 56 N. E. 1110; Topeka City R. Co. v. Higgs, 38 Kans. 375; 16 Pac. 667; 5 Am. St. 754; Hansen v. North Jersey St. R. Co. 64 N. J. L. 686; 46 Atl. 718; Payne v. Spokane St. R. Co. 15 Wash. 522; 46 Pac. 1054; Nichols v. Lynn &c. R. Co. 168 Mass. 528; 47 N. E. 427; Bosqui v. Sutro R. Co. 131 Cal. 390; 63 Pac. 682; Citizens' St. R. Co. v. Twiname, 111 Ind. 587; 13 N. E. 55; Citizens' St. R. Co. v. Merl, 134 Ind. 609; 33 N. E. 1014; Schenckel v. Pittsburg &c. Trac. Co. 194 Pa. St. 182; 44 Atl. 1072; Denver Tramway Co. v. Reid, 4 Colo. App. 53; 35 Pac. 269; El Paso &c. R. Co. v. Harry (Tex. Civ. App.), 83 S. W. 735; Montgomery Elec. R. Co. v. Mallett, 92 Ala. 209; 9 So. 363; Nellis St. R. Acc. Law, 47–52; Booth St. Rys. §§ 327, 328.

[130] Indianapolis Trac. &c. Co. v. Lawson, 143 Fed. 834, 837, citing Higley v. Gilmer, 3 Mont. 90; 35 Am. R. 450.

[131] Indianapolis Trac. &c. Co. v. Lawson, 143 Fed. 834, 836. See, also as to liability to free passenger, North Chicago St. R. Co. v. Williams, 140 Ill. 275; 29 N. E. 672; Buck v. People's St. R. Co. 108 Mo. 179; 18 S. W. 1090; Rosenberg v. Third Ave. R. Co. 61 N. Y. S. 1052; 47 App. Div. 323. Whether a passenger usually a question of fact: George v. Los Angeles R. Co. 126 Cal. 357; 58 Pac. 819; 46 L. R. A. 829; 77 Am. St. 184; Meyer v. Second Ave. R. Co. 8 Bosw. (N. Y.) 305.

for innumerable human lives, it is justly held to the highest degree of care and skill."[132]

§ 1096cs. Who are passengers.—The question as to who are passengers and when the relation of passenger and carrier begins and terminates is elsewhere[133] considered, but the fact that street railway companies often have no regular stations or places for selling tickets or taking on and letting off passengers makes it desirable to briefly consider the question with particular reference to street railway companies. As a general rule where the car is stopped at a customary place in response to a signal, to take on one as a passenger and he gets on the step or platform for the purpose of taking passage, he is to be regarded as a passenger even though he has no ticket or has not yet paid his fare.[134] A woman with a proper transfer ticket

[132] Indianapolis Trac. &c. Co. v. Lawson, 143 Fed. 834, 837, citing Hollister v. Nowlen 19 Wend. (N. Y.) 234; 32 Am. Dec. 455; Simmons v. Oregon R. Co. 41 Or. 151; 69 Pac. 440, 1022; Kennedy v. New York &c. R. Co. 125 N. Y. 422; 26 N. E. 626; Steamboat v. King, 16 How. (U. S.) 474; 14 L. Ed. 1019; Indianapolis v. Horst, 93 U. S. 296; 23 L. Ed. 898.

[133] See post, §§ **1578, 1579.**

[134] Citizens' St. R. Co. v. Merl, 26 Ind. App. 284; 59 N. E. 491; Gaffney v. St. Paul &c. R. Co. 81 Minn. 459; 84 N. W. 304; Gordon v. West &c. R. Co. 175 Mass. 181; 55 N. E. 990; West Chicago St. R. Co. v. Shiplett, 85 Ill. App. 683; Wallace v. Third Ave. R. Co. 36 App. Div. (N. Y.) 57; 55 N. Y. S. 132. See, also, Barth v. Kansas City &c. R. Co. 142 Mo. 535; 44 S. W. 778; Sanford v. Eighth Ave. R. Co. 23 N. Y. 343; 80 Am. Dec. 286; George v. Los Angeles R. Co. 126 Cal. 357; 58 Pac. 819; 46 L. R. A. 829; 77 Am. St. 184; Smith v. St. Paul &c. R. Co. 32 Minn. 1; 18 N. W. 827; 50 Am. R. 550, and note; North Chicago St. R. Co. v. Williams, 140 Ill. 275; 29 N. E. 672; Cogswell v. West St. &c. R. Co. 5 Wash. 46; 31 Pac. 411. In Hall v. Terre Haute Elec. Co. (Ind. App.) 76 N. E. 335, 336, it is said: "A street railway company is granted its franchise in order that it may carry passengers. When it brings upon the street a car equipped for such purpose, stopping the same at a place selected by it, at which to receive passengers, and the person desiring to be transported boards, or attempts to board, such car for such purpose, he becomes a passenger thereon; the act of stopping the car at the customary place being an implied invitation to those waiting to take passage. Citizens' &c. Co. v. Jolly, 161 Ind. 80; 67 N. E. 935; Citizens' St. R. Co. v. Merl, 26 Ind. App. 284; 59 N. E. 491; Gaffney v. St. Paul City R. Co. 81 Minn. 459, 462; 84 N. W. 304; Drew v. Sixth Ave. R. Co. 26 N. Y. 49; Ganiard v. Rochester City & Brighton R. Co. 50 Hun (N.

approaching a street car at the proper place to get on has also been held to be a passenger.[135] But it has been held that one who has given a signal which has been responded to but, before boarding the car is struck by the unexpected swinging of the car from its track to a switch track is not entitled to recover as a passenger,[136] and that one does not become a passenger by a mere attempt to board a car while in motion, although intending to pay his fare, in the absence of some act indicating an invitation or acceptance by the company, either express or implied.[137] Newsboys and the like who jump on cars merely to sell papers or the like are not passengers,[138]

Y.), 22; 2 N. Y. S. 470; Ganiard v. Rochester City Elec. R. Co. 121 N. Y. 661; 24 N. E. 1092; Wallace v. Third Ave. R. Co. (Sup.) 55 N. Y. S. 132, 135; Gordon v. West End St. R. Co. 175 Mass. 181; 55 N. E. 990; McDonough v. Metropolitan R. Co. 137 Mass. 210; Schepers v. Union Depot R. Co. 126 Mo. 665; 29 S. W. 712; Joliet Street R. Co. v. Duggan, 45 Ill. App. 450; Nellis St. Ry. Law, 44. If appellee did not wish to extend such invitation, its duty was to give those in waiting notice to that effect. Citizens' &c. Co. v. Jolly, supra. The person desiring passage, who boards the car without such notice, indicating his intention of becoming a passenger thereon cannot be treated as a trespasser. Citizens' &c. Co. v. Jolly, supra." In Waller v. Wilmington City R. Co. (Dela.) 61 Atl. 874, one who in attempting to board a street car that had stopped at the usual place for cars to stop to take on passengers, took hold of the hand rail with one hand and had one foot on the platform step, was held to be a passenger.

[135] Keator v. Scranton Trac. Co. 191 Pa. St. 102; 43 Atl. 86; 44 L. R. A. 546. That the relation continues while passenger is transferring from one car to another, see, also, Walger v. Jersey City &c. R. Co. 71 N. J. L. 356; 59 Atl. 14.

[136] Donovan v. Hartford St. R. Co. 65 Conn. 201; 32 Atl. 350; 29 L. R. A. 297.

[137] Schepers v. Union Depot R. Co. 126 Mo. 665; 29 S. W. 712; Schaefer v. St. Louis &c. R. Co. 128 Mo. 64; 30 S. W. 331. In Smith v. Birmingham R. &c. Co. (Ala.) 41 So. 307, which was an action for the death of a person in attempting to board an electric car the declaration not averring that the decedent was attempting to board the train at a station provided for passengers, or at a place where it was usual or customary to receive passengers, or that he was invited or knowingly permitted to board the car by an authorized servant of the company, or that he was in any manner accepted as a passenger, it was held demurrable as failing to show the relation of carrier and passenger.

[138] Raming v. Metropolitan St. R. Co. 157 Mo. 477; 57 S. W. 268; Udell v. Citizens' St. R. Co. 152 Ind. 507; 52 N. E. 799; 71 Am. St. 336; Fleming v. Brooklyn City R. Co. 74 N. Y. 618; 1 Abb. N. C. 433; Barry v. Union R. Co. R. Co. 105

nor is one who is allowed to ride free by an employe, without authority and not within the scope of his duty or employment.[139] The relation of passenger and carrier does not terminate, as a general rule, until the passenger has had a reasonable opportunity to leave the car at his journey's end where passengers are discharged,[140] nor does it always cease at once on the passenger alighting from the car,[141] or its arrival at its destination.[142] But the public street is not a passenger station for which the company is responsible, and ordinarily, when a passenger once safely alights upon the street the relation of passenger and carrier terminates.[143]

§ 1096ct. Care as to premises, tracks and places for getting on and off.—A street railway company, it is said, "is bound to furnish for its passengers a reasonably safe and sufficient track and equipments, and to maintain them in a reasonably safe condition, so far as can be provided by the utmost human skill, diligence, and foresight, and is liable to a passenger for slight negligence in any of these respects by which an injury to him is occasioned."[144] There are

App. Div. (N. Y.) 520; 94 N. Y. S. 449.

[139] Finley v. Hudson &c. R. Co. 64 Hun (N. Y.), 373; 19 N. Y. S. 621, affirmed in 74 N. Y. 618. See, also, post, §§ **1580, 1581.** But see Denison &c. R. Co. v. Carter, 98 Tex. 196; 82 S. W. 782.

[140] Chicago Terminal &c. Co. v. Schmelling, 99 Ill. App. 577, affirmed in 197 Ill. 619; 64 N. E. 714. See, also, Fremont &c. R. Co. v. Hagblad (Neb.), 101 N. W. 1033.

[141] South Covington &c. St. R. Co. v. Beatty, 20 Ky. 1845; 50 S. W. 239; Burbridge v. Kansas City R. Co. 36 Mo. App. 669; Atlanta Consol. &c. Co. v. Bates, 103 Ga. 333; 30 S. E. 41. But see Indianapolis St. R. Co. v. Tenner, 32 Ind. App. 311; 67 N. E. 1044. Compare McDonald v. St. Louis Transit Co. 108 Mo. App. 374; 83 S. W. 1001.

[142] Toledo Consol. St. R. Co. v. Fuller, 17 Ohio Cir. Ct. 562; Rosenberg v. Third Ave. R. Co. 47 App. Div. (N. Y.) 323; 61 N. Y. S. 1052.

[143] Creamer v. West End St. R. Co. 156 Mass. 320; 31 N. E. 391; 16 L. R. A. 490; 32 Am. St. 456; Platt v. Forty-second St. &c. Co. 2 Hun (N. Y.), 124; Chattanooga Elec. R. Co. v. Roddy, 105 Tenn. 666; 58 S. W. 646; 57 L. R. A. 885; West Chicago St. R. Co. v. Walsh, 78 Ill. App. 595; Smith v. City &c. R. Co. 29 Oreg. 539; 46 Pac. 136. See, also, and compare Augusta R. Co. v. Glover, 92 Ga. 132; 18 S. E. 406; Brunswick &c. R. Co. v. Moore, 101 Ga. 684; 28 S. E. 1000; Louisville &c. R. Co. v. Parke, 96 Ky. 580; 29 S. W. 455.

[144] Nellis Street Surface R. 420, citing Morris v. New York &c. R. Co. 106 N. Y. 678; 13 N. E. 455;

many cases in which the company has been held liable for injuries to its passengers proximately caused by its failure to keep its track or premises in repair or by its negligence in regard to the place for taking on or letting off passengers.[145] But it would seem that as to the condition of stopping places and especially as to places in the street where the company has no control, reasonable care is all that is required, and where the defect is caused by the city or others at a place where the company has no control, if not negligent in using or stopping at such place, or the like, the company is not liable therefor.[146]

§ 1096cu. Care as to cars and appliances.—As already stated the rule as to the care required of street railway companies and the duty they owe to their passengers applies to the selection or furnishing, maintaining, inspection, and use of cars and equipment. Thus, the company is at least prima facie liable[147] for injuries caused to pas-

Stierle v. Union R. Co. 156 N. Y. 70; 50 N. E. 419; Illinois Cent. R. Co. v. Kuhn, 107 Tenn. 106; 64 S. W. 202; St. Louis &c. R. Co. v. Mitchell, 57 Ark. 418; 21 S. W. 883; Holloway v. Pasadena &c. R. Co. 130 Cal. 177; 62 Pac. 478, and other cases. See, also, Macon Consol. St. R. Co. v. Barnes, 113 Ga. 212; 38 S. E. 756.

[145] See Hazelton v. Portsmouth &c. St. R. Co. 71 N. H. 589; 53 Atl. 1016; Wolfe v. Third Ave. R. Co. 67 App. Div. (N. Y.) 605; 74 N. Y. S. 336; Daub v. Yonkers St. R. Co. 69 Hun (N. Y.), 138; 23 N. Y. S. 268; Dixon v. Brooklyn City &c. Co. 100 N. Y. 170; 3 N. E. 65; Indianapolis St. R. Co. v. Robinson, 157 Ind. 414; 61 N. E. 936; Bigelow v. West End St. R. Co. 161 Mass. 393; 37 N. E. 367; West Chicago St. R. Co. v. Stephens, 66 Ill. App. 303; Mahnke v. New Orleans &c. Co. 104 La. Ann. 411; 29 So. 52; Montgomery St. R. Co. v. Mason, 133 Ala. 508; 32 So. 261; Valentine v. Middlesex R. Co. 137 Mass. 28; Richmond City R. Co. v. Scott, 86 Va. 902; 11 S. E. 404.

[146] See Citizens' Pass. R. Co. v. Ketchum, 122 Pa. St. 228; 15 Atl. 733; Birmingham v. Rochester City R. Co. 137 N. Y. 13; 32 N. E. 995; 18 L. R. A. 764; Indianapolis Trac. &c. Co. v. Pressell (Ind. App.) 77 N. E. 357. If the company knows of an excavation, or the like, in the street it should not, of course, stop its cars there to let the passengers off without warning or assistance, and may be held liable for injury to a passenger caused by its negligence in so doing, although it did not make the excavation. Richmond City R. Co. v. Scott, 86 Va. 902; 11 S. E. 404.

[147] Kelly v. New York &c. R. Co. 109 N. Y. 44; 15 N. E. 879; Chase v. Jamestown St. R. Co. 60 Hun (N. Y.), 582; 15 N. Y. S. 35; Kingman v. Lynn &c. R. Co. 181 Mass. 387; 64 N. E. 79; Mackin v. People's St. R. Co. 45 Mo. App. 82;

sengers by patent defects in cars, brakes,[148] and the like.[149] It is the duty of the company to make proper inspection;[150] but if the defect is a latent one which could not have been foreseen and was not and could not have been discovered by proper inspection the company is not liable therefor.[151] The use of a platform without gates has been held not to be negligent,[152] and the company is not liable for not furnishing a portable or extra step for the use of passengers in entering or leaving a car.[153]

§ 1096cv. Care in operation of cars.—Many decisions might be cited illustrating the rule as to the high degree of care due passengers and showing its application to the operation of cars. As the general subject is so fully considered elsewhere, however, reference to a few

Holt v. Southwest &c. R. Co. 84 Mo. App. 443; Gould v. Boston El. R. Co. 191 Mass. 396; 77 N. E. 712.

[148] Weber v. Metropolitan St. R. Co. 22 App. Div. (N. Y.) 628; 47 N. Y. S. 812; Dintruff v. Rochester City R. Co. 57 Hun (N. Y.), 585; 10 N. Y. S. 402; 61 Am. Dec. 751.

[149] Herbert v. St. Paul City R. Co. 85 Minn. 341; 88 N. W. 996; Willis v. Second Ave. Trac. Co. 189 Pa. St. 430; 42 Atl. 1; Burt v. Douglass &c. St. R. Co. 83 Wis. 229; 53 N. W. 447; 18 L. R. A. 479; Leonard v. Brooklyn &c. R. Co. 57 App. Div. (N. Y.) 125; 67 N. Y. S. 985; Denver Tramway Co. v. Reid, 4 Colo. App. 53; 35 Pac. 269; Cogswell v. West &c. R. Co. 5 Wash. 46; 31 Pac. 411; Firebaugh v. Seattle Elec. Co. 40 Wash. 658; 82 Pac. 995; 111 Am. St. 990.

[150] Smith v. Metropolitan St. R. Co. 59 App. Div. (N. Y.) 60; 69 N. Y. S. 176; Leonard v. Brooklyn &c. R. Co. 57 App. Div. (N. Y.) 125; 67 N. Y. S. 985; Aiken v. Southern Pac. Co. 104 La. 162; 29 So. 1; Gould v. Boston El. R. Co. 191 Mass. 396; 77 N. E. 712. It is usually a question for the jury as to whether proper inspection has been made. Schneider v. Second Ave. R. Co. 133 N. Y. 583; 30 N. E. 752; 44 Am. St. 680; Palmer v. Delaware &c. Co. 120 N. Y. 170; 24 N. E. 302; 17 Am. St. 629.

[151] Sharp v. Kansas City Cable R. Co. 114 Mo. 94; 20 S. W. 93; Carter v. Kansas City Cable R. Co. 42 Fed. 37; Kelly v. New York &c. R. Co. 109 N. Y. 44; 15 N. E. 879. But compare Hegeman v. Western R. Co. 13 N. Y. 9; 64 Am. Dec. 517, and note.

[152] Byron v. Lynn &c. R. Co. 177 Mass. 303; 58 N. E. 1015. At least as a matter of law. See West Phila. &c. R. Co. v. Gallagher, 108 Pa. St. 524. But see Augusta R. Co. v. Glover, 92 Ga. 132; 18 S. E. 406.

[153] Indianapolis Trac. &c. Co. v. Pressell (Ind. App.), 77 N. E. 357; Young v. Missouri Pac. R. Co. 93 Mo. App. 267. See, also, Texas Midland R. Co. v. Frey, 25 Tex. Civ. App. 386; 61 S. W. 442; Crowe v. Michigan Cent. R. Co. 142 Mich. 692; 106 N. W. 395.

of the decisions will be sufficient in this place. Recovery has been permitted for injuries caused by running a car at a high and dangerous rate of speed,[154] for injuries caused by overloading and overcrowding cars,[155] for negligence in starting a car while passengers are getting on and off and before they have a reasonable opportunity to do so,[156] and for injuries caused by collisions and the like.[157]

§ 1096cw. Collisions or derailment.—Where one car collides with another or runs off the track and an injury is thus caused to a passenger who is free from contributory negligence the company is usually liable unless it shows that it exercised the high degree of care due from it to its passengers. In such, and similar cases, the doctrine res ipsa loquitur usually applies, and the burden is upon the company to explain and show that the injury was not proximately caused by its negligence. Many decisions illustrate and enforce this rule.[158]

[154] Dallas Consol. Elec. R. Co. v. Ison (Tex. Civ. App.) 83 S. W. 408. See, also, Indianapolis St. R. Co. v. Schmidt, 163 Ind. 360; 71 N. E. 201.

[155] Chicago &c. R. Co. v. Newell, 113 Ill. App. 263; Halverson v. Seattle &c. Co. 35 Wash. 600; 77 Pac. 1058. But see Sias v. Rochester R. Co. 169 N. Y. 118; 62 N. E. 132; 56 L. R. A. 850. Additional care may be required. Alton &c. Trac. Co. v. Oliver, 217 Ill. 15; 75 N. E. 419; North Chicago St. R. Co. v. Polkey, 203 Ill. 225; 67 N. E. 793.

[156] Shanahan v. St. Louis Transit Co. 109 Mo. App. 228; 83 S. W. 783; Lehner v. Metropolitan St. R. Co. 110 Mo. App. 215; 85 S. W. 110; Cody v. Market St. R. Co. 148 Cal. 90; 82 Pac. 666; Normile v. Wheeling &c. Co. 57 W. Va. 132; 49 S. E. 1030; 68 L. R. A. 901; Guenther v. Metropolitan R. Co. 23 App. (D. C.) 493. But see McKenzie v. Union R. Co. 178 N. Y. 638; 71 N. E. 1134; and see Sims v. Metropolitan St. R. Co. 65 App. Div. (N. Y.) 270; 72 N. Y. S. 835; Byron v. Lynn &c. R. Co. 177 Mass. 303; 58 N. E. 1015.

[157] See next following section.

[158] Cincinnati &c. R. Co. v. Bravard (Ind. App.), 76 N. E. 899; Indiana Union Trac. Co. v. McKinney (Ind.), 78 N. E. 203; Indianapolis &c. R. Co. v. Schmidt, 163 Ind. 360; 71 N. E. 201; Cheetham v. Union R. Co. (N. H.) 58 Atl. 881; Lincoln Trac. Co. v. Heller (Neb.), 102 N. W. 262; Magrane v. St. Louis &c. R. Co. 183 Mo. 119; 81 S. W. 1158; Logan v. Metropolitan St. R. Co. 183 Mo. 582; 82 S. W. 126; Estes v. Missouri Pac. R. Co. 110 Mo. App. 725; 85 S. W. 627; Wilkerson v. Consol. St. R. Co. 26 Mo. App. 144; Hill v. Ninth Ave. R. Co. 109 N. Y. 239; 16 N. E. 61; North Chicago St. Ry. Co. v. Colton, 140 Ill. 486; 29 N. E. 899; Smith v. St. Paul &c. R. Co.

§ 1096cx. Injuries received while on cars.—The mere fact that a passenger is injured by a sudden jerk or stopping of the car is not ordinarily sufficient to establish liability on the part of the company[159] unless it is unusual or extraordinary[160] or negligence on the part of the company proximately causing the injury is otherwise shown. But the circumstances may be such as to bring the case within the doctrine of res ipsa loquitur.[161] And, as a general rule,

32 Minn. 1; 18 N. W. 827; 50 Am. R. 550, and note; Bergen Co. Trac. Co. v. Demarest, 62 N. J. L. 755; 42 Atl. 729; 72 Am. St. 683; Montgomery &c. R. Co. v. Malette, 92 Ala. 209; 9 So. 363; Londoun v. Eighth Ave. R. Co. 162 N. Y. 380; 56 N. E. 988; Kay v. Metropolitan St. R. Co. 163 N. Y. 447; 57 N. E. 751; North Baltimore &c. R. Co. v. Kaskell, 78 Md. 517; 28 Atl. 410. For cases holding that a prima facie case was not made, or was rebutted, see Cheetham v. Union R. Co. (N. H.) 58 Atl. 881; Swigelsky v. Interurban St. R. Co. 91 N. Y. S. 350; Black v. Boston El. R. Co. 187 Mass. 172; 72 N. E. 970; 68 L. R. A. 799, and note. As to whether the burden, in the true sense, shifts, see Lincoln Trac. Co. v. Shepherd (Neb.), 107 N. W. 764; note to Black v. Boston &c. R. Co. 187 Mass. 172; 92 N. E. 970; 68 L. R. A. 799. As to collisions generally, with cars and other vehicles, see Hamilton v. Great Falls St. R. Co. 17 Mont. 334, 351; 42 Pac. 860; 43 Pac. 713; Sears v. Seattle &c. R. Co. 6 Wash. 227; 33 Pac. 389; Sweeney v. Kansas City Cable R. Co. 150 Mo. 385; 51 S. W. 682; Goorin v. Allegheny Trac. Co. 179 Pa. St. 327; 36 Atl. 207, 1129; Hammond &c. R. Co. v. Spyzchalski, 17 Ind. App. 7; 46 N. E. 47; Blanchette v. Holyoke St. R. Co. 175 Mass. 51; 55 N. E. 481.

[159] Chicago City R. Co. v. Morse, 98 Ill. App. 662, affirmed in 197 Ill. 327; 64 N. E. 304; Byron v. Lynn &c. R. Co. 177 Mass. 303; 58 N. E. 1015. See, also, Merrill v. Metropolitan St. R. Co. 73 App. Div. 401; 77 N. Y. S. 122; Cleveland City R. Co. v. Osbon, 66 Ohio St. 45; 63 N. E. 604.

[160] Bartley v. Metropolitan St. R. Co. 148 Mo. 124; 49 S. W. 840.

[161] Chadwick v. St. Louis Transit Co. 195 Mo. 517; 93 S. W. 798, 800; Scott v. Bergen Co. Trac. Co. 64 N. J. L. 362; 48 Atl. 1118; Consolidated Trac. Co. v. Thalheimer, 59 N. J. L. 474; 37 Atl. 132. Where an accident, resulting in injury to a passenger on a street car, was caused by the blowing out of the controller on the car, the company having control over the equipment and operation of the car, and the passenger not being charged with contributory negligence, it was held that the company was presumptively guilty of actionable negligence, it being presumed that the accident was caused by a defect in the controller, and that, although on being placed in danger in consequence of the blowing out of the controller on the car, he jumped from the car with a view of saving himself, and was injured, he was not deprived of the right to insist that proof of the accident presumptively showed actionable neg-

a passenger who is occupying a proper place in the car cannot well be deemed guilty of contributory negligence. It is the duty of the company, so far as it may be done by the exercise of the care due passengers, to protect them from the violence and insults of its employes and of other passengers and persons upon the car.[162] But it is not liable for the unexpected and unusual act of another passenger or stranger which it could not have foreseen and had no opportunity to prevent.[163] So, where a passenger was injured by the conductor's punch falling from the pocket of the conductor as he hurried through the car to readjust the trolley, it was held that the company was not liable as such a casualty could not reasonably have been anticipated or foreseen.[164]

§ 1096cy. Injuries received in getting on or off cars.—Persons are frequently injured in boarding or alighting from street cars and there are many decisions upon the subject. As a general rule it is the duty of the company not to stop its cars at an unsafe place[165]

ligence on the company's part. Firebaugh v. Seattle &c. Co. 40 Wash. 658; 82 Pac. 995; 111 Am. St. 990.

[162] See post, § 1591; also, last note to last section of this chapter; Booth St. Rys. §§ 372, 373, 374; notes in 28 Am. R. 112; 6 Am. St. 734; 97 Am. St. 526, et seq. In Fewings v. Mendenhall, 88 Minn. 336; 93 N. W. 127; 60 L. R. A. 601; 97 Am. St. 519, it is held that only ordinary care is required to protect passengers from the criminal acts of strikers and strangers not subject to the orders or control of the company. In Ford v. Minneapolis St. R. Co. (Minn.) 107 N. W. 817, punitive damages were allowed for an assault by an employe, and other decisions are there cited to the same effect.

[163] Graeff v. Philadelphia &c. R. Co. 161 Pa. St. 230; 28 Atl. 1107; 23 L. R. A. 606; 41 Am. St. 885; Randall v. Frankford R. Co. 139 Pa. St. 464; 22 Atl. 639; Louisville &c. R. Co. v. McEwan, 17 Ky. L. 406; 31 S. W. 465; Springfield Consol. R. Co. v. Flynn, 55 Ill. App. 600; Chicago City R. Co. v. Considine, 50 Ill. App. 471; Ferguson v. Citizens' St. R. Co. 16 Ind. App. 171; 44 N. E. 936; Sullivan v. Jefferson Ave. R. Co. 133 Mo. 1; 34 S. W. 566; 32 L. R. A. 167.

[164] Cheyne v. Van Brunt &c. Co. 89 N. Y. S. 626; 97 App. Div. 56. This case, however, seems pretty close to the line. See Kohner v. Capital Trac. Co. 22 App. (D. C.) 181; 62 L. R. A. 875; Goodloe v. Memphis &c. R. Co. 107 Ala. 233; 18 So. 166; 29 L. R. A. 729; 54 Am. St. 67, and note.

[165] See Leverett v. Shreveport Belt &c. Co. 110 La. Ann. 399; 34 So. 579; 1 St. Ry. 253, and note; Henry v. Grant St. El. R. Co. 24 Wash. 246; 64 Pac. 137; Macon R. &c. Co. v. Vining, 120 Ga. 511; 48 S. E. 232.

to take on or let off passengers, at least without warning.[166] It is the duty of the conductor or persons in charge of the car before starting it again to give the boarding passenger a reasonable opportunity to get aboard safely[167] and the same is true as to giving passengers a reasonable opportunity to alight in safety.[168] Indeed, it has been held, more specifically, that the conductor or person in charge of the car should look around and use due care to see, before starting the car, that persons trying to get on or off have succeeded in doing so and are not in danger of being injured by the starting of the car.[169] The duty of the company and the duty of the pas-

[166] Sweet v. Louisville R. Co. 113 Ky. 15; 67 S. W. 4; McDonald v. St. Louis &c. Co. 108 Mo. App. 374; 83 S. W. 1001.

[167] Baltimore City &c. R. Co. v. Baer, 90 Md. 97; 44 Atl. 992; Barth v. Kansas City El. R. Co. 142 Mo. 535; 44 S. W. 778; Ganiard v. Rochester City &c. R. Co. 50 Hun (N. Y.) 22, affirmed in 121 N. Y. 661; 24 N. E. 1092; Black v. Brooklyn City R. Co. 108 N. Y. 640; 15 N. E. 389; Steeg v. St. Paul City R. Co. 50 Minn. 149; 16 L. R. A. 379; 52 N. W. 393; Conner v. Citizens' St. R. Co. 103 Ind. 62; Mobile &c. R. Co. v. Reeves, 25 Ky. L. 2236; 80 S. W. 471.

[168] Fuller v. Denison &c. R. Co. 32 Tex. Civ. App. 399; 74 S. W. 940; 1 St. R. 780, and note; Citizens' St. R. Co. v. Shepard, 30 Ind. App. 193; 65 N. E. 765; Atlanta R. Co. v. Randall, 117 Ga. 165; 43 S. E. 412; Metropolitan R. Co. v. Jones, 1 App. (D. C.) 200; Patterson v. Omaha &c. R. Co. 90 Ia. 247; 57 N. W. 880; Washington &c. R. Co. v. Harmon, 147 U. S. 571; 13 Sup. Ct. 557; Paducah &c. R. Co. v. Walsh (Ky.), 58 S. W. 431; Conway v. New Orleans &c. R. Co. 46 La. Ann. 1429; 16 So. 362; Poulin v. Broadway &c. R. Co. 61 N. Y. 621; Booth St. R. § 349; Rutledge v. New Orleans &c. R. Co. 129 Fed. 94; Elwood v. Connecticut &c. Co. 77 Conn. 145; 58 Atl. 751.

[169] Davey v. Greenfield &c. R. Co. 177 Mass. 106; 58 N. E. 172; Akersloot v. Second Ave. R. Co. 131 N. Y. 599; 30 N. E. 195; 15 L. R. A. 489; Pfeffer v. Buffalo R. Co. 24 N. Y. S. 490, affirmed in 144 N. Y. 636; 39 N. E. 494; Sexton v. Metropolitan St. R. Co. 40 App. Div. (N. Y.) 26; 57 N. Y. S. 577; Dudley v. Front St. Cable R. Co. 73 Fed. 128; Bloomington &c. R. v. Zimmerman, 101 Ill. App. 184; Memphis St. R. Co. v. Shaw, 110 Tenn. 467; 75 S. W. 713; Union Trac. Co. v. Siceloff, 34 Ind. App. 511; 72 N. E. 266; Anderson v. Citizens' St. R. Co. 12 Ind. App. 194; 38 N. E. 1109; Highland &c. R. Co. v. Burt, 92 Ala. 291; 9 So. 410; 13 L. R. A. 95; West Chicago St. R. Co. v. Manning, 170 Ill. 417; 48 N. E. 958. But compare Gilbert v. West End St. R. Co. 160 Mass. 403; 36 N. E. 60; Foster v. Seattle Elec. Co. 35 Wash. 177; 76 Pac. 995. And see, where the passenger adopts an unusual mode of egress, or the employes are not aware or chargeable with notice of his attempt to get off. Ratteree v. Galveston &c. R. Co. 36 Tex. Civ.

senger are thus stated in the syllabus in a recent case: "A street railway company, in taking on or letting off passengers, must stop its cars at its usual stopping places and wait a reasonable time for passengers to get on or off, and must exercise reasonble care to secure the safety of the passengers. A passenger attempting to board or alight from a street car must see that the car has stopped so that he may safely get on or off, and must exercise reasonable care to avoid danger."[170] But it is generally held that an attempt to board or alight from a slowly moving car is not necessarily contributory negligence as a matter of law but is a question of fact for the jury.[171] The speed may be so great, however, or the circumstances such that it is so obviously dangerous as to prevent recovery.[172]

§ 1096cz. Riding on running board, or in exposed or dangerous

App. 194; 81 S. W. 566; Harris v. Gulf &c. R. Co. 36 Tex. Civ. App. 94; 80 S. W. 1023; McCarthy v. Interurban St. R. Co. 88 N. Y. S. 388; Brown v. Interurban St. R. Co. 88 N. Y. S. 388; Chicago &c. R. Co. v. Dice, 113 Ill. App. 74.

[170] Waller v. Wilmington City R. Co. (Del.) 61 Atl. 874.

[171] McDonough v. Metropolitan R. Co. 137 Mass. 210; Briggs v. Union St. R. Co. 148 Mass. 72; 19 N. E. 19; 12 Am. St. 518; Nichols v. Lynn &c. R. Co. 168 Mass. 528; 47 N. E. 427; Sweeny v. Union Trac. Co. 199 Pa. St. 293; 49 Atl. 66; Indianapolis St. R. Co. v. Hockett, 159 Ind. 677; 66 N. E. 39; Ganly v. Brooklyn City R. Co. 7 N. Y. S. 854; Effendorf v. Brooklyn City &c. R. Co. 69 N. Y. 195; Brittan v. Grand Rapids St. R. Co. 90 Mich. 159; 51 N. W. 276; McDonald v. Kansas City &c. R. Co. 127 Mo. 38; Schmitt v. St. Louis Transit Co. 115 Mo. App. 445; 90 S. W. 421; Rouser v. Washington &c. R. Co. 13 App. (D. C.) 320; Birmingham &c. R. Co. v. James, 121 Ala. 120; 25 So. 847; Chicago City R. Co. v. Meehan, 77 Ill. App. 215; Chicago City R. Co. v. McCanghna, 216 Ill. 202; 74 N. E. 819; Posten v. Denver &c. Co. 11 Colo. App. 187; 53 Pac. 391; Pueblo &c. R. Co. v. Sherman, 25 Colo. 114; 53 Pac. 322. So, as to getting on lower step, preparatory to alighting. Wabash Riv. Trac. Co. v. Baker (Ind.), 78 N. E. 197.

[172] See Reddington v. Philadelphia Trac. Co. 132 Pa. St. 154; 9 Atl. 28; Weber v. Kansas City &c. Co. 100 Mo. 194; 18 S. W. 804; 13 S. W. 87; 7 L. R. A. 819, and note; 18 Am. St. 541, and note; Ackerstadt v. Chicago City R. Co. 194 Ill. 616; 62 N. E. 884; Schmidt v. North Jersey St. R. Co. 66 N. J. L. 424; 49 Atl. 438; Chicago City R. Co. v. Delcourt, 33 Ill. App. 430. Or it may not amount to an invitation to board the car. Savage v. Third Ave. R. Co. 29 App. Div. (N. Y.) 556; 51 N. Y. S. 1066; Basch v. North Chicago &c. Co. 40 Ill. App. 583. See, also, Ashtabula &c. Co. v. Holmes, 67 Ohio St. 153; 65 N. E. 877; Campbell v. Los Angeles R. Co. 135 Cal. 137; 67 Pac. 50; Kohler v. West Side R. Co. 99 Wis. 33; 74 N. W. 568.

place.—It is not necessarily negligence as a matter of law for a street railway company to permit passengers to stand on the running board, platform, or the like, but it may be negligence under particular circumstances and if the company permits the car to be overcrowded so that the passenger can find no other place it may be held liable, in the absence of contributory negligence, if it fails to exercise the care demanded by the circumstances.[173] It is not necessarily contributory negligence per se or as a matter of law for a passenger to ride on the platform, running board, or step.[174] This is especially true where the car is crowded so that there is no other place to ride.[175] The question is usually one for the jury.[176] But

[173] North Chicago St. R. Co. v. Polkey, 203 Ill. 225; 67 N. E. 793; North Chicago St. R. Co. v. Williams, 140 Ill. 275; 29 N. E. 672. See, also, Sheridan v. Brooklyn &c. R. Co. 36 N. Y. 39; 93 Am. Dec. 490; Faris v. Brooklyn City &c. R. Co. 46 App. Div. (N. Y.) 231; 61 N. Y. S. 670; West Chicago St. R. Co. v. Marks, 82 Ill. App. 185, affirmed in 182 Ill. 15; 55 N. E. 67; Craighead v. Brooklyn City R. Co. 123 N. Y. 391; 25 N. E. 387; Neslie v. Second &c. R. Co. 113 Pa. St. 300; 6 Atl. 72; note in 12 L. R. A. 129. Whether the conductor had authority to permit a passenger to stand on the running board has been held a question for the jury. Ft. Wayne Trac. Co. v. Hardendorf, 164 Ind. 403; 72 N. E. 593.

[174] North Chicago St. R. Co. v. Baur, 179 Ill. 126; 53 N. E. 568; 45 L. R. A. 108; Meesel v. Lynn &c. R. Co. 8 Allen (Mass.) 234; Nolan v. Brooklyn City &c. R. Co. 87 N. Y. 63; 41 Am. R. 345; Matz v. St. Paul City R. Co. 52 Minn. 159; 53 N. W. 1071; Marion St. R. Co. v. Shaffer, 9 Ind. App. 486; 36 N. E. 861; Terre Haute Elec. R. Co. v. Lauer, 21 Ind. App. 466; 52 N. E. 703; Pray v. Omaha St. Ry. Co. 44 Neb. 167; 62 N. W. 447; 48 Am. St. 717; Hesse v. Meriden &c. Co. 75 Conn. 571; 54 Atl. 299; Harbison v. Metropolitan R. Co. 9 App. (D. C.) 60; Doolittle v. Southern R. Co. 62 S. Car. 130; 40 S. E. 133; Upham v. Detroit City R. Co. 85 Mich. 12; 48 N. W. 199; 12 L. R. A. 129, and note; Seigel v. Eisen, 41 Cal. 109; Muldoon v. Seattle City R. Co. 7 Wash. 528; 35 Pac. 422; 22 L. R. A. 794; 38 Am. St. 901; Nellis St. R. Acc. Law, § 25; Clark's Acc. Law, 64, 77-89.

[175] Bruno v. Brooklyn City R. Co. 5 Misc. (N. Y.) 327; 25 N. Y. S. 507; Cummings v. Worcester &c. R. Co. 166 Mass. 220; 44 N. E. 126; Thirteenth &c. R. Co. v. Boudrou, 92 Pa. St. 475; 37 Am. R. 707; Reber v. Pittsburgh &c. Co. 179 Pa. St. 339; 36 Atl. 245; 57 Am. St. 599. See, also, Ft. Wayne Trac. Co. v. Hardendorf, 164 Ind. 403; 72 N. E. 593; Egan v. Old Colony St. R. Co. (Mass.) 80 N. E. 696.

[176] Watson v. Portland &c. R. Co. 91 Me. 584; 40 Atl. 699; 64 Am. St. 268; 44 L. R. A. 157; City R. Co. v. Lee, 50 N. J. L. 435; 14 Atl. 883; 7 Am. St. 798; Topeka City R. Co. v. Higgs, 38 Kans. 375; 16 Pac. 667; 5

where a passenger voluntarily rides on the running board or front platform or steps thereof, when he could readily obtain a seat inside it seems that he assumes the ordinary risks, and some authorities hold that this is prima facie evidence of negligence.[177] And a passenger who takes such a position must exercise reasonable care under the circumstances.[178] The passenger may also be guilty of contributory negligence in violating some rule or regulation of the company in force and forbidding such act.[179] And if he voluntarily sits upon the dashboard,[180] or rides upon the bumper,[181] or the

Am. St. 754; Geitz v. Milwaukee City R. Co. 72 Wis. 307; 39 N. W. 866; Germantown &c. R. Co. v. Walling, 97 Pa. St. 55; 37 Am. R. 796; Archer v. Ft. Wayne &c. R. Co. 87 Mich. 101; 49 N. W. 488; Bowie v. Greenville St. R. Co. 69 Miss. 196; 10 So. 574; Wilde v. Lynn &c. R. Co. 163 Mass. 533; 40 N. E. 851.

[177] Thane v. Scranton Trac. Co. 191 Pa. St. 249; 43 Atl. 136; 71 Am. St. 767; Kirchner v. Oil City St. R. Co. 210 Pa. St. 45; 59 Atl. 270; Bumbear v. United Trac. Co. 198 Pa. St. 198; 47 Atl. 961; Aikin v. Frankford &c. Co. 142 Pa. St. 47; 21 Atl. 781; Ashbrook v. Frederick Ave. R. Co. 18 Mo. App. 290; Clark v. Eighth Ave. R. Co. 36 N. Y. 135; 93 Am. Dec. 495. See, also, Caspars v. Dry Dock &c. Co. 22 App. Div. (N. Y.) 156; 47 N. Y. S. 961; Moylan v. Second Ave. R. Co. 128 N. Y. 583; 27 N. E. 977; Cassidy v. Atlantic Ave. R. Co. 9 Misc. (N. Y.) 275; 29 N. Y. S. 724; Elliott v. Newport St. R. Co. 18 R. I. 707; 28 Atl. 338; 31 Atl. 694; 23 L. R. A. 208; Booth St. Rys. §§ 338–341. See Wheeler v. South Orange &c. Trac. Co. 70 N. J. L. 725; 58 Atl. 927.

[178] See Rosen v. Dry Dock &c. R. Co. 91 N. Y. S. 333; Citizens' St. R. Co. v. Hoffbauer, 23 Ind. App. 614; 56 N. E. 54; Seller v. Market St. R. Co. 139 Cal. 267; 72 Pac. 1006; 1 St. R. 8, and note; Nugent v. Fair Haven &c. St. R. Co. 73 Conn. 139; 46 Atl. 875; Benedict v. Minneapolis &c. R. Co. 86 Minn. 224; 90 N. W. 360; 57 L. R. A. 639; 91 Am. St. 345; Flynn v. Consolidated Trac. Co. 64 N. J. L. 375; 45 Atl. 799; Coleman v. Second Ave. R. Co. 114 N. Y. 609; 21 N. E. 1064; Cummings v. Worcester &c. R. Co. 166 Mass. 220; 44 N. E. 126. Most of these citations are of cases where the passenger leaned out from the running board or step, and did not look, and was injured by collision with some object.

[179] Highland Ave. &c. R. Co. v. Donovan, 94 Ala. 299; 10 So. 139; Ft. Clark St. R. Co. v. Ebaugh, 49 Ill. App. 582; Baltimore &c. Road v. Cason, 72 Md. 377; 20 Atl. 113; Baltimore City &c. Co. v. Wilkinson, 30 Md. 224. See, also, Wills v. Lynn &c. R. Co. 129 Mass. 351; Burns v. Boston El. R. Co. 183 Mass. 96; 66 N. E. 418.

[180] Downey v. Hendrie, 46 Mich. 498; 9 N. W. 828; 41 Am. R. 177, approved in Upham v. Detroit City R. Co. 85 Mich. 12; 48 N. W. 199; 12 L. R. A. 129, and note.

[181] Bard v. Pennsylvania Trac. Co. 176 Pa. St. 97; 34 Atl. 953; 53 Am. St. 672; Nieboer v. Detroit El. R.

like,[182] he may be held guilty of contributory negligence even as a matter of law in a proper case.

§ 1096da. Making change and giving transfers.—A street railway company may make and enforce, in a proper case, reasonable rules as to obtaining tickets, making change, giving transfers, and the like.[183] But they must not be unreasonable and inconsistent with the rights of the public or the provisions of the charter or statute. Indeed, the giving of transfers, like the rate of fare, is frequently regulated largely by the charter, statute or contract with the municipality.[184] Questions as to the validity and enforcement of such rules and regulations most often arise where a passenger is ejected for failure to comply with them, but they may also arise, in some other instances, where there is a question as to whether one is a passenger or as to whether the company has violated its duty to him or he has been guilty of contributory negligence, or the like. As street railway companies often have no place, outside the cars, for purchasing tickets and fare is paid after the passenger has boarded the car, it would seem that some of the rules frequently enforced in the case of ordinary commercial railroads can not always apply, and it has been held that a tender of the exact fare is not, and cannot, always be required in such a case.[185] But a reasonable

128 Mich. 486; 87 N. W. 626. But see Grieve v. New Jersey St. R. Co. 65 N. J. L. 409; 47 Atl. 427.

[182] Butler v. Pittsburg &c. Co. 139 Pa. St. 195; 21 Atl. 500; Wills v. Lynn &c. R. Co. 129 Mass. 351; Sibley v. New Orleans City &c. Co. 49 La. Ann. 588; 21 So. 850; Barry v. Union Trac. Co. 194 Pa. St. 576; 45 Atl. 321; Ward v. Central Park &c. R. Co. 33 N. Y. Sup. Ct. (1 J. & S.) 392. See, also, Mann v. Philadelphia Trac. Co. 175 Pa. St. 122; 34 Atl. 572. But compare Bailey v. Tacoma Trac. Co. 16 Wash. 48; 47 Pac. 241; Adams v. Washington &c. R. Co. 9 App. (D. C.) 26; Kean v. West Chicago St. R. Co. 75 Ill. App. 38; Ginna v. Second Ave. R. Co. 67 N. Y. 596; Cornish v. Toronto St. R. Co. 23 U. C. C. P. 355; North Chicago St. R. Co. v. Baur, 179 Ill. 126; 53 N. E. 568; 45 L. R. A. 108.

[183] See Nellis St. R. Acc. Law, 79, 83, 86, and authorities cited in following notes to this section.

[184] See next following section.

[185] See Tarbell v. Central Pac. R. Co. 34 Cal. 616. As to regulations as to payment of fare, see, generally, Nashville St. R. Co. v. Griffin, 104 Tenn. 81; 57 S. W. 153; 49 L. R. A. 451; Perry v. Pittsburg &c. R. Co. 153 Pa. St. 236; 25 Atl. 772; Braun v. Northern Pac. R. Co. 79 Minn. 404; 82 N. W. 675; 49 L. R. A. 319; 79 Am. St. 497; Faber v. Chicago &c. R. Co. 62 Minn. 433; 64 N. W. 918; 36 L. R. A. 789.

sum may be required and a regulation of the company limiting the amount of change to be furnished by the conductor is valid.[186] In regard to transfers, it is said: "In cases where by law or by the contract the carrier is bound to furnish a transfer to his passengers over a connecting line, it must see to it that the correct transfer is furnished, and the passenger is not necessarily negligent if he fail to discover any error therein."[187] The same author also lays down the following propositions in a more recent work:

"A rule limiting the use of a transfer to the next car is proper, if there be room on such car for the passenger to ride with reasonable comfort and safety. A rule with respect to the punching of transfers is reasonable, if due precautions be taken to insure its observance and application in such a manner as to protect a passenger from the errors or mistakes of the conductor. If the passenger by reason of the inattention of the company's servants to its own rules regarding transfers, or to statutory requirement in that regard, is ejected, an action for the breach of the contract of transportation is not his only remedy. If it were, the carrier might be encouraged to employ negligent or incompetent conductors, to the serious annoyance and inconvenience of the traveling public, and passengers would not be afforded reasonable protection or security in their rights. If a passenger entered the car believing his transfer was valid, and was not negligent in failing to discover that it had been punched erroneously, he was there lawfully, and is entitled to maintain an action for the wrongful ejection, and to recover compensating damages for the loss of time, fare on another car and injury to his feelings because of the indignities suffered by him and his wrongful ejection from the car. Exemplary damages, however, will

[186] Barker v. Central Park &c. R. Co. 151 N. Y. 237; 45 N. E. 550; 35 L. R. A. 489; 56 Am. St. 626 (holding a regulation requiring change only to the amount of two dollars reasonable, and that tender of a five-dollar bill, where the fare was five cents, was not good); Fulton v. Grand Trunk R. Co. 17 U. C. Q. B. 428; Muldowney v. Pittsburg &c. Trac. Co. 8 Pa. Sup. Ct. 335; 43 W. N. C. 52; Knoxville Trac. Co. v. Wilkerson (Tenn.), 99 S. W. 992. But, in California, where five-dollar gold coin is the smallest gold coin in ordinary use, and gold is generally used, while the rule is recognized that an unreasonable amount of change cannot be required, such a tender has been held good. Barrett v. Market St. R. Co. 81 Cal. 296; 22 Pac. 859; 6 L. R. A. 336; 15 Am. St. 61.

[187] Nellis Street Surface R. 440.

not be awarded against a company, except for the malicious wrongful acts of its conductors, unless it appear that the employer has been guilty of negligence in employing or retaining the conductor, or has authorized or ratified his wrongful act, or the conductor has previously shown his incompetence or been guilty of misconduct."[188] In a recent case, although the passenger knew that he could have traveled to his destination by a route over which the company issued transfers, yet, as he had frequently traveled over the route selected and had received transfers, and on the occasion in question there was no notice of the discontinuance of transfers before he boarded the car or in time to select the other route, it was held that the company was liable for refusal to issue a transfer to him.[189] It has also been held that if the transfer slip or ticket designates the route by which the carrier may go so generally as to be applicable to several routes or lines, he may take either of them.[190] But the designation of the route and time within which the transfer may be made, or the like, must usually be complied with,[191] and the transfer ticket has been held conclusive in this respect.[192]

§ 1096db. Transfers—Statutes and rules and regulations.—Under a New York statute providing that a passenger desiring to make a continuous trip should be given a transfer, upon demand and with-

[188] Nellis St. R. Acc. Law, 84. See, also, Lawshe v. Tacoma R. &c. Co. 29 Wash. 681; 70 Pac. 118; 59 L. R. A. 350; Eddy v. Syracuse &c. Co. 50 App. Div. (N. Y.) 109; 63 N. Y. S. 645; Muckle v. Rochester R. Co. 79 Hun (N. Y.) 32; 29 N. Y. S. 732; O'Rourke v. Citizens' St. R. Co. 103 Tenn. 124; 52 S. W. 872; 46 L. R. A. 614; 76 Am. St. 639; Perrine v. North Jersey St. R. Co. 69 N. J. L. 230; 54 Atl. 799; Hayter v. Brunswick Trac. Co. 66 N. J. L. 575; 49 Atl. 714; Vining v. Detroit &c. R. Co. 122 Mich. 248; 80 N. W. 1080; Rouser v. North Park St. R. Co. 97 Mich. 565; 56 N. W. 937.

[189] Freeman v. New York City R. Co. 92 N. Y. S. 47. See, also, Consolidated Trac. Co. v. Laborn, 58 N. J. L. 1, 408; 32 Atl. 685.

[190] Pine v. St. Paul City R. Co. 50 Minn. 144; 52 N. W. 392; 16 L. R. A. 347.

[191] See Percy v. Metropolitan St. R. Co. 58 Mo. App. 75; Jenkins v. Brooklyn &c. R. Co. 29 App. Div. (N. Y.) 8; 51 N. Y. S. 216; Hanna v. Nassau El. R. Co. 18 App. Div. (N. Y.) 137; 45 N. Y. S. 437; Graves v. Newark &c. R. Co. 6 N. J. L. 307; Wakefield v. South Boston R. Co. 117 Mass. 544; Bradshaw v. South Boston R. Co. 135 Mass. 407; 46 Am. R. 481, and note; Hornesby v. Georgia &c. Co. 120 Ga. 913; 48 S. E. 339.

[192] Keen v. Detroit Elec. R. Co. 123 Mich. 247; 81 N. W. 1084.

out extra charge, entitling him to one continuous trip, upon another car to which he is transferred, it has been held unreasonable for the company to adopt an arbitrary time limit of ten minutes or less when no suitable accommodations are offered within such time.[193] But in a proper case, under other statutes, a reasonable time limit has been upheld.[194] And where the ordinance granting the franchise provided that the company should give transfers where one line intersected another and it appeared that the company owned a line which extended from the point of intersection with another line to the city limits, beyond which it was owned by a different corporation, which, however, ran its cars with the same operatives into the city to the point of intersection, it was held that this was an intersecting line to which the provision as to transfers applied.[195]

§ 1096dc. Liability for willful acts of employes.—There is some conflict in the cases as to whether a street railway company can be held liable for a willful wrong of one of its drivers or motormen.[196] In view of the fact that it is now quite well settled that corporations are liable for the willful acts of their employes when

[193] Jenkins v. Brooklyn &c. R. Co. 29 App. Div. (N. Y.) 8; 51 N. Y. S. 216. See, also, Topham v. Interurban St. R. Co. 42 Misc. (N. Y.) 503; 86 N. Y. S. 295, as to duty of company to give transfer and furnish accommodation. Lessee must do so. O'Reilly v. Brooklyn &c. R. Co. 179 N. Y. 450; 72 N. E. 517. But see Montpelier v. Barre &c. Co. 76 Vt. 66; 56 Atl. 278.

[194] Garrison v. United R. & El. Co. 97 Md. 347; 55 Atl. 371; 99 Am. St. 452. See, also, Heffron v. Detroit City R. Co. 92 Mich. 406; 52 N. W. 802; 31 Am. St. 601; 16 L. R. A. 345; Hornesby v. Georgia &c. Co. 120 Ga. 913; 48 S. E. 339; Crowley v. Fitchburg &c. St. R. Co. 185 Mass. 279; 70 N. E. 56 (regulation requiring production of transfer or payment of fare is reasonable).

[195] Passenger &c. Co. v. Commonwealth, 103 Va. 644; 49 S. E. 995. So transfer may be required where territory is afterward annexed to city. Indiana R. Co. v. Hoffman, 161 Ind. 593; 69 N. E. 399.

[196] Affirming that liability exists: Berke v. Twenty-third Avenue R. Co. 52 Hun (N. Y.) 611; 4 N. Y. S. 905; Stewart v. Brooklyn and Cross Town R. Co. 90 N. Y. 588; 43 Am. R. 185; Shea v. Sixth Avenue R. Co. 62 N. Y. 180. See, also, Birmingham R. &c. Co. v. Baird, 130 Ala. 334; 30 So. 456; 54 L. R. A. 752; 89 Am. St. 43; Eads v. Metropolitan R. Co. 43 Mo. App. 536; Lexington R. Co. v. Cozine, 111 Ky. 799; 64 S. W. 848; 98 Am. St. 430. See Day v. Brooklyn &c. R. Co. 76 N. Y. 593; Hanson v. Urbana &c. St. R. Co. 75 Ill. App. 474 (company held not liable for assault by motorman after passenger had alighted). See, generally, post, § 1265.

performed in the general line of the service in which the employes are engaged, it seems clear that street railway companies must be held liable for the willful wrongs of their drivers and conductors within the scope of their employment, but not otherwise. The cases which declare a different rule are founded upon the old doctrine of the English courts, which exculpates a master from liability for the willful act of his servant, but that rule has been much relaxed, if not entirely overthrown, in so far as it affects the liability of corporations. In a recent case,[197] the company was held liable where the conductor of one of its cars, in sport threw a dead hen at the motorman of the car upon which the plaintiff was riding and the hen missed the motorman and struck the window of the car near the plaintiff and injured the plaintiff. In considering the subject the court said:[198]

"We will assume in favor of the defendant that there was no evidence to warrant a finding that the conductor who threw the hen was acting within the scope of his employment, and therefore, under the rules of the law applicable to the ordinary relations of master and servant, the defendant would not be liable for the servant's act. But the plaintiff invokes a special rule applicable to common carriers. A common carrier of passengers impliedly agrees to exercise the utmost care and diligence, consistent with the proper management of his business, to protect his passengers from injury through the misconduct of other persons, while he is performing his contract for their transportation. They necessarily submit themselves in a large degree to his care and control, and he undertakes

[197] Hayne v. Union St. R. Co. 189 Mass. 551; 76 N. E. 219.

[198] Citing Simmons v. New Bedford &c. Steamboat Company, 97 Mass. 361; 93 Am. Dec. 99; Bryant v. Rich, 106 Mass. 180; 8 Am. R. 311; New Jersey Steamboat Co. v. Brockett, 121 U. S. 637; 7 Sup. Ct. 1039; 30 L. Ed. 1049; Goddard v. Grand Trunk R. Co. 57 Me. 202; 2 Am. R. 39; Stewart v. Brooklyn &c. R. Co. 90 N. Y. 588; 43 Am. R. 185; Dwinelle v. New York Central &c. R. Co. 120 N. Y. 117; 24 N. E. 319; 8 L. R. A. 224; 17 Am. St. 611; Haver v. Central R. Co. 62 N. J. L. 282–284; 41 Atl. 916; 43 L. R. A. 84; 72 Am. St. 647; Chicago & Eastern Illinois R. Co. v. Flexman, 103 Ill. 546–550; 42 Am. R. 33; Fick v. Chicago & Northwestern R. Co. 68 Wis. 469; 32 N. W. 527; 60 Am. R. 878; Indianapolis Union R. Co. v. Cooper, 6 Ind. App. 202; 33 N. E. 219; Terre Haute & Indiana R. Co. v. Jackson, 81 Ind. 19. See, also, Atlanta St. R. Co. v. Bates, 103 Ga. 333; 30 S. E. 41.

to provide for their safety in all those particulars which ought to be under his direction and management. Among these, to a certain extent, are the kind of persons permitted to approach the passengers on the carrier's premises, and the rules and regulations which govern the conduct of the carrier's servants and others, while the contract for carriage is being performed. While the carrier does not guaranty perfection in these particulars, he is under an obligation of implied contract, and consequent legal duty, to use a very high degree of care to prevent injuries that might be caused by the negligence or willful misconduct of others. This rule prevails generally in the American courts. In the application of the rule to injuries caused by servants of the carrier while engaged in the performance of his contract of carriage, it is held that he is liable absolutely for their misconduct."

§ 1096dd. Care as to persons at work on streets.—It may be said, generally, that the motorman must use the care which ordinarily prudent men would use under the circumstances, to prevent injury to persons at work on the streets, and whose work is of such a character as to make constant watchfulness for approaching street cars impracticable.[199] These persons are lawfully on the streets,[200] and are not to be treated as trespassers or bare licensees. Of persons so engaged Judge Thompson has said: "The proper discharge of their employment necessarily absorbs their care and attention. They can not keep their eyes on their work and at the same time look up and down the street for approaching cars or vehicles. Their situation is passive. They are driving no instrument of danger. It follows, both on moral and legal grounds, that if, while so absorbed at their work, they fail, even through inattention or negligence, to see an approaching street car in time to get out of the way and avoid it, this will not exonerate the street railway company, if the car is driven upon them under such circumstances that the driver, grip-

[199] Third Ave. R. Co. v. Krausz, 112 Fed. 379; 50 C. C. A. 293; Hennessey v. Forty-Second St. &c. R. Co. 44 Misc. (N. Y.) 198; 88 N. Y. S. 728; O'Connor v. Union R. Co. 67 App. Div. (N. Y.) 99; 73 N. Y. S. 606 (street sweeper); Wells v. Brooklyn Heights R. Co. 67 App. Div. (N. Y.) 212; 74 N. Y. S. 196; affirming s. c. 68 N. Y. S. 305.

[200] Owens v. Peoples' Pass. R. Co. 155 Pa. St. 334; 26 Atl. 748.

man or motorman might, by the exercise of ordinary or reasonable care, have seen them at their work in their exposed position, and might, by the exercise of like care, have warned them in time, or checked his car in time to avoid running upon them."[201] Though the motorman may in most cases assume that persons thus situated will heed his signals and get out of the way,[202] yet it is obviously his duty, at least where he ought to see that one is engaged in work or the like, to keep his car under control, so that he can stop it before running upon one who inadvertently fails to heed his signal.[203] It has been held, where motormen have been in the habit of giving certain warning signals to laborers at work on the street, that such laborers have a right to rely upon the giving of these signals, and may recover damages where they were not given, and as a result the injuries sued for were suffered.[204] In another case, where a car sufficiently cleared men at work in a trench at the side of the track, it was held that the company was not liable for injuries to a workman standing in the trench, caused by his being struck by the body of the conductor while passing around passengers standing on the footboard.[205]

§ 1096de. Deaf, blind and aged persons on the track.—A person of impaired hearing or eyesight is not regarded as negligent as a matter of law in attempting, unattended, to cross a street railway track.[206] But such persons are required to exercise more care in some respects than persons not so afflicted. Thus a person with impaired hearing is charged with the duty of a diligent use of his eyesight to learn whether he may safely cross a track or not.[207] And where such a person walks along the track it is clearly his duty

[201] 2 Thomp. Neg. (2d ed.) § 1391. But it may be that this statement is a little too strong in some respects.

[202] McKeown v. Cincinnati St. R. Co. 2 Ohio Leg. N. 388.

[203] Pittsburg Elec. R. Co. v. Kelly, 57 Kans. 514; 46 Pac. 945.

[204] Owens v. Peoples' Pass. R. Co. 155 Pa. St. 334; 26 Atl. 748. See, also, Ahearn v. Boston &c. R. Co. (Mass.) 80 N. E. 217.

[205] United Railway &c. Co. v. Fletcher, 95 Md. 533; 52 Atl. 608.

[206] Robbins v. Springfield St. R. Co. 165 Mass. 30; 42 N. E. 334.

[207] Aldrich v. St. Louis Transit Co. 101 Mo. App. 77; 74 S. W. 141; Hall v. West End St. R. Co. 168 Mass. 461; 47 N. E. 124. Atlantic &c. St. R. Co. v. Bates, 103 Ga. 333; 30 S. E. 41. See, also, Bennett v. Metropolitan St. Ry. Co. (Mo. App.) 99 S. W. 480.

to look back at short intervals to note the approach of cars from the rear, and his neglect to do so may amount to contributory negligence, defeating a recovery for injuries from being run into.[208] One court has held that a woman seventy-two years old was not, as a matter of law, chargeable with contributory negligence in attempting to cross a street railway track in front of an approaching car which was from ninety to one hundred feet distant at the time she stepped upon the track upon which said car was running.[209]

[208] Shanks v. Springfield Trac. Co. 101 Mo. App. 702; 74 S. W. 386.

[209] Walls v. Rochester R. Co. 92 Hun (N. Y.), 581; 36 N. Y. S. 1102. Affirmed in 154 N. Y. 771; 49 N. E. 1105.

CHAPTER XLVI.

HIGHWAY CROSSINGS.

§ 1097. What is included in highway crossing.—Strictly speaking a highway crossing may be defined as the space included within the boundaries of the right of way and the boundaries of the highway. In some cases this is the recognized meaning of the term highway crossing. The class of cases to which we refer is composed of those cases which hold that where a railway company is bound to put in wing fences and cattle-guards at public crossings, the fences and cattle-guards must be erected along the margin of the highway,[1] and not recede from or encroach upon it. A crossing, however, often embraces more than the mere space included in the boundaries referred to, and it may not include so much. Crossings are constructed for the purpose of enabling persons, horses and vehicles, or the like, to cross the railway tracks, and all the structures,

[1] See post, § 1197.

and the like, reasonably necessary to enable that object to be safely accomplished are included in the crossing. Thus embankments or approaches necessary to enable a traveler to get on or off the crossing are regarded as a part of the crossing.[2] Only such embankments, however, as are reasonably necessary to enable the crossing to be used can well be regarded as a part of the crossing. Where the highway is nearly level with the railway track, an embankment for a distance of twenty rods can not be regarded as a part of the crossing.[3] And where a railway company is required to construct good and sufficient crossings it is held that it is not necessary to construct a crossing the full width of the highway.[4] This, perhaps, would be the rule only where a limited portion of the highway was used for the actual purpose of travel. In cities where the entire width of the highway is used for travel we are of the opinion that a crossing would, ordinarily at least, be required for the entire width of the highway.[5] And under certain circumstances barriers and guard-rails may be such a necessary part of a railway crossing that the company will be bound to maintain them.[6]

§ 1098. Right to lay out highway across railway.—While the

[2] Moberly v. Kansas City &c. R. Co. 98 Mo. 183; 11 S. W. 569; Farley v. Chicago &c. R. Co. 42 Iowa, 234; Gulf &c. R. Co. v. Greenlee, 62 Tex. 344; 23 Am. & Eng. R. Cas. 322; Moggy v. Canadian Pac. R. Co. 3 Manitoba, 209; Beatty v. Central &c. R. Co. 58 Iowa, 242; 12 N. W. 332; Roxbury v. Central Vermont R. Co. 60 Vt. 121; 14 Atl. 92; Maltby v. Chicago &c. R. Co. 52 Mich. 108; 17 N. W. 717; Cincinnati &c. R. Co. v. Claire, 6 Ind. App. 390; 33 N. E. 918. In Collier v. Georgia &c. R. Co. 76 Ga. 611, it was said: "The crossing includes the width of the land on both sides, of the road allowed by charter or appropriated by the company therefor, and for as many feet beyond each way as is necessary for a traveler to get on and off the crossing safely or conveniently." See, also, See v. Wabash R. Co. 123 Ia. 443; 99 N. W. 106; Lake Erie &c. R. Co. v. Shelley, 163 Ind. 36; 71 N. E. 151.

[3] Beatty v. Central Iowa R. Co. 58 Iowa, 242; 12 N. W. 332; 8 Am. & Eng. R. Cas. 210.

[4] Ellis v. Wabash &c. R. Co. 17 Mo. App. 126.

[5] In Cleveland &c. R. Co. v. Johns, 106 Ill. App. 427, it is held that crossings and approaches in populous cities must be maintained for the full width of the street, but that in rural districts and villages it depends on circumstances and what is reasonably necessary to accommodate the public.

[6] Pittsburg &c. R. Co. v. Moses, 2 Atl. 188; 24 Am. & Eng. R. Cas. 295; Southern Ind. R. Co. v. McCarrell, 163 Ind. 469; 71 N. E. 156.

charters of railway companies are contracts within the provision of the federal constitution that no state shall pass any law impairing the obligation of contracts, the general rule is that such charters are granted and the franchises of railway companies are acquired subject to the police power of the state and to the right of eminent domain in favor of the public.[7] The public are entitled to have highways to meet the requirements of new and increased growth in business and population and it is well settled that railway companies acquire the right to construct their tracks subject to the dominant right of the state to cross their tracks with new streets and highways whenever the public necessity demands it.[8] Under a

[7] Ante, § 671; Elliott Roads and Streets (2d ed.), § 215; State v. District Court, 42 Minn. 247; 44 N. W. 7; 7 L. R. A. 121; Chicago &c. R. Co. v. Chicago, 140 Ill. 309; 29 N. E. 1109. "There is nothing more obvious," it is said in Cincinnati &c. R. Co. v. Morgan County, 143 Fed. 798, 799, "than that a railway company holds its right of way subject to the right of the sovereign to cross its right of way whenever the public convenience shall require the opening of new highways or the changing of the course of old ones." See, also, Houston &c. R. Co. v. Dallas (Tex. Civ. App.), 78 S. W. 525, 529, 530 (citing text); Boston &c. R. Co. v. County Com'rs, 79 Me. 386; 10 Atl. 113; Clarendon v. Rutland R. Co. 75 Vt. 6; 52 Atl. 1057.

[8] State v. District Court, 42 Minn. 247; 44 N. W. 7; 7 L. R. 121; Chicago &c. R. Co. v. Chicago, 140 Ill. 309; 50 Am. & Eng. R. Cas. 150; 29 N. E. 1109; Illinois Cent. R. Co. v. Chicago, 141 Ill. 586; 30 N. E. 1044, 1047; 17 L. R. A. 530; citing Elliott Roads and Streets, 598. The rule is thus expressed in the case of Ft. Wayne v. Lake Shore &c. R. Co. 132 Ind. 558; 32 N. E. 215; 18 L. R. A. 367, and note; 32 Am. St. 277: "Private corporations acquire the right to construct roads subject to the dominant right of the state to cross such road whenever the public necessity demands that new roads or streets shall be opened, and for this reason it is held that the general power to construct and open streets or other public highways carries with it the power to construct them across railroad tracks. Elliott Roads and Streets (2d ed.) § 222; Lake Erie &c. R. Co. v. Kokomo, 130 Ind. 224; 29 N. E. 780; State v. Easton &c. R. Co. 36 N. J. L. 181; Morris &c. R. Co. v. Central &c. R. Co. 31 N. J. L. 205; Baltimore &c. Co. v. Union R. Co. 35 Md. 224; 6 Am. R. 397; Little Miami &c. R. Co. v. Dayton, 23 Ohio St. 510; St. Paul &c. R. Co. v. Minneapolis, 35 Minn. 141; 27 N. W. 500; President &c. Canal Co. v. Whitehall, 90 N. Y. 21; Albany &c. R. Co. v. Brownell, 24 N. Y. 345." See, also, New York &c. Rd. Co. v. Drummond, 46 N. J. L. 644; Chicago &c. R. Co. v. Pontiac, 169 Ill. 155; 48 N. E. 485. In Chicago &c. R. Co. v. Joliet &c. R. Co. 105 Ill. 388; 44 Am. R. 799; 14 Am. & Eng. R. Cas. 62, it was said: "Unless, therefore, every railroad corporation takes its

general authority conferred upon the municipality to lay out and open streets and highways or to construct a highway from one point to another, power is implied to cross the tracks and rights of way of railway companies.[9] But under such a general power to cross a railway track a part of the railway can not be taken for the purpose of constructing a parallel or longitudinal street.[10] The right to take longitudinally is very different from the mere right to cross, for in the one case the rights of the railway company are materially impaired, while in the other the taking is such that both uses can stand together.[11] Where the two uses are such that both cannot stand together the general rule is that the railroad company's property cannot be taken for a street unless there is statutory authority authorizing it.[12] But under general authority to lay out streets across the tracks of a railway company it has been held that streets may be laid out across switches,[13] and even across yards where no franchise of the company is impaired thereby.[14]

§ 1099. Right to construct railway across highway.—The gen-

right of way subject to the right of the public to have other roads, both common highways and railways, constructed across its track whenever the public exigency might be thought to demand it, the grant of the privilege to construct a railroad across or through the state would be an obstacle in the way of its future prosperity of no inconsiderable magnitude."

[9] St. Paul &c. R. Co. v. Minneapolis, 35 Minn. 141; 27 N. W. 500; 24 Am. & Eng. R. Cas. 309; Lake Erie &c. R. Co. v. Kokomo, 130 Ind. 224; 29 N. E. 780; Hannibal v. Hannibal &c. R. Co. 49 Mo. 480. See, also, Bridgeport v. New York &c. R. Co. 36 Conn. 255; 4 Am. R. 63.

[10] Ante, §§ 49, 922; Bridgeport v. New York &c. R. Co. 36 Conn. 255; 4 Am. R. 63; Fort Wayne v. Lake Shore &c. R. Co. 132 Ind. 558; 32 N. E. 215; 18 L. R. A. 367, and note; 32 Am. St. 277.

[11] Lewis v. Germantown &c. Co. 16 Phila. 608.

[12] Infra, § 1104.

[13] Illinois Central R. Co. v. Chicago, 141 Ill. 586; 30 N. E. 1044; 51 Am. & Eng. R. Cas. 528.

[14] Philadelphia &c. R. Co. v. Philadelphia, 9 Phila. (Pa.) 563; Illinois Central R. Co. v. Chicago, 141 Ill. 586; 30 N. E. 1044; 17 L. R. A. 530; 51 Am. & Eng. R. Cas. 528; Commissioners v. Detroit &c. R. Co. 93 Mich. 58; 52 N. W. 1083; 51 Am. & Eng. R. Cas. 525. But where the yards are the property of the corporation streets cannot be constructed through them without the tender or payment of compensation, for in such a case there is a taking of private property for a public use. See, generally, on this subject, ante, § 966.

eral rule is that where a railway company is chartered with authority to construct a railway between certain termini the authority to cross highways between such termini exists by necessary implication.[15] So, authority to cross any "public road or way" has been held to include the right to cross city streets.[15a] In many states the general law under which railway companies are chartered confers upon them, in express terms, the right and authority to construct their lines across public highways.[16] The right to cross, however, is limited to the necessities of the crossing and no greater rights can be claimed than those reasonably necessary to enable the objects of the crossing to be accomplished.[17] It is the duty of the railway company constructing its lines across public highways, to do so in such a manner as to interfere with the right of the public to use the highway as little as possible and to restore the highway

[15] In Inhabitants v. Port Reading &c. R. Co. 49 N. J. Eq. 11; 23 Atl. 127; 50 Am. & Eng. R. Cas. 169, the court said: "The defendant is incorporated under the general railroad law, and, by that statute, acquires whatever rights it possesses in crossing highways. That it may cross a highway cannot be questioned. The right is given by implication from the bare authority to build a railroad connecting distant points between which there exist highways that must be crossed, and as well from expressions in the statute which assumes its existence; and, as it is impossible for a railroad to cross a highway without some incidental interference with it, such interference is also of necessity made lawful." Warren R. Co. v. State, 29 N. J. L. 353; Appeal of South Waverly (Pa.), 11 Atl. 245; 20 W. N. C. 209.

[15a] Canton v. Canton &c. Co. 84 Miss. 268; 36 So. 266; 105 Am. St. 428; 65 L. R. A. 561, and cases cited, also citing Elliott Roads and Streets (2d Ed.) § 1, note 3.

[16] Clawson v. Chicago &c. R. Co. 95 Ind. 152; Cook County v. Great Western R. Co. 119 Ill. 218; 10 N. E. 564.

[17] Inhabitants v. Port Reading &c. R. Co. 49 N. J. Eq. 11; 23 Atl. 127; 50 Am. & Eng. R. Cas. 169; Northern &c. R. Co. v. Mayor, 46 Md. 425; Palatka &c. R. Co. v. State, 23 Fla. 546; 3 So. 158; 11 Am. St. 395; Lehigh Valley R. Co. v. Orange Water Co. 42 N. J. Eq. 205; 7 Atl. 659. See, also, Jones v. Erie &c. R. Co. 169 Pa. St. 333; 32 Atl. 535; 47 Am. St. 916. It has been held that the crossing should not be permitted where the usefulness of the highway will be virtually destroyed. Osborne v. Jersey City &c. R. Co. 27 Hun (N. Y.) 589. So, it has been held that the mere non-user of a highway for two years does not entitle a railroad company crossing it to exclude the public by fencing the right of way. McNamara v. Minneapolis &c. R. Co. 95 Mich. 545; 55 N. W. 440.

to as safe a condition for travel as before the crossing was made so far as it can reasonably and practicably be done.[18] Where the right to cross exists and the company has acted on such right by constructing its line across the highway it may lay such additional parallel tracks as are reasonably necessary for it in the transaction of its business.[19]

§ 1100. Proceedings by municipality.—The proceeding by municipality in the matter of laying out streets is so largely a matter of statutory regulation and the statutes of the different states are so different that we cannot do more at this place than refer to some of the general principles governing such proceedings. Where it is sought to lay out a street across a railway company's right of way the general rule is that the railway company stands in some respects in the same position to the proceedings as any land-owner through whose lands the proposed street passes. The railway company must be made a party to the proceedings,[20] and it must be served with notice the same as other land-owners.[21] But where the railway company's interest does not appear of record and the statute provides that personal service shall be made only on persons whose interests appear of record the general notice by publication is sufficient to bind the railway company.[22] And the legislature may

[18] See infra, §§ 1105, 1106, where the duty of the company to restore the condition of the highway is fully discussed. See, also, Roxbury v. Central Vt. R. Co. 60 Vt. 121; 14 Atl. 92; Johnson v. St. Paul &c. R. Co. 31 Minn. 283; 17 N. W. 622; Louisville &c. R. Co. v. State, 3 Head (Tenn.) 523; 75 Am. Dec. 778; Paducah &c. R. Co. v. Com. 80 Ky. 147.

[19] Commonwealth v. Hartford &c. R. Co. 14 Gray (Mass.) 379; Bangor &c. R. Co. v. Smith, 47 Me. 34. But the right to construct and use more than one track may often depend upon the provisions of the statute granting the corporate franchise, and upon the license granted by the local authorities. See, also, Bangor &c. R. Co. v. Smith, 47 Me. 34.

[20] Detroit &c. R. Co. v. Detroit, 49 Mich. 47; 12 N. W. 904. A mortgagee need not be made a party. Grand Rapids v. Grand Rapids &c. R. Co. 58 Mich. 641; 26 N. W. 159.

[21] St. Paul &c. R. Co. v. Minneapolis, 35 Minn. 141; 24 Am. & Eng. R. Cas. 309; 27 N. W. 500; Long Island R. Co. v. Silverstone, 64 Hun (N. Y.) 634; 19 N. Y. Supp. 140. Service of notice upon a station agent upon whom service in suits against the company is valid is sufficient. State v. O'Conner, 78 Wis. 282; 47 N. W. 433.

[22] State v. Chicago &c. R. Co. 68 Iowa, 135; 26 N. W. 37.

provide that the notice as to everybody shall be constructive.[23] The statutes authorizing the proceedings usually provide a remedy for persons aggrieved by the action of the municipality. The remedy thus provided is, as a rule, exclusive and parties aggrieved must pursue the remedy provided. Thus, for example, where a remedy by appeal is provided the company must pursue that remedy for neither relief by certiorari,[24] nor by injunction,[25] will be granted.

§ 1101. **Proceedings by railway company.**—The general rule is, as we have said, that the authority conferred upon a railway company to construct its line from one point to another carries with it by implication authority to cross intervening highways. Where there is such authority and there is no statute regulating the subject the only proceedings required by a railway company to secure crossings over highways are such as are necessary to secure the right of way. It has been held that where the right of way has been secured from the land-owner, no further proceedings are as a rule, necessary to secure the right to cross the highway.[26] In some states, however,

[23] In St. Paul &c. R. Co. v. Minneapolis, 35 Minn. 141; 27 N. W. 500; 24 Am. & Eng. R. Cas. 309, it was said: "The plaintiff further complains that the notice of the condemnation proceedings, and the assessment of damages provided by the charter, and the only notice, in fact, given in this case, was by publication. It is certainly remarkable that, in a matter so important to the interest of property-holders, the legislature should have made no further or more adequate provision in the charter for notice of the pendency of proceedings for the assessment of damages in this class of cases. But this was a question for the legislature, and we do not think the proceedings void because the notice provided was constructive, or by publication. The proceedings are in rem, and it is the rule generally recognized that, in such cases, the legislature may provide that the compensation due the owner of the lands taken may be ascertained upon constructive notice merely, as well as upon personal notice."

[24] Little Miami &c. R. Co. v. Dayton, 23 Ohio St. 510; St. Paul &c. R. Co. v. Minneapolis, 35 Minn. 141; 27 N. W. 500; 24 Am. & Eng. R. Cas. 309; Detroit &c. R. Co. v. Graham, 46 Mich. 642; 14 Am. & Eng. R. Cas. 327; Lake Shore &c R. Co. v. Chicago &c. R. Co. 96 Ill. 125; Western &c. Railroad Co. v. Patterson, 37 Md. 125.

[25] Long Island R. Co. v. Silverstone, 19 N. Y. Supp. 140; 64 Hun (N. Y.) 634; Detroit &c. R. Co. v. Detroit, 91 Mich. 444; 52 N. W. 52. See, also, Lancy v. Boston, 185 Mass. 219; 70 N. E. 88; Erie R. Co. v. Buffalo, 96 App. Div. (N. Y.) 458; 89 N. Y. S. 122.

[26] Cook County v. Great Western &c. R. Co. 119 Ill. 218; 10 N. E.

statutes are in force which require railway companies to secure consent to construct their tracks across public highways, from the local authorities. Thus, under a New York statute, the company must after notice to the highway commissioners, obtain the consent of the supreme court, to construct its roads across the surface of any highway.[27] Where the highway sought to be crossed is owned by a private corporation, as a turnpike company, it is held that the turnpike company is entitled to compensation and in such a case the crossing should be secured either by agreement or condemnation,[28] for the crossing of such a highway is a taking of property for which compensation must be made. The crossing of a street or highway by a railway company within the limits of an incorporated village, town or city, stands on somewhat different grounds from such a crossing without such limits. Within such municipalities the authority over streets is very broad and it is generally held that the municipality has power to regulate and control the laying of railway tracks in or across the streets. The general rule is that as a condition precedent to the right to lay its tracks across streets in a municipality, consent must first be had from the proper municipal authorities.[29]

§ 1102. **Construction of crossing.**—As a general rule it is the duty of every railway company to construct and maintain in good condition its crossings over highways so far as the same can be done without interfering with the operation of the railway.[30] This duty,

564. In this case it was held that a board of county commissioners had no power to require railway companies to secure consent to cross highways.

[27] Osborne v. Jersey City &c. R. Co. 27 Hun (N. Y.) 589; Schermerhorn v. Mt. McGregor &c. R. Co. 52 N. Y. S. 892.

[28] Seneca Road Co. v. Auburn &c. R. Co. 5 Hill (N. Y.) 170; Fletcher v. Auburn &c. R. Co. 25 Wend. (N. Y.) 462; Indianapolis &c. Co. v. Belt R. Co. 110 Ind. 5; 10 N. E. 923; 32 Am. & Eng. R. Cas. 173.

[29] Cook County v. Great Western &c. R. Co. 119 Ill. 218; 10 N. E. 564; ante, §§ 1076, 1081.

[30] Burlington &c. R. Co. v. Koonce, 34 Neb. 479; 51 N. W. 1033; Lincoln v. St. Louis &c. R. Co. 75 Mo. 27; Moberly v. Kansas City &c. R. Co. 98 Mo. 183; 11 S. W. 569; State v. Chicago &c. R. Co. 29 Neb. 412; 45 N. W. 469; Farley v. Chicago &c. R. Co. 42 Iowa, 234; Thayer v. Flint &c. R. Co. 93 Mich. 150; 53 N. W. 216; Pittsburg &c. R. Co. v. Dunn, 56 Pa. St. 280; Paducah &c. R. Co. v. Commonwealth, 80 Ky. 147; Buchner v. Chicago &c. R. Co. 60 Wis. 264; 19 N. W. 56; Ferguson

as a rule, however, extends only to the crossings of such highways as were legally laid out or have become such by dedication or prescription.[31] The duty is now imposed by statute in nearly all of the states, but such duty exists independent of statute, at least as to all crossings which are in existence at the time the railway is constructed.[32] Where the duty is imposed by statute the weight of authority is to the effect that it applies to crossings of highways laid out after the construction of the railway, as well as those in existence at the time of its construction.[33] There is, however, some con-

v. Virginia &c. R. Co. 13 Nev. 184. See, also, Baltimore &c. R. Co. v. State, 159 Ind. 510, 518; 65 N. E. 508 (citing text).

[31] Gulf &c. R. Co. v. Montgomery, 85 Tex. 64; 19 S. W. 1015; Gurley v. Missouri &c. R. Co. 104 Mo. 211; 16 S. W. 11. But see Kelly v. Southern Minn. R. Co. 28 Minn. 98; 9 N. W. 588. See, generally, and compare, Missouri &c. R. Co. v. Long, 27 Kans. 684; Johanson v. Boston &c. R. Co. 153 Mass. 57; 26 N. E. 426; Retan v. Lake Shore &c. R. Co. 94 Mich. 146; 53 N. W. 1094; Missouri &c. R. Co. v. Bridges, 74 Tex. 520; 15 Am. St. 856; 12 S. W. 210; Taylor &c. R. Co. v. Warner, 88 Tex. 642; 32 S. W. 868.

[32] See Moberly v. Kansas City &c. R. Co. 98 Mo. 183; 11 S. W. 569.

[33] Chicago &c. R. Co. v. Chicago, 140 Ill. 309; 29 N. E. 1109; 50 Am. & Eng. R. Cas. 150; Illinois Cent. R. Co. v. Willenborg, 117 Ill. 203; 7 N. E. 698; 57 Am. R. 862; Louisville &c. R. Co. v. Smith, 91 Ind. 119; 13 Am. & Eng. R. Cas. 608; State v. Shardlow, 43 Minn. 524; 46 N. W. 74; 45 Am. & Eng. R. Cas. 106; State v. Chicago &c. R. Co. 29 Neb. 412; 45 N. W. 469; 42 Am. & Eng. R. Cas. 248; Lancaster County v. Chicago &c. R. Co. 29 Neb. 412; 45 N. W. 469; Missouri Pac. R. Co. v. Cass County (Neb.), 107 N. W. 773; Dyer Co. v. Railroad, 87 Tenn. 712; Chesapeake &c. R. Co. v. Dyer Co. 38 Am. & Eng. R. Cas. 676; State v. District Court, 42 Minn. 247; 44 N. W. 7; 7 L. R. A. 121; 42 Am. & Eng. R Cas. 241; State v. St. Paul &c. R. Co. (Minn.) 108 N. W. 261, reviewing the authorities; Lake Erie &c. R. Co. v. Shelley, 163 Ind. 36, 41; 71 N. E. 151 (citing text). Most of these decisions expressly, and others impliedly, hold such a statute constitutional, especially where there is a reserved power to amend or repeal the charter. See, also, Albany &c. R. Co. v. Brownell, 24 N. Y. 345; People v. Boston &c. R. Co. 70 N. Y. 569; Boston &c. R. Co. v. Greenbush, 52 N. Y. 510; Portland &c. R. Co. v. Deering, 78 Me. 61; 2 Atl. 670; 23 Am. & Eng. R. Cas. 51; 57 Am. R. 784; Georgia &c. R. Co. v. Smith, 128 U. S. 174; 9 Sup. Ct. 47; Westbrook's Appeal, 57 Conn. 95; 17 Atl. 368; New York &c. R. Co. v. Bristol, 62 Conn. 527; 26 Atl. 122, affirmed in 14 Sup. Ct. 431; Chicago &c. R. Co. v. Chicago, 166 U. S. 226; 17 Sup. Ct. 581; Vandalia R. Co. v. State, (Ind.), 76 N. E. 980, 981 (citing text). But the statute is not al-

flict in the authorities, some holding that a railway company is not bound to construct crossings over highways which are not in existence at the time of the construction of the railway.[34] We are of the opinion that the better rule is that laid down in the cases holding that the duty may be imposed upon the company to construct the class of crossings referred to. The authority to require railroad companies to construct crossings at highways, rests upon the police power of the state, and as a railway company acquires its rights subject to the police power, it seems to us that it is a just exercise of such power to hold that railway companies may be compelled to construct crossings at those highways which are afterwards opened and laid out across their rights of way.[35] The doctrine which we have

ways construed as applying to streets thereafter laid out across existing railroads. State v. Morgan's &c. Co. 111 La. Ann. 120; 35 So. 482. See Houston &c. R. Co. v. Dallas, 98 Tex. 396; 84 S. W. 648; 70 L. R. A. 850, and note, as to power of city to require company to change or conform to grade.

[34] Rock Creek Tp. v. St. Joseph &c. Co. 43 Kan. 543; 23 Pac. 585; 42 Am. & Eng. R. Cas. 255; State v. Wilmington &c. R. Co. 74 N. Car. 143; People v. Lake Shore &c. R. Co. 52 Mich. 277; 17 N. W. 841. In several jurisdictions it is held that the railroad company cannot constitutionally be compelled to construct a crossing in such a case without compensation. See Massachusetts &c. R. Co. v. Boston &c. R. Co. 121 Mass. 124; Old Colony R. Co. v. Inhabitants &c. 14 Gray (Mass.) 155; Illinois Central R. Co. v. Bloomington, 76 Ill. 447; Chicago &c. R. Co. v. Hough, 61 Mich. 507; 28 N. W. 532; Detroit v. Detroit &c. Co. 43 Mich. 140; 5 N. W. 275; People v. Detroit &c. R. Co. 79 Mich. 471; 44 N. W. 934; 7 L. R. A. 717; 2 Lewis' Am. R. & Corp. 215; Chicago &c. R. Co. v. Comrs. Chautauqua Co. 49 Kan. 763; 31 Pac. 736; State v. Capner, 49 N. J. L. 555; 9 Atl. 781; Northern &c. R. Co. v. Mayor, 46 Md. 425; Gulf &c. R. Co. v. Rowland, 70 Tex. 298; 7 S. W. 718; 35 Am. & Eng. R. Cas. 286; post, § **1103**. In Kansas City v. Kansas City Belt R. Co. 102 Mo. 633; 14 S. W. 808; 10 L. R. A. 851; 3 Lewis' Am. R. & Corp. 522, it was held that a company which had constructed a proper bridge or viaduct was entitled to compensation for the expense of altering it to conform to the street as thereafter widened by the city.

[35] Portland &c. R. Co. v. Deering, 78 Me. 61; 2 Atl. 670; 57 Am. R. 784; 23 Am. & Eng. R. Cas. 51; Boston &c. R. Co. v. County Com'rs, 79 Me. 386; 10 Atl. 113; 32 Am. & Eng. R. Cas. 271; Toledo &c. R. Co. v. Deacon, 63 Ill. 91; Chicago &c. R. Co. v. Chicago, 140 Ill. 309; 29 N. E. 1109; 50 Am. & Eng. R. Cas. 150; Gulf &c. R. Co. v. Rowland, 70 Tex. 298; 7 S. W. 718; 35 Am. & Eng. R. Cas. 286. In State v. Chicago &c. R. Co. 29 Neb. 412; 45 N. W. 469; 42 Am. & Eng. R. Cas. 248, the court said: "The re-

stated is well supported by those cases which hold that railway companies may be required by laws passed subsequent to the granting of their charters, and the construction of their lines, to fence their tracks, to put in cattle-guards, to give signals or to do other acts for the safety and protection of the public.[36] The duty to construct and maintain a suitable crossing is a continuing one and the company may be compelled to perform it, so as to meet and provide for the increased needs of the traveling public.[37]

§ 1103. Damages where highway is opened across a railroad. —In those jurisdictions in which it is held that a railroad company is entitled to compensation where a highway is laid out across its track, it is frequently difficult to determine the exact elements of compensation or measure of damages. It is generally held that compensation should be made both for the use of the land actually taken, or its value subject to its use by the railroad company, and for any additional expense created by the use of the right of way for the street, together with such other damages as may be sustained

spondent insists that the act is not constitutional, as it imposes a burden on the corporation that did not exist when it was incorporated. Under the general public power of the state, the legislature has authority to place new and additional burdens upon corporations, when such burdens are for the safety of the people and for the public good, although the power to do so may not be reserved in the charter." See, also, Chicago &c. R. Co. v. Milwaukee, 97 Wis. 418; 72 N. W. 1118; Illinois Cent. R. Co. v. Swalm, 83 Miss. 631; 36 So. 147; Harriman v. Southern R. Co. 111 Tenn. 538; 82 S. W. 213; State v. Northern Pac. R. Co. (Minn.) 108 N. W. 269; Railway Co. v. People, 200 U. S. 561; 26 Sup. Ct. 341.

[36] Ohio &c. R. Co. v. McClelland, 25 Ill. 140; Chicago &c. R. Co. v. Joliet &c. R. Co. 105 Ill. 388; 44 Am. R. 799; Galena &c. R. Co. v. Dill, 22 Ill. 265; Illinois Central R. Co. v. Willenborg, 117 Ill. 203; 7 N. E. 698; 57 Am. R. 862; Galena &c. R. Co. v. Loomis, 13 Ill. 548; 56 Am. Dec. 471; Chicago &c. R. Co. v. Irons (Ind. App.), 78 N. E. 207.

[37] State v. St. Paul &c. R. Co. 35 Minn. 131; 28 N. W. 3; 59 Am. R. 313; Cooke v. Boston &c. R. Co. 133 Mass. 185; 10 Am. & Eng. R. Cas. 328; Burritt v. New Haven, 42 Conn. 174; Manley v. St. Helens &c. R. Co. 2 Hurl. and N. 840; post, § 1112. See, also, Kansas City v. Kansas City Belt R. Co. 102 Mo. 633; 14 S. W. 808; 10 L. R. A. 851; 3 Lewis' Am. R. & Corp. R. 522, citing Elliott Roads and Streets, 599; State v. St. Paul &c. R. Co. (Minn.) 108 N. W. 261 (also holding that a contract by a city abdicating its police power in this regard is not binding).

by injury to the track, right of way or franchise, as a natural and proximate result of the opening and use of the street across the track and right of way, but not for expenses necessary in order to comply with mere police regulations, or, in other words, the compensation should include such damages as arise in making the necessary structural changes and necessarily continue in the future operation and management of the road, but not such damages or expenses as are incurred in complying with the ordinary police regulations of the state or municipality.[38] In Massachusetts, however, while the general rule is recognized that the increased expense of ringing bells and giving signals in compliance with police regulations should not be included, it is held that the expense of erecting and maintaining signboards and cattle-guards should be included.[39] In Minnesota the contrary view is taken,[40] but the courts of both states agree in

[38] Grand Rapids v. Grand Rapids &c. R. Co. 66 Mich. 42; 33 N. W. R. 15; State v. District Court, 42 Minn. 247; 7 L. R. A. 121, and note; Old Colony &c. R. Co. v. Plymouth County, 14 Gray (Mass.) 155; Boston &c. R. Co. v. Cambridge, 159 Mass. 283; 34 N. E. 382. But compare Chicago &c. R. Co. v. Chicago, 140 Ill. 309; 29 N. E. 1109; 50 Am. & Eng. R. Cas. 150; Commissioners of Parks v. Chicago &c. R. Co. 91 Mich. 291; 51 N. W. 934; Chicago &c. R. Co. v. Milwaukee, 97 Wis. 418; 72 N. W. 1118, 1121 (citing text and reviewing authorities).

[39] Old Colony &c. R. Co. v. Plymouth County, 14 Gray (Mass.) 155. See, also, State v. Bayonne, 51 N. J. L. 428; 17 Atl. 971; Morris &c. R. Co. v. Orange, 63 N. J. L. 252; 43 Atl. 730; Massachusetts &c. R. Co. v. Boston &c. R. Co. 121 Mass. 124; Chicago &c. R. Co. v. Hough, 61 Mich. 507; 28 N. W. 532; Kansas &c. R. Co. v. Jackson County, 45 Kan. 716; 26 Pac. 394.

[40] State v. District Court, 42 Minn. 247; 44 N. W. 7; 7 L. R. A. 121; State v. Shardlow, 43 Minn. 524; 46 N. W. 74; 45 Am. & Eng. R. Cas. 106. And in a recent Nebraska case it is said: "The authorities are in no wise uniform in the conclusions reached as to the particular items of damage which should or should not fall within the provisions of the statute. The weight of authority, however, is, that under statutes similar to our own such items of damage as are necessitated and occasioned by the operation of the railroad, as the erection of sign posts, the construction of wing fences and cattle guards, and the building of approaches from the public road to the railroad track, are within the clear letter of the statute, and must be borne by the railroad company without compensation. With reference to the costs that necessarily would have been expended by the public in making the highway, had the railroad never been constructed, the opinions are divergent; but, as the exercise of the police power under this section

holding that company is entitled to compensation for planking the roadway, and maintaining such planking, where the street crosses the tracks. Under an Illinois statute, however, the railroad company is not entitled to compensation for the expense of grading and planking where a street is laid across the tracks under the power of eminent domain.[41] No damages should be allowed for mere interruptions or inconveniences causing a slower movement of trains, or the like, nor for the increased danger of accidents at the crossing.[41a] In Michigan, it has been held that where, by reason of the condemnation of a highway crossing over a company's tracks, an adjacent warehouse of the company, and the land on which it stands, are rendered less available and less valuable, the company is entitled to compensation for such damage.[42] Alleged benefits to the company

of the statute frequently casts onerous burdens on public service corporations, and as the doctrine announced by this court, when the statute was first interpreted, is supported by the authority therein quoted (People v. Lake Shore &c. R. Co. 52 Mich. 277; 17 N. W. 841), and, though a deviation from the letter, is in harmony with the spirit of the enactment, we see no reason for changing the rule which has long been acquiesced in. Applying these principles to the items of damage claimed in the case at bar, the trial court was clearly right in excluding from the estimate the cost of putting in cattle guards, building wing fences, and constructing necessary approaches from the highway to the track. We think, however, that, for the land condemned within the plaintiff's right of way for public use, there should have been compensatory, and not mere nominal damages, awarded. It matters not whether the right of the plaintiff in the land was a mere easement or a fee-simple title." Missouri Pac. R. Co. v. Cass County (Neb.), 107 N. W. 773. Compare Mayor v. Cowen, 88 Md. 447; 41 Atl. 900; 71 Am. St. 433; Cincinnati &c. R. Co. v. Troy, 68 Ohio St. 510; 67 N. E. 1051. See State v. St. Paul &c. R. Co. (Minn.) 108 N. W. 261; Railway Co. v. Osborn, 189 U. S. 383; 23 Sup. Ct. 540; Gulf &c. R. Co. v. Milam County, 90 Tex. 355; 38 S. W. 747.

[41] Chicago &c. R. Co. v. Pontiac, 169 Ill. 155; 48 N. E. 485, and cases cited. But see and compare Chicago &c. R. Co. v. Milwaukee, 97 Wis. 418; 72 N. W. 1118.

[41a] Chicago &c. R. Co. v. Chicago, 140 Ill. 309; 29 N. E. 1109; Portland &c. R. Co. v. Deering, 78 Me. 61; 2 Atl. 670; 57 Am. R. 784; Boston &c. R. Co. v. County Com'rs, 79 Me. 386; 10 Atl. 113; 32 Am. & Eng. R. Cas. 271; Old Colony &c. R. Co. v. Plymouth County, 14 Gray (Mass.) 155; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604; Bridgeport v. New York &c. R. Co. 36 Conn. 255; 4 Am. R. 63.

[42] Commissioners of Parks v. Chicago &c. R. Co. 91 Mich. 291; 51 N. W. 934. See, also, Portland &c. R. Co. v. Deering, 78 Me. 61; 2 Atl. 670; 57 Am. R. 784.

on account of increase in its traffic or business arising from the increased facility for travel which the highway affords are not to be taken into consideration.[43]

§ 1104. Impairing rights of railway company.—The rule is that where property is already devoted to one public use it can not be taken for another public use, unless there is a statute which clearly authorizes such a taking. Where property is already devoted to one public use it can, as a rule, be taken for another public use, only where authority is clearly conferred by statute, and then upon just compensation paid or tendered. Where a street is laid out across the right of way of a railway company at a point where the company has only a track or switch, no question can justly arise as to an impairment of the company's franchise by such taking, for under such circumstances both the use as a highway and the use as a railway can stand together and do not interfere with each other.[44] But where it is sought to lay out a highway through a depot of a railway company, the use is such as to destroy or materially impair the franchise or property rights of the company, and the construc-

[43] State v. Shardlow, 43 Minn. 524; 46 N. W. 74; Old Colony &c. R. Co. v. Plymouth County, 14 Gray (Mass.) 155; Boston &c. R. Co. v. Middlesex, 1 Allen (Mass.) 324.

[44] In Cincinnati &c. R. Co. v. Anderson, 139 Ind. 490; 38 N. E. 167; 47 Am. St. 285, it was said: "Under the general law permitting cities to establish streets, we have no doubt of the implied power to extend streets transversely across the right of way of a railroad when in so doing the uses for which such right of way is employed are not materially injured or destroyed, and where such uses, and those for a street, may coexist without impairment of the first uses. But where such uses cannot so coexist, or where the first use is materially impaired or destroyed, it is well settled, in this state and elsewhere, that the second public use will be denied. Lake Erie &c. R. Co. v. Boswell, 137 Ind. 336; 36 N. E. 1103; Ft. Wayne v. Lake Shore &c. R. Co. 132 Ind. 558; 32 N. E. 215; 18 L. R. A. 367, and note; 32 Am. St. 277; Seymour v. Jeffersonville &c. R. Co. 126 Ind. 466; 26 N. E. 188; Valparaiso v. Chicago &c. R. Co. 123 Ind. 467; 24 N. E. 249; Prospect Park &c. R. Co. v. Williamson, 91 N. Y. 552; Buffalo, In re, 68 N. Y. 167; Boston &c. R. Co. In re, 53 N. Y. 574; Albany &c. R. Co. v. Brownell, 24 N. Y. 345; Milwaukee &c. R. Co. v. Faribault, 23 Minn. 167; Hannibal &c. R. Co. v. Muder, 49 Mo. 165; Mohawk &c. R. Co. v. Artcher, 6 Paige (N. Y.) 83; St. Paul &c. Co. v. St. Paul, 30 Minn. 359; 15 N. W. 684; New Jersey &c. R. Co. v. Long Branch Com'rs, 39 N. J. L. 28."

tion of the street or highway, except where the statute authorizes the taking and makes provision for the payment of compensation, will not be permitted.[45] The location and construction of a highway through ground intended for a station-house or engine-house may, in the proper case, be enjoined;[46] and so may the location and construction of a highway through a round-house,[47] or a park used exclusively as a place for amusement and accommodation of passengers.[48] A highway may, however, be laid out over a mere collection of tracks used for switching, handling and storing cars.[49] A railway company having acquired lands and erected thereon permanent structures to enable it to transact its business, to permit a street to be opened through such lands and structures would have the effect to destroy franchises of the company, and prevent it from performing its public duties, and in all such cases the company's property can never be taken for a street, unless the right to take is clearly conferred upon the municipality,[50] and provision made for compensation. A fuller consideration of the general subject of this section will be found in the chapter on appropriation under the eminent domain.

§ 1105. Restoring condition of highway.—The right of a railway company to lay out its rights of way and construct its tracks across public highways does not carry with it the right to destroy

[45] Chicago &c. R. Co. v. Wilson, 17 Ill. 123; New York &c. R. Co. In re, v. Kip, 46 N. Y. 546; 7 Am. R. 385; Hannibal &c. R. Co. v. Muder, 49 Mo. 165; St. Paul &c. R. Co. v. St. Paul, 30 Minn. 359; 15 N. W. 684.

[46] New York &c. R. Co. In re, 77 N. Y. 248; Low v. Galena &c. R. Co. 18 Ill. 324.

[47] Cincinnati &c. R. Co. v. Anderson, 139 Ind. 490; 38 N. E. 167; 47 Am. St. 285.

[48] Prospect Park &c. R. Co. v. Williamson, 91 N. Y. 552.

[49] Philadelphia &c. R. Co. v. Philadelphia, 9 Phila. (Pa.) 563; Illinois Central R. Co. v. Chicago, 141 Ill. 586; 30 N. E. 1044; 17 L. R. A. 530; 51 Am. & Eng. R. Cas. 528; Commissioners v. Detroit &c. R. Co. 93 Mich. 58; 52 N. W. 1083; 51 Am. & Eng. R. Cas. 525; Commissioners v. Michigan &c. R. Co. 90 Mich. 385; 51 N. W. 447; 50 Am. & Eng. R. Cas. 144. See Boston &c. R. Co. v. Greenbush, 52 N. Y. 510.

[50] Milwaukee &c. R. Co. v. Faribault, 23 Minn. 167; Fort Wayne v. Lake Shore &c. R. Co. 132 Ind. 558; 32 N. E. 215; 18 L. R. A. 367, and note; 32 Am. St. 277; Valparaiso v. Chicago &c. R. Co. 123 Ind. 467; 24 N. E. 249; Winona &c. R. Co. v. Watertown, 4 S. Dak. 323; 56 N. W. 1077; Housatonic R. Co. v. Lee &c. R. Co. 118 Mass. 391.

the highway.[51] Where a railway company constructs its tracks over a public highway the rule is that it must be done with as little injury as is practicably possible to the highway.[52] In the very nature of things it is of course impossible to lay out and construct a railway across a public highway without doing some injury to the highway and to a reasonable extent injury is to be expected, but the authorities are all to the effect that the construction must be such as to not unnecessarily interfere with or impair the usefulness of the highway.[53] As a rule the duty rests upon the railway company to restore every highway crossed by its line to as safe a condition for travel as it was in before the construction of the line, so far as it is reasonably practicable for it to be done.[54] It is not always possible to make a highway as safe for travel as it was before the construction of the railway, but this must be done so far as it is practicable to do so. The duty imposed upon railway companies to restore highways to their former condition of usefulness is usually imposed by general statute[55] although the duty may be imposed

[51] "A grant to a railroad company of the right to construct its road along, upon, or across, or to use, an existing highway, is not to be construed as a power to destroy the highway as such." Palatka &c. R. Co. v. State, 23 Fla. 546; 3 So. 158; 11 Am. St. 395.

[52] Northern &c. R. Co. v. Baltimore, 46 Md. 425; Palatka &c. R. Co. v. State, 23 Fla. 546; 3 So. 158; 11 Am. St. 395. See, also, Kyne v. Wilmington &c. R. Co. 8 Hous. (Del.) 185; 14 Atl. 922; Caldwell v. Vicksburg &c. R. Co. 41 La. Ann. 624; 6 So. 217; Elliott Roads & Sts. (2nd ed.) § 779.

[53] People v. Dutchess &c. R. Co. 58 N. Y. 152; People v. New York &c. Co. 74 N. Y. 304; Northern Central R. Co. v. Commonwealth, 90 Pa. St. 300; Kansas v. Kansas City &c. R. Co. 102 Mo. 633; 14 S. W. 808; 10 L. R. A. 851; 47 Am. & Eng. R. Cas. 157; State v. Hannibal &c. R. Co. 86 Mo. 13; Roxbury v. Central Vermont R. Co. 60 Vt. 121; 14 Atl. 92; Paducah &c. R. Co. v. Commonwealth, 80 Ky. 147; 10 Am. & Eng. R. Cas. 318; Chester v. Baltimore &c. R. Co. 140 Pa. St. 275; 21 Atl. 320; Osborne v. Jersey City &c. R. Co. 27 Hun (N. Y.), 589.

[54] Cott v. Lewiston &c. R. Co. 36 N. Y. 214; Gale v. New York &c. R. Co. 76 N. Y. 594; Masterson v. New York &c. R. Co. 84 N. Y. 247; 38 Am. R. 510, and note; Peoria &c. R. Co. v. Lyons, 9 Ill. App. 350; Louisville &c. R. Co. v. Pritchard, 131 Ind. 564; 31 N. E. 358; 31 Am. St. 451; Cooke v. Boston &c. R. Co. 133 Mass. 185; 10 Am. & Eng. R. Cas. 328. See, also, Cunningham v. Thief River Falls, 84 Minn. 21; 86 N. W. 763, 786, citing Elliott Roads & Sts. (2d ed.) § 779.

[55] Little Miami Railroad v. Commissioners, 31 Ohio St. 338; Palatka &c. R. Co. v. State, 23 Fla. 546;

by the charter granted to the company.[56] The duty, however, rests upon the company at common law, and it may be compelled to restore highways although there is no statute upon the subject and the company's charter is silent in reference to the matter.[57] In

3 So. 158; 11 Am. St. 395; Evansville &c. R. Co. v. Crist, 116 Ind. 446; 19 N. E. 310; 2 L. R. A. 450; 9 Am. St. 865; Dallas &c. R. Co. v. Able, 72 Tex. 150; 9 S. W. 871; 37 Am. & Eng. R. Cas. 453; St. Louis &c. R. Co. v. Johnson, (Tex. Civ. App.), 85 S. W. 476; Schermerhorn v. Mt. McGregor R. Co. 52 N. Y. St. 892; People v. Troy &c. R. Co. 37 How. Pr. (N. Y.) 427; Roberts v. Chicago &c. R. Co. 35 Wis. 679; Chicago &c. R. Co. v. Payne, 59 Ill. 534; Inhabitants v. Port Reading R. Co. 49 N. J. Eq. 11; 23 Atl. 127; 50 Am. & Eng. R. Cas. 169; Johnson v. Providence &c. R. Co. 10 R. I. 365; Missouri &c. R. Co. v. Long, 27 Kan. 684; 6 Am. & Eng. R. Cas. 254; Atchison &c. Ry. Co. v. Townsend, 71 Kans. 524; 81 Pac. 205. See, also, Seybold v. Terre Haute &c. R. Co. 18 Ind. App. 367; 46 N. E. 1054, 1058 (citing text); Chicago &c. R. Co. v. State, 158 Ind. 189; 63 N. E. 224, 226. (Also citing text.)

[56] People v. Chicago &c. R. Co. 67 Ill. 118; Dyer County v. Railroad, 87 Tenn. 712; 11 S. W. 943; Chesapeake &c. R. Co. v. Dyer County, 38 Am. & Eng. R. Cas. 676; People v. Chicago &c. R. Co. 67 Ill. 118. See, also, West Jersey &c. R. Co. v. Waterford Twp. 64 N. J. 663; 55 Atl. 157.

[57] People v. Chicago &c. R. Co. 67 Ill. 118; State v. St. Paul &c. R. Co. 35 Minn. 131; 28 N. W. 3; 59 Am. R. 313; Northern &c. R. Co. v. Baltimore, 46 Md. 445; Louisville &c. R. Co. v. State, 3 Head (Tenn.), 523; 75 Am. Dec. 778; Pierce Railroads, 245. In Palatka &c. R. Co. v. State, 23 Fla. 546; 3 So. 158; 11 Am. St. 395, the court said: "Where the statute is silent, the common law applies, and a statute which expresses specifically no further exaction than a restoration of the highway to its former condition is not to be construed as abridging the common law duty of maintaining the crossing in such plight as to make it reasonably safe. Maltby v. Chicago &c. R. Co. 52 Mich. 108; 17 N. W. 717." In Dyer County v. Railroad, 87 Tenn. 712; 11 S. W. 943; Chesapeake &c. R. Co. v. Dyer County, 38 Am. & Eng. R. Cas. 676, the court said: "It is a well-settled rule of the common law resting upon the most obvious consideration of fairness and justice, that, where a new highway is made across another one already in use, the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary to the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way." See, also, Hicks v. Chesapeake &c. R. Co. 102 Va. 197; 45 S. E. 888. It has also been held that the company is not relieved from this duty merely because a street railway company is also under a duty to repair the crossing. Masterson v.

restoring the highway the company may, if that be necessary and no private rights are invaded, change the location of the highway, or, slightly change its course, if that be necessary to make the highway reasonably safe for travel[58] and it has been held that the company may condemn property for the purpose of the necessary approaches and abutments to the new crossing.[59] Whether the railway company has properly restored the highway is ordinarily a question for the jury.[60]

§ 1106. Mandamus to compel restoration.—Mandamus is the appropriate remedy to compel a railroad company to perform its duty to restore a highway over which it crosses to its former condition of usefulness.[61] It has also been held that a mandatory in-

New York &c. R. Co. 84 N. Y. 247; 38 Am. R. 510, and note.

[58] Clawson v. Chicago &c. R. Co. 95 Ind. 152; 20 Am. & Eng. R. Cas. 56; Warren R. Co. v. State, 29 N. J. L. 353; Schermerhorn v. Mt. McGregor R. Co. 52 N. Y. S. 892; North Manheim v. Reading &c. R. Co. 18 Phila. (Pa.) 650; Davis v. County Commissioners 153 Mass. 218; 26 N. E. 848; 11 L. R. A. 750. But we think the rule asserted by the authorities referred to is to be carefully applied and that it can not on principle be extended. The public and private rights can not in such cases be sacrificed for the mere convenience of railroad companies. Much depends, it is obvious, upon the facts of the particular case and it is not easy to frame general rules that will justly apply to all cases.

[59] Clawson v. Chicago &c. R. Co. 95 Ind. 152; 20 Am. & Eng. R. Cas. 56.

[60] Roberts v. Chicago &c. R. Co. 35 Wis. 679.

[61] Cummins v. Evansville &c. R. Co. 115 Ind. 417; Chicago &c. R. Co. v. State, 158 Ind. 189, 191; 63 N. E. 224, 226; Vandalia R. Co. v. State (Ind.), 76 N. E. 980, 982 (both citing text); Indianapolis &c. R. Co. v. State, 37 Ind. 489; Clawson v. Chicago &c. R. Co. 95 Ind. 152; State v. Hannibal &c. R. Co. 86 Mo. 13; Pittsburgh &c. R. Co. v. Commonwealth, 104 Pa. St. 583; Moundsville v. Ohio River &c. R. Co. 37 W. Va. 92; 16 S. E. 514; 20 L. R. A. 161, 167, 168, citing Elliott Roads and Streets, 33, 600; People v. Chicago &c. R. Co. 67 Ill. 118; State v. Northeastern R. Co. 9 Rich. L. (S. C.) 247; 67 Am. Dec. 551; Boggs v. Chicago &c. R. Co. 54 Iowa, 435; 6 N. W. 744; State v. Missouri Pac. R. Co. 33 Kan. 176; Cambridge v. Charlestown &c. R. Co. 7 Met. (Mass.) 70; State v. Chicago &c. R. Co. 29 Neb. 412; 45 N. W. 469; 2 Lewis' Am. R. & Corp. R. 664. See, also, State v. New York &c. R. Co. 71 Conn. 43; 40 Atl. 925; State v. Minnesota &c. R. Co. 80 Minn. 108; 83 N. W. 32; 50 L. R. A. 656. In Greenup Co. v. Maysville &c. R. Co. 88 Ky. 659; 11 S. W. 774, it is held that a county may maintain an action to compel

junction may be granted in such a case.[62] But where the railroad company has a discretion or option as to the manner of crossing, if it properly exercises its discretion and constructs and maintains an adequate crossing, mandamus will not lie to compel it to construct the crossing in a different manner, nor, as a general rule in such a case, will the court determine which of two or more modes within the discretion of the company it shall adopt.[63] The railroad company, however, has no discretion as to whether it will or will not restore the highway, and if it "elects a manner that is not effectual, and the act remains substantially undone," it is still "under liability to do it." The discretion is a ministerial one, and "the act of restoration must be done." If the company has adopted an ineffectual mode, "the court will and should point out to it in what it has failed, and direct it particularly what it must do so as not to fail again."[64]

§ 1107. Approaches, embankments and other structures.—We have seen that there is a general duty resting upon railway companies to restore all highways crossed by their lines to a reasonably safe condition for travel, and, as near to their former condition as can practically be done. Where the railway crosses the highway at a different grade, and even where the crossing is exactly at the same grade, the highway is, however, always disturbed to a greater

a railroad company to restore the highway.

[62] Moundsville v. Ohio River R. Co. 37 W. Va. 92; 16 S. E. 514; 20 L. R. A. 161, and note; Jamestown v. Chicago &c. R. Co. 69 Wis. 648; 34 N. W. 728; Oshkosh v. Milwaukee &c. R. Co. 74 Wis. 534; 43 N. W. 489; 17 Am. St. 175; 39 Am. & Eng. R. Cas. 681.

[63] King v. Bristol Dock Co. 6 Barn. & Cress. 181; Reg. v. South Eastern R. Co. 4 H. L. Cas. 471, affirmed in Southeastern R. Co. v. Reg. 17 Q. B. 485; People v. New York &c. R. Co. 74 N. Y. 302. See, also, Illinois Cent. R. Co. v. Chicago, 141 Ill. 586; 30 N. E. 1044; 17 L. R. A. 530; Jamaica v. Long Island R. Co. 66 Hun (N. Y.), 631; 21 N. Y. S. 327.

[64] People v. Dutchess &c. R. Co. 58 N. Y. 152, approved in Moundsville v. Ohio River R. Co. 37 W. Va. 92; 16 S. E. 514; 20 L. R. A. 161, 166; State v. Minneapolis &c. R. Co. 39 Minn. 219; 39 N. W. 153; 35 Am. & Eng. R. Cas. 250; Chicago &c. R. Co. v. State, 158 Ind. 189, 195; 63 N. E. 224 (quoting text with approval); Vandalia R. Co. v. State (Ind.), 76 N. E. 980, 982 (citing text). See, also, Hudson County v. Central R. Co. 68 N. J. Eq. 500; 59 Atl. 303.

or less degree. Some change in the highway is always necessary, and as a rule the greater the difference in the grades of the highway and the railway, the greater the change required. At every crossing something must be done to make the highway safe for travel, and the duty, as a rule, rests upon the railway company to make such changes and to erect such structures as will make the highway reasonably safe for use. The railway company must erect and maintain such structures as are reasonably necessary to enable the traveler to get on, over and off the crossing in safety. Proper approaches and embankments necessary to enable a traveler to reach and leave the crossing are a part of the crossing and the railway company must construct and maintain them.[65] The embankments are to be constructed and maintained for only such a distance from the crossing as is reasonably necessary to enable the traveler to reach or pass the crossing,[66] by the exercise of ordinary care with reasonable convenience and safety. Approaches and embankments need not, as a rule, be constructed over the entire width of the highway. The company has performed its duty in this respect when it has properly constructed approaches and embankments for the width of the portion of the highway available and actually in use.[67] An additional use of the highway for an increased width will, however, necessitate an increased width in the approaches and embankments.[68] And where the construction of the railway causes a cut or fill in the highway so as to make it dangerous for travelers unless protected, it will be the duty of the company to erect proper guards or barriers to prevent travelers from falling into the cut or off the

[65] Ante, § 1097. The text is quoted with approval in Baltimore &c. R. Co. v. State, 159 Ind. 510; 65 N. E. 508, 512. See, also, Southern R. Co. v. Morris, 143 Ala. 628; 42 So. 17.

[66] Ante, § 1097.

[67] Appeal of Township of North Manheim (Pa.), 22 W. N. C. 149; 14 Atl. 137; 36 Am. & Eng. R. Cas. 194; Queen v. Rigby, 14 Q. B. 687; 14 Jur. 329. See Queen v. Birmingham &c. R. Co. 2 Q. B. 47; 2 Eng. Ry. & Canal Cas. 694; Moggy v. Canadian Pac. R. Co. 3 Manitoba, 209.

[68] Queen v. Rigby, 14 Q. B. 687; 6 Eng. Ry. & Canal Cas 479; 14 Jur. 329. The rule stated in the text is, however, a general one, and we suppose that railroad companies must adapt their crossings to the reasonable requirements of the public, and to a reasonable extent conform to the necessities created by the growth and improvement of the country. Ante, § 671; post, § 1112.

embankment.[69] Barriers or guard rails in a proper case are regarded as a reasonable part of a necessary restoration of the highway to a safe condition for travel.[70] Where the railway crosses the highway through a deep cut, the company may be required to make the highway safe by building a bridge over the railway track.[71] And where it is reasonably practicable to build a railroad bridge spanning the entire highway, it has been held that the company should be restrained from erecting abutments within the limits of the highway.[71a] It is impossible to lay down any rule defining just what kind of structures shall be used in any particular case. Each particular crossing presents different conditions, but the general rule governing all is the same, and that rule is that the company must erect whatever structures are reasonably necesary to the safety and convenience of the travelers using the crossing.[72]

§ 1108. Grade crosssings.—Where a railway company has the right to construct its track across public highways and there is no statute prescribing how the crossing shall be made it seems that the company may exercise its discretion as to the manner in which the crossing shall be constructed.[73] As a rule railway lines are constructed so as to conform in a great degree to the surface of the

[69] Aston v. McClure, 102 Pa. St. 323; Veazie v. Penobscot Railway Co. 49 Me. 119; Atlanta &c. R. Co. v. Wood, 48 Ga. 565; Oliver v. North Eastern Railroad Co. L. R. 9 Q. B. 409; Wharton Negligence, § 819; Pittsburg &c. R. Co. v. Moses (Pa.), 2 Atl. 188; 24 Am. & Eng. R. Cas. 295.

[70] Southern Ind. R. Co. v. McCarrell, 163 Ind. 469; 71 N. E. 156.

[71] Dyer Co. v. Railroad, 87 Tenn. 712; 11 S. W. 943; Chesapeake &c. R. Co. v. Dyer County, 38 Am. & Eng. R. Cas. 676.

[71a] Radnos Twp. v. Philadelphia &c. R. 214 Pa. St. 299; 63 Atl. 694.

[72] Chicago &c. R. Co. v. State, 158 Ind. 189, 193; 63 N. E. 224 (citing text); Elliott Roads & Streets (2d ed.) § 779; Kansas v. Kansas City &c. R. Co. 102 Mo. 633; 14 S. W. 808; 10 L. R. A. 851; 47 Am. & Eng. R. Cas. 157; Dyer County v. Railroad, 87 Tenn. 712; 11 S. W. 943; Chesapeake &c. R. Co. v. Dyer County, 38 Am. & Eng. R. Cas. 676. Mr. Pierce says: "The laying of a railroad across highways often requires excavations and erections, and a greater or less change in the surface. The duty, however, to restore the highway as far as may be to its former condition, and to erect and maintain structures necessary for such restoration, is presumed to be incumbent on the company, even without any express requirement imposed by statute." Pierce Railroads, 245.

[73] Illinois &c. R. Co. v. Bentley, 64 Ill. 438. See, also, De Lucca v. North Little Rock, 142 Fed. 597.

ground over which they pass and where the country through which a railroad passes is comparatively level nearly all crossings will be found to be grade crossings. Unless there be a statute forbidding grade crossings the railway company may so construct its line as to cross the highway on the same level.[74] Grade crossings are as a rule more dangerous than crossings above or below grade and the company is held to the exercise of a greater degree of care in the operation of its trains at such crossings than at those where the highway is on a different level. Yet municipalities are often, if not usually, invested with discretion to locate highways across railroad tracks at grade.[74a] Statutes conferring upon railway com-

[74] Morris v. Chicago &c. R. Co. 26 Fed. 22. See Connecticut &c. R. Co. v. St. Johnsbury, 59 Vt. 320; 10 Atl. 573.

[74a] In Cincinnati &c. R. Co. v. Morgan County, 143 Fed. 798, the court refused to enjoin the county from so doing, and in the course of the opinion it is said: "It may be that the crossing of a railroad at grade might, under certain circumstances, be absolutely destructive of the franchise to operate a railway, and the damage so resulting irreparable at law. In such a case, if one should arise, a court of equity might find itself able to grant relief under the well-recognized head of equity jurisdiction in respect of damages incapable of redress by an action at law. But we have been unable to discover any authorities of moment where a court of equity has intervened to restrain a crossing unless there has been a taking of property for the purpose which was forbidden by statute as necessary to the enjoyment of the general franchise. Such was the case of Albany Northern R. Co. v. Brownell, 24 N. Y. 345, and Smethport R. Co. v. Pittsburg R. 203 Pa. 176; 52 Atl. 88. We have been referred to the case of Franklin Turnpike Co. v. Maury, 27 Tenn. 342, and Turnpike Co. v. Davidson County, 106 Tenn. 258; 61 S. W. 68, cases where the action of county courts of Tennessee, in authorizing the opening of particular roads, was enjoined. Both were cases of turnpikes opened in violation of the charter rights of turnpike companies, and the injunction granted because of the impairment of the contract of a chartered company. The most that has been made out in this case as a reason for enjoining a grade crossing is that such a crossing will to a certain extent inconvenience the business of the railroad company. The crossing is not through the yards or terminals of the company, but at a place south of its yards, but close enough to be sometimes used for switching purposes when the trains are of unusual length. The extent of such is matter of great conflict and wide difference of opinion as to the amount of inconvenience resulting. That a grade crossing is more dangerous to the public and to the railway company may be conceded. Still it would take a more than

panies the right to cross highways with their tracks usually provide that the crossing shall be constructed in such a manner as to be safe for travel and if the company fails to construct them in the manner prescribed by the statute it will be liable for maintaining a nuisance.[75] The company may, to a reasonable degree, change the grade or surface of the highway provided the same be kept in good repair and safe for travel.[76]

§ 1109. Crosssings above grade.—The modern policy in reference

ordinary case to justify a court of equity in substituting its judgment for that of the semilegislative body intrusted with the whole subject of public highways. The case of the Wabash R. v. Defiance, 52 Ohio St. 263; 10 N. E. 89, and upon writ of error in the Supreme Court of the United States, 167 U. S. 88, 102; 17 Sup. Ct. 748; 42 L. Ed. 87, was a case which, in one aspect, involved the power of a court of equity to restrain the action of a municipality from causing the removal of an overhead street crossing and the making of a crossing at grade. Mr. Justice Brown, speaking for the court, after referring to the modern tendency to avoid grade crossings, said:

"But however this may be, we are not at liberty to inquire whether the discretion vested in the common council of determining this question was wisely exercised, or what the motives were for making the change; or whether the crossing so improved was burdensome to the railroad company; or made unsafe to persons crossing the track. These were considerations which might properly be urged upon the common council as arguments against the proposed change; but it is beyond the province of the courts either to praise the wisdom or criticise the unwisdom of such action. The question before us is simply whether the council had the power to make the change, and of this we have no doubt.' The case of the Lake Shore &c. R. Co. v. Chicago &c. R. Co. 97 Ill. 506, and Illinois Central R. Co. v. Chicago (Ill.) 30 N. E. 1044; 17 L. R. A. 530, were much stronger applications upon the theory of irreparable injury than that made out here; but in both the court declined to enjoin the opening of the streets; in one instance through the yards of a railway company." But see Pennslyvania R. Co. v. Bogert, 209 Pa. St. 589; 59 Atl. 100.

[75] Commonwealth v. Erie &c. R. Co. 27 Pa. St. 339; 67 Am. Dec. 471, and note; Wasmer v. Delaware &c. R. Co. 80 N. Y. 212; 36 Am. R. 608; People v. New York Central &c. R. Co. 74 N. Y. 302; Evansville &c. R. Co. v. Crist, 116 Ind. 446; 19 N. E. 310; 2 L. R. A. 450; 9 Am. St. 865. As to when there is no estoppel, see Bolivar v. Pittsburg &c. R. Co. 179 N. Y. 523; 71 N. E. 1141, affirming 88 App Div. (N. Y.) 387; 84 N. Y. S. 678.

[76] Davis v. Chicago &c. R. Co. 46 Iowa, 389; Commonwealth v. Hartford &c. R. Co. 14 Gray (Mass.), 379.

to the construction of railways over highways is to avoid grade crossings wherever it is possible to do so.[77] It is a valid exercise of the police power for the legislature to require railway companies to construct crossings other than at grade. And the legislature may even compel the company, after the construction of its line, to change grade crossings so as to make the track pass above or below the highway.[78] An act of the kind just referred to is a valid exercise of the police power, and is constitutional.[79] Where the street is constructed by the municipality after the railway has been built, the

[77] In Doolittle v. Braford, 59 Conn. 402; 22 Atl. 336; 49 Am. & Eng. R. Cas. 279, it was said: "In the light of these reiterated expressions of the legislative will, it is undeniable that it has become the settled policy of the legislature to abolish grade crossings. This policy has been recognized and seconded by the courts in numerous cases. Town of Suffield v. New Haven &c. Co. 53 Conn. 367; 5 Atl. 366; Woodruff v. Catlin, 54 Conn. 277; 6 A. 849; New York &c. R. Co. v. Waterbury, 55 Conn. 19; 10 Atl. 162; Westbrook's Appeal, 57 Conn. 95; 17 Atl. 368; 37 Am. & Eng. R. Cas. 446; Fairfield's Appeal, 57 Conn. 167; 17 Atl. 764; 39 Am. & Eng. R. Cas. 689."

[78] Ante, § 671; New York &c. R. Company's Appeal, 62 Conn. 527; 26 Atl. 122; New York &c. R. Co. v. Bristol (Conn.), 55 Am. & Eng. R. Cas. 38, affirmed 151 U. S. 556; 14 Sup. Ct. 437; 60 Am. & Eng. R. Cas. 577; 14 Sup. Ct. R. 437; In re Mayor of Northampton, 158 Mass. 299; 33 N. E. 568; 55 Am. & Eng. R. Cas. 31; Waterbury's Appeal, 57 Conn. 84; 17 Atl. 355. As to assessment of damages under Massachusett's statute where grade crossings are abolished, see Providence &c Co. v. Fall River, 187 Mass. 45; 72 N. E. 338; Taunton, In re, 185 Mass. 199; 70 N. E. 48; Norwood, In re, 183 Mass. 147; 66 N. E. 637. In State v. St. Paul &c. R. Co. (Minn.) 108 N. W. 261, and State v. Duluth (Minn.), 108 N. W. 269, it is held that the legislature may require railroad companies, without compensation, to construct and maintain crossings with all necessary safety devices, over highways, whether laid out before or after, and that in such a case a city can not alienate the police power, and can not contract to forever abdicate its police power and agree to maintain a viaduct, so constructed at a crossing, at its own expense. See, also, Newton v. Railway Co. 66 Ia. 422; 23 N. W. 905; Railway Co. v. Mayor (Ga.), 38 S. E. 60; Railway Co. v. Omaha, 170 U. S. 57; 18 Sup. Ct. 513; Railway Co. v. People, 200 U. S. 561; 26 Sup. Ct. 341; Shortle v. Railway Co. 131 Ind. 338; 30 N. E. 1084; Vandalia R. Co. v. State, (Ind.), 76 N. E. 980.

[79] See authorities in last preceding note; Pennsylvania R. Co. v. Braddock &c. R. Co. 152 Pa. St. 116; 25 Atl. 780. See, also, Clarendon v. Rutland R. Co. 75 Vt. 6; 52 Atl, 1057.

municipal officers generally have the right to determine whether the street shall be carried over or under the railway tracks.[80] And where the railway is constructed across a highway, and the crossing must be above or below grade, it has been held that the company may choose for itself which crossing shall be constructed, and where it exercises an election in good faith it is not subject to review.[81] Where the company constructs its track over the highway above grade it must not obstruct the highway by piers, abutments, or the like, but must restore it to safe condition for use; and it has been held that at such a crossing the company must bridge the entire width of the highway,[82] unless the highway be such that only a small portion is used for actual travel, when the abutments to support the railway may encroach upon the highway.[83] The crossing must be so constructed that parts of the crossing or material connected with the crossing will not fall and injure persons passing along the highway under the railroad.[84]

§ 1110. Crosssings below grade.—Of the crossings above and below grade the greater number, perhaps, are below grade. Owing to the great weight of railway trains as compared with the weight of vehicles using the highway, it is a rule much cheaper and safer to construct the crossing so that the highway passes above and over the railway track. We have already seen that where the highway is carried over the track it is the duty of the company to construct a proper bridge and proper approaches and barriers thereto.[85] A company is under no obligation to construct a tunnel for its road under a highway, where the tunnel is such that it would be flooded at intervals, and be an interference with travel on the company's trains.[86]

[80] Illinois Central R. Co. v. Chicago, 141 Ill. 586; 30 N. E. 1044; 17 L. R. A. 530; 51 Am. & Eng. R. Cas. 528; Smith v. New Haven, 59 Conn. 203; 22 Atl. 146.

[81] People v. New York &c. R. Co. 74 N. Y. 302. See Regina v. Southeastern R. Co. 6 Eng. L. & Eq. 214.

[82] Township of Raritan v. Port Reading &c. R. Co. 49 N. J. Eq. 11; 23 Atl. 127; 50 Am. & Eng. R. Cas. 169; Windsor v. President &c. of Delaware &c. Co. 92 Hun (N. Y.), 125; 36 N. Y. S. 863. See Jones v. Erie &c. R. Co. 169 Pa. St. 333; 32 Atl. 535; 47 Am. St. 916.

[83] Township of Raritan v. Port Reading &c. R. Co. 49 N. J. Eq. 11; 23 Atl. 127; 50 Am. & Eng. R. Cas. 169.

[84] Kearney v. London &c. R. Co. L. R. 5 Q. B. 411.

[85] Ante, § 1107.

[86] Kyne v. Wilmington &c. R. Co. 8 Hous. (Del.) 185; 14 Atl. 922.

Where the company constructs its tracks below the grade of the highway and carries the highway across its track by an overhead bridge, it is only bound to construct such a bridge as will meet the demands of ordinary travel.[87] Where a railway company has constructed its tracks at grade and the use of the street afterward becomes so great as to require an overhead crossing as a matter of public safety, the railroad company may be compelled to construct an overhead crossing at its own expense.[88] It has been held erroneous in an action by county commissioners to compel a railroad company to build an undergrade crossing, to receive in evidence proposals of the company for the building of such crossing, made before the action was commenced, for the purpose of showing a necessity for the crossing.[88a]

§ 1111. Mandamus to compel construction of viaduct.—Where it is the duty of a railroad company to construct a viaduct or bridge over its tracks, it may be compelled to do so by mandamus.[89] This duty may exist and be enforced by mandamus even though there is no express provision in the charter or statute, in regard to the erection of bridges or viaducts. It may arise out of, or be embraced in the duty to restore and keep the highway in repair. Thus, in a leading case, it appeared that the railroad company's charter empowered the company to lay its track across any public highway or street, if necessary on condition that it should put such highway or street "in such condition or state of repair, as not to impair or interfere with its free and proper use." It was held that this was a continuing duty, and that, although the crossing might have been adequate when constructed, yet if by reason of the increase of the busi-

[87] The company is not required to maintain a bridge of sufficient strength to support the weight of heavy electric cars. People v. Adams, 88 Hun (N. Y.), 122; 34 N. Y. S. 579. See Briden v. New York &c. R. Co. 27 R. I. 569; 65 Atl. 315.

[88] People v. Union Pacific &c. R. Co. 20 Colo. 186; 37 Pac. 610.

[88a] State v. Minneapolis &c. R. Co. 90 Minn. 88; 95 N. W. 581.

[89] People v. Chicago &c. R. Co. 67 Ill. 118; State v. Missouri Pac. R. Co. 33 Kan. 176; 5 Pac. 772; Boggs v. Chicago &c. R. Co. 54 Iowa, 435; 6 N. W. 744; State v. Savannah &c. R. Co. 26 Ga. 665; Trenton &c. Co. In re, 20 N. J. L. 659; State v. Minneapolis &c. R. Co. 39 Minn. 219; 39 N. W. 153; 35 Am. & Eng. R. Cas. 250. See State v. New Haven &c. Co. 45 Conn. 331, 348. In Burlington &c. R. Co. v. People, 20 Colo. App. 181; 77 Pac. 1026, a suit in equity, and not mandamus, is held to be the proper remedy.

ness of the railroad, or of the travel upon the street the crossing became dangerous or obstructed such travel, the railway company was bound to provide some other mode of crossing; and as it appeared that the only safe and convenient mode was to carry the street by viaduct under the tracks, it was further held that mandamus would lie to compel the railway company to construct such viaduct, including the abutments and approaches, as well as the bridge for its tracks.[90] So, where a petition for mandamus to compel certain railroad companies to erect a bridge across their tracks showed that the street at that point was crossed by more than twenty tracks, on which trains were continually running; that it was in a populous part of the city; that there were only four streets of which the street in question was one, connnecting a part of the city on one side of the tracks, consisting of over twenty thousand inhabitants with the part on the other side, consisting of a much larger number of inhabitants, and that the nearest of the other three streets were several blocks away, it was held that necessity for the construction of a bridge clearly appeared.[91] But it has been held that a railroad company, at least where it erects a bridge at the crossing of a country road, cannot be compelled to construct and maintain it so as to meet the needs of an electric street railway company.[92]

[90] State v. St. Paul &c. R. Co. 35 Minn. 131; 28 N. W. 3; 59 Am. R. 313; State v. Minneapolis &c. R. Co. 39 Minn. 219; 39 N. W. 153; 35 Am. & Eng. R. Cas. 250; State v. Minnesota &c. R. Co. 80 Minn. 108; 83 N. W. 32; 50 L. R. A. 656; Elliott Roads and Streets (2nd ed.), §§ 780, 781. To the same effect are Cooke v. Boston &c. R. Co. 133 Mass. 185; 10 Am. & Eng. R. Cas. 328; English v. New Haven &c. R. Co. 32 Conn. 240; Johnston v. Providence &c. 10 R. I. 365; Manley v. St. Helens &c. R. Co. 2 Hurl. & N. 840; Maltby v. Chicago &c. Railway Co. 52 Mich. 108; 17 N. W. 717; Attorney General v. Fort St. Union Depot Co. 117 Mich. 609; 76 N. W. 85; State v. St. Paul &c. Ry. Co. (Minn.) 108 N. W. 261. See, also, New York &c. R. Co. v. State, 50 N. J. L. 303; 32 Am. & Eng. R. Cas. 186; Newton v. Chicago &c. R. Co. 66 Iowa, 422; 23 N. W. 905; 23 Am. & Eng. R. Cas. 298; Cleveland v. City Council of Augusta, 102 Ga. 233; 29 S. E. 584; 43 L. R. A. 638, 644 (citing text); Baltimore &c. R. Co. v. State, 159 Ind. 510; 65 N. E. 508; Chicago &c. R. Co. v. State, 158 Ind. 189, 194; 63 N. E. 224, 225; Vandalia R. Co. v. State (Ind.), 76 N. E. 980 (all citing text).

[91] People v. Union Pac. R. Co. 20 Colo. 186; 37 Pac. 610; 10 Lewis' Am. R. & Corp. 371.

[92] Conshohocken R. Co. v. Pennsylvania R. Co. 15 Pa. Co. Ct. 445; People v. Adams, 88 Hun (N. Y.), 122.

§ 1112. Keeping crossing in repair.—The duty of a railroad company in regard to the restoration and repair of highway crossings is not fully performed and ended by the mere restoration of the highway or the construction of a proper crossing in the first instance. It should keep the crossing in reasonably safe condition and repair, with reference both to the use of the same for its own purposes and for ordinary travel upon the highway. Indeed, as to passengers upon its trains it may owe a still higher duty. This duty to keep the crossing in repair is a continuing duty[93] which rests not only upon the original company, but also upon its successors in the ownership and possession of the road.[94] We have already considered this general subject,[95] and will treat of the liability of the company for injuries to travelers upon the highway by reason of the failure to perform this duty, in a subsequent chapter.[96] It may be well, however to state in this connection, that the obligation to maintain and keep the crossing in repair usually extends only to lawful highways,[97] but if the company has constructed a crossing,

[93] Wellcome v. Leeds, 51 Me. 313; Chicago &c. R. Co. v. Moffitt, 75 Ill. 524; People v. New York &c. R. Co. 74 N. Y. 302; Windsor v. President &c. 92 Hun (N. Y.), 127; 36 N. Y. S. 863; Hatch v. Syracuse &c. R. Co. 50 Hun (N. Y.), 64; Roxbury v. Central Vermont R. Co. 60 Vt. 121; 14 Atl. 92; Pennsylvania &c. R. Co. v. Frund, 4 Ind. App. 469; 30 N. E. 1116; Paducah &c. R. Co. v. Commonwealth, 80 Ky. 147; 10 Am. & Eng. R. Cas. 318; State v. Hannibal &c. R. Co. 86 Mo. 13; 29 Am. & Eng. R. Cas. 604; Cunningham v. Thief River Falls, 84 Minn. 21; 86 N. W. 763, 786 (citing Elliott Roads & Streets, § 779); Seybold v. Terre Haute &c. R. Co. 18 Ind. App. 367; 46 N. E. 1054, 1058 (citing, text); Southern R. Co. v. Morris, 143 Ala. 628; 42 So. 17.

[94] Wasmer v. Delaware &c. R. Co. 80 N. Y. 212; 36 Am. R. 608; People v. Chicago &c. R. Co. 67; Ill. 118; Little Miami &c. R. Co. v. Commissioners, 31 Ohio St. 338; Dyer County v. Chesapeake &c. R. Co. 87 Tenn. 712; 11 S. W. 943. As to when the duty begins, see Buchner v. Chicago &c. R. Co. 60 Wis. 264; 19 N. W. 56; Pittsburgh &c. R. Co. v. Commonwealth, 101 Pa. St. 192; Chester v. Baltimore &c. R. Co. 140 Pa. St. 275; 21 Atl. 320.

[95] Ante, §§ 1092, 1102, 1105.

[96] Post, Chap. XLIX.

[97] International &c. R. Co. v. Jordan (Tex.), 10 Am. & Eng. R. Cas. 301; Missouri &c. R. Co. v. Long, 27 Kan. 684; Flint &c. R. Co. v. Willey, 47 Mich. 88; 10 N. W. 120. Duty to restore exists where town is platted and street dedicated. Racine v. Chicago &c. R. Co. 92 Wis. 118; 65 N. W. 857. See as to when it begins, Pittsburgh &c. R. Co. v. Com. 101 Pa. St. 192; Buchner v. Chicago &c. R. Co. 60 Wis. 264; 19 N. W. 36; Dallas &c. R. Co. v. Able, 72 Tex. 150; 9 S. W. 871.

and invited or induced people to use it as a public crossing, the duty rests upon the company to use reasonable care to keep it in repair, and it has been even held that this is so where it has merely licensed or acquiesced in the use of a crossing by the public, although it is not in a public road or street.[98] It seems to us that this doctrine is, at best, questionable, and that, in the absence of some governing statute, it should not be extended to private crossings or those which are used only occasionally by certain members of the public without anything in the form of an invitation express or implied.[99] Whether the company has so constructed and maintained a crossing as to make it reasonably safe and convenient, is usually a question for the jury to determine.[100]

§ 1113. Rights of abutters.—We have already considered the rights and remedies of abutters where a railroad is constructed along a street[101] and where viaducts and bridges are built at crossings.[102] We will here consider the rights of abutters at ordinary crossings. The erection and maintenance of gates in a street at the crossing, in compliance with a valid ordinance for the safety of the public, is not a taking for which the abutting owners are entitled to compensation.[103] Nor is a railroad company which crosses a highway, under due authority, on a level, without change of grade, liable to the abutters for damages on account of mere inconveniences, such as stoppages or the like, incident to such crossing.[104] In the absence

[98] See Kelly v. Southern &c. R. Co. 28 Minn. 98; 9 N. W. 588; 6 Am. & Eng. R. Cas. 264, distinguished in Missouri &c. R. Co. v. Long, 27 Kan. 684; 6 Am. & Eng. R. Cas. 254, and compare Missouri Pac. R. Co. v. Bridges, 74 Tex. 520; 12 S. W. 210; 15 Am. St. 856; Cross v. Lake Shore &c. R. Co. 69 Mich. 363; 37 N. W. 361; 13 Am. St. 399; Hanks v. Boston &c. R. Co. 147 Mass. 495; 18 N. E. 218.

[99] See Gurley v. Missouri Pac. R. Co. 104 Mo. 211; 16 S. W. 11; Redigan v. Boston &c. R. Co. 155 Mass. 44; 28 N. E. 1133; 14 L. R. A. 276; 31 Am. St. 520, and note; Wright v. Boston &c. R. Co. 142 Mass. 296; 7 N. E. 866; Louisville &c. R. Co. v. Miller, 12 Ind. App. 414; 40 N. E. 539; Breneman v. Burlington &c. R. Co. 92 Iowa, 755; 60 N. W. 176; post, § **1154**, where additional authorities on both sides are cited and reviewed.

[100] Roberts v. Chicago &c. R. Co. 35 Wis. 679. See Galveston &c. R. Co. v. Matula, 79 Tex. 577; 15 S. W. 573.

[101] Ante, §§ **1085, 1090.**

[102] Ante, § **1091.**

[103] Trustees v. Milwaukee &c. R. Co. 77 Wis. 158; 45 N. W. 1086.

[104] Wood v. Stourbridge R. Co. 16 C. B. N. S. 222; Caledonia R. Co. v. Ogilvy, 2 Macq. H. L. Cas. 229;

of any constitutional or statutory provision requiring compensation for change of grade or consequential damages it has been held that a railroad company is not liable on account of a mere change of grade, rendered necessary by the construction of its road across a highway in the authorized manner,[105] and this rule has been applied in some cases where it constructed embankments or viaducts, although there is much conflict among the authorities upon the subject.[106] Indeed, it has been said in general terms that "a railroad cannot be laid across a highway without compensation to the owner of the fee."[107] This is a different question, however, from the question of liability for change of grade, for if the construction of a railroad track across a highway is an additional burden and there are any abutters who are entitled to compensation it may still be true that damages occasioned by a change of grade are not an element of such compensation and, on the other hand, damages might be recovered for a change of grade, as for instance, where the constitution or statute so provides, even if there could be no recovery on account of the construction of a crossing without change of grade. We have elsewhere treated so fully of the rights and remedies of abutters where their easement of access or light and air is destroyed and where they are especially injured by the unlawful or negligent acts

Morgan v. Des Moines &c. R. Co. 64 Iowa, 589; 21 N. W. 96; 52 Am. R. 462; 20 Am. & Eng. R. Cas. 67. See, also, Morris &c. R. Co. v. Newark, 10 N. J. Eq. 352.

[105] Whittier v. Portland &c. R. Co. 38 Me. 26; Wead v. St. Johnsbury &c. R. Co. 64 Vt. 52; 24 Atl. 361; Slatten v. Des Moines &c. R. Co. 29 Iowa, 148; 4 Am. R. 205; Rauenstein v. New York &c. R. Co. 136 N. Y. 528; 32 N. E. 1047; 18 L. R. A. 768; Uline v. New York &c. R. Co. 101 N. Y. 98; 4 N. E. 536; 54 Am. R. 661; Newport &c. R. Co. v. Foote, 9 Bush (Ky.), 264; Robinson v. Great Northern &c. R. Co. 48 Minn. 445; 51 N. W. 384; Conklin v. New York &c. R. Co. 102 N. Y. 107; 6 N. E. 663.

[106] See ante, § **1091**; Buchner v. Chicago &c. R. Co. 60 Wis. 264; 19 N. W. 56; 14 Am. & Eng. R. Cas. 447; Shealy v. Chicago &c. R. Co. 72 Wis. 471; 40 N. W. 145; Alabama &c. R. Co. v. Williams, 92 Ala. 277; 9 So. 203; Nicks v. Chicago &c. R. Co. 84 Iowa, 27; 50 N. W. 222; Burritt v. New Haven &c. R. Co. 42 Conn. 174; Indianapolis &c. R. Co. v. Smith, 52 Ind. 428.

[107] Lewis' Em. Dom. § **118**, citing Trustees v. Auburn &c. R. Co. 3 Hill (N. Y.), 567; Starr v. Camden &c. R. Co. 24 N. J. L. 592. But where the railroad company owns its right of way in fee on each side of the street, the adjoining land-owners are not strictly abutters upon that portion of the street crossed by the railroad.

of the railroad company, that nothing further need be said in this connection.

§ 1114. Gates, watchmen and signals at crossings.—Under its police power, a state or municipality may require railroad companies to keep gates or flagmen at highway crossings, or to give signals, at or near such places by ringing a bell or blowing a whistle.[108] There is some conflict among the authorities as to whether such a statute applies where the railroad crosses on a bridge or viaduct above the highway, or the like, or only where the crossing is at grade,[108a] but this is usually determined by the particular statute in question. The failure to comply with such a police regulation is considered prima facie evidence of negligence in some jurisdictions and negligence per se in others, but in either case it must be a proximate cause of the injury in order to render the company liable, and even where it is said to be negligence per se it is not, as we understand it, conclusive evidence of actionable negligence in the sense that it may not be open to explanation and excuse. On the other hand, it may be the duty of the company to do more than to merely

[108] Ante, §§ 668, 721, 724; Kaminitzky v. Northeastern R. Co. 25 S. Car. 53; Pittsburgh &c. R. Co. v. Brown, 67 Ind. 45; 33 Am. R. 73; Illinois &c. R. Co. v. Slater, 129 Ill. 91; 21 N. E. 575; 6 L. R. A. 418; 16 Am. St. 242; State v. East Orange, 41 N. J. L. 127; People v. Boston &c. R. Co. 70 N. Y. 569; Chicago &c. R. Co. v. Milwaukee, 97 Wis. 418; 72 N. W. 1118, 1122 (citing text). See, also, Toledo &c. R. Co. v. Jacksonville, 67 Ill. 37; 16 Am. R. 611; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604; Seibert v. Missouri Pac. R. Co. 188 Mo. 657; 87 S. W. 995; 70 L. R. A. 72. The New York statute authorizing the court, or judge on application of the local authorities, to order a flagman to be stationed, or gates to be erected, at such crossings is held to be constitutional. People v. Long Island R. Co. 134 N. Y. 506; 31 N. E. 873.

[108a] In Johnson v. Southern Pac. R. Co. 147 Cal. 624; 82 Pac. 306; 1 L. R. A. (N. S.) 307, it is held to apply even where the railroad crosses on a bridge above the highway; but in Lewis v. Southern R. Co. 143 Ala. 133; 38 So. 1023, it is held to apply only to grade crossings. See post, § **1158**, and note in 1 L. R. A. (N. S.) 307, et seq. As holding that it applies to a crossing of a road though not laid out and maintained at the expense of the county, see St. Louis &c. R. Co. v. Tomlinson (Ark.), 94 S. W. 613. See, generally, St. Louis &c. R. Co. v. Morrison (Kans.), 85 Pac. 295, and authorities cited; Ray v. Chesapeake &c. R. Co. 57 W. Va. 333; 50 S. E. 413.

comply with the statute in order to escape liability, and, even where no such statute or regulation exists, the failure to give signals or to otherwise exercise reasonable care, under the circumstances, may constitute negligence for which the company will be liable to a traveler who is injured thereby while exercising reasonable care on his part.[109] It is frequently provided by statute that signboards shall be erected at crossings, and the failure to comply with the statute is evidence of negligence,[110] but is not necessarily conclusive of the liability of the company, for it may not be a proximate cause of the injury,[111] or the plaintiff may be guilty of such contributory negligence as will defeat him. Thus, it has been held that the failure to erect a signboard in compliance with the statute is not, of itself, sufficient to justify a recovery by one who is familiar with the crossing,[112] or, by the exercise of ordinary care, ought to have discovered it in time without any signboard,[113] and, in the absence of any statute upon the subject, it has been held that it is for the jury to say whether reasonable care required the erection of such a board at the par-

[109] See Chicago &c. R. Co. v. Dillon, 123 Ill. 570; 15 N. E. 181; 5 Am. St. 559; Gates v. Burlington &c. R. Co. 39 Iowa, 45; Pennsylvania Co. v. Krick, 47 Ind. 368; Winstanley v. Chicago &c. R. Co. 72 Wis. 375; 39 N. W. 856; Loucks v. Chicago &c. R. Co. 31 Minn. 526; 18 N. W. 651; Hinkle v. Richmond &c. R. Co. 109 N. Car. 472; 13 S. E. 884; 26 Am. St. 581; Lapsley v. Union Pac. R. Co. 50 Fed. 172; Vandewater v. New York &c. R. Co. 135 N. Y. 583; 32 N. E. 636; 18 L. R. A. 771; Chicago &c. R. Co. v. Netolicky, 67 Fed. 665; Atchison &c. R. Co. v. Hague, 54 Kan. 284; 38 Pac. 257; note in 45 Am. St. 278; Grand Trunk R. Co. v. Ives, 144 U. S. 408; 12 Sup. Ct. 679; Linfield v. Old Colony R. Co. 10 Cush. (Mass.) 562; 57 Am. Dec. 124, and note; post, §§ 1157, 1158. But see New York &c. R. Co. v. Hackett (N. J.), 32 Atl. 265.

[110] Dodge v. Burlington &c. R. Co. 34 Iowa, 276; Lang v. Holiday &c. R. Co. 49 Iowa, 469; Denver &c. R. Co. v. Robbins, 2 Colo. App. 313; 30 Pac. 261.

[111] Field v. Chicago &c. R. Co. 14 Fed. 332; 8 Am. & Eng. R. Cas. 425. See, also, Denver &c. R. Co. v. Robbins, 2 Colo. App. 313; 30 Pa. 261; Jennings v. St. Louis &c. R. Co. 99 Mo. 394; 11 S. W. 999; East Tennessee &c. R. Co. v. Feathers, 10 Lea (Tenn.), 103; 15 Am. & Eng. R. Cas. 446. But compare Beisiegel v. New York &c. R. Co. 34 N. Y. 622; 90 Am. Dec. 741, and note; O'Mara v. Hudson River &c. R. Co. 38 N. Y. 445; 98 Am. Dec. 61, and note.

[112] Haas v. Grand Rapids &c. R. Co. 47 Mich. 401; 8 Am. & Eng. R. Cas. 268.

[113] Gulf &c. R. Co. v. Greenlee, 62 Tex. 344; 23 Am. & Eng. R. 322; Payne v. Chicago &c. R. Co. 39 Iowa, 523; 44 Iowa, 236.

ticular crossing in question, and whether its absence was a proximate cause of the injury.[114] In states requiring the erection of warning sign-boards at crossings it is not a defense that the statute is openly and commonly violated throughout the state.[115] Neither is it a defense that the delinquent road was in the hands of a receiver.[116] But the mere fact that there is a slight deviation from the statute in the form of a warning sign rightly placed will not sustain a verdict for the plaintiff based solely thereon, where the sign, as constructed, does not deceive travelers and in the case in question the failure to exactly comply with the statute was not the proximate cause of the plaintiff's injuries.[117]

§ 1114a. Lights at crossings.—The state under its police power may constitutionally require railroad companies to light their tracks at streets crossed by them. And this power residing in the state may be delegated to cities and towns.[118] While the municipality may in some respects prescribe the kind of light and the duration of their maintenance, it can not under the guise of such power require, arbitrarily and without control or restraint, light either in volume or at times, entirely unnecessary for the security and safety of citizens.[119] Thus an ordinance compelling a railroad company to keep a flagman by day and a red lantern by night at a crossing where it had but one track, and it did not appear that the crossing was unusually dangerous or more so than ordinary crossings, was held to be an unreasonable exercise of this power.[120] So, a statute empowering a city to require all railroads to maintain lights similar to those maintained by the city at streets crossed by their tracks, has been held to authorize an ordinance requiring electric lights, such

[114] Shaber v. St. Paul &c. R. Co. 28 Minn. 103; 9 N. W. 575; 2 Am. & Eng. R. Cas. 185; Heddles v. Chicago &c. R. Co. 77 Wis. 228; 46 N. W. 115; 20 Am. St. 106, and note; Baltimore &c. R. Co. v. Whitacre, 35 Ohio St. 627; Elkins v. Boston &c. R. Co. 115 Mass. 190.

[115] Henn v. Long Island R. Co. 51 App. Div. (N. Y.) 292; 65 N. Y. S. 21.

[116] Arkansas Central R. Co. v. State, 72 Ark. 252; 79 S. W. 772.

[117] Wellbrock v. Long Island R. Co. 31 Misc. (N. Y.) 424; 65 N. Y. S. 592. See, also, Hasting v. Southern Ry. Co. 143 Fed. 260.

[118] Cincinnati &c. R. Co. v. Sullivan, 32 Ohio St. 152; ante, §§ 668, 724.

[119] Cleveland &c. R. Co. v. Connersville, 147 Ind. 277; Cleveland v. St. Bernard, 15 Ohio C. C. 588.

[120] Toledo &c. R. Co. v. Jacksonville, 67 Ill. 37.

as were used by the city, but not lights of the "arc pattern."[121] Ordinances of this character must specify particularly the time within which the lights are to be maintained.[122] In one case it was held that an ordinance enacted in conformity with a state law granting cities the power to require lights at street crossings of the character maintained by the city on all nights that the city might direct, was not invalid for indefiniteness because it excused the railroad company from lighting the crossing at times when the moon furnished sufficient light and at all times when the city lights were not in operation.[123] On the failure or refusal of a railroad company to comply with an ordinance requiring lights at crossings it has been held that the city council may procure it to be done and may declare a lien upon the real estate of the railroad company within the municipality for the expense.[124] In all cases it is to be understood that the failure of the railroad company to perform this duty of lighting will not relieve travelers attempting to cross the highway from the exercise of reasonable care for their safety.[125]

§ 1114b. Bell signals.—Crossings are sometimes safeguarded by means of bells which are caused to sound by a current of electricity set in motion by approaching trains when within a given distance of the crossing. This method is regarded as effective for the purpose and is likely to come into general use. There is already authority that a municipality has the power to compel the installation of these bells at particularly dangerous crossings under a statute authorizing municipalities to order the maintenance of flagmen and gates at crossings and to make "such other orders respecting the crossings as may be deemed proper."[126] A railroad company having installed an electric bell signal equipment at a crossing must maintain its

[121] Shelbyville v. Cleveland &c. R. Co. 146 Ind. 66. See, also, Cleveland &c. R. Co. v. Connersville, 147 Ind. 277.

[122] Lake Erie &c. R. Co. v. St. Mary's, 14 Ohio C. C. 202; Shelbyville v. Cleveland &c. R. Co. 146 Ind. 66.

[123] Chicago &c. R. Co. v. Crawfordsville, 164 Ind. 70; 72 N. E. 1025.

[124] Cincinnati &c. R. Co. v. Sullivan, 32 Ohio St. 152.

[125] Gulf &c. R. Co. v. Riordan (Tex.), 22 S. W. 519.

[126] Patchogue Street Crossings, In re, 74 Hun (N. Y.), 46; 26 N. Y. S. 293. It has also been held that an ordinance making it unlawful for a street car to cross the track or tracks of a steam railroad until the conductor crosses on foot and sig-

efficiency and where a traveler is injured by venturing on a crossing at a time when the bells were not ringing the railroad company can not successfully urge as a defense that the bells were out of order if this condition had existed for a time reasonably sufficient to repair them.[127] But if the signal has been abandoned as a failure after a long trial and allowed to remain, though out of order, a person who is in daily use of the crossing will be presumed to know this fact and he can not, in case of injuries, base his action for damages on the ground that the signal was not in a fit condition to sound warnings.[128] Yet it has been held that the mere fact that he may have crossed before when the bell or gong did not ring is not conclusive,[129] and that the fact that it did not ring on the occasion of the injury may be considered on the question of contributory negligence.[130]

§ 1114c. Duty to maintain crossings as between lessor and lessee.—The duty to restore and maintain highway crossings is a continuing duty and rests alike on both a road negligent of this duty and its lessee operating the road under a lease thereafter executed.[131] The rule is well supported that a railroad company can not devolve a primary obligation upon another company without the consent of the state in such a manner as to exonerate itself from performing the duty.[132] It follows therefore that a railroad company leasing its road to another corporation without the consent of the state will still be liable for injuries to persons caused by negligent defects in the crossing, though the lessee was in control and operating the road at the time of the accident.[133]

nals the motorman is valid. Indianapolis Trac. &c. Co. v. Romans (Ind. App.), 79 N. E. 1068.

[127] Henn v. Long Island R. Co. 51 App. Div. (N. Y.) 292; 65 N. Y. S. 21; McSweeney v. Erie R. Co. 93 App. Div. (N. Y.) 496; 87 N. Y. S. 836.

[128] Wellenhoffer v. New York &c. R. Co. 66 Hun (N. Y.), 634; 21 N. Y. S. 866.

[129] Cleveland &c. R. Co. v. Coffman, 30 Ind. App. 462; 64 N. E. 233; 66 N. E. 179.

[130] Cleveland &c. R. Co. v. Heine, 28 Ind. App. 163; 62 N. E. 455; Cleveland &c. R. Co. v. Coffman, 30 Ind. App. 462; 64 N. E. 233; 66 N. E. 179.

[131] Thayer v. Flint &c. R. Co. 93 Mich. 150; 53 N. W. 216.

[132] 5 Thompson's Corp. § 6293. See, also, Harbert v. Atlanta &c. R. Co. 74 S. Car. 13; 53 S. E. 1001; Smalley v. Atlanta &c. R. Co. 73 S. Car. 572; 53 S. E. 1000. But compare Curtis v. Cleveland &c. R. Co. 140 Fed. 777.

[133] Freeman v. Minneapolis &c. R. Co. 28 Minn. 443.

§ 1114d. Maintenance where different railroads cross at grade.—It is the general rule—made so by statute in most states—that both railroad companies at a railroad crossing are required to cooperate in maintaining and keeping such crossing in repair, and are jointly liable for injuries resulting from a neglect of their duty in this respect.[134] In Ohio the statute imposes upon railroad companies, the tracks of whose roads cross each other at common grade, the joint duty and obligation of keeping the crossing in repair and maintaining a watchman thereat, and requires this expense to be borne by the companies jointly. The burden of this duty is common to all the companies, and where either performs the whole duty and pays the whole expense it is entitled to recover from the other its equal proportion thereof.[135]

§ 1114e. Width of crossings to be maintained.—The question is sometimes important as to the width of the highway crossing to be maintained by a railroad company. Here it seems a sensible rule that the railroad company must construct and maintain crossings and approaches for the entire width of the street in populous and busy cities where great numbers of vehicles and people use them. But where few people and vehicles use the crossings, the width to be constructed and maintained is to be determined largely by what is reasonably required to accommodate the public travel over such crossings and it has been observed that this "is fixed, for the time being at least, by the actual crossings and approaches which are made by the railroad companies with the acquiescence of the public and the public authorities."[136]

§ 1115. Accidents and injuries at crossings.—The subject of injuries at crossings and the relative rights and duties of the company

[134] Indiana &c. R. Co. v. Barnhart, 115 Ind. 399; 16 N. E. 121; post, § 1134.

[135] Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577; 16 N. E. 475; post, § 1134.

[136] Cleveland &c. R. Co. v. Johns, 106 Ill. App. 427; citing Bloomington v. Illinois Central R. Co. 154 Ill. 539; 39 N. E. 478; Illinois Central R. Co. v. Truesdell, 68 Ill. App. 324. See, also, Ellis v. Wabash &c. R. Co. 17 Mo. App. 126. Compare Radnor v. Philadelphia &c. R. Co. 214 Pa. St. 299; 63 Atl. 694; Commonwealth v. Delaware &c. R. Co. 215 Pa. St. 149; 64 Atl. 417; State v. Northern Pac. R. Co. 36 Minn. 207; 110 N. W. 975.

and of travelers, will be treated in a subsequent chapter. The company is liable to a traveler upon the highway who is injured by a collision with its train at a crossing on account of its negligence, where he is not guilty of contributory negligence, and is also liable for wilfully injuring him, notwithstanding he may be guilty of contributory negligence, or where the exercise of reasonable care upon its part would have prevented the injury after it discovered, or ought to have discovered, his danger and inability to take care of himself. So, it is generally liable where a traveler, without contributory negligence is injured by defects in the track or crossing which it was the duty of the company to keep in repair.[137] But it has been held that if the construction of an approach to a crossing does not make the street more dangerous than it was before the railroad was built, the company is not required to correct defects that existed prior thereto.[138]

[137] Post, Chap. XLIX.

[138] Whitby v. Baltimore &c. R. Co. 96 Md. 700; 54 Atl. 674.

CHAPTER XLVII.

CROSSING OF RAILROADS BY RAILROADS.

§ 1116. Right of one railroad to cross another.—The general rule is that every railway company acquires its franchises, rights and privileges upon condition that its tracks may be crossed by the tracks of other railway companies. Rights of way are acquired subject to the right of the public to have other roads, and whenever it is necessary for one railway company in the construction of its line to cross the right of way of another company, the right to cross that company's line, subject to certain conditions hereafter referred to, always exists.[1] This right is based on public interest and neces-

[1] Buffalo &c. R. Co. v. New York &c. R. Co. 72 Hun (N. Y.), 587; 25 N. Y. S. 155; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604; 16 Am. Ry. R. 291; 6 Am. & Eng. Encyc. Law, p. 537; New-

sity. The rights of the public are superior to the interests of any particular railroad company, and the public have a right to demand the construction of railroads across the lines of other railway companies so long as the rights of the companies crossed are not materially and unlawfully impaired. The right which any particular company acquires to its line and right of way is not, in this sense, exclusive; it is taken subject to the exercise of the right of eminent domain in favor of the public or public corporations.[2] And

castle &c. R. Co. v. Peru &c. R. Co. 3 Ind. 464; St. Louis &c. R. Co. v. Springfield &c. R. Co. 96 Ill. 274; Chicago &c. R. Co. v. Chicago &c. R. Co. 91 Ia. 16; 58 N. W. 918; Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co. 35 Mich. 265; 24 Am. R. 545, and note; Boston &c. R. Co. Matter of, 79 N. Y. 64; South Carolina &c. R. Co. v. Columbia &c. R. Co. 13 Rich. Eq. (S. Car.) 339; Morris &c. R. Co. v. Central &c. R. Co. 31 N. J. L. 205; St. Louis &c. R. Co. v. St. Louis &c. R. Co. 111 Mo. 666; 55 Am. & Eng. R. Cas. 17; Jersey City &c. R. Co. v. Central &c. R. Co. 48 N. J. Eq. 379; 22 Atl. 728; 49 Am. & Eng. R. Cas. 256; Central &c. R. Co. v. Woodstock R. Co. 50 Vt. 452; Western Penn. R. Co.'s Appeal, 99 Pa. St. 155; Fitchburg R. Co. v. New Haven &c. R. Co. 134 Mass. 547. "The right of one railroad to cross another which is intersected by its route, is so plainly essential to its construction for any considerable distance that it has become indisputably established by implication from mere authority to build a railroad between given points." National Docks &c. R. Co. v. State, 53 N. J. L. 217; 21 Atl. 570; 26 Am. St. 421; 4 Lewis' Am. R. Corp. 560; 47 Am. & Eng. R. Cas. 87, citing Morris &c. R. Co. v. Central R. Co. 31 N. J. L. 205; State v. Easton &c. R. Co. 36 N. J. L. 182; New Jersey &c. R. Co. v. Long Branch Commissioners, 39 N. J. L. 28; State v. Drummond, 46 N. J. L. 644. "There is no doubt as to the right of one railroad company, upon the payment of compensation, to construct its road across that of another road already in existence, but the terms and conditions upon which it can be done are such as the law prescribes." Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 116 Ind. 578; 19 N. E. 440.

[2] The rule is very clearly expressed in the recent case of Kansas City &c. R. Co. v. Kansas City &c. R. Co. 118 Mo. 599; 24 S. W. 478; 57 Am. & Eng. R. Cas. 624, in the following language: "The rights of defendants in building their road, and the acquisition of their right of way and switch grounds, were by no means exclusive. They accepted their charter and franchises, and own and use their tracks, subject to the power of the state to authorize the construction of other railroads across their tracks, whenever the public welfare may require. Neither priority in the date of one charter over another, nor the prior location or construction of the one road over the other, affects this right."

the fact that a proposed crossing may inconvenience the company whose line is crossed is no excuse for not granting the crossing.[3] The right of one railway company to cross the right of way of another company does not necessarily depend on express authority contained in the charter of the company seeking the crossing; it may exist, although no such express power is given in its charter.[4] But where a company was given power by its charter to cross all railroads laid or to be laid on a certain street, it was held that an unlimited right to cross was not conferred, but only such as would enable the company to build along the street; and that if the track could be built along the street without crossing the tracks of other companies, the company seeking the crossings would be permanently enjoined from attempting to cross.[5] The right to cross exists in cases where the line sought to be crossed was acquired by purchase the same as in cases where it was acquired by the right of eminent domain, and property devoted to a railroad use is entitled to the same protection against an impairment of that use, whether acquired by purchase or by the right of eminent domain.[6] The question as to

The court cited the following cases: Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604; East St. Louis &c. R. Co. v. East St. Louis &c. R. Co. 108 Ill. 265; 17 Am. & Eng. R. Cas. 163; Lake Shore &c. R. Co. v. Chicago &c. R. Co. 97 Ill. 506; 2 Am. & Eng. R. Cas. 440; Kansas City &c. R. Co. v. St. Joseph R. Co. 97 Mo. 457; 3 L. R. A. 240; Hannibal v. Hannibal &c. R. Co. 49 Mo. 480.

[3] Butte &c. R. Co. v. Montana &c. R. Co. 16 Mont. 504, 41 Pac. 248, 31 L. R. A. 298; 50 Am. St. 508, where it was said: "That railroad crossings are inconvenient, particularly where they are on grade, and frequent, is indisputable. But the law, in regarding railroads as public necessities, has not extended its generous privileges to them altogether without some possible attending inconveniences. Among the latter are lawful crossings, intersections, and connections of a rival company legally competing for the transportation of freight."

[4] Morris &c. R. Co. v. Central &c. R. Co. 31 N. J. L. 205. The right to construct a railroad between certain termini carries with it, by necessary implication, the right to cross other railway tracks between those termini. Perry County &c. R. Co. v. Newport &c. R. Co. 150 Pa. St. 193; 24 Atl. 709.

[5] Market Street &c. R. Co. v. Union &c. R. Co. 10 Phila. (Pa.) 43. But we suppose that under the settled rule that a railroad company acting in good faith may choose its own location, it may cross an existing road at such places and as often as it may be necessary to enable it to discharge its duty to the public.

[6] See Providence &c. R. Co. In re, 17 R. I. 324; 21 Atl. 965.

whether or not a railway company is entitled to invoke the exercise of the right of eminent domain in its favor or to have the right of eminent domain exercised in the matter of railway crossings, is not conclusively determined by the fact that the road may have been organized for private purposes. The true test is whether or not the road is one that the public have a right to use and enjoy. If the road is such a one it may successfully invoke the aid of the right of eminent domain to secure a crossing over the tracks of another road.[7]

§ 1117. Crossings secured by agreement of companies.—The right of one railway company to cross the track of another may be acquired in either one of two ways, that is, by contract between the companies, or under the provisions of statutes, authorizing the condemnation of such crossings.[8] In this section we propose to discuss the question of crossings secured by agreement of the companies. Crossings secured under statutory authority will be discussed in a subsequent section.[9] Railroad companies being free to contract in reference to the matters concerning the purposes for which they are organized and matters connected with their legitimate business, it follows that they may properly and lawfully contract with each other in reference to crossing each other's tracks and lines. Courts look with favor upon contracts by which two railway companies mutually agree upon the place, manner, compensation, and other matters connected with a crossing of their lines.[10] Indeed, it is expressly provided in many of the statutes giving one railroad company the right to cross the line of another that the statutory right thereby

[7] Colorado &c. R. Co. v. Union Pac. R. Co. 41 Fed. 293; Butte &c. R. Co. v. Montana &c. R. Co. 16 Mont. 504; 41 Pac. 232; 31 L. R. A. 298; 50 Am. St. 508. If, however, the railroad is a purely private one, and cannot be used or enjoyed by the public, it cannot exercise the right of eminent domain. See ante, § 961.

[8] Chicago &c. R. Co. v. Cincinnati &c. R. Co. 126 Ind. 513; 26 N. E. 204.

[9] Post, § 1119.

[10] The supreme court of Pennsylvania thus expressed itself on the wisdom of such contracts: The litigant parties to this contention undertook, wisely, to settle the terms upon which the crossing of their tracks should be conducted, by an agreement which seems to us to be extremely sensible, plain and simple." Cornwall &c. R. Co. Appeal of, 125 Pa. St. 232; 17 Atl. 427; 11 Am. St. 889, and note; 42 Am. & Eng. R. Cas. 233.

given cannot be invoked until the companies have made an effort to agree and have failed or are unable to agree.[11] The location and manner of crossing may be determined by agreement, provided the agreement contemplates such a crossing as the law allows, and the company which desires the crossing may agree not only to construct the crossing at its own expense, but to keep and maintain it in good order and repair.[12] A stipulation that the company desiring the crossing shall have the "perpetual and free use of the right of way" of the other company at such point not only contemplates its uninterrupted use, but also, relieves the crossing company from the payment of compensation other than that agreed upon for the crossing.[13] So, where one company agreed for a certain consideration that another company should have the right to cross its main and side tracks and afterwards permitted the latter to construct its road and locate its right of way over a strip of ground owned by the former, but not devoted to public use, it was held that the first company could not thereafter enjoin the second company from constructing a side-track on said strip of ground within the limits of

[11] Richmond &c. R. Co. v. Durham &c. R. Co. 104 N. Car. 650; 10 S. E. 659; 40 Am. & Eng. R. Cas. 488; Chicago &c. R. Co. v. Cincinnati &c. R. Co. 126 Ind. 513; 26 N. E. 204; Boston &c. R. Co. Matter of, 79 N. Y. 69; Boston &c. R. Co. Matter of, 79 N. Y. 64; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 116 Ind. 578; 19 N. E. 440. "The petitioner had no right to resort to the court until a failure to agree as to the matter specified. Such failure was a condition precedent to any standing in court; and there could be no failure or inability to agree, within the meaning of the statute, until some efforts to agree had in good faith been made." Lockport &c. R. Co. Matter of, 77 N. Y. 557, 563. See post, § 1119.

[12] See Chicago &c. R. Co. v. Joliet &c. R. Co. 105 Ill. 388; 44 Am. R. 799; 14 Am. & Eng. R. Cas. 62; Seattle &c. R. Co. v. State, 7 Wash. 150; 34 Pac. 551; 22 L. R. A. 217; 38 Am. St. 866; Hydell v. Toledo &c. R. Co. 74 Ohio St. 138; 77 N. E. 1066. In the last case cited it is held that companies may agree, as between themselves, upon the terms of crossing, including the compensation for the right to so cross and the payment of the expense of constructing and maintaining the crossing and the installing and maintaining of an interlocking system, as well as to which of them shall employ, control, and pay the necessary flagman or towerman to operate the interlocking system.

[13] Alabama &c. R. Co. v. South &c. R. Co. 84 Ala. 570; 3 So. 286; 5 Am. St. 401. See Illinois Cent. R. Co. v. Chicago &c. 122 Ill. 473; 13 N. E. 140.

its right of way, so long, at least, as the same did not affect the operation of trains on the first company's road or in any way interfere with the transaction of its business.[14] And it has been held that the mere commencement of an action by one company to condemn a crossing over the road of another would not prevent them from afterwards entering into an agreement fixing their rights.[14a]

§ 1118. **Enforcing agreement as to crossing.**—Since railway companies may lawfully contract in reference to crossings over each other's tracks it follows that there must be a remedy for the aggrieved party in case of a breach of such contract. The general rule is that the law applicable to ordinary contracts is applicable to such contracts and that the remedies are, in the main, the same as in cases of breach of contracts between individuals. A contract between two railway companies by which one receives the right to construct its line over the right of way of the other is, however, usually of such a nature that it is not possible to redress the breach of such a contract by a mere recovery of money damages.[15] The usual remedy in a case of this kind is by a resort to equity for a specific performance of the contract. This remedy has been sought and applied in a number of cases.[16] Where the two companies have voluntarily entered into the contract, equity will not refuse to enforce the contract on the ground that it is not equitable in all its parts. The courts will not decide whether the contract was for the best interests of the parties, or wise or discreet, or profitable or unprofitable or otherwise,

[14] Chicago &c. R. Co. v. Cincinnati &c. R. Co. 126 Ind. 513; 26 N. E. 204.

[14a] Baltimore &c. R. Co. v. Wabash R. Co. 31 Ind. App. 201; 67 N. E. 544.

[15] Appeal of Cornwall &c. R. Co. 125 Pa. St. 232; 17 Atl. 427; 11 Am. St. 889, and note; 42 Am. & Eng. R. Cas. 233.

[16] South & North &c. R. Co. v. Highland Avenue &c. R. Co. 98 Ala. 400; 39 Am. St. 74; 57 Am. & Eng. R. Cas. 271; Rome &c. R. Co. v. Ontario &c. R. Co. 16 Hun (N. Y.) 445. "The enforcement of such a contract as the one made between these parties can only be secured by means of a decree in equity; an action at law for breach of its terms would be of no avail. It would not be possible to represent the consequences of a breach by money damages, and a literal performance of its stipulations is essential, not only in the interests of the contracting parties, but also in the interests of the traveling public." Appeal of Cornwall &c. R. Co. 125 Pa. St. 232; 11 Am. St. 889, and note; 42 Am. & Eng. R. Cas. 233.

as those were questions for the companies to decide before entering into the contract.[17] But where two companies entered into a contract concerning a crossing of their tracks, by the terms of which one company was bound to keep the crossing in repair, the contract providing that if such company failed, after thirty days' notice, to renew or repair the crossing, the other company could do so at the expense of the former company, the court held that a breach of that part of the contract entailed only a money liability and a court of equity would not retain jurisdiction of a case involving the validity of the contract for the sole purpose of enforcing the clause referred to.[18]

§ 1119. Crossings secured under statutory authority.—Where companies fail, or are unable to agree upon the terms on which their lines shall cross, resort must be had to statutory proceedings to secure the crossing. In nearly all of the states statutes are in force prescribing the terms upon which one company may secure a crossing over another company's line or right of way.[19] Such statutes are valid so long as they do not violate some constitutional provision against the taking of property without due compensation, or take away from the person in whose favor damages may be assessed the constitutional right to a hearing. But it has been held that a statute, which does not provide for compensation to the company whose line is crossed, is unconstitutional upon the ground that the crossing is deemed such a taking of property within the provision of the constitution that compensation must be made.[20] So a statute

[17] South & North &c. R. Co. v. Highland Avenue &c. R. Co. 98 Ala. 400; 13 So. 682; 39 Am. St. 74; 57 Am. & Eng. R. Cas. 271.

[18] South & North &c. R. Co. v. Highland Avenue &c. R. Co. 98 Ala. 400; 13 So. 682; 39 Am. St. 400; 57 Am. & Eng. R. Cas. 271.

[19] In Texas the state constitution contains a provision that railroads shall have the right to cross each other's lines. It was held that this did not of itself give the right to cross, but that there must be some act of the legislature fixing the manner in which the right should be exercised. Missouri &c. R. Co. v. Texas &c. R. Co. 10 Fed. 497. See San Antonio &c. R. Co. v. State, 79 Tex. 264; 14 S. W. 1063; 45 Am. & Eng. R. Cas. 586.

[20] Memphis &c. R. Co. v. Birmingham &c. R. Co. 96 Ala. 571; 11 So. 642; 18 L. R. A. 166; Pennsylvania R. Co. v. Baltimore &c. R. Co. 60 Md. 263; Georgia &c. R. Co. v. Columbus &c. R. Co. 89 Ga. 205; 15 S. E. 305; 51 Am. & Eng. R. Cas. 538. A statute which provides that the company whose road is crossed

which provided that the assessment of damages should be made by commissioners, but did not provide that there should be an appeal from their decision, was held unconstitutional on the ground that it violated a provision of the constitution which prohibited the general assembly from depriving any person of an appeal from any preliminary assessment of damages made by reviewers or otherwise.[21] Statutes authorizing one company to condemn a crossing over another company's line usually provide that an attempt must be made by the companies to agree upon the matter of the crossing between themselves. Where such a provision is found in the statute, it has the effect of a condition precedent to the right to invoke the aid of the statute, and a complaint or instrument to condemn under the statute must show that the companies failed or were unable to agree.[22] The things which the statutes require are in their nature jurisdictional, and the petitioner must affirmatively show that the provisons of the statute have been complied with or the court will not assume jurisdiction.[23] If there is a waiver of an agreement or of an effort to agree, that fact should be alleged in the petition.[24]

shall bear part of the expense of making the crossing has been held unconstitutional. Toledo &c. R. Co. v. Detroit &c. R. Co. 62 Mich. 564; 29 N. W. 500; 4 Am. St. 875. Contra, Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577; 16 N. E. 475.

[21] Memphis &c. R. Co. v. Birmingham &c. R. Co. 96 Ala. 571; 11 So. 642; 18 L. R. A. 166; 57 Am. & Eng. R. Cas. 639.

[22] Seattle &c. R. Co. v. State, 7 Wash. 150; 34 Pac. 551; 22 L. R. A. 217; 38 Am. St. 866; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co 116 Ind. 578; 19 N. E. 440; Lockport &c. R. Co. Matter of, 77 N. Y. 557; Boston &c. R. Co. Matter of, 79 N. Y. 64; Boston &c. R. Co. Matter of, 79 N. Y. 69; Richmond &c. R. Co. v. Durham &c. R. Co. 104 N. Car. 658; 10 S. E. 659; Toledo &c. R. Co. v. Detroit &c. R. Co. 62 Mich. 564; 4 Am. St. 875; St. Louis &c. R. Co. v. Southwestern Tel. &c. Co. 121 Fed. 276, 282 (citing text). See Chicago &c. R. Co. v. Kansas City &c. R. Co. 110 Mo. 510; 9 S. W. 826. It has been held, however, that the lapse of a month, after the company desiring to cross has made a proper proposition for such crossing to the other company, without any response thereto by the latter, is sufficient to justify a finding that they were unable to agree. Eastern Wisconsin R. &c. Co. In re, 127 Wis. 641; 107 N. W. 496.

[23] Lewis Eminent Domain (2d Ed.) § 348. "The road seeking the right to cross another must affirmatively show that it has performed the acts which the statute requires." Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 116 Ind. 578; 19 N. E. 440.

[24] Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 116 Ind. 578; 19 N. E. 440.

Negotiations had with officers of the road sought to be crossed, who assume to act in its behalf, although they have no authority to so act, will be sufficient to constitute an effort to agree, unless the person with whom such officers act has knowledge of their lack of authority.[25] The burden of proof has been held to be upon the petitioner to show that there was a failure to agree.[26] It must be made to appear before a crossing will be granted when so required by the statute authorizing the condemnation, that the crossing is necessary.[27] The company seeking the crossing must ordinarily state in its petition

[25] Saratoga &c. R. Co. In re, 58 Hun (N. Y.) 287; 12 N. Y. S. 318.

[26] Lockport &c. R. Co. In re, 77 N. Y. 557.

[27] St. Paul &c. R. Co. In re, 37 Minn. 164; 33 N. W. 701; 30 Am. & Eng. R. Cas. 294. See, also, State v. District Court, 35 Minn. 461; 29 N. W. 60; Seattle &c. R. Co. v. State, 7 Wash. 150; 34 Pac. 551; 22 L. R. A. 217; 38 Am. St. 866. An absolute necessity need not appear. If it appear that the proposed crossing is reasonably necessary to enable the company seeking the crossing to carry out the project of the construction of its line, the right to cross will be adjudged. Colorado &c. R. Co. v. Union Pac. R. Co. 41 Fed. 293. In Butte &c. R. Co. v. Montana &c. R. Co. 16 Mont. 504; 41 Pac. 232; 31 L. R. A. 298; 50 Am. St. 508, the following statement from Mobile &c. R. Co. v. Alabama &c. R. Co. 87 Ala. 501; 6 So. 404, was quoted with approval: "It may be observed generally that 'necessary,' in this connection, does not mean an absolute or indispensable necessity, but reasonable, requisite, and proper for the accomplishment of the end in view, under the particular circumstances of the case." See, also, Anniston &c. R. Co. v. Jacksonville &c. R. Co. 82 Ala. 297; 2 So. 710; Peoria &c. R. Co. v. Peoria &c. R. Co. 66 Ill. 174; New York &c. R. Co. v. Boston &c. R. Co. 36 Conn. 196. But in Pennsylvania it is held that, to justify such a taking, there must be "a necessity so absolute that, without it, the grant itself will be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control. It must not be created by the company for its own convenience, or for the sake of economy." Pennsylvania Railroad Co.'s Appeal, 93 Pa. St. 150. See, also, to the same effect, Appeal of Sharon R. Co. 122 Pa. St. 533; 17 Atl. 234; 9 Am. St. 133, and note; Appeal of Pittsburgh &c. R. Co. 122 Pa. St. 511; 6 Atl. 564; 9 Am. St. 128. It seems to us that the Pennsylvania cases go a little too far in declaring and enforcing the doctrine of absolute necessity. The cases of that state, at least, go much further than the cases in any other jurisdiction, and are opposed to the weight of authority. In Wisconsin it is held that the necessity of the crossing is to be determined by the legislature, and not by the court or commissioners. Eastern Wisconsin R. &c. Co. In re, 127 Wis. 641; 107 N. W. 496.

to condemn the point and manner of crossing, so as to afford to the commissioners sufficient information to form a basis on which they can calculate the compensation to be paid.[28] After the filing of such a petition or instrument to condemn as is sufficient to give the court jurisdiction, the determination of the place of crossing and the amount of damages is usually left with commissioners appointed for that purpose. Since the procedure in these cases depends so largely upon the terms of the statute under which the proceedings to condemn are prosecuted, and since the statutes in the different states are so dissimilar, it is unsafe to attempt to lay down rules that will be applicable to all cases. As a general rule, a commission appointed to determine a crossing and to fix the amount of damages, has no power to change the location described in the petition,[29] unless the statute expressly confers upon the commission power to locate the crossing.[30] A broad discretion is usually vested in the commissioners as to the manner in which the crossing shall be made. It has also been held that the award of the commissioners stands in the place of a contract between the companies, and may be enforced in the same way as if it had been made by voluntary agreement,[31] and in such award it is proper for the commissioners to provide for all the details of construction and operation of the crossing which the companies might have agreed upon between them-

[28] Lake Shore &c. R. Co. v. Chicago &c. R. Co. 100 Ill. 21; Lake Shore &c. R. Co. v. Chicago &c. R. Co. 97 Ill. 506; 2 Am. & Eng. R. Cas. 440.

[29] Central &c. R. Co. In re, 1 Thomp. & C. (N. Y.) 419. But see, as to power of the court in West Virginia, Wellsburg &c. R. Co. v. Panhandle Trac. Co. 56 W. Va. 18; 48 S. E. 746; and see post, § 1120.

[30] A decision of the commissioners, as to the necessity for the manner of crossing and the award therefor, is final unless appealed from. Union Terminal &c. R. Co. v. Board, 54 Kan. 352; 38 Pac. 290. In Maine, and some other states, the whole question of the construction of railroad crossings is left to the railroad commissioners, and their decision is final unless an appeal is taken as provided by statute. Boston &c. R. Co. v. Saco Valley &c. Co. 98 Me. 78; 56 Atl. 202.

[31] In Chicago &c. R. Co. v. Kansas City &c. R. Co. 110 Mo. 510; 19 S. W. 826, it was said: "It is perfectly clear, we think, that the statute intended the award of the commissioners to stand as a contract between the parties; and we are also of the opinion that the parties have the same rights, and we may enforce the award, the same as if it had been their voluntary agreement." See Winona &c. R. Co. v. Chicago &c. R. Co. 50 Minn. 300; 52 N. W. 657.

selves in case they had been able to agree.[32] It is the duty of the commissioners, after they have agreed upon the crossing and the matters for which they were appointed, and have prepared their report, to present it to the court by which they were appointed, or in which the petition seeking the crossing was filed. Such reports will not be held invalid for any informal defect. Thus it has been held that the report of the commissioners need not show that the commissioners viewed the premises,[33] and a report showing that the commissioners allowed the company seeking the crossing a latitude of ten feet in which to make their connections, explaining that this latitude was necessary in order to secure the proper alignment and connections of the frogs, was held valid.[34] When the report of the commissioners has been filed, the matter may be said to be in the hands of the court until action is taken on the report, either confirming or disaffirming it, and the safest course for a condemning company to pursue would be to wait until action is taken on the commissioners' report before commencing the actual construction of the crossing.[35]

§ 1120. Location of crossing.—Where two companies agree upon a crossing of their lines the location of the crossing can be fixed once for all by the agreement. But where the companies are not able to agree upon a crossing and resort must be had to statutory authority to condemn a crossing the point of crossing often becomes a matter of much contention between the parties and can only be settled by the courts, unless the statute confers upon one company the power to name the point of crossing. The general rule is that

[32] Chicago &c. R. Co. v. Kansas City &c. R. Co. 110 Mo. 510; 19 S. W. 826. In this case it was held that the commissioners had power to award that temporary pile piers should be replaced within a year by stone masonry.

[33] St. Louis &c. R. Co. v. St. Louis &c. R. Co. 100 Mo. 419; 13 S. W. 710.

[34] St. Louis &c. R. Co. v. St. Louis &c. R. Co. 100 Mo. 419; 13 S. W. 710.

[35] See Richmond &c. R. Co. v. Durham &c. R. Co. 104 N. Car. 658; 10 S. E. 659, where the crossing company proceeded without attempting to agree or to condemn under the statute. See, also, Toledo &c. R. Co. v. Detroit &c. R. Co. 63 Mich. 645; 30 N. W. 595. In Missouri the determination of the commissioners as to the point and manner of crossing is not conclusive, but is open to review by the court. State v. Dearing, 173 Mo. 492; 73 S. W. 485.

the point of crossing sought should be designated in the petition or instrument to condemn and that point is usually the point at which the crossing is made.[36] The point of crossing may be subject to slight change by the commissioners for it is not always possible in a petition to condemn to designate with mathematical certainty the exact point of crossing.[37] A crossing should be so located as to do no unnecessary injury to the line to be crossed, and the theory of some of the cases is that in giving a company power to cross another company's line and to locate the point of crossing the condemning company will always seek a point where the injury will be as small as possible. So far as consistent with the performance of the object for which the condemning company is organized, its interest, as well as the interest of the company whose line is to be crossed, demands that the condemning company should locate a crossing where the least injury will be done and where the consequential damages will be as small as possible.[38] Where there is dispute as to the best point of crossing and the location of the crossing is left

[36] Central &c. R. Co. In re, 1 Thomp. & C. (N. Y.) 419.

[37] The court is not bound to fix the exact point mentioned in the petition as the point of crossing. If there is an identity of purpose of the crossing petitioned for, and that fixed by the court, that will be sufficient. State v. District Court, 35 Minn. 461; 29 N. W. 60.

[38] The supreme court of Illinois, in speaking of the power of the condemning company to designate the point of crossing, said: "The security against a wanton and arbitrary exercise of this power, upon mere whim or caprice, and that in all cases the point and manner of taking selected will be that least injurious to the owner and yet suited to the public necessity, is found in the fact that such corporations will be induced by considerations of their own best interest to select, in making such crossings, that practical place and that practical mode which will be the least detrimental to the owner, because the corporation so selecting is required by law to make the owner full compensation, and the more injurious to the owner the place selected and the mode chosen the greater will be the amount of necessary compensation to be paid. It is assured that no corporation formed under this act will ever do so foolish a thing as to demand, under these proceedings, from the owners of an intervening railroad, the privilege of crossing at a point and in a mode so destructive of the interests of such owners that full compensation therefor will be so enormous that the new company could get no profit or gain by the payment thereof." Lake Shore &c. R. Co. v. Chicago &c. R. Co. 97 Ill. 506; 2 Am. & Eng. R. Cas. 440.

to the court the matter is to be determined as a question of fact upon all the evidence in the case.[39]

§ 1121. **Franchise must not be impaired.**—The general rule is that one railroad will not be allowed to cross another at such a place or in such a manner as to impair the franchise of the company across whose line the crossing is sought.[40] When there is a mere crossing of one railroad over another at a point where there is nothing but the track of the company whose line is crossed, the franchise is not thereby impaired for the crossing can be used by both companies, and the ability of both companies to perform their public duties does not come in conflict.[41] In such a case the trains of both companies can run subject only to the slight inconvenience of being required to stop at the crossing. Such an inconvenience does not amount to an impairment of a company's franchise. But where a crossing is sought at such a point that some permanent improvement of the company whose line is already constructed will be taken and completely destroyed, this is held to be an impairment of the franchise, and a crossing at such a point and in such a manner will usually be denied.[43] "The manner of crossing is not to be destructive

[39] California &c. R. Co. v. Southern Pac. Railroad Co. 67 Cal. 59; 7 Pac. 123; Minneapolis &c. R. Co. In re, 36 Minn. 481; 32 N. W. 556; 30 Am. & Eng. R. Cas. 279.

[40] The rule is thus stated in National Docks &c. R. Co. v. State, 53 N. J. L. 217; 21 Atl. 570; 26 Am. St. 421; 4 Lewis Am. R. & Corp. 560: "As has been stated, in the acquisition of a right to cross, the ability of the existing company to fully, fairly and freely exercise its franchises is not to be destroyed. It is not the policy of the law to cripple or destroy one highway for the purpose of erecting another. The purpose is to preserve, multiply and maintain highways for the development of the country and the general public benefit, and this purpose is especially manifested in the general railroad law, where there exists a prohibition against the condemnation of land, used for railroad purposes, except for a mere crossing. But it does not follow that the precise existing use of the land crossed may not be interfered with. There can be no reason why such use should not yield, if the proposed interference with it is necessary, and of a character that will not destroy the reasonably fair enjoyment and exercise of the franchise of the company whose road is crossed."

[41] Boston &c. R. Co. In re, 79 N. Y. 64; State v. Dover &c. R. Co. 43 N. J. L. 528; 14 Am. & Eng. R. Cas. 87; New Jersey &c. R. Co. v. Long Branch Commissioners, 39 N. J. L. 28; Hornellsville &c. R. Co. v. New York &c. R. Co. 31 N. Y. S. 745.

[43] Pittsburgh &c. R. Co.'s Appeal, 122 Pa. St. 511; 6 Atl. 564; 9 Am.

of the ability of the road crossed to fully and freely exercise its franchises."[44] Where, however, the proposed crossing was near the edge of a yard of the company whose line was to be crossed so that about 180 feet of storage track was destroyed, it was held that such a crossing would not constitute an impairment of the franchise of the company crossed.[45] It is no excuse for the impairment of a company's franchise that the company seeking the crossing is not able to pay the expense of such a crossing as would not impair the franchise of the company crossed.[46] No distinction can be made on the basis of the wealth of the company seeking the crossing. In those cases where the proposed crossing would totally destroy a part of a permanent yard or permanent buildings or structures, the condemnation of the crossing will as a rule be enjoined. But it must clearly appear that such impairment of the franchise will take place. A mere prospective permanent use of the grounds or lands across which the crossing is sought must give way to the necessities of the petitioning company.[47] "Mere priority of acquisition, or even of occupation, gives no exclusive right, except in so far as the condemnation trenches upon the greater necessities of the other franchise."[48]

St. 128; Boston &c. R. Co. v. Lowell &c. R. Co. 124 Mass. 368; Central &c. R. Co. v. Ft. Clark &c. R Co. 81 Ill. 523.

[44] National Docks &c. R. Co. v. State, 53 N. J. L. 217; 21 Atl. 570; 26 Am. St. 421; 4 Lewis Am. R. & Corp. 560. See, also, State v. Easton &c. R. Co. 36 N. J. L. 181; New Jersey &c. R. Co. v. Long Branch Commissioners, 39 N. J. L. 28; State v. Dover &c. R. Co. 43 N. J. L. 528; State v. Drummond, 46 N. J. L. 644; Jersey City &c. R. Co. v. Central R. Co. 48 N. J. Eq. 379; 22 Atl. 728; 49 Am. & Eng. R. Cas. 256.

[45] Kansas City &c. R. Co. v. Kansas City &c. R. Co. 118 Mo. 599; 24 S. W. 478; 57 Am. & Eng. R. Cas. 628. See, also, Norfolk &c. R. Co. v. Tidewater R. Co. 105 Va. 129; 52 S. E. 852.

[46] Pittsburgh Junction R. Co.'s Appeal, 122 Pa. St. 511; 6 Atl. 564; 9 Am. St. 128; 28 Am. & Eng. R. Cas. 266; Pennsylvania Co.'s Appeal, 93 Pa. St. 150; Perry County R. Co. v. Newport &c. R. Co. 150 Pa. St. 193; 24 Atl. 709; 55 Am. & Eng. R. Cas. 12.

[47] Colorado &c. R. Co. v. Union Pac. R. Co. 41 Fed. 293; Board &c. Illinois &c. Canal v. Chicago &c. R. Co. 14 Ill. 314; Easton R. Co. v. Boston &c. R. Co. 111 Mass. 125; 15 Am. R. 13; Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co. 35 Mich. 265; 24 Am. R. 545, and note.

[48] Colorado &c. R. Co. v. Union Pac. R. Co. 41 Fed. 293, citing East St. Louis &c. R. Co. v. East St. Louis &c. R. Co. 108 Ill. 265; Lake Shore &c. R. Co. v. Chicago &c. R. Co. 97 Ill. 506.

§ 1122. Crossings at grade.—The tendency of modern legislation and judicial authority is to discourage the construction of grade crossings of railways whenever it is possible to avoid the same,[49] at least unless some interlocking device is provided for. Crossings at grade are not only a source of inconvenience and delay to the companies operating trains over the crossings, but they are also a source of danger on account of collisions between trains and consequent injuries to employes and passengers. In a great many parts of the country where the surface of the ground over which the railway grades are constructed is level and unbroken, it is almost impossible to avoid crossings at grade. But, it has been held that whenever it is practicable to avoid a crossing at grade equity may interfere to prevent such a crossing.[50] In Pennsylvania the courts are

[49] The supreme court of Pennsylvania thus expresses itself: "The evident intendment of the statute is to discourage crossings at grade. This is a question in which the company, whose road is to be crossed, is not the only party liable to injury thereby. It involves the safety and security of the public. Crossings at grade are always attended with danger. As our population becomes more dense, travel and traffic will increase, and the injuries resulting from grade crossings will be multiplied. Each succeeding year will increase the necessity for avoiding them. Their construction should now and henceforth be discouraged." Pittsburgh &c. R. Co. v. Southwest &c. R. Co. 77 Pa. St. 173. See, also, Delaware &c. Co. v. Lackawanna &c. R. Co. (Pa. Com. Pl.) 3 Lack. Jur. 413; Pennsylvania R. Co. Appeal of, 116 Pa. St. 55; 8 Atl. 914; Chester Trac. Co. v. Philadelphia &c. R. Co. 188 Pa. St. 105; 41 Atl. 449; 44 L. R. A. 269; Pittsburg &c. R. Co. v. Ft. Pitt &c. R. Co. 192 Pa. St. 44; 43 Atl. 352; Wabash R. Co. v. Cincinnati &c. R. 29 Ind. App. 546; 63 N. E. 325; Malott v. Collinsville &c. R. Co. 108 Fed. 313. In many of the states there are positive statutes interdicting the construction of grade crossings wherever it is found practicable to cross in any other way. See Pennsylvania R. Co. v. Braddock Electric R. Co. 152 Pa. St. 116; 25 Atl. 780. They are, however, expressly authorized in West Virginia. Wellsburg &c. R. Co. v. Panhandle Trac. Co. 56 W. Va. 18; 48 S. E. 746, and in a number of other states, in most of which, however, an interlocking device or system is provided for.

[50] Missouri &c. R. Co. v. Texas &c. R. Co. 10 Fed. 497; Toledo &c. R. Co. v. Detroit &c. R. Co. 63 Mich. 645; 28 Am. & Eng. R. Cas. 280; Central Vermont R. Co. v. Woodstock R. Co. 50 Vt. 452; Chicago &c. R. Co. v. Chicago &c. R. Co. 6 Biss. (U. S.) 219; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604; Fort Street &c. Co. v. State Railroad Board, 81 Mich. 248; 45 Am. & Eng. R. Cas. 113. The prima facie presumption of law is that a crossing at grade can be reasonably avoided, and the burden of

imperatively required by statute to enjoin the crossing of one railroad of another at grade whenever it is reasonably practicable to avoid a crossing at grade.[51] Where the point at which a crossing was sought was on a grade of the line crossed, the track extending both directions from such point on a down grade, and it appearing that a crossing at grade would endanger life and be of great harm to the company whose line was being crossed on account of being compelled to start its trains on an up-grade after stopping for such crossing and that a crossing below grade could be constructed at a somewhat larger expense than the grade crossing, it was held that a crossing at grade would be permanently enjoined.[52] The fact that the com-

proof is on the company seeking the crossing to show that, in the particular case, a crossing at grade cannot be avoided. In Appeal of Baltimore &c. R. Co. (Pa.) 10 W. N. C. 530; 3 Am. & Eng. R. Cas. 244, it was said: "Where the public safety can be reasonably secured at a grade crossing by appliances of signals and watchmen and stoppage of trains, and the expense of an overgrade crossing would be so considerable as to seriously interfere with the profitable construction of the new line, it is not, as we view it, reasonably practicable to avoid the grade crossing."

[51] Baltimore &c. R. Co.'s Appeal, (Pa.), 10 W. N. C. 530; 3 Am. & Eng. R. Cas. 242; Pittsburgh &c. R. Co.'s Appeal (Pa.), 28 Am. & Eng. R. Cas. 266; Appeal of Moosic &c. R. Co. (Pa.) 13 Atl. 915; Pennsylvania R. Co. v. Braddock &c. R. Co. 152 Pa. St. 116; 25 Atl. 780; 55 Am. & Eng. R. Cas. 1. The Pennsylvania Supreme Court, in the very recent case of Perry Co. R. &c. Co. v. Newport &c. R. Co. 150 Pa. St. 193; 24 Atl. 709, gave its reasons why grade crossings should be avoided in the following language: "The time for grade crossings in this state has passed. They ought not to be permitted, except in case of imperious necessity. They admittedly involve great danger to life and property. In the earlier period of railroads this danger was overlooked, or at least disregarded. The desire of the people for this species of improvements tended to close their eyes to the dangers involved. The traffic then upon railroads was comparatively light, and trains ran at long intervals. The rapid development of the country, the enormous growth in wealth, population, and business, have materially changed the relations of railroads to the public and to each other. The result is, that we now see railroad companies and municipalities spending enormous sums in correcting the defects of earlier railroad construction, and especially in avoiding grade crossings." See, also, Baltimore &c. R. Co. v. Butler &c. Co. 207 Pa. St. 406; 56 Atl. 959.

[52] Humeston &c. R. Co. v. Chicago &c. R. Co. 74 Iowa, 554; 38 N. W. 413; 35 Am. & Eng. R. Cas. 263. See, also, Southern R. Co. v. Washington &c. R. Co. 102 Va. 483; 46 S. E. 784.

pany seeking the crossing is unable to pay the expense of constructing a crossing above or below the grade of the company whose line is crossed will not justify the condemnation of a grade crossing.[53] In New Jersey the road seeking the crossing may decide for itself whether it will cross at grade or otherwise, the right to cross at grade being subject only to the restrictions that the crossing shall not be made at less than a certain angle and shall not impair the franchises of the road crossed.[54] Where a crossing can not be made otherwise than at grade it will not be denied because it will necessitate the raising of spur tracks of the company crossed eighteen inches, it appearing that the new grade is necessary because of another crossing.[55] But to authorize such a crossing it must appear that such a change in the grade of the company whose line is crossed can be made and that without such a change the crossing would be defeated. The general rule is that the company seeking the crossing where it is to be made at grade must adopt such plans as will make its grade conform to that of the line to be crossed.[56]

§ 1122a. Interlocking devices.—As intimated in the last preceding section, when grade crossings are permitted under modern statutes they are usually permitted only when it is impracticable to cross in any other way or when some interlocking device or system is provided for, and the statutes often require stops to be made before crossing. Where such a system or device is provided, however, some of the statutes excuse the companies from stopping at such crossings. In some jurisdictions the subject of interlocking devices is left largely to railroad commissioners, or the like, and in some of them the device or system must be approved by them or by some state officer. This subject, however, is more fully considered elsewhere.[57]

[53] Perry County &c. R. Co. v. Newport &c. R. Co. 150 Pa. St. 193; 24 Atl. 709.

[54] Jersey City &c. R. Co. v. Central &c. R. Co. 48 N. J. Eq. 379; 22 Atl. 728; 49 Am. & Eng. R. Cas. 256. As to duty of new company crossing at grade to pay expense, see West Jersey &c. R. Co. v. Atlantic City &c. R. Co. 65 N. J. Eq. 613; 56 Atl. 890.

[55] Butte &c. R. Co. v. Montana &c. R. Co. 16 Mont. 504; 41 Pac. 248; 31 L. R. A. 298; 50 Am. St. 508.

[56] United New Jersey &c. Co. v. National Docks &c. R. Co. 52 N. J. L. 90; 18 Atl. 574; 44 Am. & Eng. R. Cas. 226.

[57] For recent cases upon the subject, see Hydell v. Toledo &c. R. Co. 74 Ohio St. 138; 77 N. E. 1066; Chi-

§ 1123. Crossings above or below grade.—Railroad crossings may be made in one of three ways, by an underground way or tunnel, by an overhead crossing or by a crossing at grade.[58] In the preceding section we have seen that the tendency is to discourage the use of grade crossings, so that it follows that where a grade crossing will not be allowed the crossing must be made either by a tunnel or an overhead way. In those jurisdictions where the policy of the law is to avoid grade crossings, an overhead or tunnel crossing will be ordered wherever it is reasonably practicable to avoid a crossing at grade. In determining whether it is reasonably practicable to avoid a grade crossing many factors enter into a consideration of the subject. The location and surroundings of the proposed crossing, the character and use of the intersecting lines, the increased cost of construction and operation, public safety and convenience and the interest and convenience of the road to be crossed are all proper matters to be considered in determining whether an overhead crossing should be ordered.[59] Where it appeared that the increased cost of an overhead crossing would be from $300,000 to $600,000, that a troublesome grade would result and the construction of switches and side-tracks be prevented and other inconveniences result, the court refused to order an overhead crossing.[60] Tunnel crossings or

cago &c. R. Co. v. Indianapolis &c. Co. 165 Ind. 453; 74 N. E. 513; Minneapolis &c. R. Co. v. Gowrie &c. Co. 123 Ia. 543; 99 N. W. 181; Minneapolis &c. R. Co. v. Cedar Rapids &c. R. Co. 114 Ia. 502; 87 N. W. 410. In Indiana it is held that, while an appeal lies from any rate, charge, classification, or general regulation of the railroad commissioners, no such appeal lies from their order requiring an interlocking device at a crossing on petition of one of the companies. Grand Rapids &c. R. Co. v. Hunt, (Ind. App.), 78 N. E. 358; Grand Rapids &c. R. Co. v. Railroad Commissioners (Ind.), 78 N. E. 981.

[58] "Such a crossing will be effected by a tunnel which leaves the surface intact, and provides support for the use it has been applied to; or by an overhead bridge at such a height as will not interfere with the free use of its route by the existing railroad; or by a passage on the surface, and at grade, where the rails of the existing railroad are temporarily cut, and frogs inserted, which thereafter permit the continuous use of the route by the existing railroad, except when the trains of the new railroad are crossing." United New Jersey &c. Co. v. National Docks &c. R. Co. 52 N. J. L. 90; 18 Atl. 547; 44 Am. & Eng. R. Cas. 226.

[59] Northern Central R. Co.'s Appeal, 103 Pa. St. 621.

[60] Northern Central R. Co.'s Appeal, 130 Pa. St. 621. And where

under-way crossings stand on the same basis as overhead crossings, within the policy of avoiding grade crossings, and will be ordered to avoid a crossing at grade whenever it appears that it is practicable to construct such a crossing. Thus, where a crossing was sought at such a point on the company's line as to cause it great inconvenience because of a heavy grade, if a crossing at grade should be ordered, it was held that the company seeking the crossing should be compelled to cross by an underway, it appearing that such a way could be constructed at a somewhat greater expense than a grade crossing.[61] And under similar conditions as to expense an overhead crossing will be ordered.[62]

§ 1124. Number of crossings.—Ordinarily the company seeking the crossing is not limited to a single crossing. More than one crossing may be secured, but each crossing must be secured on the ground that it is necessary. In the absence of any statute regulating the subject there is no limit to the number of crossings which one company may secure across another company's line, provided it be made to appear that all the crossings are necessary to the construction and operation of the company seeking the crossings,[63] and do not materially impair the franchises of the company whose line is crossed. But where it appears that the crossings which a company seeks are not necessary, but are sought for the mere convenience of the new com-

the costs of an overhead crossing would be so great as to compel an abandonment of the new road, a crossing at grade will be permitted. Pennsylvania &c. R. Co. v. Philadelphia &c. R. Co. 160 Pa. St. 277; 28 Atl. 784. Where it is practicable for an electric street railroad to cross the tracks of a steam railroad by an overhead viaduct, at an expense not greatly exceeding $7,000, an injunction will issue to restrain the street railroad from constructing a grade crossing which would be extremely perilous to human life, by reason of the descending grade and curvature of the tracks of the steam railroad, the obstructed view, the large number of trains (over two hundred daily) passing over such tracks, and the difficulty of keeping electric cars at all times under perfect control. Pennsylvania R. Co. v. Braddock Electric R. Co. 152 Pa. St. 116; 25 Atl. 780.

[61] Humeston &c. R. Co. v. Chicago &c. R. Co. 74 Iowa, 554; 38 N. W. 413; 35 Am. & Eng. R. Cas. 263; Chicago &c. R. Co. v. Chicago &c. R. Co. 91 Iowa, 16; 58 N. W. 918.

[62] Pennsylvania R. Co. v. Braddock &c. R. Co. 152 Pa. St. 116; 25 Atl. 780; Altoona &c. R. Co. v. Tyrone &c. R. Co. 160 Pa. St. 623; 28 Atl. 997.

[63] Boston &c. R. Co. Matter of, 79 N. Y. 64.

pany, the number will be limited. Thus, where a company sought two crossings at near intervals over another company's line, and it appeared that neither of the crossings was necessary, and that both could be avoided by constructing the new line over a route nearly as practicable as that sought, at a slight additional expense, it was held that both crossings would be denied.[64]

§ 1125. Enjoining construction of crossings.—Where one railway company seeks to condemn and construct a crossing over the right of way and tracks of another at a place or in a manner not authorized by law, resort may often be had to equity for relief. If a company seeks a crossing at an improper place, or seeks an unnecessary crossing or attempts to erect one in such a manner as to materially interfere with the franchises of the company whose line is crossed or in excess of lawful authority, the remedy by injunction is appropriate.[64a] The general principles applicable to the remedy by injunction are applicable to such cases and a plaintiff who seeks such relief must bring his case within those principles.[65] The cases in which injunctions have been granted are numerous. Thus, where a crossing at grade is sought, injunction is held to be the appropriate remedy to prevent such a crossing where it appears that it is practicable to construct an overhead or underway crossing.[66] Injunction is the appropriate remedy to prevent the condemnation of a crossing through another's

[64] Perry County R. Co. v. Newport &c. R. Co. 150 Pa. St. 193; 24 Atl. 709; 55 Am. & Eng. R. Cas. 12.

[64a] See Chicago &c. R. Co. v. Chicago &c. R. Co. 6 Biss. (U. S.) 219; 5 Fed. Cas. 590. A court of equity will always interfere in a proper case and control the rights of two railway companies in reference to a proposed crossing of their tracks. National Docks &c. R. Co. v. State, 53 N. J. L. 217; 21 Atl. 570; 26 Am. St. 421; National Docks &c. R. Co. v. Pennsylvania R. Co. (N. J.) 30 Atl. 1102; Cincinnati &c. R. Co. v. Chattanooga &c. R. Co. 44 Fed. 470. See, also, Kanawha &c. R. Co. v. Glen Jean &c. R. Co. 45 W. Va. 119; 30 S. E. 86, 91, citing text.

[65] See Pennsylvania Co. v. Lake Erie &c. R. Co. 146 Fed. 446.

[66] Humeston &c. R. Co. v. Chicago &c. R. Co. 74 Iowa, 554; 38 N. W. 413; 35 Am. & Eng. R. Cas. 263; Reynoldsville &c. R. Co. v. Buffalo &c. R. Co. 134 Pa. St. 541; 19 Atl. 674; Pittsburg Junction R. Co.'s Appeal, 122 Pa. St. 511; 6 Atl. 564; 28 Am. & Eng. R. Cas. 266; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; Central Vermont R. Co. v. Woodstock R. Co. 50 Vt. 452; Toledo &c. R. Co. v. Detroit &c. R. Co. 63 Mich. 645; 30 N. W. 595; Missouri &c. R. Co. v. Texas &c. R. Co. 4 Woods (U. S.) 360; 10 Fed. 497.

yards or permanent structures.[67] And equity will interfere to prevent a company from constructing a crossing before condemnation proceedings have been had and terminated, or the condemnation of more crossings than are necessary.[68] But where a complainant has an adequate remedy at law equity will not interfere by injunction.[69] Thus, where one railway company, pending an appeal from an award establishing a crossing and fixing the amount of compensation to which the older company was entitled, without paying or depositing the compensation required by law, entered upon the right of way and constructed its tracks, it was held that its action was a mere naked trespass, for the redress of which there was an adequate legal remedy.[70] And a crossing will not be enjoined where it appears that all damage caused can be adequately compensated in money.[71] Where commissioners have been appointed to condemn a right of crossing of one railway over another, they will not be enjoined from considering a certain plan of crossing, which presents slight but not material differences from that described in the petition seeking to condemn.[72] Injunction will also be denied where there is an adequate remedy by appeal or certiorari.[73]

§ 1126. Compensation—Taking property.—The right of one railroad company to lay and operate its tracks across the roadway of another company is well established. As we have seen, every railroad company takes its right to construct its road upon the implied contract that other railroad companies may lay their tracks across its tracks and right of way. It is held by many of the adjudged cases that the right of one company to cross the tracks of another rests upon the power of eminent domain, and that in constructing a crossing there is a "taking" of property within the meaning of the consti-

[67] See Cincinnati &c. R. Co. v. Anderson, 139 Ind. 490; 38 N. E. 167; 47 Am. St. 285.

[68] Pennsylvania R. Co. v. Consolidated Coal Co. 55 Md. 158.

[69] Anniston &c. R. Co. v. Jacksonville &c. R. Co. 82 Ala. 297; 2 So. 710; Tennessee &c. R. Co. v. East Alabama &c. R. Co. 75 Ala. 516; 51 Am. R. 475, and note.

[70] Mobile &c. R. Co. v. Alabama Midland &c. R. Co. 87 Ala. 520; 6 So. 407.

[71] Chicago &c. R. Co. v. Illinois &c. R. Co. 113 Ill. 156.

[72] Pennsylvania R. Co. v. National Docks &c. R. Co. 56 Fed. 697.

[73] Pennsylvania R. Co. v. National Docks &c. R. Co. 56 Fed. 697. See, also, Cincinnati &c. R. v. Wabash R. Co. 162 Ind. 303; 70 N. E. 256.

tution. It seems to us that some of the cases state the doctrine too broadly.[74] While it is perhaps true that there is a "taking" within the meaning of the constitution, still there is not in all cases a "taking" in the same sense that there is where private property is appropriated. If it be true, as unquestionably it is, that a railroad company secures its franchise subject to the right of the public to have other railroads constructed across its tracks, then it cannot be true that the mere fact that another company constructs a track across its roadway is a "taking" in the strict sense. We think that there is a "taking" only in a very narrow and limited sense, and that the right to compensation is very different from that which exists in favor of a private owner whose property is seized under the right of eminent domain, for the exclusive use is not taken and the award of damages must be governed by consideration somewhat different from those applied where the company seeks to condemn a right of way over lands of private persons. The mere fact of crossing does not add a burden, since the company took its franchise subject to the right of crossing by other railroads; but where there is an interference with the roadway or tracks, or where there is an injury to the prior railroad, or where there is expense caused by the crossing, then there may be right to compensation. As we have said, in such cases, the construction of a crossing by one company over the tracks of another is generally regarded as a taking of private property for public use, and compensation must be made before the right to cross can be exercised.[75] Since such a crossing is deemed a taking of private prop-

[74] A very thoughtful author thus states the law: "Where a company's location is subjected to a railroad crossing, in a manner not substantially interfering with the use thereof, or causing damage to the road-bed, its property is not taken in the constitutional sense. But the use of its rails for running trains, or the laying of tracks upon its location by another company, under authority of law, is such a taking. The grant of a right to one company to lay a track on a highway is not exclusive, and similar rights may be given to other companies without compensation for injury to the earlier franchise." Pierce Railroads, 194.

[75] Anniston &c. R. Co. v. Jacksonville &c. R. Co. 82 Ala. 297; 2 So. 710; Chicago &c. R. Co. v. Springfield &c. R. Co. 67 Ill. 142; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604; Mobile &c. R. Co. v. Alabama &c. R. Co. 87 Ala. 501; 6 So. 404; Massachusetts &c. R. Co. v. Boston &c. R. Co. 121 Mass. 124; Grand Rapids &c. R. Co. v. Grand Rapids &c. R. Co. 35 Mich. 265; 24 Am. R. 545, and note; Chicago &c. R. Co. v.

erty for public use, it follows that just compensation must be made.[76] Where, however, there is no damage, no compensation need be made; but the fact that there may be no damage, and therefore no compen-

Englewood &c. R. Co. 115 Ill. 375; 4 N. E. 246; 56 Am. R. 173; National Docks &c. R. Co. v. State, 53 N. J. L. 217; 21 Atl. 570; 26 Am. St. 421; Flint &c. R. Co. v. Detroit &c. R. Co. 64 Mich. 350; 31 N. W. 281; Cincinnati &c. R. Co. v. Chattanooga &c. R. Co. 44 Fed. 470; Georgia &c. R. Co. v. Columbus &c. R. Co. 89 Ga. 205; 15 S. E. 305; 51 Am. & Eng. R. Cas. 538; Chicago &c. R. Co. v. Englewood &c. R. Co. 17 Ill. App. 141. In Memphis &c. R. Co. v. Birmingham &c. R. Co. 96 Ala. 571; 11 So. 642; 18 L. R. A. 166; 57 Am. & Eng. R. Cas. 639, in a railway crossing case, the court, after referring to the constitutional limitations and restrictions that private property shall not be taken for public use without just compensation, said: "If, therefore, the crossing or intersecting of the road of one railway company by the road of another is taking, injuring or destroying private property, by the construction or enlargement of the works, highways or improvements of such company, within the meaning of the constitution, then the constitutional restrictions or limitations to which we have referred are applicable; and the exercise of such right can only be sustained when it is claimed under a valid legislative enactment by which the rights contemplated by these constitutional restrictions are secured to the owner of the property so taken, injured or destroyed. There is abundant authority in the text-books and adjudicated cases for the proposition that the crossing or intersecting of the road of one railway company by that of another is the taking of property, within the meaning of constitutional provisions requiring compensation to be made." In Lake Shore &c. R. Co. v. Chicago &c. R. Co. 97 Ill. 506; 2 Am. & Eng. R. Cas. 440, the court, in speaking of the right to condemn a railway crossing over another line, under the Illinois constitution, said: "This 14th section of article 11 was inserted out of abundant caution, and simply declares such property to be subject to the recognized power of eminent domain, and, like other private property, protected by the limitation that private property shall not be taken without just compensation, to be ascertained by a jury, unless the same is to be made by the state. . . . In so far as the private rights of the railroad company in such property are concerned, such rights, like other private property, are subject to the power of the state to condemn and take the same for the new use, upon the payment of just compensation."

[76] Memphis &c. R. Co. v. Birmingham &c. R. Co. 96 Ala. 571; 11 So. 642; 18 L. R. A. 166; 57 Am. & Eng. R. Cas. 639; Georgia &c. R. Co. v. Columbus &c. R. Co. 89 Ga. 205; 51 Am. & Eng. R. Cas. 538; Jersey City &c. R. Co. v. Central R. Co. 48 N. J. Eq. 379; 22 Atl. 728; 49 Am. & Eng. R. Cas. 256; authorities cited next preceding note.

sation, does not change the nature of the right under which the crossing is secured. It seems to us that, under such circumstances, the crossing would still be secured under the right of eminent domain, and might still be, in a sense, a taking of private property for public use.

§ 1127. Damages—Elements of.—We have seen in the preceding section that the condemnation and construction of a railroad across the right of way and tracks of another company may be a taking of property within the constitutional limitations that just compensation must be made. Since compensation must be made in such cases it follows that there must be some rule for estimating the compensation and defining what elements shall be considered in making up such estimate. In the very nature of things there must usually be some injury to a railway company by constructing another railway line across its tracks and right of way. While there are many elements of injury, which result in greater or less damage and loss to the company whose line is crossed, compensation for every such element will not be allowed. The general rule is that the company whose line is crossed is entitled to recover compensation for everything which renders its property less valuable, causes it additional expense in restoring its property to a safe condition for use, renders it less able to transact its business, or makes the transaction of its business more expensive.[77] Thus a recovery can be had for the land

[77] The rule is thus stated in the case of Peoria &c. R. Co. v. Peoria &c. R. Co. 105 Ill. 110; 10 Am. & Eng. R. Cas. 129: "It is the injury which depreciates the value of the property, whether by taking a portion of it or rendering the portion left less useful, or, in case of a railroad company, or other corporate body less capable of transacting its business, such a hindrance and inconvenience as to occasion loss, or diminish and limit its capacity to transact its business, by decreasing the power to transact as much, or necessarily, the expense of what may be done, although not diminished." See, also, Chicago &c. R. Co. v. Springfield & N. R. Co. 67 Ill. 142; Chicago &c. R. Co. v. Englewood &c. R. Co. 115 Ill. 375; 4 N. E. 246; 56 Am. R. 173. In Michigan the rule is laid down as follows: "Any additional expense created in the ordinary use of respondent's track, or any other injury or damage to its track, right of way, or franchises, occasioned by the crossing, and which may properly be considered as the natural, necessary and approximate cause thereof, should be allowed the respondent in all cases of this kind." Toledo &c. R. Co. v. De-

or property actually taken,[78] for the destruction of buildings, fences or the like,[79] for the cost of restoring the tracks and right of way to a safe condition,[80] for the expense of the erection of new structures made necessary by reason of the crossing,[81] and, also, it seems, on account of contingent loss which may result because of additional exposure to hazards by fire or otherwise.[82] Compensation is not confined to such elements of damage as may arise at the actual place of crossing. It has been held that a company whose line is crossed is entitled to recover damages for a diminution in its capacity to do business,[83] or for increased expense[84] in transacting its business caused by the construction of the crossing. Where a large part of the line is rendered less useful or practically valueless, this should be considered in estimating the damages.[85] Where new structures, such as embankments, abutments or the like, must be erected because of the crossing, the expense of maintaining these and keeping them in repair may be considered as an element of damage.[86] And it has also been held that the additional expense of providing a watchman, where

troit &c. R. Co. 63 Mich. 645; 30 N. W. 575; 28 Am. & Eng. R. Cas. 272. The delay, interference and obstruction while the crossing is being put in is a proper element of damage. Chicago &c. R. Co. v. Chicago &c. R. Co. 15 Ill. App. 587.

[78] Chicago &c. R. Co. v. Englewood &c. R. Co. 115 Ill. 375; 4 N. E. 246; 56 Am. R. 173; 23 Am. & Eng. R. Cas. 56; Memphis &c. R. Co. v. Birmingham &c. R. Co. 96 Ala. 571; 11 So. 642; 18 L. R. A. 166; 57 Am. & Eng. R. Cas. 639; Chicago &c. R. Co. v. Springfield &c. R. Co. 67 Ill. 142; Lockport &c. R. Co. In re, 19 Hun (N. Y.), 38. But see Flint &c. R. Co. v. Detroit &c. R. Co. 64 Mich. 350; 31 N. W. 281.

[79] Mills Eminent Domain, § 44a; Kansas City v. Kansas City &c. R. Co. 102 Mo. 633; 14 S. W. 808; 10 L. R. A. 851; 57 Am. & Eng. R. Cas. 624. See, also, Kansas Cent. R. Co. v. Board &c. Jackson County, 45 Kan. 716; Old Colony &c. R. Co. v. County of Plymouth, 14 Gray (Mass.) 155.

[80] St. Louis &c. R. Co. v. Springfield &c. R. Co. 96 Ill. 274.

[81] Old Colony &c. R. Co. v. County of Plymouth, 14 Gray (Mass.) 155; St. Louis &c. R. Co. v. Springfield &c. R. Co. 96 Ill. 274; Flint &c. R. Co. v. Detroit &c. R. Co. 64 Mich. 350; 31 N. W. 281.

[82] St. Louis &c. R. Co. v. Springfield &c. R. Co. 96 Ill. 274.

[83] Lake Shore &c. R. Co. v. Chicago &c. R. Co. 100 Ill. 21. See, also, Chicago &c. R. Co. v. Englewood, 115 Ill. 375; 4 N. E. 246; 56 Am. R. 173.

[84] Lake Shore &c. R. Co. v. Chicago &c. R. Co. 100 Ill. 21.

[85] Poughkeepsie &c. R. Co. In re, 63 Barb. 151.

[86] St. Louis &c. R. Co. v. Springfield &c. R. Co. 96 Ill. 274.

the same has been rendered necessary because of the great hazard resulting from the construction of the crossing, may be taken into account in estimating the measure of damages.[87] There are many things, however, which result in more or less damage to a railway company whose line is crossed by the line of another company which cannot be considered as elements of damage for which compensation must be made. No damages will be allowed for mere interruption or inconvenience occasioned in the transaction of its business,[88] for increased liability to accidents at the crossing,[89] for being required by statute or ordinance to stop at the crossings, while the trains of the other company pass or before crossing,[90] for the additional expense

[87] St. Louis &c. R. Co. v. Springfield &c. R. Co. 96 Ill. 274. But see Massachusetts Cent. R. Co. v. Boston &c. R. Co. 121 Mass. 124.

[88] Boston &c. R. Co v. Old Colony R. Co. 3 Allen (Mass.) 142; Massachusetts R. Co. v. Boston R. Co. 121 Mass. 124; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604; Old Colony R. Co. v. Inhabitants &c. 14 Gray (Mass.) 155; Boston R. Co. v. Old Colony R. Co. 12 Cush. (Mass.) 605; Flint &c. R. Co. v. Detroit, 64 Mich. 350; 31 N. W. 281; St. Louis &c. R. Co. v. St. Louis &c. R. Co. 111 Mo. 666; 20 S. W. 319. See, also, Chicago &c. R. Co. v. Joliet &c. Co. 105 Ill. 388; 44 Am. R. 799.

[89] Peoria &c. R. Co. v. Peoria &c. R. 105 Ill. 110; 10 Am. & Eng. R. Cas. 129. In this case it was said: "Accidents can be avoided by proper care. Nor are we warranted in presuming the employes would be negligent of their duty. If they observe their duty, a collision need never occur. To allow damages on this claim would violate the rule that they cannot be allowed on mere conjecture, speculation, fancy or imagination; they must be real, tangible and proximate." See, also, Kansas City &c. R. Co. v. Kansas City &c. R. Co. 118 Mo. 599; 24 S. W. 478; 57 Am. & Eng. R. Cas. 624; Old Colony &c. R. Co. v. Inhabitants &c. 14 Gray (Mass.) 155; Bridgeport v. New York &c. R. Co. 36 Conn. 255; 4 Am. R. 63. The opinion of witnesses as to the probability of collisions and accidents at crossings is inadmissible in fixing the damages. Kansas City &c. R. Co. v. Kansas City &c. R. Co. 118 Mo. 599; 24 S. W. 478; 57 Am. & Eng. R. Cas. 624.

[90] Kansas City &c. R. Co. v. Kansas City &c. R. Co. 118 Mo. 599; 24 S. W. 478; 57 Am. & Eng. R. Cas. 624; Kansas City &c. Co. v. St. Joseph &c. Co. 97 Mo. 457; 10 S. W. 826; 3 L. R. A. 240; St. Louis &c. R. Co. v. St. Louis &c. R. Co. 111 Mo. 666; 20 S. W. 319; Massachusetts &c. R. Co. v. Boston &c. R. Co. 121 Mass. 124; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604; Peoria &c. R. Co. v. Peoria &c. R. Co. 105 Ill. 110; 10 Am. & Eng. R. Cas. 129; Flint &c. R. Co. v. Detroit &c. R. Co. 64 Mich. 350; 31 N. W. 281.

and trouble of ringing the bell on approaching the crossing,[91] for the risk of being ordered to provide additional safeguards at such crossings, nor for the probable loss or decrease of business which may result because of such crossing.[92] A company seeking the crossing, and against whom the damages are assessed, cannot set off as an element of gain to the company crossed, a supposed benefit which may result to it in the way of securing additional business because of such crossing.[93]

§ 1128. Expense of constructing crossing.—The expense of constructing the crossing must as a rule be borne by the company seeking the crossing. In the absence of any statutory enactments regulating the subject, the rule seems to be that the latest company must at its own expense construct the crossing. In several states it is provided by statute that the original expense of constructing the crossing shall be borne by the newer or latest company. We have before seen that all such expenses as result from the construction of the crossing must either be borne by the crossing company or allowed as an element of damages to the company whose line is crossed.[94] And

[91] Peoria &c. R. Co. v. Peoria &c. R. Co. 105 Ill. 110; 10 Am. & Eng. R. Cas. 129; Old Colony &c. R. Co. v. Inhabitants &c. 14 Gray (Mass.) 155. Or operating gates. Boston &c. R. Co. v. Cambridge, 159 Mass. 283; 34 N. E. 382. See, also, Massachusetts Cent. R. Co. v. Boston &c. R. Co. 121 Mass. 124; Detroit &c. R. v. Osborn, 189 U. S. 383, 390; 23 Sup. Ct. 540 (nor for the possibility that safety gates or the like may be required in the future).

[92] Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604. The text, including nearly all of this section, is quoted with approval in Kansas City &c. R. Co. v. Louisiana &c. R. Co. 116 La. Ann. 178; 40 So. 627, 630, where it is held that, "Where the plaintiff company takes nothing but the easement of crossing, the compensation should be based on the depreciation in value of the property resulting from the joint use of the tracks. The value of the portion actually used, and the consequent depreciation, if any, of the value of the remainder for railroad purpose, should be considered; but mere interruption or inconvenience in the transaction of business, increased liability to accidents, and the stopping or flagging of trains at crossings, if required by statute or ordinances, do not constitute elements of damage."

[93] Old Colony &c. R. Co. v. Inhabitants &c. 14 Gray, 155; Boston &c. R. Co. v. County of Middlesex, 1 Allen 324.

[94] § 1127, ante. See, also, Chicago &c. R. Co. v. Joliet &c. R. Co. 105 Ill. 388; 44 Am. R. 799; 14 Am. & Eng. R. Cas. 62.

in some cases it has been held that the company seeking the crossing may make a valid agreement in the condemnation proceedings not only to put in the crossing at its own expense, but also to keep and maintain all necessary frogs and crossing appliances.[95] In the state of Ohio there is a statute in force which provides that, where "the tracks of two railroads cross each other, or in any way connect, at a common grade, the crossing shall be made and kept in repair . . . at the joint expense of the companies owning the track." This statute has been held valid and enforced by the supreme court of the state of Ohio.[96]

§ 1129. Watchmen and flagmen at crossings.—In the absence of statutory enactments requiring a watchman to be kept at the crossing of two railway tracks, no duty rests upon the companies to provide such watchman.[97] But where there is a statutory provision to the effect that such watchman must be maintained, the statute must be complied with by the companies.[98] And where the statute provides that watchmen must be furnished at the joint expense of the companies whose lines cross, it has been held that the expense of keeping such watchman must be borne equally by the two companies, notwithstanding the fact that one company runs more trains and uses the crossing more frequently than the other company.[99] Companies may, and often do, for their own protection, keep watchmen at crossings to notify employes in charge of trains when the crossings are safe and when trains may pass without danger. Though not absolutely required, the maintenance of such watchmen is an effective means of preventing accidents and facilitating the transaction of

[95] Chicago &c. R. Co. v. Joliet &c. R. Co. 105 Ill. 388; 44 Am. R. 799; 14 Am. & Eng. R. Cas. 62; Seattle &c. R. Co. v. State, 7 Wash. 150; 34 Pac. 551; 22 L. R. A. 217; 38 Am. St. 866.

[96] Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577; 16 N. E. 475; 35 Am. & Eng. R. Cas. 271; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604. But see Toledo &c. R. Co. v. Detroit &c. R. Co. 62 Mich. 564; 29 N. W. 500; 4 Am. St. 875.

[97] See Sellars v. Richmond &c. R. Co. 94 N. Car. 654; 25 Am. & Eng. R. Cas. 451.

[98] Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577; 35 Am. & Eng. R. Cas. 271; Lake Shore &c. R. Co. v. Cincinnati &c. R. Co. 30 Ohio St. 604.

[99] Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577; 35 Am. & Eng. R. Cas. 271.

business, and for that reason companies often so equip their crossings. The expense of maintaining such watchmen may be arranged between the companies by contract, or in some cases it may be that the services of a watchman has been rendered so imperatively necessary by the construction of the crossing that the latter company in point of time will be required to bear the expense of keeping a watchman at the crossing. In some cases it has been held that the cost of maintaining a watchman at the crossing is a proper element of damages to be taken into account in estimating the compensation to which the company whose line is crossed is entitled,[100] but there is also authority to the effect that such an outlay cannot be placed upon the condemning company.[101] The company seeking the crossing may agree, as a condition precedent to the right to cross, that it will keep a watchman at the crossing at its own expense.[102] Where such is the case, the contract is a valid one, and the company making it will be held liable for its breach.

§ 1130. Stopping at crossings—Duty imposed by contract.—As a precaution against collisions and consequent injuries, railway companies are usually required to stop their trains before crossing the tracks of another company. This duty is ordinarily imposed by statute, but it may, in some cases, be imposed by contract between the two companies whose lines cross.[103] Such contracts are valid, and will be enforced by the courts. Where two companies whose lines cross agreed upon the manner and order in which their trains should cross, and adopted a code of signals to be observed, it was held that one company which violated the code of signals, thereby causing injury to the other company, was liable for damages for breach of the contract.[104]

[100] Flint &c. R. Co. v. Detroit &c. R. Co. 64 Mich. 350; 31 N. W. 281.

[101] Massachusetts &c. R. Co. v. Boston &c. R. Co. 121 Mass. 124.

[102] New York &c. R. Co. v. Grand Rapids &c. R. Co. 116 Ind. 60; 18 N. E. 182.

[103] As to what is a "crossing," and for construction of rule as to crossing or intersection, see Southern Ind. R. Co. v. Peyton, 157 Ind. 690; 61 N. E. 722.

[104] New York &c. R. Co. v. Grand Rapids &c. R. Co. 116 Ind. 60; 18 N. E. 182; 35 Am. & Eng. R. Cas. 283. In the course of the opinion, in commenting on the contract, the court said: "It is obvious that what the parties intended was that the appellant should secure a way across the track of the appellee, and should provide means of making and keeping the crossing safe for the use of both parties. What-

The companies may agree that the trains of one company shall have priority over the trains of the other company,[105] and such a contract may be enforced in equity by a decree for specific performance.[106] Where two companies, by an agreement in reference to the use of a crossing, stipulated that one of the companies should bring its trains to a stop at least two hundred feet from the crossing before attempting to cross, it was held that it was not a sufficient compliance with the contract to stop at a point eight hundred or nine hundred feet from the crossing, but that such stop should be made at a point from two hundred to three hundred feet from the crossing, notwithstanding the fact that the stop at the farther point was more convenient because of the curve and grade.[107]

§ 1131. Stopping at crossings—Duty imposed by statute.—In nearly every state in the Union statutes are in force which provide that, where two railways cross each other at grade, the employes engaged in operating trains on either of the lines shall bring them to a full stop at a specified distance from the crossing before attempting to cross.[108] In some of the states the statutes excuse the companies from stopping at crossings, where interlocking switches or other devices for the safety of trains are erected and maintained.[109] These statutes are applicable to all railway companies, and in some of the states they have been held to apply to dummy lines.[110] But where a

ever was reasonably necessary to carry into execution this object was implied, and it was therefore entirely competent for the parties to give effect to the contract by establishing a code of signals. As they did establish such a code under the contract, and the appellant refused or failed to obey them, there was a breach of contract, and hence a clear right of action. This right of action came into existence the moment the contract was violated and loss resulted."

[105] Cornwall &c. R. Co. Appeal of, 125 Pa. St. 232; 17 Atl. 427; 11 Am. St. 889, and note; 42 Am. & Eng. R. Cas. 233.

[106] Cornwall &c. R. Co. Appeal of, 125 Pa. St. 232; 17 Atl. 427; 11 Am. St. 899, and note; 42 Am. & Eng. R. Cas. 233.

[107] Cornwall &c. R. Co. Appeal of, 125 Pa. St. 232; 17 Atl. 427; 11 Am. St. 899, and note; 42 Am. & Eng. R. Cas. 233.

[108] Stimson Am. Stat. § 8813.

[109] Stimson Am. Stat. § 8813.

[110] Birmingham &c. R. Co. v. Jacobs, 92 Ala. 187; 9 So. 320; 12 L. R. A. 830; 49 Am. & Eng. R. Cas. 263. In that case it was said, in speaking of the statute requiring railroads to stop at crossings: "The purpose of the statute was to guard against collisions at these

steam railway company's line is crossed by the track of a mere street railway the steam railway company is not required to stop its trains before attempting to cross.[111] There seems to be a distinction made between a dummy line operated by steam and the ordinary street railway, the former being classed as an ordinary commercial railway.[112] Statutes requiring companies to stop their trains at railway crossings are generally penal, and a failure to comply with them renders the company or the employes liable to a criminal prosecution.[113]

§ 1132. Collisions at crossings.—What will be said here regarding collisions at crossings refers more particularly to rights and liabilities as they exist between the companies whose trains collide. The rights of employes, passengers, and other persons who are injured in railway collisions at crossings will be fully treated in a subsequent portion of this work, and that branch of the subject will be only incidentally referred to at this place. It is generally provided by agreement, statute or custom, the order and manner in which trains shall cross at grade crossings. The necessity for some system regulating the passage of trains at crossings grows out of the great danger which would result to life and property if no system were adopted. As a general rule, it may be stated that, where the tracks of two railway companies cross at grade, and there is in force a system regulating the manner and order in which trains shall pass, the company which violates the

crossings. Prior to the adoption of the code of 1886, the distance within which trains were required to stop was fifty feet, and the distance was extended to one hundred feet on account of the difficulty of controlling the large engines and heavily loaded trains. The purpose of the statute, as we have said, is to prevent collision, and the fact that engines and trains, by reason of their structure and appliances, are more easily managed than others, and may be stopped within a distance of twenty, thirty or fifty feet, is no reason why the law should not apply to them." In Katzenberger v. Lawo, 90 Tenn. 235; 16 S. W. 611; 13 L. R. A. 185, and note; 25 Am. St. 681, it was said: "A train pulled by a small engine called a 'dummy,' although exclusively engaged in carrying passengers, is a railroad, within the meaning of the statute prescribing precautions to be observed by railroads. The evil intended to be remedied pertains as much to this sort of railways as to the ordinary railroads of commerce."

[111] Byrne v. Kansas City &c. R. Co. 61 Fed. 605; 24 L. R. A. 693.

[112] Byrne v. Kansas City &c. R. Co. 61 Fed. 605; 24 L. R. A. 693.

[113] See Commonwealth v. Chesapeake &c. R. Co. 16 Ky. L. 481; 29 S. W. 136.

provisions of the rules governing the crossing will be liable for all damages resulting from such failure.[114] Where a rule was in force which provided that the train which first reached and stopped at the stopping-post maintained at a certain specified distance from the crossing had the right of way, it was held to be actionable negligence on the part of a company to attempt to cross when a train on the other line had first reached the stopping-post and was in the act of starting to make the crossing.[115] In an action brought to recover for injuries sustained in a collision of trains at a railway crossing, both companies may be liable,[116] and where the action is brought against one company only, it cannot escape liability by setting up the fact that the other company was also guilty of negligence.[117] A presumption of negligence may arise against one or both companies where a collision occurs on a level grade crossing in broad daylight, and the companies each seek to fasten the blame upon the other.[118]

§ 1133. Priority of passage.—Where two trains approach a railway crossing at the same time, as is often the case, it is necessary that there be some regulation defining which train shall have the prior right to cross.[119] It is obvious that without some regulation defining the rights of the respective companies confusion and injury would often result. The matter is usually regulated by statutes of the dif-

[114] New York &c. R. Co. v. Grand Rapids &c. R. Co. 116 Ind. 60; 18 N. E. 182. In the first case cited the companies had agreed upon a code of rules governing the order and manner in which trains should cross. A violation of the code of rules resulting in injury to the other company was held to be a breach of the contract, and damages were awarded the complaining company. Compare Albert v. Sweet, 116 N. Y. 363; 22 N. E. 762; 42 Am. & Eng. R. Cas. 216. See Grand Rapids &c. R. Co. v. Ellison, 117 Ind. 234; 20 N. E. 135. See, also, Cleveland &c. R. Co. v. Gray, 148 Ind. 266; 46 N. E. 675.

[115] Chicago &c. R. Co. v. Chambers, 68 Fed. 148.

[116] Downey v. Philadelphia &c. R. Co. 161 Pa. St. 588; 28 Atl. 1019; 58 Am. & Eng. R. Cas. 594; Kansas City &c. R. Co. v. Stoner, 49 Fed. 209.

[117] Kansas City &c. R. Co. v. Stoner, 51 Fed. 649. See, also, Baltimore &c. R. Co. v. Kleespies (Ind. App.), 76 N. E. 1015; 78 N. E. 252; Pittsburgh &c. R. Co. v. Spencer, 98 Ind. 186.

[118] Kansas City &c. R. Co. v. Stoner, 49 Fed. 209.

[119] In Missouri Pac. R. Co. v. Chicago &c. R. Co. 98 Mo. App. 214; 71 S. W. 1081, it is held that, in the absence of statute or agreement, the right of one company cannot be held subservient to that of the other.

ferent states, and we can here give only a reference to such statutes. These statutes are very different in their provisions, and the statute of the particular state should be examined to find the ultimate rule in force in that state. Among these statutes will be found provisions giving the road first built priority, trains on a main track precedence over trains on side tracks, passenger trains precedence over freight trains, regular trains precedence over trains behind time, and engines with cars precedence over engines without cars.[120] Companies whose lines cross may, and often do, agree upon rules governing the crossing of their trains and which trains shall have priority. Such contracts are valid and will be enforced. A violation of such contract will make the violator liable for all damages which result,[121] and a violation of such contract may be enjoined in a court of equity,[122] or the contract may be specifically enforced by a decree in equity.[123] Where by the rules governing priority of passage the company whose train first reaches the stopping-post has prior right of passage, it is negligence for the employes of the other company to attempt to cross in advance of the train on the other track.[124] "Each train," it is said, "may indulge the presumption that the other will comply with the mandates of the statute, but this presumption will not protect either from liability for want of care in proceeding when it becomes apparent, or reasonably so, that the other train is negligent or disobedient."[125]

[120] Stimson Am. Stat. § 8813; Moulder v. Cleveland &c. R. Co. (Ohio C. P.) 1 Ohio N. P. 361; 2 Ohio Leg. News, 540.

[121] New York &c. R. Co. v. Grand Rapids &c. R. Co. 116 Ind. 60; 18 N. E. 182.

[122] Cornwall &c. R. Co. Appeal of, 125 Pa. St. 232; 17 Atl. 427; 11 Am. St. 889, and note; 42 Am. & Eng R. Cas. 233.

[123] Cornwall &c. R. Co. Appeal of, 125 Pa. St. 232; 17 Atl. 427; 11 Am. St. 889, and note; 42 Am. & Eng. R. Cas. 233.

[124] Chicago &c. R. Co. v. Chambers, 68 Fed. 148. But see, as to construction of rule, or waiver and presumption in favor of general verdict as against answers to special interrogatories, Southern Ind. R. Co. v. Peyton, 157 Ind. 690; 61 N. E. 722. Long continued practice may constitute practical and binding construction of rule. Bassy v. Hannibal &c. Co. 98 Mo. 62; 14 Am. St. 610; Texas &c. Co. v. Leighty, 88 Tex. 604; 32 S. W. 799; Louisville &c. R. Co. v. East Tenn. Co. 60 Fed. 993; Spaulding v. Chicago &c. R. Co. 98 Ia. 205; 67 N. W. 227.

[125] Southern R. Co. v. Bryan, 125 Ala. 297; 28 So. 445, 447, citing text, and Birmingham &c. R. Co. v. Jacobs, 101 Ala. 149; 13 So. 408. That such a presumption as to compliance with the statutes, rules, custom or arrangement may usually be indulged, see New York &c. R. Co. v. Grand Rapids &c. Co. 116 Ind. 60;

§ 1134. Maintenance and repair of crossings.—In a former section[126] we discussed the duty of constructing a railway crossing; here we propose to discuss the duty of keeping up and repairing crossings after they have been constructed. As a general rule the duty rests upon both companies to see that a crossing of their tracks is kept in proper repair. This duty does not rest upon any obligation which one company owes to the other, but upon the duty which both companies owe to the public. Safety of property and passengers carried on railway trains demands that the company should use every reasonable precaution for their safety, and it is for this reason that the duty is imposed upon both companies to see that crossings are properly maintained and kept in repair.[127] In some of the states there are express statutory provisions imposing upon both companies the duty of keeping the crossing in proper repair,[128] but we are of the opinion that this duty, at least, so far as the public is concerned, rests upon both companies independent of any statute.[129] Where the duty is imposed

18 N. E. 182; Thompson v. Chicago &c. R. Co. 71 Minn. 89; 73 N. W. 707; Louisville &c. R. Co. v. East Tenn. Co. 60 Fed. 993; Kansas City &c. R. Co. v. McDonald, 51 Fed. 178; Chicago &c. R. Co. v. Kansas City &c. Co. 78 Mo. App. 245.

[126] § 1128, ante.

[127] Indiana &c. R. Co. v. Barnhart, 115 Ind. 399; 16 N. E. 1121. In Chicago &c. R. Co. v. Joliet &c. R. Co. 105 Ill. 388; 44 Am. R. 799; 14 Am. & Eng. R. C. 62, it was said: "Both parties are common carriers of passengers and freight and both are under the highest obligations to the public to observe that this crossing is kept in repair, so that it may be entirely safe for the passage of trains, and it may reasonably be presumed both companies will omit no duty in that regard. One party is as much interested in its maintenance in a suitable condition as is the other, and should it become unsafe through use, or for other cause, either party might, and it would be its duty to, make all needed repairs, and on the party obligated to maintain such crossing would rest the expense of such repairs, and the same might be recovered in an action."

[128] Indiana &c. R. Co. v. Barnhart, 115 Ind. 399; 16 N. E. 121; Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577; 35 Am. & Eng. R. Cas. 271; Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577; 36 Am. & Eng. R. Cas. 492.

[129] The companies may, of course, provide by contract for constructing and maintaining the crossing, and designate what portion of the expense shall be borne by each, but the companies can not by a contract between themselves absolve themselves from the duty owing the public. If there is a violation of the contract, the company in the wrong may doubtless be held liable for all damages resulting to

by statute, it has been held negligence per se to disregard it.[130] The obligation to repair may rest upon a lessee operating a line the same as upon an owner.[131] As between the two companies using a crossing, the expense of maintaining and repairing the crossing may be provided for either by statute or by contract. Where the statute provides that the expense of keeping up the crossing after it is constructed shall be borne by both companies, both companies are bound to contribute to such expense.[132] If the statute is silent as to the proportion of the expense which should be borne by each company, it would seem that the true rule would be to make the older company contribute at least such a proportion of the expense as it would have cost to have kept in repair the portion of the track affected by the crossing, if the crossing had not been made.[133] The duty of contributing to the expense exists whether the crossing is made on, above, or below grade.[134] As a condition precedent to the right to construct a crossing, the company seeking the crossing may legally bind itself to maintain and keep in repair the crossing at its own expense.[135] Where one

the other from the breach, but the rights of the public are not affected.

[130] Indiana &c. R. Co. v. Barnhart, 115 Ind. 399; 16 N. E. 121.

[131] Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577; 35 Am. & Eng. R. Cas. 271; 36 Am. & Eng. R. Cas. 492.

[132] Toledo &c. R. Co. v. Detroit &c. R. Co. 62 Mich. 564; 29 N. W. 500; 4 Am. St. 875; 28 Am. & Eng. R. Cas. 272; Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577; 36 Am. & Eng. R. Cas. 492.

[133] In Toledo &c. R. Co. v. Detroit &c. R. Co. 62 Mich. 564; 29 N. W. 500; 4 Am. St. 875; 28 Am. & Eng. R. Cas. 272, it was said: "The provision of the section which requires that the company whose road is crossed shall bear some proportion of the expense of keeping the crossing in repair after it is made can only be justified by the necessities of the case growing out of the connecting of the two tracks, for the reason that no repairs can be made at the point of crossing which will not extend to both tracks; and the extent of such expense required to be borne by the company whose track is crossed should always be limited as near as may be to what would have been necessary to keep the respondent's track in repair at the crossing had the same not been made." See, also, Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577; 36 Am. & Eng. R. Cas. 492.

[134] Toledo &c. R. Co. v. Detroit &c. R. Co. 62 Mich. 564; 29 N. W. 500; 4 Am. St. 875; 28 Am. & Eng. R. Cas. 272.

[135] Seattle &c. R. Co. v. State, 7 Wash. 150; 34 Pac. 551; 22 L. R. A. 217; 38 Am. St. 866; Chicago &c. R. Co. v. Joliet &c. R. Co. 105 Ill. 388; 44 Am. R. 799; 14 Am. & Eng. R. Cas. 62.

of the companies, jointly bound to keep in repair the crossing, at its own expense makes repairs, it may enforce contribution from the other company,[136] or where one company has bound itself by contract to keep up the crossing at its own expense and fails to do so, the other company may make the repairs and recover from the company upon which the duty of making the repairs legally rested.[137]

§ 1135. Street railways crossing steam railroads.—Street railways have a right to cross steam railways, and it has been held that the general statutes in force regulating the manner in which railways shall cross each other are applicable in such cases.[138] And under a statute which authorizes a court to order a crossing other than at grade a street railway may be ordered to construct an overhead crossing.[139] So, where a street railway has lawfully laid its track across the track of a steam railway in conformity to the grade thereof, the steam railroad company will be enjoined from tearing up or injuring the street railway company's track.[140] Where a steam railway crosses a highway or a street, a street railway which has a right to lay its

[136] Baltimore &c. R. Co. v. Walker, 45 Ohio St. 577; 36 Am. & Eng. R. Cas. 492.

[137] Chicago &c. R. Co. 105 Ill. 388; 44 Am. R. 799; 14 Am. & Eng. R. Cas. 62, 68.

[138] Elizabethtown &c. R. Co. v. Ashland &c. R. Co. 96 Ky. 347; 26 S. W. 181; Pennsylvania R. Co. v. Braddock Electric R. Co. 152 Pa. St. 116; 25 Atl. 780; 55 Am. & Eng. R. Cas. 1; Port Richmond &c. R. Co. v. Staten Island &c. R. Co. 144 N. Y. 445; 39 N. E. 392; Buffalo &c. R. Co. v. New York &c. R. Co. 25 N. Y. 265; Pennsylvania R. Co. v. Conshohocken R. Co. 15 Pa. Co. Ct. 454. See, also, Chester Trac. Co. v. Philadelphia &c. R. Co. 188 Pa. St. 105; 41 Atl. 449; 44 L. R. A. 269; Malott v. Collinsville &c. R. Co. 108 Fed. 313; Stillwater &c. St. R. Co. v. Boston &c. R. Co. 171 N. Y. 589; 64 N. E. 511; 59 L. R. A. 489. But compare Wabash R. Co. v. Ft. Wayne &c. Trac. Co. 161 Ind. 295; 67 N. E. 674; Kansas City &c. R. Co. v. Railroad Commissioners (Kans.), 84 Pac. 755. The right to cross, however, is not acquired by acquiescence of the steam railroad during a short period in which the street railroad is allowed to use the crossing, while the matter is in negotiation between the companies. Port Richmond &c. R. Co. v. Staten Island &c. R. Co. 144 N. Y. 445; 39 N. E. 392.

[139] Pennsylvania R. Co. v. Braddock &c. R. Co. 152 Pa. St. 116; 25 Atl. 780; 55 Am. & Eng. R. Cas. 1. See, also, New York &c. R. Co. v. Bridgeport Traction Co. 65 Conn. 410; 32 Atl. 953; 29 L. R. A. 367.

[140] Buffalo &c. R. Co. v. DuBois &c. R. Co. 149 Pa. St. 1; 24 Atl. 179.

track in the street or highway may cross the track of the steam railway,[141] and the steam railway is not entitled to recover any compensation for such crossing, as for an additional burden.[142] This rule rests on the theory that, where a steam railroad crosses a street or public highway, it takes its right subject to the rights of the public to use the street in a reasonable and lawful manner, and since a street railway is not an additional burden to the street, but such a use as the public are entitled to have made of the street, therefore the railroad takes its right in the street subject to the right of street railway companies to lay their tracks across its tracks. The construction of a street railway under such circumstances imposes no additional burden upon the steam railway for which compensation must be made.[143] After a street railroad has constructed its track across the track of a

[141] Chicago &c. R. Co. v. Whiting &c. R. Co. 139 Ind. 297; 38 N. E. 604; 47 Am. St. 264; 26 L. R. A. 337; 1 Am. & Eng. R. Cas. (N. S.) 181. The same view is taken in Chicago &c. R. Co. v. West Chicago Street R. Co. 156 Ill. 255; 40 N. E. 1008; 29 L. R. A. 485, and note. In the last case it was held that an injunction would not lie at the suit of the steam railroad company. See, also, Morris &c. R. Co. v. Newark &c. R. Co. 51 N. J. Eq. 379; 29 Atl. 184. But compare Cincinnati &c. R. Co. v. Chattanooga &c. R. Co. 44 Fed. 470.

[142] Chicago &c. R. Co. v. Whiting &c. R. Co. 139 Ind. 297; 38 N. E. 604; 26 L. R. A. 337; 47 Am. St. 264; 1 Am. & Eng. R. Cas. (N. S.) 181. See, also, Chicago &c. R. Co. v. West Chicago St. R. Co. 156 Ill. 255; 40 N. E. 1008; 29 L. R. A. 485; New York &c. R. Co. v. Bridgeport Trac. Co. 65 Conn. 410; 32 Atl. 953; 29 L. R. A. 367; Consolidated Trac. Co. v. South Orange &c. Co. 56 N. J. Eq. 569; 40 Atl. 15. But see People's R. Co. v. Syracuse &c. R. Co. 22 Abb. N. Cas. (N. Y.) 427; Central &c. R. Co. v. Philadelphia &c. R. Co. 95 Md. 428; 52 Atl. 752. As to the right of one street railroad to cross another, see Brooklyn &c. R. Co. v. Brooklyn &c. R. Co. 33 Barb. (N. Y.) 420; Citizens' &c. R. Co. v. East Harrisburg &c. R. Co. 164 Pa. St. 274; 30 Atl. 159; Market St. R. Co. v. Central R. Co. 51 Cal. 583; Omaha Horse R. Co. v. Cable &c. Co. 32 Fed. 727. As to the right of a commercial railroad to cross a street railway, see Lynn &c. R. Co. v. Boston &c. Co. 114 Mass. 88, and compare Georgia &c. R. Co. v. Columbus &c. R. Co. 89 Ga. 205; 15 S. E. 305.

[143] Braddock &c. R. Co. v. Braddock Ry. Co. 1 Pa. Dist. R. 44; 49 Leg. Intel. 25; Pennsylvania &c. R. Co. v. Braddock &c. R. Co. 1 Pa. Dist. 626; 49 Leg. Intel. 74; Chicago &c. R. Co. v. Whiting &c. R. Co. 139 Ind. 297; 38 N. E. 604; 26 L. R. A. 337; 47 Am. St. 264; 1 Am. & Eng. R. Cas. (N. S.) 181; New York &c. R. Co. v. Bridgeport Traction Co. 65 Conn. 410; 32 Atl. 953; 29 L. R. A. 367.

steam railroad the crossing does not become such a railroad crossing as to require the steam railroad to stop its trains before attempting to cross.[144] It has been held that at such crossings the same duty rests upon the street railway to stop and look and listen, before attempting to cross, that rests upon persons riding in ordinary vehicles, and where the employe in charge of a street car fails to take such precautions, and injury results, the street railway company will be liable to its passengers for all resulting injury.[145] In some cases, however, both companies may be guilty of negligence, and where such is the case a joint action may be maintained against both.[146] Additional authorities will be found in a subsequent section, where the subject is more fully treated.[147]

§ 1135a. Further of street railways crossing steam railroads.— The tendency of legislatures and courts to discourage the construction of steam railroad crossings at grade where it is possible to avoid such crossings is for even stronger reasons extended in some jurisdictions to the crossing of street and steam railroads.[148] The Supreme Court of Pennsylvania has announced it as the settled policy of that state to permit of no such grade crossings, except in cases of manifest and unavoidable necessity,[149] and in determining whether it is practicable to avoid a grade crossing it has been held that the courts will not consider the expense of an overhead structure, nor its unsightliness, nor the fact that damages may have to be paid to the owner of private property by reason of the erection of such structure; nor that an overhead structure will interfere with property on the street, will frighten horses, and will obstruct the view of coming trains, nor that local sentiment is in favor of such grade crossings.[150] In defining the duty of the courts in the grade

[144] Byrne v. Kansas City &c. R. Co. 61 Fed. 605; 24 L. R. A. 693.

[145] Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91; 2 Am. & Eng. R. Cas. 172; Booth Street Railroads, § 301.

[146] Downey v. Philadelphia &c. R. Co. 161 Pa. St. 588; 29 Atl. 126; 58 Am. & Eng. R. Cas. 594.

[147] Post, § 1178, and authorities there cited.

[148] See Ante, § 1122.

[149] Baltimore &c. R. Co. v. Butler Pass. R. Co. 207 Pa. St. 406; 56 Atl. 959.

[150] Baltimore &c. R. Co. v. Butler Pass. R. Co. 207 Pa. St. 406; 56 Atl. 959; Pennsylvania R. Co. v. Warren St. R. Co. 188 Pa. St. 74; 41 Atl. 331. The construction of a grade crossing by a street railway company over a steam railroad

crossing statute of that state the court says: "So far as the possible may be considered the practicable, there are very few points on the surface of the state where other than grade crossings are not practicable. . . . In the first place we must assume, because the legislature in this enlightened age has impliedly so assumed, that it is unwise, if not reckless and barbarous, to unnecessarily subject the traveling public and the employes of carrying corporations to the death, maiming and horrors of collisions which inevitably result from grade crossings. And, if it be reasonably practicable to avoid a grade crossing, then the question as to what extent the risk of such a crossing may be reduced is immaterial, for the law assumes and experience demonstrates that extraordinary care by both parties using such crossing, aided by all the advances in science and mechanics, has only resulted in lessening the risk and not abolishing it. In deciding, therefore, what is reasonable we are bound to keep in mind the consequences to be avoided. . . . Safety is the object in view, and, therefore, in determining what is reasonable, we must balance expense and difficulty against loss of life and limb."[151]

§ 1135b. Interurban railway crossing steam railroads.—In many states it seems that the law does not make any distinction calling for a different procedure from that between steam railroads, in a case where a crossing over a steam railroad is sought by an interurban railway. The crossing may be settled by contract between the parties,[152] and if an agreement can not be reached then resort

company's track will be enjoined where it is in a depression, the street ascending in either direction from the tracks, and being very much traveled, and where thirty-four scheduled trains, beside extra trains, pass daily, where it was practicable to build an overhead crossing about eight hundred feet in length. Baltimore &c. R. Co. v. Butler Pass. R. Co. 207 Pa. St. 406; 56 Atl. 959.

[151] Scranton &c. Trac. Co. v. Delaware &c. Canal Co. 180 Pa. St. 634; 37 Atl. 122.

[152] An agreement between a railroad company and a traction company, whereby the former allows the latter to construct a traction road across the line of the railroad at grade, and settling, as between these parties, the mode of crossing, is not void because made without application to the chancellor to define such made under the statute. Raritan River R. Co. v. Middlesex &c. Trac. Co. (N. J.) 58 Atl. 332.

may be had to the court,[153] or duly authorized commissioners,[154] to determine the question. Bills filed in these proceedings are governed by the rules of equity pleading applicable to bills in general and a bill so filed is generally regarded sufficient if it so states the plaintiff's case as to inform the defendant of what he is called upon to meet.[155] It is incumbent on the petitioner to show it had lawful power to construct its road.[156] The question on the hearing is determined by the situation of the parties, the public interest, the expense, and all the facts affecting the public and the rights of the parties concerned, and the court may, after such a hearing, direct a crossing other than the one prayed for.[157] In states where the matter is left to the judgment of the railroad commissioners their decision has been held final unless an appeal is taken.[158] There is authority that the board of railroad commissioners have no power to modify or change a decree once rendered by them for the construction and maintenance of an interurban railway crossing except on a new application, notice, or hearing. And it has been further held that they can not before appeal make a temporary decree not purporting to represent their judgment in the matter.[159]

[153] Wellsburg &c. R. Co. v. Panhandle Trac. Co. 56 W. Va. 18; 48 S. E. 746.

[154] Boston &c. R. Co. v. Saco Valley Elec. R. Co. 98 Me. 78; 56 Atl. 202.

[155] Wellsburg &c. R. Co. v. Panhandle Trac. Co. 56 W. Va. 18; 48 S. E. 746.

[156] Mercer County Trac. Co. v. United Jersey R. &c. R. Co. (N. J. L.) 61 Atl. 461.

[157] Wellsburg &c. R. Co. v. Panhandle Trac. Co. 56 W. Va. 18; 48 S. E. 746.

[158] Boston &c. R. Co. v. Saco Valley Elec. R. Co. 98 Me. 78; 56 Atl. 202.

[159] Boston &c. R. Co. v. Saco Valley &c. R. Co. 98 Me. 78; 56 Atl. 202. See, also, Eastern &c. R. Co. In re, 127 Wis. 641; 107 N. W. 496. In Kansas City &c. R. Co. v. Railroad Comrs. (Kans.) 84 Pac. 755, it is held that an electric railway is not such a railroad as comes within the jurisdiction of the board of railroad commissioners and they can not entertain an application by a railroad company to cross its track with an electric railway.

CHAPTER XLVIII.

PRIVATE CROSSINGS.

§ 1136. Definition.—Private or farm crossings, as distinguished from public crossings, are those crossings which are constructed not for the use of the public, but for the benefit of a single individual or group of individuals, and are crossings in which the general public have no interest. They are usually constructed between different parcels of land which have been severed by the construction of the railway, so as to afford the owner access from one parcel to the other. Private crossings may, however, include those sometimes constructed between parcels of land owned by different individuals, or between parcels of land and highways located on opposite sides of the right of way,[1] but farm, or private crossings, as the term is generally or

[1] For a definition and explanation of what amounts to and is included in a highway crossing, see § 1907, ante, Highway Crossing.

frequently used in this connection, are private crossings between different portions of the same tract of land, or parcels thereof severed by the road, rather than between separate farms of different individuals, or a farm all on one side and a highway on the other.[2]

§ 1137. Who entitled to.—The number of persons who are entitled to claim and secure private or farm crossings must depend, in a measure, at least, on the manner in which it is sought to secure the crossing. Where the crossing is secured by agreement between the person seeking the crossing and the railroad company, any one who may be able to secure an agreement with the company may obtain a crossing, and, if not prohibited by statute, a company may grant any number of private crossings it sees fit, so long as it does not impair its ability to perform its public functions.[3] The general rule is that only the person to be benefited by the crossing has a right to demand its construction.[4] Aside from the crossings secured by agreement between the person for whom the crossing is constructed and the railway company granting it, the subject is so largely a matter of statutory regulation in the different states that it is almost impossible to lay down general rules applicable to the subject. The question as to who are entitled to private and farm crossings is so closely connected with the sections which are to follow that the discussion there made completely covers the subject, and, therefore, we do not deem it necessary to further consider it at this place. It has been held that a statute requiring a railway company to put in and maintain private farm crossings for adjoining land-owners applies only to those cases where the farm was bisected by the construction of the road, and not to those cases where an owner acquired lands on both sides of the right of way, after the road was constructed.[5]

[2] See Louisville &c. R. Co. v. Hughes, 2 Ind. App. 682; 28 N. E. 158; Wheeler v. Rochester &c. R. Co. 12 Barb. (N. Y.) 227.

[3] In the case of Kansas City &c. R. Co. v. Kregelo, 32 Kan. 608; 5 Pac. 15; 20 Am. & Eng. R. Cas. 241, this language was used: "As a general rule, the land-owner has a reasonable right to farm crossings at such places as the necessities of his farm demand, provided such crossings, and the use thereof will not interefere with the paramount rights of the railroad company."

[4] Henderson v. Chicago &c. R. Co. 48 Iowa, 216. It has been held that where a landlord would be entitled to a private crossing, his tenant is entitled to it. Hugo v. Great Western &c. R. Co. 16 U. C. Q. B. 506.

[5] Stumpe v. Missouri &c. R. Co.

§ 1138. Effect of conveyance of right of way by land-owner.— Where a landowner, through whose land a railroad company seeks to secure a right of way, executes to the company a conveyance which is silent as to private crossings between the different parts of his land, the question sometimes arises as to the effect of such a conveyance. After the conveyance has been made, and the railway company has constructed its line, the owner of the different parcels of land may desire a crossing over the railway tracks from one part of the land to another. Where such cases have arisen the contention of the railway company has been that the execution of an unconditional deed by an owner to a right of way through his land estops him to claim any further interest in such strip of land, such as a right to have a private way across the same. The rule, however, is that such a conveyance does not constitute a waiver of a right to a private crossing, and the owner whose land has been severed into parcels may claim and enforce the right to a crossing, notwithstanding his unconditional instrument of conveyance.[6] One of the authorities which we have cited seems to rest on the ground that, where there is a statute securing to owners, whose lands are severed by a railroad right of way, the right to private crossings from one part to another, it is applicable to cases where the right of way is secured by conveyance from the owner as well as to cases in which the right of way is secured under the right of eminent domain,[7] while another rests on the ground that,

1 Mo. App. 633. But see Miller v. Quincy &c. R. Co. 56 Mo. App. 72. See, generally, Carroll v. Great Western R. Co. 14 U. C. Q. B. 614; Louisville &c. R. Co. v. Hughes, 2 Ind. App. 68; 28 N. E. 158.

[6] New York &c. R. Co. v. Railroad Commissioners, 162 Mass. 81; 38 N. E. 27; Smith v. New York &c. R. Co. 63 N. Y. 58; Gulf &c. R. Co. v. Rowland, 70 Tex. 298; 7 S. W. 718.

[7] "The statute is general and applies to cases where the lands are acquired by purchase, as well as to those where they are acquired by the power of eminent domain. It may be assumed that the owner has power to waive or release this obligation in respect to his lands, but we do not think that a conveyance in fee of a right of way has this effect. Such a conveyance is not inconsistent with the duty imposed upon the corporation. It gives the company a title in fee to the land for their roadway, and nothing more. In the conveyance of this land there is not a word indicating a purpose to waive or release the right to enforce the duty to make a farm crossing, and the presumption is, that the parties intended to leave the duty unaffected. The obligation imposed is not

where a strip of land is conveyed from the middle of a parcel, leaving the remainder in two separate tracts, a right of way from one to the other is implied independent of any statute securing such right.[8] It is possible that the latter case carries the doctrine a little too far, at least when applied to railroads.[9]

§ 1139. Right to crossing where right of way has been condemned.—Where a railroad right of way has been condemned through the lands of a landowner, and damages have been assessed and paid to such landowner, his right to a private crossing from one portion of his land to another seems to depend in a great measure upon what he was allowed compensation for in the condemnation proceedings. If, in estimating the damages, compensation has been allowed for the reduced value of the land because of the owner being deprived of access from one parcel to another, and compensation has been made on the theory that no crossing would be put in, then the railroad company is entitled to exclusive possession of its right of way, and the landowner has no right to a private crossing.[10] Where it appears that

connected with the acquisition of land by purchase or otherwise, but is enjoined independently, and upon the assumption of ownership, and without regard to the manner of acquisition." Smith v. New York &c. R. Co. 63 N. Y. 58.

[8] "But it is familiar law that, if one conveys a part of his land in such a form as to deprive himself of access to the remainder of it unless he goes across the land sold, he has a way of necessity over the granted portion. This comes by implication from the situation of the parties, and from the terms of the grant, when applied to the subject-matter. The law presumes that one will not sell land to another without the understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold, if he can reach it in no other way. This presumption prevails over the ordinary covenants of a warranty deed." New York &c. R. Co. v. Railroad Commissioners, 162 Mass. 81; 38 N. E. 27. See, also, Gulf &c. R. Co. v. Rowland, 70 Tex. 298; Gulf &c. Ry. Co. v. Clay, (Tex. Civ. App.) 66 S. W. 1115.

[9] As a general rule no obligation rests upon the company to construct and maintain such crossings at its own expense unless required by statute or agreement. Cook v. North &c. R. Co. 50 Ga. 211; Atchison &c. R. Co. v. Gough, 29 Kans. 94; Chicago &c. R. Co. v. Eichman, 47 Ill. App. 156; People v. Detroit &c. R. Co. 79 Mich. 471; 44 N. W. 934; 7 L. R. A. 717.

[10] Chicago &c. R. Co. v. Cosper, 42 Kan. 561; 22 Pac. 634; Baltimore

compensation was not made on the theory that there should be no crossings, and the owner was not compensated for the damages resulting from being deprived of access from one parcel of his land to the other, the award of damages and the acceptance of compensation under the award does not estop the owner from claiming and securing a private crossing over the railroad right of way from one parcel of his land to the other.[11] And where an award of damages has been made, unless it appears that it was made on the theory that the landowner should be limited to a certain kind of crossing, it has been held that he is not thereby estopped from compelling the railroad company to construct an underground crossing.[12]

§ 1140. Private crossings by prescription.—It seems to be well settled that a landowner may acquire a right to a private crossing over a railroad right of way by adverse user.[13] The right to acquire a crossing in this way has been declared in a number of cases. Thus, where a crossing was used continuously for forty-nine years, and no effort was made by the railroad company to discontinue it, it was held that the railroad company was liable for its maintenance.[14] Twenty years' user has been held sufficient to acquire the right to a private crossing.[15] And where a railway company, in constructing its line, left under a trestle an open subway which an adjoining owner used, openly and continuously, for a period of twenty-five years, as a passway from one portion of his land to another, it was held that he had acquired such right to such passage-way as would entitle him to main-

&c. R. Co. v. Lansing, 52 Ind. 229; Springfield &c. R. Co. v. Rhea, 44 Ark. 258; Cedar Rapids &c. R. Co. v. Raymond, 37 Minn. 204; 33 N. W. 704; 30 Am. & Eng. R. Cas. 345.

[11] Lind v. Chicago &c. R. Co. 42 Kan. 352; 22 Pac. 423; Kansas City &c. R. Co. v. Kregelo, 32 Kan. 608; 5 Pac. 15; Beardsley v. Lehigh Valley &c. R. Co. 142 N. Y. 173; 36 N. E. 877.

[12] Beardsley v. Lehigh Valley &c. R. Co. 142 N. Y. 173; 36 N. E. 877; Van Wagner v. Central &c. R. Co. 30 N. Y. S. 165.

[13] Twenty years of appropriate user is sufficient to prove the establishment of a public way across a railroad, or the grant of a private way. Fisher v. New York &c. R. Co. 135 Mass. 107." See Gay v. Boston &c. R. Co. 141 Mass. 407; 6 N. E. 236.

[14] Prince v. New York &c. R. Co. 14 N. Y. S. 817.

[15] Fisher v. New York &c. R. Co. 135 Mass. 107; 17 Am. & Eng. R. Cas. 80; Gay v. Boston &c. R. Co. 141 Mass. 407; 6 N. E. 236. See note in 35 Am. & Eng. R. Cas. 320.

tain an action for damages against the railway company for filling up and destroying it.[16] But the use must be as a matter of right, and not merely permissive.[17]

§ 1141. Private crossings by agreement.—The terms and conditions upon which private crossings are secured may be, and often are, determined by contract between the railway company and the person seeking the crossing.[18] Such contracts are valid, and will be enforced by the court. Resort may be had to equity to enforce such a contract, if there is no adequate remedy at law for the person aggrieved,[19] but where there is an adequate remedy at law equity will not interfere. Thus, where it was sought to enforce specific performance of a contract for a private crossing, and it appeared that the crossing would be of slight or doubtful value to the landowner after constructed, the court refused to decree specific performance, and left the party to his remedy for damages.[20] And where a company, in consideration of the conveyance of a right of way by a landowner, agreed to construct farm crossings for him, and refused to do so, and it appeared that there was in force a statute which provided that landowners could

[16] Wells v. Northern R. Co. 14 Ont. R. 595; 35 Am. & Eng. R. Cas. 314. See, also, Louisville &c. R. Co. v. Brooks, 25 Ky. L. 1307; 77 S. W. 693; Farwell v. Boston &c. R. Co. 72 N. H. 335; 56 Atl. 751.

[17] McCreary v. Boston &c. R. Co. 153 Mass. 300; 26 N. E. 864; 11 L. R. A. 359. See, also, post, § **1154**; and see Thompson v. Louisville &c. R. Co. 25 Ky. L. 529; 76 S. W. 44.

[18] In Gay v. Boston &c. R. Co. 141 Mass. 407; 6 N. E. 236, the court said: "That a land-owner, in conveying land for a railway, may reserve a right of way, which must operate as a grant; that the railroad corporation, when settling with the land-owner for damages for land taken, may make a valid agreement to allow or maintain a crossing as one of the terms of settlement, and that a railroad corporation may, to the extent of its interest as owner of the land, or holder of the easement and franchise, grant a private right of way over its road—are propositions which we believe have never been questioned, and which are recognized by statutes and decisions." See, also, Speer v. Erie R. Co. 68 N. J. Eq. 615; 60 Atl. 197, 198.

[19] See Clouse v. Canada &c. R. Co. 4 Ont. R. 28; 14 Am. & Eng. R. Cas. 456; Speer v. Erie R. Co. 68 N. J. Eq. 615; 60 Atl. 197; (N. J. Eq.) 62 Atl. 943; Louisville &c. R. Co. v. Brooks, 25 Ky. L. 1307; 77 S. W. 693; Marsh v. Lehigh &c. R. Co. (Pa. St.) 64 Atl. 366.

[20] Murdfeldt v. New York &c. R. Co. 102 N. Y. 703; 7 N. E. 404; 1 Sil. App. N. Y. 93; 25 Am. & Eng. R. Cas. 144. See, also, Clark v. Rochester R. 18 Barb. (N. Y.) 350.

secure private crossings, it was held that equity would not enforce the contract, but would leave the owner to his remedy at law for damages for a breach of the contract or his right to secure the crossings under the statute.[21] Damages will be allowed for the obstruction of a crossing by gates when the agreement provides that the crossing shall be open,[22] and where the company refuses altogether to construct the crossing.[23] When once a valid contract has been made for a crossing, the railway company will not be excused from performing the contract and constructing the crossing because the cost will be somewhat heavy.[24] It has been held that the sale of the land after suit is brought will not defeat the action for damages.[25] The measure

[21] Illinois Central R. Co. v. Willenborg, 117 Ill. 203; 7 N. E. 698; 57 Am. R. 862; 26 Am. & Eng. R. Cas. 358. In that case it was said: "Whether they (the land-owners) are entitled to have a crossing constructed by the company for their use, either under the covenant in the right of way deed, or under the statute, or both, their remedy is clearly in a court of law, and they will be remitted to that forum, where such matters are purposely cognizable. The remedy for the complaint made against the railroad company for the omission of duty, whether it arises out of a contract or under the statute, is full, complete and adequate at law, and no reason appears why a court of equity should assume jurisdiction." See Canada &c. R. Co. v. Erwin, 13 Can. S. C. R. 162; 35 Am. & Eng. R. Cas. 311. When there was an alleged agreement as to a crossing, and plaintiff sued to redress a breach of it and it appeared that he did not rely upon his contract, but upon the law to secure his crossing, it was held that he had no rights under the alleged contract. Canada &c. R. Co. v. Clouse, 13 Can. S. C. R. 139; 35 Am. & Eng. R. Cas. 296. See for alleged agreement held insufficient, Owazarzak v. Gulf &c. Ry. Co. 31 Tex. Civ. App. 229; 71 S. W. 793.

[22] Williams v. Clark, 140 Mass. 238; 5 N. E. 802; 24 Am. & Eng. R. Cas. 460.

[23] Indiana &c. R. Co. v. Koons, 105 Ind. 507; 5 N. E. 549. In this case the contract provided that the company should fence the track and build a private crossing. The owner sued and recovered damages for a failure to construct the crossing. Afterward he brought a second suit for the failure to fence. It was held that the first suit was an adjudication of the breach of contract and that the second suit would not lie.

[24] Cincinnati &c. R. Co. v. Hudson, 88 Ky. 480; 11 S. W. 509; 39 Am. & Eng. R. Cas. 693. See Clouse v. Canada &c. R. Co. 4 Ont. R. 28; 14 Am. & Eng. R. Cas. 456.

[25] Cincinnati &c. R. Co. v. Hudson, 88 Ky. 480; 11 S. W. 509; 39 Am. & Eng. R. Cas. 693. And that such an agreement does not run with the land nor bind the lessee of the road. Cook v. Milwaukee &c. R. Co. 36 Wis. 45. In Speer v. Erie R. Co. (N. J. Ch.) 62 Atl.

of damages for failure to construct a private crossing has been held to be the cost of constructing the crossings, together with such damages as may have resulted from the loss of the use of the crossing up to the time of the trial.[26]

§ 1142. Private crossings under statutory authority.—In a great many of the states statutes are in force which provide a method by which landowners whose lands border on the right of way of a railroad company may secure private or farm crossings. There is some conflict in the authorities as to the constitutionality of such statutes. That such statutes are constitutional as to all railway companies which are chartered and constructed after the enactment of the statutes the authorities are agreed,[27] but where the statute requiring a railroad company to construct and maintain private crossings was enacted after the railway company was chartered and its line constructed, it was held unconstitutional as depriving the company of its property without due compensation.[28] Other well reasoned authorities, how-

943, a strip of land through a farm was conveyed to a railroad for a right of way by a deed in which the railroad covenanted to provide the grantor with a convenient road crossing. One of the severed portions of the farm was intersected by a road, but there was no method of egress from the other portion, except over the railroad crossing, and through the intersected portion to the road. A bill to restrain the company and for specific performance had been filed but the court, finding that specific performance could not be granted, retained the case for assessment of damage caused by destruction of the crossing, and it was held that the right to use the crossing was not limited to the use of it as a farm crossing, but that the original grantor and his grantees had a right to use it for any purpose to which the land became adapted; that the right to use the crossing was not restricted to the grantors but extended to her grantees even of subdivisions, and that after the land had ceased to be used for agricultural purposes and had been divided into lots, the railroad company had no right to maintain bars at the crossing.

[26] Cincinnati &c. R. Co. v. Hudson, 88 Ky. 480; 11 S. W. 509; 39 Am. & Eng. R. Cas. 693. See Port v. Huntingdon &c. R. Co. 168 Pa. St. 19; 31 Atl. 950.

[27] Illinois &c. R. Co. v. Willenborg, 117 Ill. 203; 7 N. E. 698; 57 Am. R. 862; 26 Am. & Eng. R. Cas. 358. A railway company which is reorganized after purchase at foreclosure sale is estopped to question the constitutionality of an act requiring farm crossings which was in effect at the time of such reorganization. Alabama &c. R. Co. v. Odeneal (Miss.) 19 So. 202.

[28] People v. Detroit &c. R. Co. 79 Mich. 471; 44 N. W. 934; 42 Am. &

ever, hold that the enactment of such a statute is a valid exercise of the police power of the state, and applies to those companies chartered before as well as those chartered after its passage.[29] If the decisions which uphold the constitutionality of such statutes can be placed upon the ground that the statutes rest upon the police power of the state, they are undoubtedly correct, but some of the authorities hold, and, we think, with some reason, that such statutes do not rest upon and are not within the police power of the state.[30] The state usually exercises the police power for the benefit and safety of the public, and it seems to us that the construction of private and farm crossings over railway tracks can hardly be said to be for the benefit of the public. The same reason cannot exist for placing a statute requiring a railway company to construct private crossings upon the police power that exists for resting a statute requiring a company to fence its tracks upon the police power, for in one case the safety of the public who use the railway is endangered, while in the other it is secured.[31] The provisions of the various statutes are so different that

Eng. R. Cas. 257; 7 L. R. A. 717; Gulf &c. R. Co. v. Rowland, 70 Tex. 298; 7 S. W. 718; 35 Am. & Eng. R. Cas. 286. See, also, Milliman v. Oswego &c. R. Co. 10 Barb (N. Y.) 87; Owazarzak v. Gulf &c. R. Co. 31 Tex. Civ. App. 229; 71 S. W. 793. In the case of New York &c. R. Co. v. Railroad Comrs. 162 Mass. 81; 38 N. E. 27, the statute was upheld, but the court placed its opinion upon the ground that the statute did not create a new right, but simply declared a right which existed independent of statute. The court intimated that if the statute attempted to create a new right or to impose a new burden it would be held unconstitutional. The court, among other things, said: "If the statute assumed to create a right of way where none before existed, and to put upon the railroad corporations the burden of establishing and maintaining crossings for private persons over land held by a railroad corporation under a perfect title, subject to no rights or privileges, it might well be held unconstitutional."

[29] New York &c. R. Co. v. Railroad Comrs. 162 Mass. 81; 38 N. E. 27; Illinois &c. R. Co. v. Willenborg, 117 Ill. 203; 7 N. E. 698; 57 Am. R. 862; 26 Am. & Eng. R. Cas. 358.

[30] People v. Detroit &c. R. Co. 79 Mich. 471; 44 N. W. 934; 42 Am. & Eng. R. Cas. 257; 7 L. R. A. 717. But they may also be valid where the power to amend or repeal has been reserved.

[31] "It is apparent that every open crossing into the public highway across a railroad track increases rather than diminishes, the danger of travel, by giving animals an opportunity to get upon the track in front of passing trains. These residence crossings can not, therefore, be justified on the ground of protection and safety to passen-

it will be impossible to notice them all. The right to a crossing under such statutes is not confined to one for agricultural purposes.[32] Lessees may be compelled to furnish private crossings under the statute,[33] as well as the owners of the railway, and so may a receiver.[34] The procedure in securing a crossing under statutory authority depends on the particular statute under which the crossing is sought, and since the statutes are so different in their provisions it follows that the procedure must vary.[35] In some of the states the owner must put the crossing in at his own expense, while in others the expense must be borne by the company.[36] Some of the statutes provide that, if the company fail, after being notified, to put in the crossing, the landowner may do so and recover the expense from the railroad company,[37] or, if the railroad company refuse, the owner may recover damages for such refusal.[38]

§ 1143. Location and number of crossings.—The manner in which the location of a crossing shall be determined depends in a great measure upon the terms of the statute. Where the statute confers upon the landowner the right to select the place of crossing, he may do so, but his selection must be reasonable and such as not to interfere with the paramount rights of the railway company.[39] And, on

gers and property." People v. Detroit &c. R. Co. 79 Mich. 471; 34 N. W. 934; 42 Am. & Eng. R. Cas. 257; 7 L. R. A. 717.

[32] Buffalo &c. Co. v. Delaware &c. R. Co. 130 N. Y. 152; 29 N. E. 121. In the case cited it was said: "The statute does not limit the right of adjoining owners to crossings solely for agricultural purposes, but they may be ordered to enable owners to remove the natural products of the land, like stone and minerals."

[33] Buffalo &c. R. Co. v. Delaware &c. R. Co. 130 N. Y. 152; 29 N. E. 121.

[34] Peckham v. Dutchess County R. Co. 145 N. Y. 385; 40 N. E. 15.

[35] It has been held that where the obligation to put in farm crossings is purely statutory, the statutory method of enforcing that obligation is exclusive. Chicago &c. R. Co. v. Eichman, 47 Ill. App. 156; Baltimore &c. R. Co. v. Campbell, 109 Ill. App. 25. But see Swinney v. Chicago &c. R. Co. 123 Ia. 219; 98 N. W. 635.

[36] Omaha &c. Co. v. Severin, 30 Neb. 318; 46 S. W. 842; 45 Am. & Eng. R. Cas. 122.

[37] Sheridan v. Atchison &c. R. Co 56 Mo. App. 68. See, also, Illinois Cent. R. Co. v. Willenborg, 117 Ill. 203; 7 N. E. 698; 57 Am. R. 862; Birlew v. St. Louis &c. R. Co. 104 Mo. App. 561; 79 S. W. 490.

[38] Port v. Huntingdon &c. R. Co. 168 Pa. St. 19; 31 Atl. 950.

[39] Van Vrankin v. Wisconsin &c.

the other hand, where the statute permits the railway company to select the place of crossing, it may do so, provided the location is a suitable one and such as not to subject the owner to great inconvenience.[40] Whether the landowner or the railroad company has the right to select the place of crossing, the purposes of the crossing and the respective rights of each of the parties must be considered, and neither party will be allowed to arbitrarily select a place of crossing to the manifest injury or detriment of the other party.[41] The remedy, where the company fails to construct the crossing at a place convenient for the landowner, is by an action for damages,[42] or by an action

R. Co. 68 Iowa, 576; 27 N. W. 761. See, also, Chalcraft v. Louisville &c. R. Co. 113 Ill. 86. "As a general rule the landowner has a reasonable right to farm crossings at such places as the necessities of his farm demand, provided such crossings and the use thereof will not interfere with the paramount rights of the railroad company. Kansas &c. Railway Co. v. Allen, 22 Kan. 285; 31 Am. R. 190; Atchison &c. Railroad Co. v. Gough, 29 Kan. 94." Kansas City &c. R. Co. v. Kregelo, 32 Kan. 608; 5 Pac. 15; 20 Am. & Eng. R. Cas. 241.

[40] Wademan v. Albany &c. R. Co. 51 N. Y. 568; Boggs v. Chicago &c R. Co. 54 Iowa, 435; 6 N. W. 744.

[41] In Jones v. Seligman, 81 N. Y. 190; 3 Am. & Eng. R. Cas. 236, the court said: "The location of a crossing is to be made somewhat with reference to the needs, necessities and convenience of the owner of the farm, and he is entitled to be reasonably and fairly accommodated. The circumstances are to be considered, and the crossings should be located in view of all the surroundings, and according to the situation of the adjacent land. The railroad corporation, in the exercise of its duty in providing farm crossings, is not vested with any absolute discretion or arbitrary power that its decision is final and conclusive and can not be reviewed or disturbed, while under the provisions of the general railroad act. requiring the corporation to erect farm crossings, etc., for the use of the proprietor of lands adjoining, the interest of neither party is alone controlling, the power must be exercised in a proper manner, having due regard to the convenience of the owner of the land, and without subjecting him to needless and unreasonable injury." See, also, Van Kleeck v. Dutchess County R. Co. 28 N. Y. Supp. 902; Clarke v. Ohio River R. Co. 39 W. Va. 732; 20 S. E. 696. As to right of company to change location when necessary, see Costello v. Grand Trunk R. 70 N. H. 403; 47 Atl. 465.

[42] Wademan v. Albany &c. R. Co. 51 N. Y. 568. In this case the plaintiff sued for damages and for the construction of a crossing at a suitable place. The court held that as the construction of a new crossing would entail such a heavy expense on the railroad in proportion to the benefit to the land-owner, he should be awarded damages and nothing more. See, also, Sheri-

to compel the construction of a crossing at a proper place.[43] And where the landowner selects a place for a crossing at a point where the expense to the company will be enormous in proportion to the benefit to the landowner, the company may properly refuse to construct the crossing at such place.[44] The number of crossings to which a landowner is entitled is limited. The general rule is that, when the railroad has granted a reasonable number of crossings, and offered the owner a reasonable opportunity to pass from one part of his farm to another, its duty, at least so far as the number of crossings is concerned, is at an end.[45] When the statute under which the crossing is sought provides that the company must furnish adjoining owners "necessary" farm crossings, it has been held that it must furnish such crossings, and as many as are reasonably necessary, and that what are "necessary" crossings is a question for the jury.[46]

§ 1144. Construction of crossing—Sufficiency.—Where the railway company is under an obligation to put in private crossings for the adjoining landowners, such crossings must be adequate and sufficient

dan v. Atchison &c. R. Co. 56 Mo. App. 68.

[43] See Jones v. Seligman, 81 N. Y. 190; Sheridan v. Atchison &c. R. Co. 56 Mo. App. 68.

[44] The company, however, can not refuse to construct a crossing at a proper place. Gray v. Burlington &c. R. Co. 37 Iowa, 119.

[45] See, on the general subject, Van Kleeck v. Dutchess County R. Co. 28 N. Y. S. 902; Jones v. Seligman, 81 N. Y. 190; Canada S. R. Co. v. Clouse, 13 Can. S. C. 139; 35 Am. & Eng. Cas. 296. The law is very clearly expressed in the recent case of Clarke v. Ohio River R. Co. 39 W. Va. 732; 20 S. E. 696, as follows: "When once the company has put in suitable crossings, can it be required later to put in additional ones? No authority has been cited to the exact point, and I have found none. In Wademan v. Albany &c. R. Co. 51 N. Y. 568, under such a statute, it was held that if the statute give no election in terms to the landowner, it is the right of the company to say where the crossings shall be; but in the exercise of this right regard must be had to the convenience of both parties, and such a location must be made as will not subject the owner to needless and unreasonable injury. 1 Ror. R. R. 444. Must the company change the crossings in place, or add new ones, with the changing caprices, or even needs, of the owner? If the owner sell part of his land, must the company then make a crossing on the part sold, and must it keep on adding crossings as further sales of parts are made? I think not."

[46] Alabama &c. R. Co. v. Odeneal, 13 Miss. 34; 19 So. R. 202. See Dubbs v. Phila. &c. Railroad Co. 148 Pa. St. 66; 23 Atl. 883.

for all the usual purposes for which such crossings are used. The company cannot discharge its duty by constructing a crossing which would enable only persons on foot or animals to cross. The crossing must be adequate, and an adequate means of crossing has been held to be such a crossing as would enable the owner to cross the track and right of way on foot or horseback, with wagon or carriage, or with domestic animals under his control.[47] It is difficult to lay down any general rule that can apply to all cases for the adequacy of any particular private crossing must necessarily depend largely on its position and the surrounding circumstances.[48]

§ 1145. Enforcing construction.—Different methods are provided for enforcing the construction of private or farm crossings. The methods must, of course, vary, because, in some cases, the right to the crossing rests on a contract, while in others it rests on statutory enactments. Where the right to the crossing rests on a contract between the landowner and the railway company there is some conflict as to whether or not such a contract can be enforced by a decree of specific performance. Unless the landowner has a full, complete and adequate remedy at law for damages for a violation of the contract, we are of the opinion that the contract may be enforced by a decree in equity, but where full and adequate compensation can be made,[49] or where it appears that to decree specific performance will result in little advantage to the landowner and great expense to the railroad company, specific performance will be denied.[50] Where the right to a crossing rests upon statute the statute usually provides a method

[47] Omaha &c. R. Co. v. Severin, 30 Neb. 318; 46 N. W. 842; 45 Am. & Eng. R. Cas. 122. See, also, Fremont &c. R. Co. v. Lamb, 11 Neb. 592; 10 N. W. 493; 5 Am. & Eng. R. Cas. 367. An adequate crossing has been held not to mean an open crossing, so that animals may wander across the track from one part of a farm to another. Curtis v. Chicago &c. 62 Iowa, 418; 17 N. W. 591; 13 Am. & Eng. R. Cas. 593. See, also, Missouri &c. R. Co. v. Chenault (Tex. Civ. App.), 60 S. W. 55.

[48] Horne v. Atlantic &c. R. Co. 36 N. H. 440; Gray v. Burlington &c. R. Co. 37 Iowa, 119. It may be necessary to consider future as well as present use. Hespenheide v. King, 31 Pittsb. Leg. J. (N. S.) 242. But see People v. New York &c. R. Co. 168 N. Y. 187; 61 N. E. 172.

[49] Ante, § 1141.

[50] Murdfeldt v. New York, &c. R. Co. 102 N. Y. 703; 7 N. E. 404; 1 Sil. App. (N. Y.) 93; 25 Am. & Eng. R. Cas. 144; ante, § 1141.

for enforcing a construction of the crossing. The methods provided by the statutes are not at all uniform, varying, of course, in the different states. Some of the statutes provide that the construction of the crossing may be secured by mandamus against the railway company.[51] Others provide that the landowner may give notice to the railway company to construct the crossing, and, on its failure to do so within the time specified by the statute, he may do so and recover the expense from the railway company.[52] Some of the statutes provide that double the cost of the crossing may be recovered.[53]

§ 1146. Repair and maintenance.—The general rule is that the duty of repairing and maintaining private crossings rests upon the person whose duty it was to construct the crossing.[54] The statutes imposing upon railway companies the duty of constructing farm crossings usually provide that the company shall "construct and maintain" suitable farm crossings, and under such provisions the duty of keeping in repair falls upon the railway company.[55] The obligation

[51] Boggs v. Chicago &c. R. Co. 54 Iowa, 435; 6 N. W. 744; State v. Mason City &c. R. Co. 85 Iowa, 516; 52 N. W. 490. See Buffalo &c. Co. v. Delaware &c. R. Co. 130 N. Y. 152; 29 N. E. 121; State v. Wisconsin Cent. R. Co. (Wis.) 107 N. W. 16. In State v. Chicago &c. R. Co. 79 Wis. 259; 12 L. R. A. 180, and note; 49 Am. & Eng. R. Cas. 304, it was said: "This provision (the one providing for a penalty for the failure to construct a farm crossing) enables the owner to use the corporation and recover damages or penalties for its failure to perform its legal duty; but that will not secure the construction of the necessary farm crossing, nor will it afford an adequate remedy. The writ of mandamus would seem to be most efficient, if not the only adequate means for compelling the corporation to do its legal duty. . . . It seems to us clear that mandamus is the only legal remedy to which the relator can resort in this case to enforce his rights to compel the corporation to perform the duty which the law imposes." Mandamus, however, is not an exclusive remedy. State v. Mason City &c. R. Co. 85 Iowa, 516; 52 N. W. 490.

[52] Chicago &c. R. Co. v. Eichman, 47 Ill. App. 156; Green v. Morris &c. R. Co. 24 N. J. L. 486.

[53] Chicago &c. R. Co. v. Eichman, 47 Ill. App. 156.

[54] Madison v. Missouri &c. R. Co. 60 Mo. App. 599; Peckham v. Dutchess County &c. R. Co. 20 N. Y. S. 39; Cotton v. New York &c. R. Co. 20 N. Y. S. 347; Patterson v. South &c. R. Co. 89 Ala. 318; 7 So. 473; Miller v. Chicago &c. R. Co. 66 Iowa, 546; 24 N. W. 36; Stewart v. Cincinnati &c. R. Co. 89 Mich. 315; 50 N. W. 852; 17 L. R. A. 539.

[55] See Omaha &c. R. Co. v. Severin, 30 Neb. 318; 46 N. W. 842; 45 Am. & Eng. R. Cas. 122; Clouse

to repair may also become binding upon the company from long continued custom to repair. Thus, where the company had kept a crossing in repair for a period of forty-nine years, it was held that the duty to repair was one from which it could not escape.[56] The duty to repair is not owing to anyone besides persons lawfully using the crossing. A person using a public crossing without right, and for his own convenience, cannot complain because the crossing may not be in proper repair.[57]

§ 1147. Passways and subways under the tracks.—Communication from one part of a landowner's property to another part, which has been cut off by a railroad right of way, is often provided for by passways and subways constructed under the tracks. As a rule, such passways and subways are more convenient for the landowner, and are at the same time much safer for the railway company, for collisions and injuries at such crossings are practically reduced to a minimum. There are but few adjudicated cases as to whether or not a company can be compelled to furnish a crossing by means of a passway or subway under the track. Most of the cases on the subject involve the rights of railway companies and landowners in reference to passways and subways after they have been constructed. It has, however, been held, and correctly, we think, that where a railroad company was required to construct farm crossings, and it appeared that the track was on a high embankment, and there was a natural depression through which a subway could be more conveniently constructed than a grade crossing, such subway would be ordered constructed.[58] And where a railway company was under a statutory obligation to furnish a landowner a crossing, it was held that it might be either a grade

v. Canada Southern R. Co. 4 Ont. R. 28; 14 Am. & Eng. R. Cas. 456; Fremont &c. R. Co. v. Lamb, 11 Neb. 592; 10 N. W. 493; 5 Am. & Eng. R. Cas. 367; Illinois Central R. Co. v. Willenborg, 117 Ill. 203; 7 N. E. 698; 57 Am. R. 862; 26 Am. & Eng. R. Cas. 358; Chicago &c. R. Co. v. Harris, 54 Ill. 528; Baltimore &c. R. Co. v. Keck, 89 Ill. App. 72.

[56] Prince v. New York &c. R. Co. 14 N. Y. S. 817. See Stewart v. Cincinnati &c. R. Co. 89 Mich. 315; 50 N. W. 852; 17 L. R. A. 539.

[57] Cornell v. Skaneateles R. Co. 15 N. Y. 581. See Mann v. Chicago &c. R. Co. 86 Mo. 347. And compare Southern R. Co. v. Murrell, 78 Miss. 446; 28 So. 824 (tenant).

[58] Beardsley v. Lehigh Valley Ry. Co. 142 N. Y. 173; 36 N. E. 877; 20 N. Y. S. 458; Van Wagner v. Central &c. R. Co. 80 Hun (N. Y.), 278; 30 N. Y. S. 165; Jones v. Seligman, 81 N. Y. 190.

crossing, an overhead crossing, or an undergrade crossing, depending on the lay of the land and the relative cost of constructing the different crossings.[59] After a passway has been constructed, and the railway company attempts to fill it up, there is some conflict as to whether an injunction will lie to restrain the company from taking such action. Where the company has entered into a valid agreement with the landowner to construct and maintain passways under its tracks, and it afterwards undertakes to fill up and destroy such passways, injunction is the proper remedy.[60] But where a passway has been used by mere sufferance, and under no claim of right, although it has been used for a sufficient length of time to give an easement by prescription, no such right has been acquired as will entitle a landowner to an injunction to prevent the filling up of the passway.[61] Yet if the landowner has acquired an easement, although he may not be entitled to an injunction to prevent the company from filling up the subway, he can recover damages for the destruction of his easement.[62]

§ 1148. Damages for destruction or impairment of crossing by railway company.—Where a railway company has once constructed a private crossing under a statutory duty to build such crossing, it is under an obligation to see that the crossing is properly maintained. It has no right, as a rule, to take out or destroy the crossing, and if

[59] Post v. Huntington &c. R. Co. 168 Pa. St. 19; 31 Atl. 950. See St. Paul &c. R. Co. v. Murphy, 19 Minn. 500. The text is cited in State v. Wisconsin Cent. R. Co. 123 Wis. 551; 102 N. W. 16, 17, where it is said: "We have no hesitation in affirming this view (that undergrade crossings may be required in a proper case), for they may be vastly promotive of the owner's convenience, and, while they may involve more expense to the railroad company, it may well be doubted whether they are not always a real economy over the grade crossing with its continual peril of collision of trains with passing teams or cattle."

[60] Swan v. Burlington &c. R. Co. 72 Iowa, 650; Rock Island &c. R. Co. v. Dimick, 144 Ill. 628; 32 N. E. 291; 19 L. R. A. 105. See, also, Cleveland &c. R. Co. v. Munsell, 192 Ill. 430; 61 N. E. 374.

[61] Davis v. Cleveland &c. R. Co. 140 Ind. 468; 39 N. E. 495. See Canada Southern R. Co. v. Clouse, 13 Can. S. C. R. 139; 35 Am. & Eng. R. Cas. 296; Schrimper v. Chicago &c. R. Co. 115 Ia. 35; 87 N. W. 731.

[62] Wells v. Northern &c. R. Co. 14 Ont. 594; 35 Am. & Eng. R. Cas. 314.

it does so it will be liable in damages.[63] But where a company changed the grade of its track, thus necessitating a change in a private crossing, it was held that the company was not bound to construct new approaches to the crossing.[64]

§ 1149. When right to private crossing runs with the land.— Where there is a mere parol agreement to put in a private crossing, or for its use, the right to such crossing does not run with the land, and does not pass to a subsequent grantee of the adjoining land.[65] But where a deed conveying a right of way to the railway company provided for the construction and maintenance of private crossings, the right is one that runs with the land, and the right to the crossing may be enforced in favor of a subsequent grantee of the land.[66] And where the railway company which has put in a crossing in compliance with an agreement between itself and an adjoining landowner continues to maintain the crossing after the landowner has conveyed to another, it may estop itself to claim that the subsequent grantee is not entitled to the crossing.[67] Where a railway company has constructed

[63] Ohio &c. R. Co. v. McGehee, 47 Ill. App. 348; Wells v. Northern &c. R. Co. 14 Ont. R. 594; 35 Am. & Eng. R. Cas. 314.

[64] Williams v. Clark, 140 Mass. 238; 5 N. E. 802; 24 Am. & Eng. R. Cas. 460. See, also, Schrimper v. Chicago &c. R. Co. 115 Ia. 35; 87 N. W. 731. But see Chesapeake &c. R. Co. v. Richardson (Ky.), 98 S. W. 1042.

[65] Mills v. Hopkins, 6 U. C. C. P. 138. A purchaser of a railway at a foreclosure rule is not bound by a parol agreement made by the president of the railroad company to make a farm crossing or maintain a fence of a certain description. Hunter v. Burlington &c. R. Co. 76 Iowa, 490; 41 N. W. 305.

[66] Post v. West Shore &c. R. Co. 50 Hun, 301; 3 N. Y. S. 172; Hall v. Clearfield &c. R. Co. 168 Pa. St. 64; 31 Atl. 940. See, also, Rathbun v. New York &c. R. Co. 20 R. I. 60; 37 Atl. 300; Speer v. Erie R. Co. (N. J. Eq.) 62 Atl. 943.

[67] The question of whether the right to a private crossing runs with the land was before the supreme court of Michigan in the case of Stewart v. Cincinnati &c. R. Co. 89 Mich. 315; 50 N. W. 852; 17 L. R. A. 539. The court held that it was not necessary to decide that point to dispose of the case, but said in the course of its opinion: "In this case it is contended by the defendant that the agreement was personal, and was binding only between the railroad and the owner, and did not contain any covenants which ran with the land; and, moreover, it was an agreement to construct, and not to maintain. Conceding, without deciding, that this contention is correct, it follows that when Kent conveyed to

and maintained a private crossing, and the company afterwards sells its line, the grantee taking with notice that the crossing exists, it has been held that the grantee is bound to maintain the crossing and cannot destroy it.[68]

§ 1150. Care required on part of railway company at private crossings.—We have already referred to the duty of a railway company in reference to repairing and maintaining private crossings, and in another chapter is discussed the duty of railway companies in reference to fences, gates and bars at private crossings. Here we propose to discuss the duty in respect to the operation of trains at private crossings. At public crossings railway companies are required to exercise a care reasonably proportionate to the danger to protect persons who may be using the crossings, but at private crossings, where only a limited number of persons cross, the precautions required to be taken in order to constitute reasonable care, under the circumstances, may be few and slight when compared with those required at public crossings. While there is some slight conflict in the authorities as to whether signals are required at private crossings the decided weight of authority is that they are not required,[69] unless a statute so pro-

Green on March 15, 1884, the obligation of the railroad company with respect to the crossing it had erected for Kent terminated, and they were at liberty to remove the structure at pleasure; but they did not remove it, but continued it as a crossing; and as long as they did so they were obligated to use ordinary care to see that it was not dangerous to those who should accept the invitation to use it for the purposes for which it was maintained."

[68] Swan v. Burlington &c. R. Co. 72 Iowa, 650; 34 N. W. 457; Rock Island &c. R. Co. v. Dimick, 144 Ill. 628; 32 N. E. 291; 19 L. R. A. 105; 55 Am. & Eng. R. Cas. 65.

[69] Holmes v. Central &c. R. Co. 37 Ga. 593; Hucker v. Railroad Co. 7 Ky. L. 761; Annapolis &c. R. Co. v. Pumphrey, 72 Md. 82; 19 Atl. 8; Northern Central R. Co. v. State, 54 Md. 113; Gurley v. Missouri &c. R. Co. 104 Mo. 211; 16 S. W. 11; Sanborn v. Detroit &c. R. Co. 91 Mich. 538; 52 N. W. 153; 16 L. R. A. 119; Johnson v. Louisville &c. R. Co. (Ky.) 13 Am. & Eng. R. Cas. 623; Thomas v. Delaware &c. R. Co. 8 Fed. 729; Philadelphia &c. R. Co. v. Fronk, 67 Md. 339; 10 Atl. 204, 307; 1 Am. St. 390; 32 Am. & Eng. R. Cas. 31; Maxey v. Missouri Pac. R. Co. 113 Mo. 1; 20 S. W. 654; Locke v. First Division &c. R. Co. 15 Minn. 350. Contra, Cahill v. Cincinnati &c. R. Co. 92 Ky. 345; 18 S. W. 2; 13 Ky. L. 714; 6 Lewis' R. R. & Corp. Rep. 18. See Ransom v. Chicago &c. R. Co. 62 Wis. 178; 22 N. W. 147; 51 Am. R. 718. In Johnson v. Louisville

vides. Where, however, a private crossing is located so near a public crossing that signals given thereat can be distinctly heard at the private crossing, it has been held by some courts that the persons using the private crossing are entitled to the benefit of the signals required at the public crossing, and that if the company fails to give such signals it will be guilty of negligence.[70] If the company has recognized a private crossing as a public crossing, and the public use it as such, then, it seems, signals must be given.[71] At private crossings the persons who have a right to use the crossing do not do so as trespassers, and since they are not trespassers, and the company knows that such use of the crossing is likely to be made, it has been held that it is bound to use some degree of care to warn persons of the approach of trains.[72] Some authorities hold that the question of whether or not it was negligence to omit signals, or some warning at a private crossing in any particular instance, should be left to a jury.[73]

&c. R. Co. (Ky.) 60 Am. & Eng. R. Cas. 648, it was said: "There not being any reason for requiring the giving of signals and slackening the speed of railroad trains when approaching a private way as exists in respect to a public road, and as to require it to be done at every private crossing, or opposite every dwelling house near the road, would unnecessarily and seriously interfere with and impede the running of trains, we think it would be unreasonable to require it."

[70] Sanborn v. Detroit &c. R. Co. 91 Mich. 538; 52 N. W. 153; 16 L. R. A. 119, and note; Cahill v. Cincinnati &c. R. Co. 92 Ky. 345; 18 S. W. 2; 6 Lewis' R. R. & Corp. Rep. 18. This, however, seems to us to be questionable.

[71] Missouri Pacific R. Co. v. Lee, 70 Tex. 496; 7 S. W. 857; Chicago &c. R. Co. v. Dillon, 24 Ill. App. 203. See Sutton v. New York &c. R. Co. 66 N. Y. 243. And where the company has been in the habit of giving signals at a private crossing it can not discontinue them without notice. If it does so and injury results therefrom it will be held guilty of negligence. Westaway v. Chicago &c. R. Co. 56 Minn. 28; 57 N. W. 222; 60 Am. & Eng. R. Cas. 653. See, also, Hartman v. Chicago &c. R. Co. (Ia.) 110 N. W. 10.

[72] Swift v. Staten Island &c. R. Co. 123 N. Y. 645; 25 N. E. 378; Thomas v. Delaware &c. R. Co. 8 Fed. 729. In Owens v. Pennsylvania Co. 41 Fed. R. 187, the court speaking of the duty of the company to give warnings at private crossings, said: "I think it was proper and reasonable to require that persons having charge of railroad trains, in coming to a place of that kind where, as I have said, a number of persons are engaged in business, and have occasion to pass backward and forward, should give some sign of warning."

[73] Thomas v. Delaware &c. R. Co. 8 Fed. 729. There is conflict, however, on this question for in the case of Philadelphia &c. R. Co.

§ 1151. Accidents and injuries at private crossings.—Where a railway company is under an obligation to maintain and repair a private crossing, it is generally liable for all proximate damages which may result to persons rightfully using the crossing by reason of such failure to repair,[74] unless the person who has suffered damages has been guilty of contributory negligence.[75] It is held, however, that one who uses a private crossing with full knowledge that it is defective and dangerous, does so at his own risk, and if he is injured when so using the crossing, he cannot recover,[76] but if he is ignorant of the condition of the crossing, the company may be liable.[77] Where the person who uses such a crossing is a mere licensee, it has been held he takes it as he finds it, and the company is not liable to him for injuries sustained because the crossing is not properly constructed.[78] And in a recent case it is held that even if it be assumed that, where a private road crosses a railroad track by means of a subway, a court is authorized to submit to a jury the question whether the railroad company owes to one about to use or actually using such crossing a duty to give warning of the approach of a train, the omission to give it cannot be made the basis of a recovery for injuries received in a runaway by one whose horse is frightened by a passing train, after he

v. Fronk, 67 Md. 339; 10 Atl. 204, 307; 1 Am. St. 390; 32 Am. & Eng. R. Cas. 31, it is said: "Nor have we found or been referred to any case, either in this country or in England, in which it has been decided that the failure to whistle at a crossing like this, is evidence to go to the jury of culpable negligence on the part of a railway company." See post, § **1154**.

[74] Smith v. New York &c. R. Co. 63 N. Y. 58; Stewart v. Cincinnati &c. R. Co. 89 Mich. 315; 50 N. W. 852; 17 L. R. A. 539; Central R. &c. Co. v. Robertson, 95 Ga. 430; 22 S. E. 551; Cowans v. Ft. Worth &c. R. Co. (Tex. Civ. App.) 89 S. W. 1116; Cotton v. New York &c. R. Co. 20 N. Y. 347. In the case last cited a horse's hoof became fastened in a defective private crossing, and a train struck him and killed him.

[75] Madison v. Missouri &c. R. Co. 60 Mo. App. 599.

[76] Madison v. Missouri &c. R. Co. 60 Mo. App. 599; Artman v. Kansas Cent. R. Co. 22 Kan. 296. That is, if a reasonably prudent man, in the exercise of ordinary care, would not use it, or, in other words, if he is guilty of contributory negligence.

[77] See Stewart v. Cincinnati &c. R. Co. 89 Mich. 315; 50 N. W. 852; 17 L. R. A. 539; Madison v. Missouri &c. R. Co. 60 Mo. App. 599.

[78] Truax v. Chicago &c. R. Co. 83 Wis. 547; 53 N. W. 842. See, also, post, § **1154**.

has driven through the subway and is traveling upon a road parallel with the track, although he is but fifty feet from the crossing; and that this is true although the place where the plaintiff's horse was frightened was one of peculiar dangers, because the road was there confined in a narrow lane by a barbed wire fence paralleling the railroad.[79] The court distinguished another case,[80] decided in the same jurisdiction, in which it was held that under certain circumstances it might be a question for the jury to determine whether the company was negligent in not giving a signal near a crossing, even though it was a private crossing. It has been held that a railroad company which builds and undertakes to keep in repair a bridge over an approach to a private crossing thereby extends such an invitation to the public to use the same as will render it liable for injuries from defects negligently permitted to exist or remain in the bridge or approach, even though it is not affirmatively shown that such crossing is one that the company is bound by statute to keep in safe order and condition.[81] It has also been said that there is no distinction between public and private crossings in the application of the principle of contributory negligence, and in a general sense, at least, this is true. It is the duty of a person traveling over a private crossing to use all his faculties to ascertain whether or not he can cross in safety.[82] And, where he ventures on such crossing without first looking and listening, he will be charged with negligence, defeating a recovery for injuries proximately caused by a failure to take these precautions.[83]

§ 1151a. Care at "traveled places," etc.—A South Carolina statute makes it the duty of railroad companies to sound signals on

[79] St. Louis &c. R. Co. v. Morrison (Kans.), 85 Pac. 295.

[80] Roach v. St. Joseph &c. R. Co. 55 Kans. 654; 41 Pac. 964. See post, §§ 1154, 1158; Hartman v. Chicago &c. Ry. Co. (Ia.) 110 N. W. 10.

[81] Central R. &c. Co. v. Robertson, 95 Ga. 430; 22 S. E. 551; Southern R. Co. v. Hooper, 110 Ga. 779; 36 S. E. 232. But compare Atchison &c. R. Co. v. Fuller, 72 Kans. 527; 84 Pac. 140; Houston &c. R. Co. v. Evans (Tex. Civ. App.), 92 S. W. 1077 (question of contributory negligence).

[82] Thomas v. Delaware &c. R. Co. 8 Fed. 729.

[83] Lyman v. Philadelphia &c. R. Co. 4 Houst. (Del.) 583; Sprow v. Boston &c. R. Co. 163 Mass. 330; 39 N. E. 1024. See, also, Rich v. Chicago &c. R. Co. 149 Fed. 79; Annapolis &c. R. Co. v. State (Md.), 65 Atl. 434.

approach to "traveled places."[84] The courts of that state hold, that to constitute a place a "traveled place" under this statute, it must not only be a place where persons are accustomed to travel, but it must also be a place where persons have in some way acquired the right to travel.[85] An open place, traveled for years by the public in going from the streets of the town to a depot, has been held a "traveled place" within this statute.[86] It has been held that the Minnesota statute, requiring signals to be sounded by locomotives before reaching places where the railroad crosses a "traveled" road or street, is without application to private farm crossings.[87] At a later place[88] the subject of the duty of the railroad company at crossings established by custom or license, will be discussed. It may not be amiss at this point, however, to say that it does not follow that because a railroad company is under no statutory obligation to sound these signals it may altogether omit to sound them at all private crossings. The question is usually to be determined on general legal principles, whether, under all the circumstances, reasonable care required the giving of such signals.[89] On this subject the New York court of appeals has said: "Where the public have, for a long time, notoriously and constantly been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad company, such acquiescence amounts to a license, and imposes a duty upon the company, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury. Although in such cases the company is not absolutely bound to ring a bell or blow a whistle upon the locomotive of a train approaching such a crossing, yet it is bound

[84] Gen. Stat. S. Car. § 1483.

[85] Hale v. Railroad Co. 34 S. Car. 299; 13 S. E. 537; Hankinson v. Railroad Co. 41 S. Car. 20; 19 S. E. 206; Risinger v. Southern R. Co. 59 S. Car. 429; 38 S. E. 1.

[86] Risinger v. Southern R. Co. 59 S. Car. 429; 38 S. E. 1.

[87] Czech v. Great Northern R. Co. 68 Minn. 38; 70 N. W. 791; 38 L. R. A. 302. See, also, Byrne v. New York &c. R. Co. 94 N. Y. 12; Hodges v. St. Louis &c. R. Co. 71 Mo. 50. But compare Missouri &c. R. Co. v. Lee, 70 Tex. 496; Chicago &c. R. Co. v. Dillon, 24 Ill. App. 203; St. Louis &c. R. Co. v. Tomlinson (Ark.), 94 S. W. 613.

[88] Post, 1154.

[89] Czech v. Great Northern R. Co. 68 Minn. 38; 70 N. W. 791; 38 L. R. A. 302. See, also, Sanborn v. Detroit &c. R. Co. 91 Mich. 538; 52 N. W. 153; 16 L. R. A. 119, and note.

to give some notice and warning; and as to what is sufficient in this regard is a question for the jury. Where a train is approaching a crossing of this character, the fact that the bell was rung does not, as matter of law, establish the fact that the company used reasonable care; but it is for the jury to determine whether any other precaution should have been taken by those in charge of the train."[90] But, as elsewhere shown,[91] in many jurisdictions where there is nothing that can be construed as an invitation on the part of the company, or the like, the mere fact that people occasionally, or even frequently, cross the tracks at a place where there is no public right of passage does not necessarily require the company to treat it as a public crossing, and, as a general rule, the company is not required as a matter of law, under ordinary circumstances, to signal the approach of its train.[92]

[90] Swift v. Staten Island &c. R. Co. 123 N. Y. 645; 25 N. E. 378; Barry v. Railroad Co. 104 N. Y. 362; 10 N. E. 539. See, also, Houston &c. R. Co. v. Boozer, 70 Tex. 530; 8 S. W. 119; Sites v. Knott, 197 Mo. 684; 96 S. W. 206.

[91] Ante, §§ 1140, 1150, and post, § 1154.

[92] See, also, Annapolis &c. Ry. Co. v. State (Md.), 65 Atl. 434; Annapolis &c. R. Co. v. Pumphrey, 72 Md. 82; Sanborn v. Detroit &c. Ry. Co. 91 Mich. 538; 16 L. R. A. 119; and note; Hoback v. Louisville &c. R. Co. (Ky.) 99 S. W. 341; post, § 1154.

CHAPTER XLIX.

INJURIES AT CROSSINGS.

§ 1152. Introductory.—It is the purpose in this chapter to treat of the duties respectively of railway companies and travelers at highway crossings and such other places as have by custom and use become recognized as crossings, so as to require a duty from the railroad company to those entitled to use them, and also to treat of the liability of the railway company to travelers suffering injuries at such crossings. At other places the right of way and track of the railroad company are its exclusive property upon which no stranger has a right to be,[1] and to those who trespass upon its track and right of way it owes no duty, as a general rule, except to refrain from willfully or wantonly injuring them.[2] But when a public crossing is once established, the traveler, in the proper use of the crossing, is no longer a trespasser and certain mutual rights and duties arise upon the part of both the company and the traveler.[3] Any attempt to specifically define these rights and duties is

[1] Philadelphia &c. R. Co. v. Hummell, 44 Pa. St. 375; 84 Am. Dec. 457; Jackson v. Rutland &c. R. Co. 25 Vt. 150; 60 Am. Dec. 246; Donnelly v. Brooklyn &c. R. Co. 109 N. Y. 16; 15 N. E. 733; Isabel v. Hannibal &c. R. Co. 60 Mo. 475; 9 Am. R. 261; Kansas &c. R. Co. v. Ward, 4 Col. 30; Finlayson v. Chicago &c. R. Co. 1 Dill. (U. S.) 579; Pittsburgh &c. R. Co. v. Collins, 87 Pa. St. 405; 30 Am. R. 371; Patterson v. Philadelphia &c. R. Co. 4 Houst. (Del.) 103; 7 Am. R. R. 207; Sweeney v. Boston &c. R. Co. 128 Mass. 5; 1 Am. & Eng. R. Cas. 138; Hazen v. Boston &c. R. Co. 2 Gray (Mass.), 574; Cauley v. Pittsburgh &c. R. Co. 95 Pa. St. 398; 40 Am. R. 664, and note; 2 Am. & Eng. R. Cas. 4.

[2] Gaynor v. Old Colony &c. R. Co. 100 Mass. 208; Palmer v. Chicago &c. R. Co. 112 Ind. 250; 14 N. E. 70; Finlayson v. Chicago &c. R. Co. 1 Dill. (U. S.) 579; Jeffersonville &c. R. Co. v. Goldsmith, 47 Ind. 43; Pittsburgh &c. R. Co. v. Evans, 53 Pa. St. 250; 2 Wood Railroads, 1459, and authorities cited; 2 Rorer Railroads, 112. See note to Houston &c. R. Co. v. Sympkins, 54 Tex. 615; 38 Am. R. 632, and note; 6 Am. & Eng. R. Cas. 17 (11); Lewis v. Baltimore &c. R. Co. 38 Md. 588; 17 Am. R. 521, and note; 13 Am. Law. Reg. N. S. 284; Cooley Torts, 674; St. Louis &c. R. Co. v. Neely, 63 Ark. 636; 40 S. W. 130, 131; 37 L. R. A. 618 (citing text).

[3] Kay v. Pennsylvania &c. R. Co. 65 Pa St. 269; 3 Am. R. 628; Continental Improvement Co. v. Stead, 95 U. S. 161; Willoughby v. Chicago &c. R. Co. 37 Iowa, 432; Pennsylvania &c. R. Co. v. Krick, 47 Ind.

embarrassed by much conflict of authority, but there are certain well defined general rules which are universally recognized as applying to the general class of cases, and these rules we shall attempt to lay down.

§ 1153. Mutual rights and duties of company and traveler at crossings—Generally.—The company possesses the right to the use of its tracks over highway crossings and the public retains the right to the use of the crossing as a highway. Neither has a right to interfere with a proper use of it by the other.[4] Their rights have been said to be "mutual, co-extensive, and, in all respects reciprocal,"[5] but this statement must be qualified in that, owing to the momentum of trains, confinement of their movement to a track, and the necessities and public nature of railway traffic, the railway company has the right of way and the traveler must wait until the train, the coming of which he knows, or ought to know, has passed.[6] The prior right of passage is in the railway company.

368; Elliott Roads and Streets (2d ed.) § 781; Pierce Railroads, 340; Wood Railroads, 1510.

[4] Baltimore &c. R. Co. v. Owings, 65 Md. 502; 5 Atl. 329; 28 Am. & Eng. R. Cas. 639; Louisville &c. R. Co. v. Goetz, 79 Ky. 442; 42 Am. R. 227; 14 Am. & Eng. R. Cas. 627; Indianapolis &c. R. Co. v. McLin, 82 Ind. 435; Rockford &c. R. Co. v. Hillmer, 72 Ill. 235; Baltimore &c. R. Co. v. State, 29 Md. 252; 96 Am. Dec. 528; Pennsylvania &c. R. Co. v. Goodman, 62 Pa. St. 329; Beisiegel v. New York &c. R. Co. 40 N. Y. 9; Kelly v. Michigan &c. R. Co. 65 Mich. 186; 31 N. W. 186; 8 Am. St. 876; North Pa. R. Co. v. Heileman, 49 Pa. St. 60; 88 Am. Dec. 482; Morris v. Chicago &c. R. Co. 26 Fed. R. 22; Lesan v. Maine Cent. R. Co. 77 Me. 85; 23 Am. & Eng. R. Cas. 245; Toledo &c. R. Co. v. Goddard, 25 Ind. 185; Louisville &c. R. Co. v. Phillips, 112 Ind. 59, 62; 13 N. E. 132; 2 Am. St. 155. See 2 Wood Railroads, § 1510.

[5] 1 Rorer Railroads, 531. See Elliott Roads and Streets (2nd ed.), § 786; Texas &c. R. Co. v. Cody, 166 U. S. 606; 17 Sup. Ct. 703; International &c. R. Co. v. Glover (Tex. Civ. App.); 88 S. W. 515.

[6] Ohio &c. R. Co. v. Walker, 113 Ind. 196; 15 N. E. 234; 32 Am. & Eng. R. Cas. 121; 3 Am. St. 638; Continental Improvement Co. v. Stead, 95 U. S. 161; Chicago &c. R. Co. v. Boggs, 101 Ind. 522; 51 Am. R. 761; Chicago &c. R. Co. v. Spilker, 134 Ind. 380, 400; 33 N. E. 280 (citing Elliott Roads and Streets, § 786); Malott v. Hawkins, 159 Ind. 127; 63 N. E. 308 (citing text); Pennsylvania &c. R. Co. v. Goodman, 62 Pa. St. 329; Black v. Burlington &c. R. Co. 38 Iowa, 515; Galena &c. R. Co. v. Dill. (U. S.) 22 Ill. 265; Toledo &c. R. Co. v. Goddard, 25 Ind. 185; Chicago &c.

The right of precedence of the company, however, does not impose upon the traveler the whole duty of avoiding collisions, but both parties must exercise care and diligence in regard to their respective duties and are charged with the mutual duty of exercising reasonable care to prevent injury.[7] Each must make reasonable and proper efforts, in view of the circumstances, to foresee and avoid collisions,[8] and each may, to a limited extent, rely upon the other

R. Co. v. Cauffman, 38 Ill. 424; Lehigh &c. R. Co. v. Brandtmaier, 113 Pa. St. 610; 6 Atl. 238; Lesan v. Maine Cent. R. Co. 77 Me. 85; 23 Am. & Eng. R. Cas. 245; Philadelphia &c. R. Co. v. Hogeland, 66 Md. 149; 7 Atl. 105; 59 Am. R. 159; Brown v. Texas &c. R. Co. 42 La. Ann. 350; 7 So. 682; 21 Am. St. 374; Louisville &c. R. Co. v. Phillips 112 Ind. 59; 13 N. E. 132; 2 Am. St. 155; Morris v. Chicago &c. R. Co. 26 Fed. R. 22; Newhard v. Pennsylvania &c. R. Co. 153 Pa. St. 417; 26 Atl. 105; 19 L. R. A. 563; 2 Rorer Railroads, 1049. See, also, Chicago &c. R. Co. v. Roberts, 3 Neb. (unoff.) 425; 91 N. W. 707. As to "absolute right of way" see Chicago &c. R. Co. v. Ingraham, 33 Ill. App. 351; Northern Pac. R. Co. v. Holmes, 3 Wash. Ter. 543; 18 Pac. 76. The assertion in Continental Improvement Co. v. Stead, 95 U. S. 161, followed in Indianapolis &c. R. Co. v. McLin, 82 Ind. 435, and many other cases, that the right of precedence of trains is conditioned upon due and timely warning of their approach, is subject to the qualification that the absence of warning does not absolve the traveler from reasonable diligence on his part and that the presence of the track is in itself sufficient to put him upon guard.

[7] Continental Improvement Co. v. Stead, 95 U. S. 161, per Bradley, J.; Chicago &c. R. Co. v. Cauffman, 38 Ill. 424; Lehigh Valley R. Co. v. Brandtmaier, 113 Pa. St. 610; 6 Atl. 238; Heddles v. Chicago &c. R. Co 74 Wis. 239; 42 N. W. 237; 39 Am & Eng. R. Cas. 645; Bullock v. Wilmington &c. R. Co. 105 N. Car. 180; 10 S. E. R. 988; 42 Am. & Eng R. Cas. 93; Cooper v. North Carolina R. Co. 140 N. Car. 209; 52 S. E. 932; Kelly v. Duluth &c. R. Co. 92 Mich. 19; 52 N. W. 81; Halferty v. Wabash &c. R. Co. 82 Mo. 90; Purinton v. Maine &c. R. Co. 78 Me. 569; 7 Atl. 707; Robinson v. Western &c. R. Co. 48 Cal. 409; Cooper v. Lake Shore &c. R. Co. 66 Mich. 261; 33 N. W. 306; 11 Am. St. 482; North Pa. R. Co. v. Heileman, 49 Pa. St. 60; 88 Am. Dec. 482; Chesapeake &c. R. Co. v. Riddle, 24 Ky. L. 1687; 72 S. W. 22; 24 Ky. L. 22.

[8] Morris v. Chicago &c. R. Co. 26 Fed. R. 22; Glass v. Memphis &c. R. Co. 94 Ala. 581; 10 So. 215; Beyel v. Newport News &c. R. Co. 34 W. Va. 538; 45 Am. & Eng. R. Cas. 188; North Pa. R. Co. v. Heileman, 49 Pa. St. 60; 88 Am. Dec. 482; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Beers v. Housatonic &c. R. Co. 19 Conn. 566; Brand v. Schenectady &c. R. Co. 8 Barb. (N. Y.) 368; Runyon v. Central R. Co. 25 N. J. L. 556; Baltimore &c. R. Co. v. State, 29 Md. 252; 96 Am. Dec. 528; Kansas Pac. R. Co. v. Pointer, 9 Kan. 620; Terre

to exercise such ordinary care.[9] It is generally the duty of the railroad company to give due and timely warning of the approach of trains, and it is the duty of the traveler to seek to discover whether danger is imminent and to yield precedence. Failure to give such warning, whether statutory or required by ordinary care, will render the company liable for any injury of which it is the proximate cause, where the party injured is without fault, but the track itself is a warning of danger and the traveler must always exercise care proportionate to the known danger, and this care must be such as one who knows the danger and is aware of the prior right of passage would be expected to exercise.[10] The engineer

Haunte &c. R. Co. v. Voelker, 129 Ill. 540; 22 N. E. 20; Pennsylvania R. Co. v. Horton, 132 Ind. 189; 31 N. E. 45; Esler v. Wabash R. Co. 109 Mo. App. 580; 83 S. W. 73.

[9] Thomas v. Delaware &c. R. Co. 8 Fed. R. 729, and authorities cited; Beisiegel v. New York &c. R. Co. 34 N. Y. 622; 90 Am. Dec. 741; Boyd v. Wabash &c. R. Co. 105 Mo. 371; 16 S. W. 909; Indiana &c. R. Co. v. Wheeler, 115 Ind. 253; 17 N. E. 563; Georgia &c. R. Co. v. Evans, 87 Ga. 673; 13 S. E. 580; Valin v. Milwaukee &c. R. Co. 82 Wis. 1; 51 N. W. 1084; 33 Am. St. 17; 55 Am. & Eng. R. Cas. 247; Duame v. Chicago &c. Railway Co. 72 Wis. 523; 40 N. W. 394; 7 Am. St. 879; Pennsylvania Railroad Co. v. Ogler, 35 Pa. St. 60; 78 Am. Dec. 322; Lyman v. Boston &c. R. Co. 66 N. H. 200; 20 Atl. 976; 11 L. R. A. 364; 45 Am. & Eng. R. Cas. 163; Robinson v. Western &c. R. Co. 48 Cal. 409; Jennings v. St. Louis &c. R. Co. 112 Mo. 268; 20 S. W. 490; Correll v. Burlington &c. R. Co. 38 Iowa, 120; 18 Am. R. 22; Ramsey v. Louisville &c. R. Co. 89 Ky. 99; 20 S. W. 162; Rodrian v. New York &c. R. Co. 55 Hun (N. Y.), 606; 7 N. Y. Supp. 811; Hendrickson v. Great Northern R. Co. 49 Minn. 245; 51 N. W. 1044; 16 L. R. A. 261, and note; 32 Am. St. 540; Petty v. Hannibal &c. R. Co. 88 Mo. 306; 28 Am. & Eng. R. Cas. 618; Blackwell v. Lynchburg &c. R. Co. 111 N. Car. 151; 16 S. E. 12; 17 L. R. A. 729, and note; 32 Am. St. 786; Lesan v. Maine Cent. R. Co. 77 Me. 85; 23 Am. & Eng. R. Cas. 245.

[10] Louisville &c. R. Co. v. Phillips, 112 Ind. 59; 13 N. E. 132; 2 Am. St. 155; Indianapolis &c. R. Co. v. McLin, 82 Ind. 435; 8 Am. & Eng. R. Cas. 237; Clampit v. Chicago &c. R. Co. 84 Iowa, 71; 50 S. W. 673; Murray v. Missouri &c. R. Co. 101 Mo. 236; 13 S. W. 817; 20 Am. St. 601; Bitner v. Utah &c. R. Co. 4 Utah, 502; 11 Pac. 620; Baltimore &c. R. Co. v. Walborn, 127 Ind. 142; 26 N. E. 207; Burns v. North Chicago &c. Co. 65 Wis. 312; 27 N. W. 43; Eskridge v. Cincinnati &c. R. Co. 89 Ky. 367; 12 S. W. 580; Gray v. North Eastern R. Co. 48 L. T. Rep. 904; Morris v. Chicago &c. R. Co. 26 Fed. 22; State v. Union R. Co. 70 Md. 69; 18 Atl. 1032. See, also, Herbert v. Southern Pac. Co. 121 Cal. 227; 53 Pac. 651; Green v. Los Angeles &c. R. Co.

may presume, until the situation would otherwise disclose itself to a man on guard, that an adult person on the track or approaching the track is in full possession of his senses, knows that he must yield precedence, and will exercise ordinary care and diligence to take care of himself.[11] The traveler may rely, to a limited extent, upon the railroad company to give the usual or required warning, and to otherwise observe the requirements of ordinary care, but to him the track is itself a warning of danger and he is in all cases under the duty to exercise proper precaution to inform himself as to the proximity of trains before attempting to cross.[12]

143 Cal. 31; 76 Pac. 719; 101 Am. St. 68; Quirm v. Chicago &c. R. Co. 162 Ind. 442; 70 N. E. 526; Reed v. Queen Anne's R. Co. 4 (Pen) Del. 413; 57 Atl. 529; Evansville &c. R. Co. v. Clements, 32 Ind. App. 659; 70 N. E. 554.

[11] Ohio &c. R. Co. v. Walker, 113 Ind. 196; 15 N. E. 234; 3 Am. St. Co. 112 Ind. 250; 14 N. E. 70; Gaynor v. Old Colony, etc., R. Co., 100 Mass. 208; 97 Am. Dec. 96; Mason v. Missouri &c. R. Co. 27 Kan. 83; 41 Am. R. 405; Louisville, etc., R. Co., v. Phillips, 112 Ind. 59, 62; 13 N. E. 132; 2 Am. St. 155; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Rothe v. Milwaukee &c. R. Co. 21 Wis. 256; Harty v. Central R. Co. 42 N. Y. 468; Dyson v. New York &c. R. Co. 57 Conn. 9; 17 Atl. 137; 14 Am. St. 82; Lesan v. Maine, &c. R. Co. 77 Me. 85; 23 Am. & Eng. R. Cas. 245; Boyd v. Wabash &c. R. Co. 105 Mo. 371; 16 S. W. 909; Heddles v. Chicago &c. R. Co. 77 Wis. 228; 46 N. W. 115; 20 Am. St. 106, and note; Beach Contrib. Neg. 394; Johnson's Adm. v. Louisville &c. R. Co. (Ky.); 13 Am. & Eng. R. Cas. 623, and authorities cited in note. See also, Givens v. Louisville &c. R. Co. 24 Ky. L. 1796; 72 S. W. 320; Shetter v. Fort Worth &c. R. Co. 30 Tex. Civ. App. 536; 71 S. W. 31; Houston &c. R. Co. v. Ramsey (Tex. Civ. App.); 97 S. W. 1067; Humphreys v. Valley R. Co. 100 Va. 169; 42 S. E. 882; 57 L. R. A. 384; 93 Am. St. 944. But see Georgia &c. R. Co. v. Evans, 87 Ga. 673; 13 S. E. 580; Card v. New York &c. R. Co. 50 Barb. (N. Y.) 39.

[12] Miller v. Terre Haute &c. R. Co. 144 Ind. 323; 43 N. E. 257; Jennings v. St. Louis &c. R. Co. 112 Mo. 268; 20 S. W. 490; Railroad Co. v. Huston, 95 U. S. 697; Loucks v. Chicago &c. R. Co. 31 Minn. 526; 18 N. W. 651; 19 Am. & Eng. R. Cas. 305; Carlson v. Chicago &c. R. Co. 96 Minn. 504; 105 N. W. 555; Beisiegel v. New York &c. R. Co. 34 N. Y. 622; 90 Am. Dec. 741; Ernst v. Hudson &c. R. Co. 35 N. Y. 9; 90 Am. Dec. 761; Northern Pac. R. Co. v. Freeman, 174 U. S. 379; 19 Sup. Ct. 763; Elliott v. Chicago &c. R. Co. 150 U. S. 245, 248; 14 Sup. Ct. 85; Schofield v. Chicago &c. R. Co. 114 U. S. 615; 5 Sup. Ct. 1125; Brown v. Milwaukee &c. R. Co. 22 Minn. 165; Bowers v. Chicago &c. R. Co. 61 Wis. 457; 21 N. W. 536; 19 Am. & Eng. R. Cas. 301; Vandewater

§ 1154. Duty of company at private crossings and at crossings by custom or license.—The duties of the company and traveler respectively at a private crossing are somewhat different from those imposed upon each at a public crossing. As a rule the company is not required at such places to give the signals required by statute or otherwise at public crossings,[13] but it may, in peculiar instances, be a question for the jury, whether in the particular case it is negligence to omit the warning signals.[14] The fact that people repeatedly cross the tracks at a place where there is no public right of passage does not necessarily entail upon the company any duty to treat the place as a public crossing and the fact that there are numerous trespassers and the act is committed often does not in itself relieve their presence upon the track of the character of a trespass,[15]

v. New York &c. R. Co. 74 Hun. 32; 26 N. Y. Supp. 397; Blackwell v. Lynchburg &c. R. Co. 111 N. Car. 151; 16 S. E. 12; 17 L. R. A. 729, and note; 32 Am. St. 786; Hendrickson v. Great Northern R. Co. 49 Minn. 245; 51 N. W. 1044; 16 L. R. A. 261, and note; 32 Am. St. 540. See, also, Van Winkle v. New York &c. R. Co. 34 Ind. App. 476; 73 N. E. 157; Gora v. Southern Ry. Co. 67 S. Car. 347; 45 S. E. 810; Brammer v. Norfolk &c. R. Co. 104 Va. 50; 51 S. E. 211.

[13] Johnson's Admr. v. Louisville &c. R. Co. (Ky.); 13 Am. & Eng. R. Cas. 623; Early's Adm. v. Louisville &c. R. Co. 115 Ky. 13; 72 S. W. 348; Sanborn v. Detroit &c. R. Co. 91 Mich. 538; 52 N. W. 153; 16 L. R. A. 119, and note; Thomas v. Delaware &c. R. Co. 8 Fed. R. 729; Bennett v. Grand Trunk &c. R. Co. 3 Ont. 446; 13 Am. & Eng. R. Cas. 627; Philadelphia &c. R. Co. v. Fronk, 67 Md. 339; 10 A. 204, 307; 1 Am. St. 390; 32 Am. & Eng. R. Cas. 31; Maxey v. Missouri &c. R. Co. 113 Mo. 1; 20 S. W. 654; Defrieze v. Illinois Cent. R. Co. (Ia.); 94 N. W. 905. But see Walton v. St. Louis &c. R. Co. 67 Mo. 56.

[14] Thomas v. Delaware &c. R. Co. 8 Fed. R. 729; Cordell v. New York &c. R. Co. 70 N. Y. 119; 26 Am. R. 550. And in Defrieze v. Illinois Cent. R. Co. (Ia.); 94 N. W. 905, it is held that one at a private crossing "may take advantage of the failure to give statutory signals for a public crossing near by." See, also, Louisville &c. R. Co. v. Bodine, 109 Ky. 509; 59 S. W. 740; 56 L. R. A. 506.

[15] Beach Contr. Neg. § 212; Finlayson v. Chicago &c. R. Co. 1 Dill. (U. S.) 579, per Miller, J. Illinois &c. R. Co. v. Hetherington, 83 Ill. 510; Gaynor v. Old Colony &c. R. Co. 100 Mass. 208; 97 Am. Dec. 96; Philadelphia &c. R. Co. v. Hummell, 44 Pa. St. 375; Ivens v. Cincinnati &c. R. Co. 103 Ind. 27; 2 N. E. 134; Blanchard v. Lake Shore &c. R. Co. 126 Ill. 416; 18 N. E. 799; 9 Am. St. 630; Brown v. Louisville &c. R. Co. 97 Ky. 228; 30 S. W. 639; Atchison &c. R. Co. v.

but situations may arise from which the company ought reasonably to foresee danger, and in such cases it has been held that the company is not absolved from ordinary care and precautions to prevent injuries.[16] Yet, although the place is used repeatedly and frequently as a crossing with the mere silent acquiescence of the company, or with the knowledge and simply passive permission of the company, it would seem that the traveler who uses it is at most a bare licensee, who takes his license with all its concomitant risks and perils,[17] and as a general rule, the company owes him no duty greater than that

Parsons, 42 Ill. App. 93; Illinois &c. R. Co. v. Beard, 49 Ill. App. 232; Illinois Cent. R. Co. v. O'Connor, 189 Ill. 559; 59 N. E. 1098. See, also, Ward v. Southern Pa. Co. 25 Oreg. 433; 36 Pac. 166; 23 L. R. A. 715, and post, §§ 1248-1257. "By endurance or toleration of a trespass we do not understand that any of a party's privileges are waived or yielded, or that it ceases to be entitled to the protection afforded by the law. . . . It is not believed that any length of forbearance to take legal proceedings against trespassers, or to warn them from the bed on which a railroad is constructed, will amount to a dedication of the same to the use of the public as a way for pedestrians." Central &c. R. Co. v. Brinson, 70 Ga. 207, 241. But see Bullard v. Southern R. Co. 116 Ga. 644; 43 S. E. 39.

[16] Western &c. R. Co. v. Meigs, 74 Ga. 857; South &c. R. Co. v. Donovan, 84 Ala. 141; 4 So. 142; Peyton v. Texas &c. R. Co. 41 La. Ann. 861; 6 So. 690; 17 Am. St. 430; Cassida v. Oregon R. &c. Co. 14 Ore. 551; 13 Pac. 438; Sutton v. New York &c. R. Co. 66 N. Y. 243; Owens v. Pennsylvania R. Co. 41 Fed. 187; Keith v. Intercolonial &c. R. Co. 18 Nova Sc. 226; Johnson v. Lake Superior &c. R. Co. 86 Wis. 64; 56 N. W. 161.

[17] Baltimore &c R. Co. v. State, 62 Md. 479; 50 Am. R. 233; McLaren v. Indianapolis &c. R. Co. 83 Ind. 319; 8 Am. & Eng. R. Cas. 217; Memphis &c. R. Co. v. Womack, 84 Ala. 149; 4 So. 618; Cleveland &c. R. Co. v. Tartt, 64 Fed. 823; Gaynor v. Old Colony R Co. 100 Mass. 208; 97 Am. Dec. 96; Grethen v. Chicago &c. R. Co. 22 Fed. 609; Baltimore &c. R. Co. v. Sherman, 30 Gratt. (Va.) 602; Sweeny v. Old Colony &c. R. Co. 10 Allen (Mass.), 368; 87 Am. Dec. 644, and note; Hickey v. Boston &c. R. Co. 14 Allen (Mass.), 429; Philadelphia &c. R. Co. v. Hummell, 44 Pa. St. 375; 84 Am. Dec. 457; Gillis v. Pennsylvania R. Co. 59 Pa. St. 129; 98 Am. Dec. 317; Hounsell v. Smyth, 7 C. B. (N. S.) 731; Redigan v. Boston &c. R. Co. 155 Mass. 44; 28 N. E. 1133; 14 L. R. A. 276; 31 Am. St. 520, and note; Crane Elevator Co. v. Lippert, 63 Fed. 942; Faris v. Hoberg, 134 Ind. 269; 33 N. E. 1028; 39 Am. St. 261. See, also, Thomas v. Chicago &c. R. Co. 103 Ia. 649; 39 L. R. A. 399; 72 N. W. 783, 786, citing text with approval, but following prior Iowa decisions as applicable to the particular facts.

which is due to a trespasser.[18] In order to impose upon the company the duty to treat a place as a public crossing, those who use the place as a crossing must either have a legal right to so use it, or must use it at the invitation of the company, and "neither sufferance, nor permission, nor passive acquiescence" is equivalent to an invitation.[19] If, however the traveler uses a place as a crossing by invitation of the company, it must use ordinary care to prevent injury to him, as, where the company constructs a grade crossing and holds it out to the public as a suitable place to cross.[20] Where by fencing off a foot way over its tracks it induces the public to so

[18] Spicer v. Chesapeake &c. R. Co. 34 W. Va. 514; 12 S. E. 553; 11 L. R. A. 385, and note; Baltimore &c. R. Co. v. State, 62 Md. 479; 50 Am. R. 233; Illinois &c. R. Co. v. Godfrey, 71 Ill. 500; 22 Am. R. 112; Baltimore &c. R. Co. v. Sherman, 30 Gratt. (Va.) 602; Jeffersonville &c. R. Co. v. Goldsmith, 47 Ind. 43; Cleveland &c. R. Co. v. Stephenson, 139 Ind. 641; 37 N. E. 720; Evansville &c. R. Co. v. Griffin, 100 Ind. 221; 50 Am. R. 783; Diebold v. Pennsylvania R. Co. 50 N. J. L. 478; 14 Atl. 576; Sutton v. New York &c. R. Co. 66 N. Y. 243; Nicholson v. Erie &c. R. Co. 41 N. Y. 525; Matze v. New York &c. R. Co. 1 Hun (N. Y.), 417; Cornell v. Skaneateles R. Co. 15 N. Y. S. 581; 61 Hun (N. Y.), 618; Collis v. New York Cent. R. Co. 71 Hun (N. Y.), 504; 24 N. Y. S. 1090; Burk v. President &c. Canal Co. 86 Hun (N. Y.), 519; 33 N. Y. S. 986; Pennsylvania R. Co. v. Meyers, 136 Ind. 242; 36 N. E. 32; Hanks v. Boston &c. R. Co. 147 Mass. 495; 18 N. E. 218; June v. Boston &c. R. Co. 153 Mass. 79; 26 N. E. 238; Chenery v. Fitchburg R. Co. 160 Mass. 211; 35 N. E. 554; 22 L. R. A. 575; Illinois Cent. R. Co. v. O'Connor, 189 Ill. 559; 59 N. E. 1098; Compare Atchison &c. R. Co. v. Potter, 64 Kans. 13; 67 Pac. 534; 56 L. R. A. 575. See post, §§ 1248-1257; Alabama &c. R. Co. v. Linn, 103 Ala. 134; 15 So. 508; Clark v. Michigan Cent. R. Co. 113 Mich. 24; 71 N. W. 327; 67 Am. St. 442.

[19] Wright v. Boston &c. R. Co. 142 Mass. 296; 7 N. E. 866; Murphy v. Boston &c. R. Co. 133 Mass. 121; Sweeny v. Old Colony &c. R. Co. 10 Allen (Mass.) 368; 87 Am. Dec. 644; Jeffersonville &c. R. Co. v. Goldsmith, 47 Ind. 43; Bennett v. Railroad Co. 102 U. S. 577; Cleveland &c. R. Co. v. Adair, 12 Ind. App. 569; 39 N. E. 672; 40 N. E. 822; Indiana &c. R. Co. v. Barnhart, 115 Ind. 399; 16 N. E. 121; Stewart v. Pennsylvania R. Co. (Ind. Super. Ct.) 14 Am. & Eng. R. Cas. 679. See, also, Clark v. Northern Pac. R. Co. 29 Wash. 139; 69 Pac. 636; 59 L. R. A. 508.

[20] Murphy v. Boston &c. R. Co. 133 Mass. 121; 14 Am. & Eng. R. Cas. 675; Sweeny v. Old Colony &c. R. Co. 10 Allen (Mass.) 368; 87 Am. Dec. 644 and note; Adams v. Iron Cliffs Co. 78 Mich. 271; 44 N. W. 270; 18 Am. St. 441, and note; Yazoo &c. R. Co. v. Watson, 82 Miss. 89; 33 So. 942.

use it,[21] by building to the track plank bridges for foot passengers,[22] or by constructing gates in the railroad fence for the use of pedestrians who habitually cross the track,[23] it thereby holds out the place as proper for them to use. Such invitation as imposes on the company the duty of ordinary care is implied, where by some act or designation of the company persons are led to believe that a way was intended to be used by travelers or others having lawful occasion to go that way, and the company is under obligation to use ordinary care to keep it free from danger.[24] There is much conflict of authority as to what constitutes such a general use of a place as a crossing or such recognition of the right to use such a place as will impose upon the company the duty of observing the precaution required at public crossings, but we think the doctrine we have expressed is the true one supported by the best reasoned cases and by the recognized principles of law. The opposite view has been taken in a line

[21] Pennsylvania R. Co. v. Hammill, 56 N. J. L. 370; 29 Atl. 151; 24 L. R. A. 531.

[22] Norfolk &c. R. Co. v. Carper, 88 Va. 556; 14 S. E. 328. See, also, De Larr v. Ferd. Heim Brew. Co. 62 Kans. 188; 61 Pac. 689.

[23] Lynch v. St. Joseph &c. R. Co. 111 Mo. 601; 19 S. W. 1114. See, also, Baltimore &c. R. Co. v. Slaughter (Ind.); 79 N. E. 186; Houston &c. R. Co. v. Beard (Tex. Civ. App.); 93 S. W. 532. Mere acquiescence may not even amount to a license, and in order to impliedly authorize travelers to use a railroad track there must usually be some allurement or enticement on the part of the company.

[24] Evansville &c. R. Co. v. Griffin, 100 Ind. 221; 50 Am. R. 783; Carleton v. Franconia Iron and Steel Co. 99 Mass. 216; Ray v. Chesapeake &c. Ry. Co. 57 W. Va. 333; 50 S. E. 413, 415 (quoting text). In Cowans v. Ft. Worth &c. R. Co. (Tex. Civ. App.); 89 S. W. 1116, it was held in an action by a drayman injured, while unloading a car, by reason of a defective crossing, where "the evidence showed that the crossing had been used for many years by draymen as a crossing when unloading cars, that the custom was known to the company, that the public crossing on a near-by street was out of repair, that cars of goods were placed within a few feet of the defective crossing, and that no barrier forbidding the use thereof by the public was erected, the jury were authorized to find that the drayman was impliedly invited by the company to use the tracks at that point, imposing on the company the duty of exercising ordinary care in keeping the crossing in repair," and that "the drayman was under no obligation to exercise ordinary care in selecting a crossing; he having a right in the absence of knowledge to the contrary, to assume that the company had made the crossing reasonably safe."

of cases in which it is held that if the place has been used as a passageway for a long period of time and this use is with the knowledge and permission of the railroad company, it is its duty to treat it as a highway,[25] and that where the railroad company licenses the public to make a general use of a crossing over its track, it can not treat a person who walks upon it as a trespasser,[26] but some of these decisions seem to impose upon the company a greater duty than is due to a bare licensee, and the traveler is no more than a bare licensee, unless he has a legal right to be on the track, or is there by invitation of the company. It has also been held that where the company has established a practice of giving signals or keeping a flagman at a place frequently used as a crossing and such practice is notorious, the traveler has the right to expect that the usual warning will be given, and the failure of the company to do so, is a proper fact for the jury to consider in determining the question of the defendant's negligence.[27]

[25] Barry v. New York &c. R. Co. 92 N. Y. 289; 44 Am. R. 377; Byrne v. New York &c. R. Co. 104 N. Y. 362; 10 N. E. 539; 58 Am. R. 512; Harriman v. Pittsburg &c. R. Co. 45 Ohio St. 11; 9 Western R. 438; 4 Am. St. 507; Chicago &c. R. Co. v. Hedges, 105 Ind. 398; 7 N. E. 801; Bellefontaine &c. R. Co. v. Snyder, 18 Ohio St. 399; Taylor v. Delaware &c. R. Co. 113 Pa. St. 162; 8 Atl. 43; 57 Am. R. 446; Davis v. Chicago &c. R. Co. 58 Wis. 646; 17 N. W. 406; 46 Am. R. 667; Swift v. Staten Island &c. R. Co. 123 N. Y. 645; 25 N. E. 378; Hansen v. Southern Pac. R. Co. 105 Cal. 379; 38 Pac. 957; Texas &c. R. Co. v. Watkins (Tex. Civ. App.); 26 S. W. 760. See, also, Murrell v. Missouri Pac. R. Co. 105 Mo. App. 88; 79 S. W. 505; Ray v. Chesapeake &c. R. Co. 57 W. Va. 333; 50 S. E. 413, 414 (citing text); Roth v. Union Depot Co. 13 Wash. 525; 43 Pac. 641; 31 L. R. A. 855; Hinkle v. Richmond &c. R. Co. 109 N. Car. 472; 13 S. E. 884; 26 Am. St. 581; Clampit v. Chicago &c. R. Co. 84 Ia. 71; 50 N. W. 673; Cahill v. Chicago &c. R. Co. 74 Fed. 285; Texas &c. R. Co. v. Watkins (Tex. Civ. App.); 26 S. W. 760; Union Pac. Ry. Co. v. Connolly (Neb.); 109 N. W. 368.

[26] Davis v. Chicago &c. R. Co. 58 Wis. 646; 17 N. W. 406; 46 Am. R. 667; Murphy v. Chicago &c. R. Co. 38 Iowa, 539; Bennett v. Railroad Co. 102 U. S. 577; Kay v. Pennsylvania &c. R. Co. 65 Pa. St. 269; 3 Am. R. 628; Campbell v. Boyd, 88 N. Car. 129; 43 Am. R. 740; Well v. Portland &c. R. Co. 57 Me. 117; Philadelphia &c. R. Co. v. Troutman (Pa.); 6 Am. & Eng. R. Cas. 117; 11 W. N. C. 453.

[27] Nash v. New York &c. R. Co. 48 Hun (N. Y.), 618; 1 N. Y. S. 269. And the company should not discontinue the signals without notice. Westaway v. Chicago &c. R. Co. 56 Minn. 28; 57 N. W. 222;

§ 1155. Statutory duties of company at crossing—Violation as negligence.—The precautions to be observed by the railroad company at crossings are ordinarily prescribed by statutes which generally designate the signals required to be given by approaching trains and the maximum speed allowed at dangerous or populous places, and provide for the use of signboards, bells, lights, gates or flagmen at crossings of certain descriptions. These statutes may generally be regarded as defining the ordinary care due to travelers at such places, but circumstances may arise in which the observance of all the statutory requirements will not be sufficient to amount to the ordinary care required. It is said by some of the authorities that the statutes are merely cumulative, and do not release the company from the observance of such additional precautions as peculiar circumstances may demand, or, in other words, that they represent the minimum of care exacted,[28] but ordinarily, although not always, when that which the statute prescribes is done, the company cannot be held guilty of negligence. In some states the statutes provide that an omission of the statutory duty shall, prima facie, constitute actionable negligence,[29] although the company may show by way of defense

Pittsburgh &c. R. Co. v. Yundt, 78 Ind. 373; 41 Am. R. 580. See, also, Wolcott v. New York &c. R. Co. 68 N. J. L. 421; 53 Atl. 297.

[28] Bradley v. Boston &c. R. Co. 2 Cush. (Mass.) 539; Chicago &c. R. Co. v. Boggs, 101 Ind. 522; Eaton v. Fitchburg R. Co. 129 Mass. 364; 2 Am. & Eng. R. Cas. 183; Favor v. Boston &c. R. Co. 114 Mass. 350; 19 Am. R. 364; Richardson v. N. Y. &c. R. Co. 133 N. Y. 563; 30 N. E. 1148; 61 Hun (N. Y.), 624; 15 N. Y. S. 868; Barry v. N. Y. &c. R. Co. 92 N. Y. 289; 13 Am. & Eng. R. Cas. 615; Alabama &c. R. Co. v. Phillips, 70 Miss. 14; 11 So. 602; Chicago &c. R. Co. v. Spilker, 134 Ind. 380; 33 N. E. 280; Atchison &c. R. Co. v. Hague, 54 Kan. 284; 38 Pac. 257; 45 Am. St. 278; Clark v. Canadian Pac. R. Co. 69 Fed. 543; Chicago &c. R. Co. v. Netolicky, 67 Fed. 665. See, also, Hayes v. Mich. Cent. R. Co. 111 U. S. 228, 235; 4 Sup. Ct. 369; O'Neil v. Dry Dock &c. R. Co. 129 N. Y. 125; 29 N. E. 84; 26 Am. St. 512; Chicago City R. Co. v. Fennimore, 199 Ill. 9; 64 N. E. 985. But see contra, Chicago &c. R. Co. v. Dougherty, 110 Ill. 521; 19 Am. & Eng. R. Cas. 292; Chicago &c. R. Co. v. Robinson, 106 Ill. 142; 19 Am. & Eng. R. Cas. 396; Beisiegel v. N. Y. &c. R. Co. 40 N. Y. 9; 34 N. Y. 622; 90 Am. Dec. 741; Grippen v. N. Y. &c. R. Co. 40 N. Y. 34; Dyson v. N. Y. &c. R. Co. 57 Conn. 9; 17 Atl. 137; 14 Am. St. 82.

[29] In Mississippi, Georgia, Missouri and Tennessee. In Tennessee such a statute has been construed to mean that when a violation of the statute is followed by an injury, it will be conclusively

that the negligence was not the proximate cause of the injury.[30] It has been held in many cases, in the absence of an express statutory provision to that effect, that the omission of statutory duty is prima facie evidence of negligence,[31] and in other courts the rule has prevailed that the fact of failure to observe the statutory requirements is simply evidence of negligence, and is to be considered by the jury in connection with all the circumstances of the case.[32] The rule supported, we think, by the weight of authority is that one who vio-

presumed that the violation was the proximate cause of the injury. Railroad v. Walker, 11 Heisk. (Tenn). 383; Nashville &c. R. Co. v. Thomas, 5 Heisk. (Tenn.) 262; Collins v. East Tenn. &c. R. Co. 9 Heisk. (Tenn.) 841; Louisville &c. R. Co. v. Connor, 9 Heisk. (Tenn.) 19. But see Southern R. Co. v. Simpson, 131 Fed. 705. And that proof of the observance of the statute entirely relieves from liability for injuries inflicted at the time of its observance. Railroad v. Walker, 11 Heisk. (Tenn.) 383; Hill v. Louisville &c. R. Co. 9 Heisk. (Tenn.) 823; Nashville &c. R. Co. v. Thomas, 5 Heisk. (Tenn.) 262.

[30] Huckshold v. St. Louis &c. R. Co. 90 Mo. 548; 2 S. W. 794; 28 Am. & Eng. R. Cas. 659. See, also, Illinois Cent. R. Co. v. Watson (Miss.); 39 So. 69; Louisville &c. R. Co. v. Martin, 113 Tenn. 266; 87 S. W. 418. See Davis v. Atlanta &c. R. Co. 63 S. Car. 370; 41 S. E. 468, 892, under South Carolina statutes.

[31] Terre Haute &c. R. Co. v. Barr, 31 Ill. App. 57; St. Louis &c. R. Co. v. Terhune, 50 Ill. 151; 99 Am. Dec. 504; Orcutt v. Pacific Coast R. Co. 85 Cal. 291; 24 Pac. 661; Atchison &c. R. Co. v. Feelan, 47 Ill. App. 66; Winstanley v. Chicago &c. R Co. 72 Wis. 375; 39 N. W. 856. See, also, Tucker v. Boston &c. R. Co. 73 N. H. 132; 59 Atl. 943; Chicago &c. R. Co. v. Mochell, 193 Ill. 208; 61 N. E. 1028; 86 Am. St. 318; Mobile &c. R. Co. v. Dugan, 103 Ill. App. 371.

[32] Vandewater v. New York &c. R. Co. 135 N. Y. 583; 32 N. E. 636; 18 L. R. A. 771; Meek v. Pennsylvania R. Co. 38 Ohio St. 632; 13 Am. & Eng. R. Cas. 643; Phila. &c. R. Co. v. Ervin, 89 Pa. St. 71; 33 Am. R. 726; Phila. &c. R. Co. v. Boyer, 97 Pa. St. 91; McGrath v. New York &c. R. Co. 63 N. Y. 522; Omaha &c. R. Co. v. O'Donnell, 22 Neb. 475; 35 N. W. 235; 35 Am. & Eng. R. Cas. 346; Garteiser v. Galveston &c. R. Co. 2 Tex. Civ. App. 230; 21 S. W. 631; Beck v. Portland &c. R. Co. 25 Ore. 32; 34 Pac. 753; Massoth v. Delaware &c. R. 64 N. Y. 524; Grand Trunk R. Co. v. Ives, 144 U. S. 408; 12 Sup. Ct. 679; Union Pac. R. Co. v. Rassmussen, 25 Neb. 810; 41 N. W. 778; Blanchard v. Lake Shore &c. R. Co. 126 Ill. 416; 18 N. E. 799; 9 Am. St. 630; Riley v. Salt Lake &c. R. Co. 10 Utah, 428; 37 Pac. 681; Clark v. Boston &c. R. Co. 64 N. H. 323; 10 Atl. 676. See, also, Baltimore &c. R. Co. v. Golway, 6 App. Cas. (D. C.) 143. See ante, §§ 711, 1095.

lates the law is a wrong-doer,[33] that ordinarily the omission of the statutory duty is negligence per se,[34] and that where the omission is established, such negligence arises as a matter of law,[35] but such

[33] Chicago &c. R. Co. v. Kennedy, 2 Kan. App. 693; 43 Pac. 802; Atchison &c. R. Co. v. Morgan, 31 Kan. 77; 1 Pac. 298; Karle v. Kansas City &c. R. Co. 55 Mo. 476; Baker v. Flint &c. R. Co. 68 Mich. 90; 35 N. W. 836. It is an axiomatic truth that every person while violating an express statute is a wrong-doer, and as such is ex necessitate negligent in the eye of the law. Jetter v. N. Y. &c. R. Co. 2 Keyes (N. Y.), 154. See, also, Penn. R. Co. v. Stegemeier, 118 Ind. 305; 10 Am. St. 136, citing Wanless v. Northeastern R. Co. L. R. 6 Q. B. 481; Railway Co. v. Schneider, 45 Ohio St. 678; 30 Am. R. 620; Baker v. Pendergast, 32 Ohio St. 494.

[34] Penn. R. Co. v. Horton, 132 Ind. 189; 31 N. E. 45; Penn. R. Co. v. Hensil, 70 Ind. 569; 36 Am. R. 188; Indiana &c. R. Co. v. Barnhart, 115 Ind. 399; 16 N. E. 121; Cincinnati &c. R. Co. v. Butler, 103 Ind. 31; 2 N. E. 138; Dugan v. St. Paul &c. R. Co. 40 Minn. 544; 42 N. W. 538; Dahlstrom v. St. Louis &c. R. Co. 108 Mo. 525; 18 S. W. 919; Murray v. Missouri Pac. Ry. Co. 101 Mo. 236; 13 S. W. 817; 20 Am. St. 601; Schlereth v. Missouri Pac. R. Co. 115 Mo. 87; 21 S. W. 1110; Keim v. Union Ry. Co. 90 Mo. 314; 2 S. W. 427; Piper v. Chicago &c. R. Co. 77 Wis. 247; 46 N. W. 165; Philadelphia &c. R. Co. v. Stebbing, 62 Md. 504; 19 Am. & Eng. R. Cas. 36; Central &c. R. Co. v. Smith, 78 Ga. 694; 3 S. E. 397; 34 Am. & Eng. R. Cas. 1; Atlanta &c. R. Co. v. Wyly, 65 Ga. 120; 8 Am. & Eng. R. Cas. 262; Jetter v. New York &c. R. Co. 2 Keyes (N. Y.), 154; Virginia &c. Ry. Co. v. White, 84 Va. 498; 5 S. E. 573; 10 Am. St. 874. See, also, Kansas City &c. R. Co. v. Herman (Kans.); 62 Pac. 543; Central of Ga. R. Co. v. Bond, 111 Ga. 13; 36 S. E. 299; South &c. Ala. R. Co. v. Donovan, 84 Ala. 141; 4 So. 142; Hooker v. Chicago &c. R. Co. 76 Wis. 542; 44 N. W. 1085. A statute creates an absolute duty, and the duty of performance does not depend upon, and is not controlled by, surrounding circumstances. Terre Haute &c. R. Co. v. Voelker, 129 Ill. 540; 22 N. E. 20. "But the weight of authority is overwhelmingly to the effect that the failure to perform any duty imposed either by a statute or an ordinance, is negligence per se." Penn. R. Co. v. Hensil, 70 Ind. 569; 36 Am. R. 188. "It is negligence per se to run a train of cars in violation of a city ordinance, and if any one is injured in consequence of such negligence, without being himself guilty of contributory negligence, he may recover damages for such injury." Pennsylvania R. Co. v. Horton, 132 Ind. 189; 31 N. E. 45. See, also, Hays v. Gainesville St. R. Co. 70 Tex. 602; 8 S. W. 491; 8 Am. St. 624; Fath v. Tower Grove &c. R. Co. 105 Mo. 537; 16 S. W. 913; 13 L. R. A. 74.

[35] "But as was said in McCully v. Clarke, 40 Pa. St. 399; 80 Am. Dec. 584, there are some cases in which a court can determine that omis-

omission by no means conclusively establishes the company's liability, for the injured party must have been free from fault, and the negligence of the company must have been the proximate cause of his injury in order to enable him to recover.[36] And further, an omission of statutory duty is not conclusively negligence per se, for the company may explain the omission, and show that under peculiar circumstances, it may not have constituted negligence, and it has been so held

sions constitute negligence. They are those in which the precise measure of duty is determinate, the same under all circumstances. When the duty is defined, a failure to perform it is, of course, negligence, and may be so declared by the court." Schum v. Pennsylvania R. Co. 107 Pa. St. 8; 19 Rep. 184; 52 Am. R. 468. The duty to give signals at a crossing in the manner prescribed by the statute is a determinate one, and the court has a right to instruct as a matter of law that an omission of such duty constitutes negligence. Chicago &c. R. Co. v. Boggs, 101 Ind. 522; 51 Am. Rep. 761. The duty to give prescribed signals upon approaching a public highway was a duty defined by a positive law of the state, and a failure to observe it was in and of itself negligence, and an instruction to that effect as a matter of law was proper. Cincinnati &c. R. Co. v. Butler, 103 Ind. 31; 2 N. E. 138. See, also, Terre Haute &c. R. Co. v. Voelker, 129 Ill. 540; 22 N. E. 20; Central &c. Co. v. Smith, 78 Ga. 694; 34 Am. & Eng. R. Cas. 1; Cordell v. N. Y. &c. R. Co. 64 N. Y. 535; Renwick v. New York &c. R. Co. 36 N. Y. 132; Gorton v. Erie R. Co. 45 N. Y. 660; Western &c. R. Co. v. Young, 81 Ga. 397; 7 S. E. 912; 12 Am. St. 320. See Cooley Torts, 670. See, also, McKerley v. Red River &c. R. Co. (Tex.); 85 S. W. 499; 86 S. W. 921; Baltimore &c. R. Co. v. Reynolds, 33 Ind. App. 219; 71 N. E. 250.

[36] Chicago &c. R. Co. v. Crisman, 19 Col. 30; 34 Pac. 286; Cent. Tex. &c. R. Co. v. Nycum (Tex.), 34 S. W. 460; Chicago &c. R. Co. v. Kennedy, 2 Kan. App. 693; 43 Pac. 802; Atchison &c. R. Co. v. Morgan, 31 Kan. 77; 1 Pac. 298; Pennsylvania R. Co. v. Hensil, 70 Ind. 569; 36 Am. R. 188; Baltimore &c. R. Co. v. Young, 146 Ind. 374; 45 N. E. 479, 480 (quoting text); Quincy &c. R. Co. v. Willhoener, 72 Ill. 60; Phila. &c. R. Co. v. Stebbing, 62 Md. 504; Stoneman v. Atlantic &c. R. Co. 58 Mo. 503; Pennsylvania R. Co. v. Rathgeb, 32 Ohio St. 66; Horn v. Baltimore &c. R. Co. 54 Fed. 301. See, also, Chicago &c. R. Co. v. Thomas, 147 Ind. 35; 46 N. E. 73; Enoch v. Pittsburg &c. R. Co. 145 Ind. 635; 44 N. E. 658; Dodge v. Burlington &c. R. Co. 34 Ia. 276; Louisville &c. R. Co. v. Penrod, 108 Ky. 172; 56 S. W. 1; McManamee v. Missouri Pac. R. Co. 135 Mo. 440; 37 S. W. 119; San Antonio &c. R. Co. v. Gray, 95 Tex. 424; 67 S. W. 763; McDonald v. International &c. R. Co. 86 Tex. 1; 22 S. W. 939; 40 Am. St. 803; Schug v. Chicago &c. R. Co. 102 Wis. 515; 78 N. W. 1090; Atlantic &c. R. Co. v. Rieger, 95 Va. 418; 28 S. E. 591.

where the locomotive started at less distance from the crossing than that at which the statute required signals to be given.[37] In no event is the omission to give the statutory signals sufficient of itself to make out a case, for there must be evidence showing that it was the proximate cause of the injury. Some courts and some authors, in discussing the elements which go to constitute negligence per se have produced confusion by a failure to distinguish the act or omission as separate from its consequences,[38] and have in their discussion erroneously assumed that absolute liability is an inseparable concomitant of negligence per se. The consequences of an act or omission do not of themselves show that an act is or is not negligent, and it is not necessary, in order to render an act or omission negligent, that it produce some disastrous result. Negligence per se may work no serious injury to any person, not because it is not wrongful in itself, but because no one is in position at a particular time to be injured. The liability of the wrong-doer to the person injured is, however, generally dependent upon the element of proximate cause.[39]

§ 1156. Common-law duty of company at crossings—Degree of care.—At common law the railway company is under obligation to exercise ordinary care to prevent collisions with travelers on the highway, and by ordinary care is meant such care as a reasonably prudent man would ordinarily exercise under the circumstances.[40] The

[37] 2 Jaggard Torts, 927; Cent. Tex. &c. R. Co. v. Nycum (Tex.), 34 S. W. 460. But see Ft. Worth &c. R. Co. v. Greer, 32 Tex. Civ. App. 606; 75 S. W. 552; Spiller v. St. Louis &c. R. Co. 112 Mo. App. 491; 87 S. W. 43, holding that signals may nevertheless be required although not for the full statutory distance. See, also, Golinvaux v. Burlington &c. R. Co. 125 Iowa, 652; 101 N. W. 465; Stotler v. Chicago &c. R. Co. (Mo.) 98 S. W. 509.

[38] See Beck v. Portland &c. R. Co. 25 Ore. 32; 34 Pac. 753, 755; 4 Am. & Eng. Encyc. of Law, 922, 923; 16 Am. & Encyc. of Law, 420 et seq.; 2 Wood Railroads, 1514, 1515.

[39] "It should be remarked that a liability does not attach to every act of negligence per se; such liability only attaches when the injury results from the negligence." Houston &c. R. Co. v. Wilson, 60 Tex. 142.

[40] Chicago &c. R. Co. v. Fisher, 49 Kan. 460; 30 Pac. 462; Philadelphia &c. R. Co. v. Hogeland, 66 Md. 149; 7 Atl. 105; 59 Am. R. 159; Continental Improvement Co. v. Stead, 95 U. S. 161; Weber v. N. Y. &c. R. Co. 58 N. Y. 451; Lapsley v. Union Pac. R. Co. 50 Fed. R. 172; Austin &c. R. Co. v. McElmurray (Tex. Civ. App.), 25 S. W. 324.

company is not bound to exercise extraordinary care by using every possible means to prevent injury, but it is bound to use reasonable precautions.[41] It is said that the care and skill, to be reasonable, must be proportioned to the danger and multiplied chances of injury,[42] and where the surroundings are such as to render a crossing peculiarly dangerous it is the duty of the company to exercise care commensurate with the danger,[43] and especially if the company has created unusual danger at or near a crossing, it must meet such peril with additional precautions.[44] At the crossing of a street in

An instruction is erroneous which requires "ordinary" care of a traveler and a "high degree of care" of the company. Atchison &c. R. Co. v. McClurg, 59 Fed. 860.

[41] Weber v. New York &c. R. Co. 58 N. Y. 451; Chicago &c. R. Co. v. Stumps, 55 Ill. 367; Willoughby v. Chicago &c. R. Co. 37 Iowa, 432; Shaw v. Boston &c. R. Co. 8 Gray (Mass.), 45; Gulf &c. R. Co. v. Smith, 87 Tex. 348; 28 S. W. 520; Gulf &c. R. Co. v. Younger, 10 Tex. Civ. App. 141; 29 S. W. 948. "In some cases, and under some circumstances, ordinary care may require a very high degree of vigilance and precaution, but this does not necessarily include all that is physically possible." Weber v. New York &c. R. Co. 58 N. Y. 451, citing authorities. See, also, Gulf &c. R. Co. v. Smith, 87 Tex. 348; 28 S. W. 520.

[42] Beers v. Housatonic &c. R. Co. 19 Conn. 566; Runyon v. Cent. R. Co. 25 N. J. L. 556; Kennedy v. North Mo. R. Co. 36 Mo. 351; Bellefontaine &c. R. Co. v. Snyder, 24 Ohio St. 670; Lapsley v. Union Pac. R. Co. 50 Fed. 172; Norton v. Eastern R. Co. 113 Mass. 366; Dyer v. Erie &c. R. Co. 71 N. Y. 228; Penn. R. Co. v. Barnett, 59 Pa. St. 259; 98 Am. Dec. 346; Pittsburg &c. R. Co. v. Yundt, 78 Ind. 373; 41 Am. R. 580; Inabnett v. St. Louis &c. R. Co. 69 Ark. 130; 61 S. W. 570, 572 (quoting text).

[43] Penn. R. Co. v. Matthews, 36 N. J. L. 531; Duffy v. Chicago &c. R. Co. 32 Wis. 269; Central &c. R. Co. v. Feller, 84 Pa. St. 226; Peoria &c. R. Co. v. Siltman, 88 Ill. 529; Eilert v. Green Bay &c. R. Co. 48 Wis. 606; 4 N. W. 769; Mackay v. N. Y. &c. R. Co. 35 N. Y. 75; Richardson v. N. Y. &c. R. Co. 45 N. Y. 846; Funston v. Chicago &c. R. Co. 61 Iowa, 452; 16 N. W. 518; 14 Am. & Eng. R. Cas. 640; Nehrbas v. Cent. Pac. R. Co. 62 Cal. 320; 14 Am. & Eng. R. Cas. 670; Continental Improvement Co. v. Stead, 95 U. S. 161; Louisville &c. R. Co. v. Goetz, 79 Ky. 442; 14 Am. & Eng. R. Cas. 627; Weber v. N. Y. &c. R. Co. 58 N. Y. 451; Lake Shore &c. R. Co. v. Orvis, 1 Ohio Dec. 492; Eichorn v. New Orleans &c. R. Co. 112 La. Ann. 236; 36 So. 335; 104 Am. St. 437, citing Elliott Roads and Streets (2d ed.), 791, 856. Evidence of expert that crossing is dangerous and evidence that many others have been hurt there has been held inadmissible. Tiffin v. St. Louis &c. R. Co. (Ark.) 93 S. W. 564.

[44] Klein v. Jewett, 26 N. J. Eq.

a city or town the duties are usually greater than would be required in less populous districts where the chances of danger are less.[45] The company must exercise reasonable care to provide sufficient men and proper appliances for the control of the train;[46] must, where necessary, provide suitable warnings of danger at highway crossings,[47] and on the approach of trains to crossings, warnings must generally be given which would apprise a traveler in the use of ordinary care of the danger of the situation.[48] The signals should be given at such a time and the speed of the train so regulated that the warning may be effectual to the traveler to whom the duty is due.[49] The traveler

474; New York &c. R. Co. v. Randel, 47 N. J. L. 144; 23 Am. & Eng. R. Cas. 308; Funston v. Chicago &c. R. Co. 61 Iowa, 452; 14 Am. & Eng. R. Cas. 640; Nehrbas v. Cent. Pac. R. Co. 62 Cal. 320; 14 Am & Eng. R. Cas. 670; Delaware &c. R. Co. v. Shelton, 54 N. J. L. 342; 26 Atl. 937.

[45] Pittsburg &c. R. Co. v. Yundt, 78 Ind. 373; 41 Am. R. 580; Illinois &c. R. Co. v. Dick, 91 Ky. 434; 15 S. W. 665; Baltimore &c. R. Co. v. State, 29 Md. 252; 96 Am. Dec. 528; Harlan v. St. Louis &c. R. Co. 65 Mo. 22; Hilz v. Missouri &c. R. Co. 101 Mo. 36; 13 S. W. 946; Andrews v. N. Y. &c. R. Co. 60 Conn. 293; 22 Atl. 566; Louisville &c. R. Co. v. Schuster (Ky.); 35 Am. & Eng. R. Cas. 407; Chicago &c. R. Co. v. O'Sullivan, 143 Ill. 48; 32 N. E. 398; Pennsylvania R. Co. v. Lewis, 79 Pa. St. 33; Fero v. Buffalo &c. R. Co. 22 N. Y. 209; 78 Am. Dec. 178. See, also, Christensen v. Oregon Short Line R. Co. 29 Utah, 192; 80 Pac. 746.

[46] O'Mara v. Hudson River R. Co. 38 N. Y. 445; 98 Am. Dec. 61, and note; St. Louis &c. R. Co. v. Mathias, 50 Ind. 65; Frick v. St. Louis &c. R. Co. 75 Mo. 595; 8 Am. & Eng. R. Cas. 280; Toledo &c. R. Co. v. McGinnis, 71 Ill. 346; Kansas &c. R. Co. v. Pointer, 14 Kan. 37; Kay v. Pennsylvania R. Co. 65 Pa. St. 269; 3 Am. R. 628.

[47] Chicago &c. R. Co. v. Still, 19 Ill. 499; 71 Am. Dec. 236; Field v. Chicago &c. R. Co. 14 Fed. R. 332; 8 Am. & Eng. R. Cas. 425; Shaber v. St. Paul &c. R. Co. 28 Minn. 103; 5 N. W. 575; 2 Am. & Eng. R. Cas. 185. See, also, Eichorn v. New Orleans &c. R. Co. 112 La. Ann. 236; 36 So. 335; 104 Am. St. 437.

[48] Missouri Pac. R. Co. v. Moffatt, 56 Kan. 667; 44 Pac. 607; Continental Improvement Co. v. Stead, 95 U. S. 161; Loucks v. Chicago &c. R. Co. 31 Minn. 526; 19 Am. & Eng. R. Cas. 305; 4 Am. & Eng. Encyc Law, 917.

[49] Continental Improvement Co. v. Stead, 95 U. S. 161; Reeves v. Delaware &c. R. Co. 30 Pa. St. 454; 72 Am. Dec. 713, and note; Hinkle v. Richmond &c. R. Co. 109 N. C. 472; 13 S. E. 884; 26 Am. St. 581; Hermans v. New York &c. R. Co. 63 Hun (N. Y.), 625; 17 N. Y. S. 319; South &c. R. Co. v. Thompson, 62 Ala. 494; Ellis v. Lake Shore &c. R. Co. 138 Pa. St. 506; 21 Atl. 140; 21 Am. St. 914; Baltimore &c. R. Co. v. Owings, 65 Md. 502; 5 Atl. 329;

has a right to rely, to a limited extent, upon the company to exercise ordinary care, but never to such an extent as to dispense with ordinary care on his part. The traveler is not himself excused under any circumstances from the observance of like care in guarding himself from injury;[50] but what is ordinary care usually depends upon the circumstances of the particular case. If the company so operates its trains as to render the statutory warnings ineffectual, its having given them may not in all cases relieve it from liability.[51] Ordinarily it is for the jury to determine what constitutes ordinary care under the circumstances of each case,[52] but where the facts are undisputed it may sometimes present a question of law for the court.[53] In cases

Childs v. Penn. R. Co. 150 Pa. St. 73; 24 Atl. 341.

[50] Robinson v. Western Pac. R. Co. 48 Cal. 409; Loucks v. Chicago &c. R. Co. 31 Minn. 526; 18 N. W. 651; 19 Am. & Eng. R. Cas. 305; Ernst v. Hudson River R. Co. 35 N. Y. 9; 90 Am. Dec. 761; Railroad Co. v. Houston, 95 U. S. 697; Schofield v. Chicago &c. R. Co. 114 U. S. 615; 5 Sup. Ct. 1125; Bower v. Chicago &c. R. Co. 61 Wis. 457; 21 N. W. 536; 19 Am. & Eng. R. Cas. 301. See, also, Penn. R. Co. v. Stegemeier, 118 Ind. 305; 20 N. E. 843; 10 Am. St. 136, same as to statutory requirement. And see Van Winkle v. New York &c. R. Co. 34 Ind. App. 476; 73 N. E. 157; Van Riper v. New York &c. R. Co. 71 N. J. L. 345; 59 Atl. 26.

[51] Chicago &c. R. Co. v. Boggs, 101 Ind. 522; 51 Am. R. 761; 23 Am. & Eng. R. Cas. 282; South &c. R. Co. v. Thompson, 62 Ala. 494; Ellis v. Lake Shore &c. R. Co. 138 Pa. St. 506; 21 Atl. 140; 21 Am. St. 914; Baltimore &c. R. Co. v. Owings, 65 Md. 502; 5 Atl. 329; Childs v. Penn. R. Co. 150 Pa. St. 73; 24 Atl. 341.

[52] Lapsley v. Union Pac. R. Co. 50 Fed. R. 172; Omaha &c. R. Co. v. Brady, 37 Neb. 27; 57 N. W. 767; Shaber v. St. Paul &c. R. Co. 28 Minn. 103; 2 Am. & Eng. R. Cas. 185; Loucks v. Chicago &c. R. Co. 31 Minn. 526; 18 N. W. 651; 19 Am. & Eng. R. Cas. 305, 309; Frick v. St. Louis &c. R. Co. 75 Mo. 595; 8 Am. & Eng. R. Cas. 280; Louisville &c. R. Co. v. Goetz, 79 Ky. 442; 14 Am. & Eng. R. Cas. 627; 42 Am. R. 227; Macon &c. R. Co. v. Davis, 18 Ga. 679. See, also, Northern Cent. R. Co. v. State, 100 Md. 404; 60 Atl. 19; Central Texas &c. R. Co. v. Gibson (Tex. Civ. App.); 83 S. W. 862. "The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and can not be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court." Lamar, J., in Grand Trunk R. Co. v. Ives, 144 U. S. 408; 12 Sup. Ct. 679.

[53] Loucks v. Chicago &c. R. Co. 31 Minn. 526; 18 N. W. 651; 19

where the statutory duties have been performed, it is, in some peculiar instances, for the jury to determine whether in the particular case the performance of such duties was sufficient to comply with the common law requirement.[54]

§ 1157. Signboards, gates and flagmen at crossings.—Where signs or gates are not required by statute it is usually a question for the jury, as to whether, under the circumstances, it is negligence for the company to omit them.[55] The track in itself is a warning of danger, but its presence may not always be apparent to the traveler, and where it is obscured by the surroundings, reasonable care may require the company to erect such signs as will apprise him of its presence, or to take other proper precautions. The omission of a signboard will not render the company liable to one who knows of the location of the track and is familiar with the surroundings, as the omission of the company can in no way be the cause of his injury,[56] but where signboards are required by statute their omission may constitute negligence, or, at least, evidence of negligence.[57] In order

Am. & Eng. R. Cas. 305; Delaware &c. R. Co. v. Converse, 139 U. S. 469; 11 Sup. Ct. 569; Randall v. Baltimore &c. R. Co. 109 U. S. 478; 3 Sup. Ct. 322; Schofield v. Chicago &c. R. Co. 114 U. S. 615; 5 Sup. Ct. 1125; Union Pac. R. Co. v. McDonald, 152 U. S. 262; 14 Sup. Ct. 619; Rogers v. Boston &c. R. Co. 187 Mass. 217; 72 N. E. 55. The general rule is that it is only where the facts are such that reasonable men must draw the same conclusion from them that the question of negligence is considered as one of law for the court. Grand Trunk R. Co. v. Ives, 144 U. S. 408; 12 Sup. Ct. 679.

[54] Finklestein v. N. Y. &c. R. Co. 41 Hun (N. Y.), 34; Byrne v. New York &c. R. Co. 104 N. Y. 362; 10 N. E. 539; 58 Am. R. 512; Piper v. Chicago &c. R. Co. 77 Wis. 247; 46 N. W. 165; Weber v. N. Y. &c. R. Co. 58 N. Y. 451; Dyer v. Erie Ry. Co. 71 N. Y. 228; Grand Trunk R. Co. v. Ives, 144 U. S. 408; 12 Sup. Ct. 679.

[55] Eaton v. Fitchburg &c. R. Co. 129 Mass. 364; 2 Am. & Eng. R. Cas. 183; Shaber v. St. Paul &c. R. Co. 28 Minn. 103; 9 N. W. 575; 2 Am. & Eng. R. Cas. 185; Baltimore &c. R. Co. v. Whitacre, 35 Ohio St. 627; Elkins v. Boston &c. R. Co. 115 Mass. 190; Heddles v. Chicago &c. R. Co. 77 Wis. 228; 46 N. W. 115; 20 Am. St. 106, and note; Central Texas &c. R. Co. v. Gibson (Tex. Civ. App.); 83 S. W. 862. See, also, Chicago &c. R. Co. v. Kowalski, 92 Fed. 310.

[56] Field v. Chicago &c. R. Co. 14 Fed. 332; 8 Am. & Eng. R. Cas. 425; Haas v. Grand Rapids &c. R. Co. 47 Mich. 401; 11 N. W. 216; Gulf &c. R. Co. v. Greenlee, 62 Tex. 344; 23 Am. & Eng. R. Cas. 322.

[57] Field v. Chicago &c. R. Co. 14

to render the company liable, however, the omission must have been the proximate cause of injury to the traveler who was himself in the exercise of ordinary care,[58] and it has been held that the erection of a signboard, whether required by statute or not, can only be regarded as a duty to one who approaches a crossing for the purpose of using it.[59] Outside of statutory and municipal regulations there is no rule of law requiring the company to maintain gates at crossings, but the necessity for a gate at a particular crossing in order to comply with the requirement of ordinary care is in some cases to be determined by the jury.[60] Where maintained, whether required by statute or not, the fact that the gate is open is held to be an invitation to cross and an assurance that the track can be crossed in safety,[61] but such an invitation will not excuse the traveler from himself exercising care to avoid a collision.[62] It is the duty of the

Fed. R. 332; 8 Am. & Eng. R. Cas. 425; Haas v. Grand Rapids &c. R. Co. 47 Mich. 401; 11 N. W. 216; Shager v. St. Paul &c. R. Co. 28 Minn. 103; 9 N. W. 575; Payne v. Chicago &c. R. Co. 44 Ia. 236.

[58] Lang v. Holiday &c. R. Co. 49 Iowa, 469; Field v. Chicago &c. R. Co. 14 Fed. 332; 8 Am. & Eng. R. Cas. 425.

[59] East Tenn. &c. R. Co. v. Feathers, 10 Lea (Tenn.), 103; 15 Am. & Eng. R. Cas. 446.

[60] Stubley v. London &c. R. Co. L. R. 1 Ex. 13; Eaton v. Fitchburg &c. R. Co. 129 Mass. 364; 2 Am. & Eng. R. Cas. 183.

[61] Stubley v. London &c. R. Co. L. R. 1 Ex. 13; Northeastern &c. R. Co. v. Wanless, L. R. 7 E. & I. App. Cas. 12; 43 L. J. Q. B. 185; Sharp v. Glushing, 96 N. Y. 676; 19 Am & Eng. R. Cas. 372; Penn. R. Co. v. Stegemeier, 118 Ind. 305; 20 N. E. 843; 10 Am. St. 136; Cleveland &c. Railway Co. v. Schneider, 45 Ohio St. 678; 17 N. E. 321; Central Trust Co. v. Wabash &c. R. Co. 27 Fed. 159; Lindeman v. New York &c. R. Co. 46 Hun (N. Y.), 679; 11 N. Y. St. 837; Fitzgerald v. Long Island R. Co. 117 N. Y. 653; 22 N. E. 1133; Oldenburg v. N. Y. &c. R. Co. 124 N. Y. 414; 26 N. E. 1021; State v. Boston &c. R. Co. 80 Me. 430; 15 Atl. 36; Evans v. Lake Shore &c. R. Co. 88 Mich. 442; 50 N. W. 386; 14 L. R. A. 223; Wilson v. New York &c. R. Co. 18 R. I. 491; 29 Atl. 258; 2 Wood Ry. Law, 1328.

[62] Penn. R. Co. v. Stegemeier, 118 Ind. 305; 20 N. E. 843; 10 Am. St. 136, and authorities cited; 31 Cent. L. J. 473. He is not required to do all that might otherwise be required, but "he should use such care as a reasonably prudent man would under the circumstances." Missouri &c. R. Co. v. Ray, 25 Tex. Civ. App. 567; 63 S. W. 912, 913 (citing text). See, also, Briggs v. Boston &c. R. Co. 188 Mass. 463; 74 N. E. 667. The facts of the absence of the flagman and the gates being open, are to be considered by the jury as affecting the traveler's conduct. Palmer v. N. Y. &c. R. Co. 112 N. Y. 234; 19 N. E. 678.

company to close the gates on the approach of a train, but the traveler must not rely entirely upon its servant to do so.[63] In cases where the failure to close the gates is followed by a collision, the questions of negligence and contributory negligence are usually for the jury.[64] It is held that a traveler who attempts to cross while the gate is in motion is guilty of such contributory negligence as to defeat his action against the company.[65] In the absence of a statute, the company is not required to keep a flagman at every highway crossing,[66] but if the place be one of extraordinary peril, the fact that there was no flagman, while not conclusive evidence of negligence on the part of the company, is usually for the jury to consider in determining whether in the particular case, the company exercised ordinary care.[67] When a flagman is required by statute or ordi-

[63] Lunt v. London &c. R. Co. L. R. 1 Q. B. 277; Phila. &c. R. Co. v. Boyer, 97 Pa. St. 91; 2 Am. & Eng. R. Cas. 172.

[64] Palmer v. N. Y. &c. R. Co. 112 N. Y. 234; 19 N. E. 678; Lunt v. London &c. R. Co. L. R. 1 Q. B. 277; Bilbee v. London &c. R. Co. 18 Com. B. (N. S.) 584; Sharp v. Glushing, 96 N. Y. 676; 19 Am. & Eng. R. Cas. 372. See, also, O'Keefe v. St. Louis &c. R. Co. 108 Mo. App. 177; 83 S. W. 308.

[65] Peck v. New York &c. R. Co. 50 Conn. 379; 14 Am. & Eng. R. Cas. 633. See where gate is closed, Baltimore &c. R. Co. v. Landrigan, 191 U. S. 461; 24 Sup. Ct. 137.

[66] Weber v. New York &c. R. Co. 58 N. Y. 451; Commonwealth v. Boston &c. R. Co. 101 Mass. 201; Haas v. Grand Rapids &c. R. Co. 47 Mich. 401; 8 Am. & Eng. R. Cas. 268; Penn. R. Co. v. Matthews, 36 N. J. L. 531; McGrath v. New York &c. R. Co. 59 N. Y. 468; 17 Am. R. 359; Seifried v. Penna. R. Co. 206 Pa. St. 399; 55 Atl. 1061. See, also, Chicago &c. R. Co. v. Clarkson, 147 Fed. 397. In the case of Houghkirk v. President &c. of Canal Co. 92 N. Y. 219; 44 Am. R. 370, it was said: "A railroad company is not bound and owes no duty so to station a flagman, and negligence can not be predicated on the omission. The fact may be proven as one of the circumstances under which the train was moved, and by which the degree of care requisite in its handling and running may be affected; so that the question never is whether there should have been a flagman, or one ought to have been stationed at the crossing, but whether in view of his presence or absence, the train was moved with prudence or negligence." See article in 31 Cent. L. J. 473.

[67] Omaha &c. R. Co. v. Brady, 39 Neb. 27; 57 N. W. 767; Schmitz v. St. Louis &c. R. Co. 119 Mo. 256; 23 S. W. 250; 23 L. R. A. 250; Eaton v. Fitchburg R. Co. 129 Mass. 364; 2 Am. & Eng. R. Cas. 183; McGrath v. New York &c. R. Co. 63 N. Y. 522; Bailey v. New Haven &c. R. Co. 107 Mass. 496; Phila. R. Co. v. Killips, 88

nance, the violation of the law does not conclusively establish liability on the part of the company, but the injured party must show that the omission was the proximate cause of the injury, and that he was himself free from fault.[68] It has been held, where the statute empowers railroad commissioners to designate the crossings at which flagmen shall be required and compels the company to maintain flagmen at such places, that in the absence of an order from the commissioners the company is under no duty to keep a flagman at a particular crossing and that the fact of its failure to do so could not be introduced as evidence,[69] but this is in conflict with what we think is the better rule—that the statutes only prescribe the minimum of care required.[70] Although not originally under obligation to do so, if the company has maintained a flagman at a particular crossing for a long time and his presence is notorious, travelers have, within limits, a right to assume, when he is absent, that no train is approaching, and his absence or permanent removal, without notice

Pa. St. 405; Penn. R. Co. v. Matthews, 36 N. J. L. 531; Cent. Pass. R. Co. v. Kuhn, 86 Ky. 578; 9 Am. St. 309; Kansas Pac. R. Co. v. Richardson, 25 Kan. 391; 6 Am. & Eng. R. Cas; 96; Kinney v. Crocker, 18 Wis. 74; Pittsburgh &c. R. Co. v. Yundt. 78 Ind. 373; 41 Am. R. 580; Welsch v. Hannibal &c. R. Co. 72 Mo. 451; 6 Am. & Eng. R. Cas. 75; 37 Am. R. 440. and note; Hoye v. Chicago &c. R. Co. 67 Wis. 1; 29 N. W. 646; Bolinger v. St. Paul &c. R. Co. 36 Minn. 418; 31 N. W. 856; 1 Am. St. 680; Central Tex. &c. R. Co. v. Gibson (Tex. Civ. App.); 83 S. W. 862. And failure to station a flagman at a particular crossing may be introduced as evidence of negligence without being specifically alleged in the complaint. Lesan v. Main &c. R. Co. 77 Me. 85; 23 Am. & Eng. R. Cas. 245. See, also, Heddles v. Chicago &c. R. Co. 74 Wis. 239; 42 N. W. 237.

[68] Pennsylvania Co. v. Hensil, 70 Ind. 569; 36 Am. R. 188; 6 Am. & Eng. R. Cas. 79; Pakalinski v. New York &c. R. Co. 82 N. Y. 424; 2 Am. & Eng R. Cas. 251; Cordell v. New York &c. R. Co. 70 N. Y. 119; 26 Am. R. 550; Briggs v. New York &c. R. Co. 72 N. Y. 26; Chicago &c. R. Co. v. Notzki, 66 Ill. 455; Fletcher v. Atlantic &c. R. Co. 64 Mo. 484; Johnson v. St. Paul &c. R. Co. 31 Minn. 283; 17 N. W. 622; 15 Am. & Eng. R. Cas. 467. See, also, Brooks v. Boston &c. R. Co. 188 Mass. 416; 74 N. E. 670.

[69] Battiskill v. Humphrey, 64 Mich. 494; 31 N. W. 894; 28 Am. & Eng. R. Cas. 597; 29 Am. & Eng. R. Cas. 411.

[70] See Ante, § **1155**. Also, Grand Trunk R. Co. v. Ives, 144 U. S. 408; 12 Sup. Ct. 679; Dolph v. New York &c. R. Co. 74 Conn. 538; 51 Atl. 525.

to the public is evidence of negligence,[71] but where, not knowing that a flagman had usually been stationed at the crossing, the traveler's conduct was in no way influenced by his absence, such absence creates no liability, nor does the absence of a flagman in any event absolve the traveler from the exercise of care.[72] The invitation or direction of the flagman to the traveler is held to be an assurance of safety upon which he has a right to rely,[73] but while relying upon such assurance he has no right to omit to use the senses of sight and hearing, as a prudent man would do under the circumstances,[74] al-

[71] Pittsburgh &c. R. Co. v. Yundt, 78 Ind. 373; 41 Am. R. 580; Indianapolis, St. Louis &c. R. Co. v. Dunn, 78 Ill. 197; Ernst v. Hudson River R. Co. 39 N. Y. 61; 100 Am. Dec. 405, and note; Dolan v. Delaware &c. R. Co. 71 N. Y. 285; Phila. &c. R. Co. v. Killips, 88 Pa. St. 405; Heddles v. Chicago &c. R. Co. 74 Wis. 239; 42 N. W. 237; Burns v. North Chicago Rolling Mill Co. 65 Wis. 312; 27 N. W. 43; Richmond v. Chicago &c. R. Co. 87 Mich. 374; 49 N. W. 621; Sweeny v. Old Colony R. Co. 10 Allen (Mass.), 368; 87 Am. Dec. 644, and note; Delaware &c. R. Co. v. Toffey, 38 N. J. L. 525; 2 Thomp. Neg. (2d ed.) § 1539. See, also, Sights v. Louisville &c. R. Co. 117 Ky. 436; 78 S. W. 172; Indianapolis Un. R. Co. v. Newbaucher, 16 Ind. App. 21; 43 N. E. 576; Richmond v. Chicago &c. R. Co. 87 Mich. 374; 49 N. W. 621; Dolph v. New York &c. R. Co. 74 Conn. 538; 51 Atl. 525; Mitchell v. Illinois Cent. R. Co. 110 La. Ann. 630; 34 So. 714; 98 Am. St. 472; Montgomery v. Missouri Pac. R. Co. 181 Mo. 477; 79 S. W. 930, 936, (quoting text).

[72] Pakalinsky v. New York &c. R. Co. 82 N. Y. 251; 2 Am. & Eng. R. Cas. 251; Lake Shore &c. R. Co. v. Sunderland, 2 Bradw. (Ill.) 307. See, also, Hodgin v. Southern R. Co. (N. Car.); 55 S. E. 413, in which it is held that when the traveler discovers the absence of the flagman he is put on his guard and it is all the more incumbent on him to look and listen for his own protection.

[73] Sharp v. Glushing, 96 N. Y. 676; 19 Am. & Eng. R. Cas. 372; Sweeny v. Old Colony R. Co. 10 Allen (Mass.) 368; 87 Am. Dec. 644; Bayley v. Eastern R. Co. 125 Mass. 62; Whelan v. New York &c. R. Co. 38 Fed. 15; Central Trust Co. v. Wabash &c. R. Co. 27 Fed. R. 159; State v. Boston &c. R. Co. 80 Me. 430; 15 Alt. 36; 35 Am. & Eng. R. Cas. 356; Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91; 2 Am. & Eng. R. Cas. 172. See, also, Louisville &c. R. Co. v. Schmidt, 147 Ind. 638; 46 N. E. 344, 347 (citing text); Lake Erie &c. R. Co. v. Fike, 35 Ind. App. 554; 74 N. E. 636. It seems to us that some of these cases go too far toward absolving the traveler from all care for himself. No reliance upon a servant of the company can excuse him for stepping recklessly into certain and apparent danger.

[74] Penn. R. Co. v. Stegemeier,

though the same degree of vigilance may not be required of him as if there were no such invitation.[75] If the traveler refuses to heed the signals of the flagman and attempts to cross when warned not to do so, he cannot ordinarily recover for any injury sustained[76] except it be willful. The negligence of the flagman or gatekeeper is the negligence of the company and one customarily permitted to act as flagman, although not employed for the purpose, may render the company liable for his negligence.[77] Evidence of the intoxication of the flagman at the time of the accident is admissible.[78] It has also been held that when gates are constructed at a dangerous crossing and the watchman is absent and the gates open the company should slacken speed.[79]

§ 1158. Signals on approach to crossings.—The duty to give warning signals on the approach of trains to crossings has become so well established that in most, if not all of the states they are required by statutes, which are generally held to be cumulative only and to define the minimum of ordinary care, although there are a number of cases holding that compliance with the statute is always sufficient.[80] It has been held that whether required by statute or not

118 Ind. 305; 20 N. E. 843; 10 Am. St. 136; Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91; 2 Am. & Eng. R. Cas. 172; Berry v. Pennsylvania R. Co. 48 N. J. L. 141; 4 Atl. 303; 26 Am. & Eng. R. Cas. 396; Casey v. New York &c. R. Co. 78 N. Y. 518; Lake Shore &c. R. So. v. Frantz, 127 Pa. St. 297; 18 Atl. 22; 4 L. R. A. 389; Greenwood v. Phila. &c. R. C. 124 Pa. St. 572; 17 Atl. 188; 3 L. R. A. 44; 10 Am. St. 614.

[75] Lunt v. London &c. R. Co. L. R. 1 Q. B. 277; Dolan v. Delaware &c. Co. 71 N. Y. 285; Chicago &c. R. Co. v. Hutchinson, 120 Ill. 587; 11 N. E. 855; Callaghan v. Delaware &c. R. Co. 52 Hun (N. Y.) 276; 5 N. Y. S. 285. See, also, Palmer v. New York &c. R. Co. 112 N. Y. 234; 19 N. E. 678. See, also, Missouri &c. R. Co. v. Ray, 25 Tex. Civ. App. 567; 63 S. W. 912, 913 (citing text).

[76] Houston, &c. R. Co. v. Carson, 66 Tex. 345; 1 S. W. 107.

[77] Louisville &c. R. Co. v. Webb, 90 Ala. 185; 8 So. 518; 11 L. R. A. 674; Dickson v. Missouri Pac. R. Co. 104 Mo. 491; 16 S. W. 381; Peck v. Mich. Cent. R. Co. 57 Mich. 3; 23 N. W. 466; 19 Am. & Eng. R. Cas. 257; Dolan v. Delaware &c. R. Co. 71 N. Y. 285; Ernst v. Hudson River R. Co. 35 N. Y. 9; 90 Am. Dec. 761; Kissenger v. New York &c. R. Co. 56 N. Y. 538.

[78] Warner v. New York &c. R. Co. 44 N. Y. 465.

[79] Schwarz v. Delaware &c. R. Co. 211 Pa. St. 625; 61 Atl. 255.

[80] Ante, **§§ 1155, 1156.** Atchison, &c. R. Co. v. Hague, 54 Kan. 284;

suitable warnings must be given to appraise the traveler of the presence of the train.[81] How far the omission to give the warnings in compliance with the statute or to meet the requirements of ordinary care constitutes negligence on the part of the company has been discussed in previous sections. The company must exercise care to so operate its trains that the warning signals may be heard and that the traveler may take advantage of them.[82] Otherwise it will be guilty of negligence. In order that one injured may recover he must be able to show that the omission of the signals was the proximate cause of his injury,[83] and in no case can one recover on account of such omission, who by any other means has timely notice of the approach of the train, for after he has seen the danger the purpose of the signals is subserved, whether they have been given or not;[84] but such stat-

45 Am. St. 278; 60 Am. & Eng. R. Cas. 617; 38 Pac. 257; Missouri Pac. R. Co. v. Moffatt (Kan.), 44 Pac. 607. See New York, &c. R. Co. v. Hackett (N. J.), 32 Atl. 265.

[81] Chicago &c. R. Co. v. Sharp, 63 Fed. R. 532; 60 Am. & Eng. R. Cas. 595; Gulf, &c. R. Co. v. Hamilton (Tex.), 28 S. W. 906; Vandewater v. New York &c. R. Co. 74 Hun (N. Y.), 32; 26 N. Y. S. 397; Atlanta &c. R. Co. v. Wyly, 65 Ga. 120; 8 Am. & Eng. R Cas. 262; Faber v. St. Paul &c. R. Co. 29 Minn. 465; 13 N. W. 902; 8 Am. & Eng. R. Cas. 277; Continental Improvement Co. v. Stead, 95 U. S. 161; Cleveland &c. R. Co. v. Miles, 162 Ind. 646; 70 N. E. 985. See as to inadmissibility of rule of company requiring bell to be rung. Minot v. Boston &c. R. Co. 73 N. H. 317; 61 Atl. 509.

[82] Chicago &c. R. Co. v. Netolicky, 67 Fed. R. 665; Chicago &c. R. Co. v. Boggs, 101 Ind. 522; 51 Am. R. 761; 23 Am. & Eng. R. Cas. 282. See, also, Smith v. Mich. Cent. R. Co. 35 Ind. App. 188; 73 N. E. 928; Cleveland &c. R. Co. v. Carey, 33 Ind. App. 275; 71 N. E. 244; Cleveland &c. R. Co. v. Miles, 162 Ind. 646; 652, et seq. 70 N. E. 985.

[83] Chicago &c. R. Co. v. Crisman, 19 Colo. 30; 34 Pac. 286; Toledo &c. R. Co. v. Jones, 76 Ill. 311; Chicago &c. R. Co. v. Harwood, 90 Ill. 425; Parker v. Wilmington &c. R. Co. 86 N. C. 221; 8 Am. & Eng. R. Cas. 420; East Tennessee &c. R. Co. v. King, 81 Ala. 177; 2 So. 152; Central R. Co. v. Brinson, 70 Ga. 207; 19 Am. & Eng. R. Cas. 42; Horn v. Baltimore &c. R. Co. 54 Fed 301. See, also, Bryant v. Illinois Cent. R. Co. (La. Ann.) 22 So. 799; Stahl v. Lake Shore &c. R. Co. 117 Mich. 273; 75 N. W. 629, 630 (citing text). For a peculiar case in which the negligence of the company was held a proximate cause, see Morey v. Lake Superior &c. R. Co. 125 Wis. 148; 103 N. W. 271.

[84] State v. Baltimore &c. R. Co. 69 Md. 339; 14 Atl. 685; 35 Am. & Eng. R. Cas. 412; Atchison &c. R. Co. v. Walz, 40 Kan. 433; 19 Pac. 787; Chicago &c. R. Co. v. Bell, 70

utes are mandatory; they define a positive duty, and it has been held that the court should not leave the question of their necessity to the jury,[85] although it is said that they are excused when the city ordinances forbid them in the limits of the municipality.[86] One who approaches the crossing has a right to assume that the company will give the usual signals of approach, and when he can neither hear nor see any signs of a moving train, that the crossing may be made safely,[87] but he is not thereby relieved from the duty to use his senses vigilantly to avoid danger.[88] Where there is no statutory requirement it is generally for the jury to determine what notice is reasonable under the circumstances of the particular case.[89] There is conflict

Ill. 102; Telfer v. Northern R. Co. 30 N. J. L. 188; Houston &c. R. Co. v. Nixon, 52 Tex. 19; Saldana v. Galveston &c. R. Co. 43 Fed. R. 862; Stahl v. Lake Shore &c. R. Co. 117 Mich. 273; 75 N. W. 629, 630, (citing text); Pakalinsky v. Railroad Co. 82 N. Y. 424; Atchison &c. R. Co. v. Judah, 65 Kans. 474; 70 Pac. 346.

[85] Cincinnati &c. R. Co. v. Butter, 103 Ind. 31; 2 N. E. 138; 23 Am. & Eng. R. Cas. 262; Pittsburgh &c. R. Co. v. Martin, 82 Ind. 476; Atlanta &c. R. Co. v. Wyly, 65 Ga 120; 8 Am. & Eng. R. Cas. 262; Havens v. Erie R. Co. 53 Barb. (N. Y.) 328; Semel v. N. Y. &c. R. Co. 9 Daly (N. Y.) 321.

[86] Penn. R. Co. v. Hensil, 70 Ind. 569; 36 Am. R. 188. But under such circumstances the company must exercise greater precaution in other respects. Baltimore &c. R. Co. v. Golway, 23 Wash. L. Rep. 308. It has been held however, that the engineer must blow his whistle if prudence demands it, notwithstanding an order to the contrary from the railroad commissioners. Rowen v. New York &c. R. Co. 59 Conn. 364; 21 Atl. 1073. See, also, Katzenberger v. Lawo, 90 Tenn. 235; 16 S. W. 611; 13 L. A. R. 185, and note; 25 Am. St. 681.

[87] Ernst v. Hudson &c. R. Co. 35 N. Y. 9; 90 Am. Dec. 761, and note; Kennayde v. Pac. R. Co. 45 Mo. 255; Donohue v. St. Louis &c. R. Co. 91 Mo. 357; 2 S. W. 424; 28 Am. & Eng. R. Cas. 673; Wabash &c. R. Co. v. Central Trust Co. 23 Fed. 738; Baltimore &c. R. Co. v. Conoyer, 149 Ind. 524, 529; 48 N. E. 352, 354; Malott v. Hawkins, 159 Ind. 127; 63 N. E. 308; 311, (both citing text).

[88] Gorton v. Erie &c. R. Co. 45 N. Y. 460; Shaw v. Jewett, 86 N. Y. 616; 6 Am. & Eng. R. Cas. 111; Baltimore &c. R. Co. v. State, 29 Md. 252; 96 Am: Dec. 528; Meeks v. Southern Pac. R. Co. 52 Cal. 602; 56 Cal. 513; 8 Am. & Eng. R. Cas. 314; Stoneman v. Atlantic &c. R. Co. 58 Mo. 503; Miller v. Terre Haute &c. R. Co. 144 Ind. 323; 43 N. E. 257.

[89] Tolman v. Syracuse &c. R. Co. 98 N. Y. 198; 50 Am. Rep. 649, and note; Loucks v. Chicago &c. R. Co. 31 Minn. 526; 18 N. W. 651; 19 Am. & Eng. R. Cas. 305; Guggenheim v. Lake Shore &c. R. Co. 57 Mich. 488; 24 N. W. 827; 22

of authority as to who may claim the benefit of the statutory signals, and it may depend somewhat upon the language of the particular statute. Where the statute does not specifically designate the class to whom the duty is owing, the courts have usually construed it to be due only to those who are about to use, are using, or have lately used the crossing, and have held that no others could recover for injuries resulting from a failure to give the signals,[90] but other courts have gone further and hold that the duty is for the protection of all persons lawfully at or near the crossing from any danger to be apprehended from the sudden approach of a train without warning.[91] There are other decisions which hold that the warning is intended only for travelers on the highway, whether intending to cross or not, and that no duty is due to a farmer working in the field.[92] There is

Am. & Eng. R. Cas. 546; Penn. R. Co. v. Ogier, 35 Pa. St. 60; 78 Am. Dec. 322; Longenecker v. Pennsylvania R. Co. 105 Pa. St. 328.

[90] Reynolds v. Great Northern R. Co. 69 Fed. 808; 29 L. R. A. 695; Pike v. Chicago &c. R. Co. 39 Fed. 754; Bell v. Hannibal &c. Railroad Co. 72 Mo. 50; Evans v. Atlantic &c. R. Co. 62 Mo. 49; Elwood v. New York &c. R. Co. 4 Hun (N. Y.), 808; O'Donnell v. Providence &c. R. Co. 6 R. I. 211, 216; Clark v. Missouri Pac. Railway Co. 35 Kan. 350; 11 Pac. 134; Gorris v. Scott, L. R. 9 Exch. 125; East Tenn. &c. R. Co. v. Feathers, 10 Lea. (Tenn.) 103; Harty v. Central R. Co. 42 N. Y. 468; Central &c. R. Co. v. Golden, 93 Ga. 510; 21 S. E. 68. See, also, Louisville &c. R. Co. v. Markel, 103 Ala. 160; 15 So. 511; 49 Am. St. 21; Louisville &c. R. Co. v. Hall, 87 Ala. 708; 6 So. 277; 13 Am. St. 84; 4 L. R. A. 710; St. Louis &c. R. Co. v. Morrison (Kans.), 85 Pac. 295; Everett v. Great Northern R. Co. (Minn.) 111 N. W. 281, 283 (quoting text).

[91] Chicago &c. R. Co. v. Metcalf, 44 Neb. 848; 63 N. W. 51; 28 L. R. A. 824; Lonergan v. Illinois Cent. R. Co. 87 Iowa, 755; 49 N. W. 852, aff'd. 53 N. W. 236; 17 L. R. A. 254; Defrieze v. Illinois Cent. R. Co. (Ia.); 94 N. W. 505; Sanborn v. Railway Co. 91 Mich. 538; 52 N. W. 153; Central Railroad Co. v. Raiford, 82 Ga. 400; 9 S. E. 169. In People v. New York &c. R. Co. 25 Barb. (N. Y.) 199, it is held that the hazards to be provided against by such a statute are twofold: First, the danger of collision at crossings; second, that of damage by frightening of teams traveling upon a public highway near the crossing. See, also, Cahill v. Railroad Co. 13 Ky. 714; 18 S. W. 2; Wakefield v. Railroad Co. 37 Vt. 330; 86 Am. Dec. 711; Ward v. Chicago &c. R. Co. 97 Ia. 50; 65 N. W. 999; St. Louis &c. Ry. Co. v. Kilman (Tex. Civ. App.); 86 S. W. 1050.

[92] Williams v. Chicago &c. R. Co. 135 Ill. 491; 26 N. E. 661; 11 L. R. A. 352; 25 Am. St. 397; Ranson v. Chicago &c. R. Co. 62 Wis. 178; 22 N. W. 147; 51 Am. R. 718. See,

also conflict among the authorities as to whether such statutes apply only to grade crossings. In some instances this conflict is more apparent than real, and is caused by a difference in the language of the statutes, but in others the conflict is substantial.[93] Positive evidence that signals were given is held to overcome evidence that they were not heard by other witnesses;[94] but if one who was intently listening for, and expecting the signals, and could have heard them, testifies that he did not hear them, his evidence may be of equal weight with the evi-

also, St. Louis &c. R. Co. v. Morrison, (Kans.); 85 Pac. 295.

[93] Holding statute applicable only to grade crossings are: Jenson v. Chicago &c. R. Co. 86 Wis. 589; 57 N. W. 359; 22 L. R. A. 680; Barron v. Chicago &c. R. Co. 89 Wis. 79; 61 N. W. 303; Cleveland &c. R. Co. v. Halbert, 179 Ill. 196; 53 N. E. 623; McElroy v. Georgia &c. R. Co. 98 Ga. 257; 25 S. E. 439; Bowen v. Gainesville &c. R. Co. 95 Ga. 688; 22 S. E. 695; Favon v. Boston &c. R. Co. 114 Mass. 351; 19 Am. 364; Houston &c. R. Co. v. Sagalinski, 19 Tex. Civ. App. 107; 46 S. W. 113; Missouri &c. R. Co. v. Thomas, 87 Tex. 282; 28 S. W. 343. Holding contra are: Johnson v. Southern Pac. R. Co. 107 Cal. 624; 82 Pac. 306; 1 L. R. A. (U. S.) 307; Toledo &c. R. Co. v. Jump, 50 Ohio St. 651; 35 N. E. 1054; People v. New York &c. R. Co. 13 N. Y. 78. See, also, Pennsylvania R. Co. v. Barnett, 59 Pa. St. 259; 98 Am. Dec. 346; Rupard v. Chesapeake &c. R. Co. 88 Ky. 280; 11 S. W. 70; 7 L. R. A. 316. We are inclined to think that, ordinarily, the statute should be held to apply only to grade crossings, but there is much to be said on both sides of the question, and perhaps all that can be safely said is that the matter depends upon the language and purpose of the statute. In this connection, however, it may be noted that municipal regulations as to speed, signals, and the like have often been held authorized and applicable even in the switch yards of the company. Gulf &c. R. Co. v. Melville (Tex. Civ. App.); 87 S. W. 863; Missouri &c. R. Co. v. McGlamory (Tex. Civ. App.); 34 S. W. 359; Baltimore &c. R. Co. v. Peterson, 156 Ind. 364, 371; 59 N. E. 1044, and additional authorities there cited.

[94] Ellis v. Great Western R. Co. L. R. 9 C. P. 551; Chicago &c. R. Co. v. Still, 19 Ill. 499; 71 Am. Dec. 236, and note; Telfer v. Northern R. Co. 30 N. J. L. 188; Savannah &c. R. Co. v. Shearer, 58 Ala. 672; McGrath v. New York &c. R. Co. 63 N. Y. 522; Chapman v. New York &c. R. Co. 14 Hun (N. Y.), 484; Bohan v. Milwaukee &c. R. Co. 61 Wis. 391; 21 N. W. 241; 19 Am. & Eng. R. Cas. 276; Chicago &c. R. Co. v. Robinson, 106 Ill. 142; 13 Am. & Eng. R. Cas. 620; Missouri &c. R. Co. v. Pierce 39 Kan. 391; 18 Pac. 305; Missouri Pac. R. Co. v. Moffatt, 56 Kan. 667; 44 Pac. 607. But it would not be safe in all jurisdictions to so instruct the jury. See 2 Elliott Ev. § 969.

dence that they were given, and it is for the jury to determine from the evidence.[95] The construction of the various statutes involves many difficult questions which the scope of this chapter will not allow us to discuss. Statutory signals are generally only required at legally established highways,[96] and it has been held that where the statute requires the ringing of the bell, or the blowing of the whistle, both are not necessary.[97] Also, the company is considered as having discharged its duty under some statutes where the signal is given at the required distance and continued until the crossing is passed,[98] but what constitutes a compliance must depend upon the phraseology of the particular statute, and its strict construction depends upon whether it is penal or remedial.[99] Statutes or ordinances requiring signals are police regulations, and the liability for their violation is sometimes in the nature of a penalty, and generally the company or the engineer is liable to indictment for failure to give them.[100]

§ 1159. Duty of company to keep a lookout—Lights.—It is frequently provided by statute or ordinance that railroad companies shall keep a lookout as their trains approach crossings, and this may be required, in order to constitute reasonable care, even in the absence of any statute or ordinance upon the subject,[101] particularly

[95] Dublin &c. R. Co. v. Slattery, L. R. 3 App. Cas. 1155; Voak v. Northern Cent. R. Co. 75 N. Y. 320; Renwick v. New York &c. R. Co. 36 N. Y. 132; Chicago &c. R. Co. v. Dickson, 88 Ill. 431; Bunting v. Cent. Pac. R. Co. 16 Nev. 277; 6 Am. & Eng. R. Cas. 282; Urbanek v. Chicago &c. R. Co. 47 Wis. 59; 1 N. W. 464; Berg v. Chicago &c. R. Co. 50 Wis. 419; 7 N. W. 347; 2 Am. & Eng. R. Cas. 70.

[96] Ante, § 1154; Cordell v. N. Y. &c. R. Co. 64 N. Y. 535.

[97] Terry v. St. Louis &c. R. Co. 89 Mo. 586; 1 S. W. 746; Chicago &c. R. Co. v. Damerell, 81 Ill. 450.

[98] Zimmerman v. Hannibal &c. R. Co. 71 Mo. 476; 2 Am. & Eng. R. Cas. 191.

[99] Ante, § 715.

[100] Ante, § 721; Chicago &c. R. Co. v. McDaniels, 63 Ill. 122; Commonwealth v. Boston &c. R. Co. 133 Mass. 383; 8 Am. & Eng. R. Cas. 297, and note.

[101] Marcott v. Marquette &c. R. Co. 47 Mich. 1; 4 Am. & Eng. R. Cas. 548; Hinkle v. Richmond &c. R. Co. 109 N. Car. 472; 13 S. E. 884; 26 Am. St. 581; St. Louis &c. R. Co. v. Mathias, 50 Ind. 65; Leavitt v. Terre Haute &c. R. Co. 5 Ind. App. 513; 31 N. E. 860; 32 N. E. 866; Johnson v. Chicago &c. R. Co. 49 Wis. 529; 5 N. W. 886; Frick v. St. Louis &c. R. Co. 75 Mo. 595; 8 Am. & Eng. R. Cas. 280; Chicago &c. R. Co. v. Ryan, 70 Ill. 211; Missouri &c. R. Co. v. Matherly, 35 Tex. Civ. App. 604; 81 S. W. 589. In New York &c. R. Co. v.

where the crossing is unusually dangerous,[102] or the train is backed over the crossing, or the like,[103] but under ordinary circumstances the engineer or other employe on the lookout may assume that an adult on the track or approaching the track, and who is apparently able to do so, will yield the right of way, and exercise due care to avoid a collision.[104] So, there are cases in which it is the duty of the company at night to have a headlight on the locomotive or a light on the car nearest the crossing, where the train is backed over it, unless reasonable care is exercised to provide some other efficient precaution to take its place.[105] But when a headlight is provided the company is not liable, where it exercises due care, merely because the light is temporarily obscured by causes beyond its control.[106] Nor is it liable merely because there was no headlight where the train was plainly visible and the absence of the headlight was not a proximate cause of the injury.[107]

Kistler, 66 Ohio St. 326; 64 N. E. 130, 132, it is said that it is the duty of the engineer to keep a lookout along the track ahead, but he is not expected to see anything at the side that does not come within the range of his vision while so doing (citing text). In some jurisdictions it is held that the engineer or fireman must keep a continuous lookout wherever persons may reasonably be expected upon the track even if they are not a public crossing. Post, § 1257; Smith v. Norfolk &c. R. Co. 114 N. Car. 728; 19 S. E. 863, 923; 25 L. R. A. 287, and note.

[102] East Tenn. &c. R. Co. v. White, 5 Lea (Tenn.), 540; 8 Am. & Eng. R. Cas. 65; Marcott v. Marquette &c. R. Co. 47 Mich. 1; 10 N. W. 52.

[103] Barley v. Chicago &c. R. Co. 4 Biss. (U. S. C. C.) 430; Chicago &c. R. Co. v. Triplett, 38 Ill. 482; Kansas Pac. R. Co. v. Pointer, 14 Kan. 37; Robinson v. Western Pac. R. Co. 48 Cal. 409; Chicago &c. R. Co. v. Sharp, 63 Fed. 532; Schlimgen v. Chicago &c. R. Co. 90 Wis. 186; 62 N. W. 1045; Wiley v. Long Island &c. R. Co. 76 Hun (N. Y.), 29; St. Louis &c. R. Co. v. Johnson, 74 Ark. 372; 86 S. W. 282; Smith v. Pere Marquette R. Co. 136 Mich. 224; 98 N. W. 1022. But compare Richmond &c. R. Co. v. Yeamans, 86 Va. 860; 12 S. E. 946.

[104] Ante, § 1153.

[105] Smedis v. Brooklyn &c. R. Co. 88 N. Y. 13; Cheney v. New York Cent. R. Co. 16 Hun (N. Y.), 415; Nashville &c. R. Co. v. Smith, 6 Heisk. (Tenn.) 174; Chicago &c. R. Co. v. Garvy, 58 Ill. 83; Chicago &c. R. Co. v. Sharp, 63 Fed. 532; Missouri &c. R. Co. v. Finch (Tex. Civ. App.); 31 S. W. 84. See, also, St. Louis &c. R. Co. v. Johnson, 75 Ark. 372; 86 S. W. 282.

[106] Louisiville &c. RR. Co. v. Melton, 2 Lea (Tenn.), 262. (Light obscured by mist).

[107] Daniels v. Staten Island &c. Co. 125 N. Y. 407; 26 N. E. 466.

§ 1160. Rate of speed—When negligence.—In the absence of any statute or ordinance upon the subject, no rate of speed is negligence per se.[108] But, when considered in connection with other circumstances, as it must be in some cases, the court may sometimes be justified in declaring that the company was guilty of negligence in running its train at an excessive and dangerous rate of speed under the circumstances of the particular case. Ordinarily, however, the question is one of fact for the jury.[109] In the absence of any statutory requirement there is no obligation upon the company to slacken the speed of its trains, under ordinary circumstances, at country crossings,[110] and a high rate of speed may be perfectly proper at country

[108] Reading &c. R. Co. v. Ritchie, 102 Pa. St. 425; 19 Am. & Eng. R. Cas. 267, and note; Young v. Hannibal &c. R. Co. 79 Mo. 336; Powell v. Missouri Pac. R. Co. 76 Mo. 80; 8 Am. & Eng. R. Cas. 467; Cohen v. Eureka &c. R. Co. 14 Nev. 376; Terre Haute &c. R. Co. v. Clark, 73 Ind. 168; Warner v. New York &c. R. Co. 44 N. Y. (5 Hand.) 465; Dyson v. New York &c. R. Co. 57 Conn. 9; 17 Atl. 137; 14 Am. St 82; Schackleford v. Louisville &c. R. Co. 84 Ky. 43; 4 Am. St. 189; Burlington &c. R. Co. v. Wendt, 12 Neb. 76; 10 N. W. 456; Artz v. Chicago &c. R. Co. 44 Iowa, 284; Chicago &c. R. Co. v. Harwood, 80 Ill. 88; Bemis v. Connecticut &c. R. Co. 42 Vt. 375; 1 Am. R. 339; Grows v. Maine &c. R. Co. 67 Me. 100; Tobias v. Michigan Cent. R. Co. 103 Mich. 330; 61 N. W. 514. See, also, Golinvaux v. Burlington &c. R. Co. 125 Ia. 625; 101 N. W. 465; Southern Ind. R. Co. v. Messack, 35 Ind. App. 616; 74 N. E. 1097, 1098 (citing text); New York &c. R. Co. v. Kistler, 66 Ohio St. 326; 64 N. E. 130, 132 (citing text).

[109] Marcott v. Marquette &c. R. Co. 47 Mich. 1; 10 N. W. 53; 4 Am. & Eng. R. Cas. 548; Reeves v. Delaware &c. R. Co. 30 Pa. St. 454; 72 Am. Dec. 713; Western &c. R. Co. v. King, 70 Ga. 261; 19 Am. & Eng. R. Cas. 255; McGill v. Pittsburgh &c. R. Co. 152 Pa. St. 331; 25 Atl. 540; Miller v. New York &c. R. Co. 65 Hun (N. Y.), 623; 20 N. Y. S. 163; Chicago &c. R. Co. v. Spilker, 134 Ind. 380; 33 N. E. 280; 34 N. E. 218, and authorities cited in last preceding note, supra; Bilton v. Southern Pac. R. Co. 148 Cal. 443; 83 Pac. 440, 442 (citing text).

[110] Chicago &c. R. Co. v. Harwood, 80 Ill. 88; Toledo &c. R. Co. v. Miller, 76 Ill. 278; Zeigler v. Northeastern R. Co. 5 S. Car. 221; 7 S. Car. 402; Chicago &c. R. Co. v. Robinson, 9 Bradw. (Ill. App.) 89; DuBoise v. New York &c. R. Co. 88 Hun (N. Y.), 10; 34 N. Y. S. 279. See, also, Newhard v. Pennsylvania R. Co. 153 Pa. 417; 26 Atl. 105; 19 L. R. A. 563; Warner v. New York, &c. R. Co. 44 N. Y. 465; Childs v. Pennsylvania R. Co. 150 Pa. 75; 24 Atl. 341; Custer v. Railroad Co. 206 Pa. 529; 55 Atl. 1130; Sutton v. Chicago &c. R. Co. 98 Wis. 157; 73 N. W. 993; Atchison &c. R. Co. v. Judah, 65 Kan.

crossings, although it might be considered negligence at a crossing in a populous city.[111] Whether it is negligence or not usually depends upon the circumstances of the particular case, and the rate of speed, when alleged as one of the grounds for recovery, may generally be shown in connection with the other circumstances as evidence of negligence.[112] The rate of speed, however, should not be so great as to render the statutory signals unavailing,[113] and the company will be liable to one who is injured by reason of the violation of a valid statute or ordinance limiting the rate of speed, where such violation is the proximate cause of the injury and the person injured is rightfully using the crossing in the exercise of due care.[114] So, indeed, it

474; 70 Pac. 346; New York &c. R. Co. v. Kistler, 66 Ohio, 326; 64 N. E. 130.

[111] Telfer v. Northern R. Co. 30 N. J. L. 188; Chicago &c. R. Co. v. Spilker, 134 Ind. 380; 33 N. E. 280; 34 N. E. 218. See, also, Parkerson v. Louisville &c. R. Co. 25 Ky. L. 2260; 80 S. W. 468; Lake Shore &c. R. Co. v. Barnes (Ind.); 76 N. E. 629, 630. In this last case reasons are given for the distinction, and the text is cited, with numerous decisions in its support.

[112] Artz v. Chicago &c. R. Co. 44 Iowa, 284; Salter v. Utica &c. R. Co. 88 N. Y. 42; 8 Am. & Eng. R. Cas. 437; Massoth v. Delaware &c. Canal Co. 64 N. Y. 524; Rockford &c. R. Co. v. Hillmer, 72 Ill. 235; Galveston &c. R. Co. v. Duelm (Tex.), 23 S. W. 596; Louisville &c. R. Co. v. Stommel, 126 Ind. 35; Terre Haute &c. R. Co. v. Clark, 73 Ind. 168; Annacker v. Chicago &c. R. Co. 81 Iowa, 267; 47 N. W. 68. Speed should be regulated according to the danger. Reed v. Queen Anne's R. Co. 57 Del. 529; 57 Atl. 529. See, also, Evansville &c. R. Co. v. Clements, 32 Ind. App. 659; 70 N. E. 554. But compare Missouri Pac. Ry. Co. v. Hansen, 48 Neb. 232; 66 N. W. 1105. As to the admissibility of evidence of the rate of speed elsewhere or on other occasions, see 3 Elliott Ev. § 2522; Union Trac. Co. v. Vandercook, 32 Ind. App. 621; 69 N. E. 486; Lyman v. Boston &c. R. Co. 66 N. H. 200; 20 Atl. 976; 11 L. R. A. 364.

[113] Continental Imp. Co. v. Stead, 95 U. S. 161, 164. See, also, Pennsylvania R. Co. v. Ackermann, 74 Pa. St. 265; Philadelphia &c. R. Co. v. Hagan, 47 Pa. St. 244; 86 Am. Dec. 541; Quimby v. Vermont Cent. R. Co. 23 Vt. 387; Louisville &c. R. Co. v. Commonwealth, 80 Ky. 143; 44 Am. R. 468 and note; 14 Am. & Eng. R. Cas. 613; Chicago &c. R. Co. v. Boggs, 101 Ind. 522; 51 Am. R. 761; 23 Am. & Eng. R. Cas. 282.

[114] Haas v. Chicago &c. R. Co. 41 Wis. 44; Chicago &c. R. Co. v. Becker, 84 Ill. 483; Corroll v. Burlington &c. R. Co. 38 Iowa, 120; 18 Am. R. 22; St. Louis &c. R. Co. v. Mathias, 50 Ind. 65; Crosby v. New York &c. R. Co. 88 Hun (N. Y.), 196; 34 N. Y. Supp. 714; New Orleans &c. R. Co. v. Toulme, 59 Miss. 284; Wabash R. Co. v. Kamradt, 109 Ill. App. 203. See, also, Baltimore &c. R. Co. v. Reynolds, 33 Ind. App. 219; 71 N. E. 250;

will be liable in such a case where it runs its trains over a dangerous crossing at a rate of speed not so great as that limited by the statute or ordinance, if it is negligent for it to do so under the circumstances.[115]

§ 1161. Duty of company where view is obstructed.—Where a crossing is unusually dangerous because the track is curved or the view obstructed, or because of its peculiar construction or situation, it is the duty of the company to exercise such care and take such precautions as the dangerous nature of the crossing requires.[116] Its duty to travelers upon the highway is to exercise reasonable care under the circumstances, and reasonable care in such cases may require it to exercise precautions not demanded in ordinary cases. This rule is especially applicable when the company itself causes the obstruc-

Stolter v. Chicago &c. Ry. Co. (Mo.); 98 S. W. 509. That it must be the proximate cause to render the company liable, see Chicago &c. R. Co. v. Kennedy, 3 Kan. App. 693; 43 Pac. 802; Georgia &c. R. Co. v. Williams, 93 Ga. 253; 18 S. E. 825; Kelley v. Hannibal &c. R. Co. 75 Mo. 138; 13 Am. & Eng. R. Cas. 638; Evans &c. Co. v. St. Louis &c. R. Co. 17 Mo. App. 624; Philadelphia &c. R. Co. v. Stebbing, 62 Md. 504; Pennsylvania Co. v. Hensil, 70 Ind. 569; 36 Am. R. 188; ante, § 1155. That it does not excuse the plaintiff from exercising due care and that contributory negligence is a good defense, see Illinois &c. R. Co. v. Hetherington, 83 Ill. 510; Schofield v. Chicago &c. R. Co. 114 U. S. 615; 5 Sup. Ct. 1125; post, § 1163.

[115] Louisville &c. R. Co. v. Milam, 9 Lea (Tenn.), 223; Shaber v. St. Paul &c. R. Co. 28 Minn. 103; 9 N. W. 575; 2 Am. & Eng. R. Cas. 185; Frick v. St. Louis &c. R. Co. 75 Mo. 595; 8 Am. & Eng. R. Cas. 280; Louisville &c. R. Co. v. French, 69 Miss. 121; 12 So. 338; Wabash R. Co. v. Henks, 91 Ill. 406.

[116] Dimick v. Chicago &c. R. Co. 80 Ill. 338; Funston v. Chicago &c. R. Co. 61 Iowa, 452; 16 N. W. 518; Central R. Co. v. Feller, 84 Pa. St. 226; Cordell v. New York &c. R. Co. 75 N. Y. 330; Richardson v. New York &c. R. Co. 45 N. Y. 846; Continental Imp. Co. v. Stead, 95 U. S. 161; Vandewater v. New York &c. R. Co. 74 Hun (N. Y.), 32; 26 N. Y. S. 397; Eilert v. Green Bay &c. R. Co. 48 Wis. 606; 4 N. W. 769; Ritchie v. Caledonian R. Co. 7 Scotch Sess. Cas. (4th series) 148; Harlan v. St. Louis &c. R. Co. 65 Mo. 22; Artz v. Chicago &c. R. Co. 34 Iowa, 153; Chicago &c. R. Co. v. Dillon, 123 Ill. 570; 15 N. E. 181; 5 Am. St. 559; Stapley v. London &c. R. Co. L. R. 1 Ex. 21; James v. Great Western R. Co. L. R. 2 C. P. 634. note; Bilbee v. London &c. R. Co. 18 C. B. N. S. 584. See, also, Southern R. Co. v. Jones (Va.); 56 S E. 155.

tion, as, for instance, where it has allowed weeds and trees to grow up on its right of way, or has piled up wood, or left cars in such a place that they obstruct the view.[117] It also requires the company, as a general thing, to take greater precautions at a dangerous crossing in a city than at an ordinary crossing in the open country.[118] And it may even require flagmen or gates to be placed at the crossing,[119] although these are unnecessary in ordinary cases, in the absence of a statute or an ordinance requiring them. But it is not negligence for a railroad company to properly maintain on its right of way buildings reasonably necessary for the prosecution of its business,[120] and it has even been held that, as the company has no control over weeds, brush and the like, not on its right of way, it is not required to take the same into consideration when approaching the crossing.[121] It is usually a question of fact, or a mixed question of law and fact, for the jury to determine, under proper instructions, whether the company has exercised reasonable care in the particular case,[122] and it should not be forgotten that the traveler must also exercise such

[117] Nehrbas v. Central Pac. R. Co. 62 Cal. 320; 14 Am. & Eng. R. Cas. 670; Indianapolis &c. R. Co. v. Smith, 78 Ill. 112; Chicago &c. R. Co. v. Lee, 87 Ill. 454; Mackey v. New York &c. R. Co. 35 N. Y. 75; Kissenger v. New York &c. R. Co. 56 N. Y. 538; Brown v. Hannibal &c. R. Co. 50 Mo. 461; 11 Am. R. 420; Houston &c. R. Co. v. Poras (Tex. Civ. App.); 29 S. W. 945; Thomas v. Delaware &c. R. Co. 8 Fed. 729; Delaware &c. R. Co. v. Shelton, 55 N. J. L. 342; 26 Atl. 937. See, also, Klein v. Jewett, 26 N. J. Eq. 474; Pennsylvania Co. v. Stegemeier, 118 Ind. 305; 10 Am. St. 136.

[118] Fero v. Buffalo &c. R. Co. 22 N. Y. 209; 78 Am. Dec. 178, and note; Longabaugh v. Virginia City &c. R. Co. 9 Nev. 271; Gagg v. Vetter, 41 Ind. 228; 13 Am. R. 322; Paducah &c. R. Co. v. Hoehl, 12 Bush (Ky.), 41; Telfer v. Northern R. Co. 1 Vroom (N. J.), 188. See, also, Andrews v. New York &c. R. Co. 60 Conn. 293; 22 Atl. 566; Illinois Cent. R. Co. v. Dick, 91 Ky. 434; 15 S. W. 665.

[119] Messenger v. Pennsylvania R. Co. 37 N. J. L. 531; 18 Am. R. 754; Hubbard v. Boston &c. R. Co. 162 Mass. 132; 38 N. E. 366; Pollock v. Eastern R. Co. 124 Mass. 158; Bailey v. New Haven &c. Co. 107 Mass. 496; Louisville &c. R. Co. v. Hackman, 17 Ky. L. 81; 30 S. W. 407; Railway Co. v. Schneider, 45 Ohio St. 678; 17 N. E. 321; Freeman v. Duluth &c. R. Co. 74 Mich. 86; 41 N. W. 872; 3 L. R. A. 594, and note.

[120] Evansville &c. R. Co. v. Clements, 32 Ind. App. 659; 70 N. E. 554.

[121] New York &c. R. Co. v. Kistler, 66 Ohio St. 326; 64 N. E. 130. The soundness of this decision, however, seems questionable.

[122] Text cited in Bilton v. Southern Pac. Co. 148 Cal. 443; 83 Pac. 441, 442.

reasonable care and take such precautions as the dangerous nature of the crossing may require.[123]

§ 1162. Backing and "kicking" cars.—It is frequently said that it is negligence per se to make a "flying switch" or "kick" a car over a crossing, or to push a train backward over a crossing, without warning and in the absence of a lookout.[124] It is doubtless true that there are many cases in which but one reasonable inference can be drawn, and the court can say, as a matter of law, that it is negligence to make a "flying switch" or "kick" a car over a crossing where people are likely to be, as, for instance, in a populous city, without giving any notice or taking other precautions to protect them,[125] or to back a train, especially when composed of flat cars, over such a crossing without warning or other precautions.[126] But we think that much must depend upon the peculiar circumstances of each particular case, and that it is going too far to say that making a "flying switch" or "kicking" or backing cars, is negligence per se under any

[123] Evansville &c. R. Co. v. Clements, 32 Ind. App. 659; 70 N. E. 554; Robinson v. Rockland &c. R. 99 Me. 47; 58 Atl. 57. See post, § 1163, et seq.

[124] 3 Lawson's Rights, Rem. & Pr. § 1187; Pierce Railroads, 356; note to Kentucky Cent. R. Co. v. Smith 93 Ky. 449; 20 S. W. 392; 18 L. R. A. 63; 2 Thomp. Neg. (2d ed.) §§ 1695–1697; Shearm. & Redf. Neg. (3rd ed.) § 446; Chicago Term. &c. R. Co. v. Walton (Ind. App.); 74 N. E. 988.

[125] French v. Taunton Branch Railroad, 116 Mass. 537; Delaware &c. R. Co. v. Converse, 139 U. S. 469; 11 Sup. Ct. 569; Robinson v. Western &c. R. Co. 48 Cal. 409; Chicago &c. R. Co. v. Garvy, 58 Ill. 83 (detached car sent over a much used crossing at night without brakeman or light); Brown v. New York &c. R. Co. 32 N. Y. 597; 88 Am. Dec. 353, and note; East Tennessee &c. R. Co. v. King, 81 Ala. 177; 2 So. 152; Kay v. Pennsylvania R. Co. 65 Pa. St. 269; 3 Am. R. 628; Peltier v. Louisville &c. R. Co. (Ky.); 39 S. W. 30; Pennsylvania R. Co. v. State, 61 Md. 108; Illinois Cent. R. Co. v. Hammer, 72 Ill. 347. See, also, O'Connor v. Missouri &c. R. Co. 94 Mo. 150; 7 S. W. 106; 4 Am. St. 364; Hinckley v. Cape Cod R. Co. 120 Mass. 257; Schindler v. Milwaukee &c. R. Co. 87 Mich. 400; 49 N. W. 670; Louisville &c. R. Co. v. Coleman, 86 Ky. 556. See, also, Mitchell v. Illinois Cent. R. Co. 110 La. Ann. 630; 34 So. 714; 98 Am. St. 472, 477, and note.

[126] Chicago &c. R. Co. v. Triplett, 38 Ill. 482; Chicago &c. R. Co. v. Sharp, 63 Fed. 532; Cooper v. Lake Shore &c. R. Co. 66 Mich. 261; 33 N. W. 306; 11 Am. St. 482; Eaton v. Erie R. Co. 51 N. Y. 544; Kansas Pac. R. Co. v. Ward, 4 Colo. 30; Bailey v. New Haven &c. Co. 107 Mass. 496.

and all circumstances.[127] It is certainly not negligence, if proper precautions are taken, and whether the company has taken such precautions and used reasonable care under the circumstances is generally a question of fact for the jury.[128] So, as in other cases, it is not actionable negligence unless it was a proximate cause of the injury complained of, and the plaintiff cannot recover if he was guilty of contributory negligence.[129]

§ 1163. Contributory negligence of travelers at railroad crossings—Generally.—At many places we have treated of contributory negligence, and at this place our purpose is to treat very generally of the doctrine as applied to accidents at railroad crossings. The general rules as to the presence or absence of contributory negligence in crossing cases are, in the main, much the same as in other cases of actions for personal injuries where there is no contract relation, such as that of carrier and passenger, or employer and employe, between the parties, but there is this important qualification, namely, that as the quantum of care to be exercised at railroad crossings is defined by

[127] See Sullivan v. Pennsylvania Co. (Pa. St.); 7 Atl. 177; Carroll v. Minnesota Valley R. Co. 13 Minn. 30, 36; 97 Am. Dec. 221; Ohio &c. R. Co. v. McDaneld, 5 Ind. App. 108; 31 N. E. 836; Pakalinsky v. New York &c. R. Co. 82 N. Y. 424.

[128] Alabama &c. R. Co. v. Summers, 68 Miss. 566; 10 So. 63; Bohan v. Milwaukee &c. R. Co. 58 Wis. 30; 15 N. W. 801; 15 Am. & Eng. R. Cas. 374; 61 Wis. 391; 21 N. W. 241; 19 Am. & Eng. R. Cas. 276; Ferguson v. Wisconsin &c. R. Co. 63 Wis. 145; 23 N. W. 123; 19 Am. & Eng. R. Cas. 285; Woodard v. New York &c. R. Co. 106 N. Y. 369; 13 N. E. 424; Howard v. St. Paul &c. R. Co. 32 Minn. 214; 20 N. W. 93; 19 Am. & Eng. R. Cas. 283; Barry v. New York &c. R. Co 92 N. Y. 289; 44 Am. R. 377; Illinois Cent. R. Co. v. Larson, 152 Ill. 326; 38 N. E. R. 784; York v. Maine Cent. R. Co. 84 Me. 117; 24 Atl. 790; 18 L. R. A. 60. Negligence unless they are taken. Bowles v. Chesapeake &c. R. Co. (W. Va.) 57 S. E. 131, 132 (citing text).

[129] Pennsylvania R. Co. v. State, 61 Md. 108; Lehigh &c. Coal Co. v. Lear, (Pa.) 9 Atl. 267 (question for the jury); Grippen v. New York &c. R. Co. 40 N. Y. (1 Hand.) 34; Hinckley v. Cape Cod R. Co. 120 Mass. 257 (nonsuit because of contributory negligence); Woodard v. New York &c. R. Co. 106 N. Y. 369 (same); Murphy v. Chicago &c. R. Co. 45 Iowa, 661; Drain v. St. Louis &c. R. Co. 86 Mo. 574 (question for jury); Delaware &c. R. Co. v. Converse, 139 U. S. 469; 11 Sup. Ct. 569 (same); Patton v. Railway Co. 89 Tenn. 370; 14 S. W. 485; 12 L. R. A. 184 (same); Chicago &c. R. Co. v. Hedges, 105 Ind. 398 (same); Phillips v. Milwaukee &c. R. Co. 77 Wis. 349; 46 N. W. 543; 9

the law, the question whether there was contributory negligence is more frequently a question of law than in other cases where damages are sought for personal injuries caused by negligence. The rule which seems to us to have the best foundation in principle, is, that in cases of collision between travelers and railroad trains the presumption, in the absence of anything to the contrary, is, that the traveler was guilty of negligence, and hence that, prima facie, his fault was the proximate cause of the injury.[130] It is established law that the track itself is a warning of danger, and it is a fact of which, because of its being a matter of general knowledge, courts take judicial notice, that multitudes of persons pass over railroad tracks in safety. It is also a matter of common knowledge, and, therefore, a matter judicially known, that reasonable care on the part of the traveler will in all ordinary cases enable him to cross the track in safety. These considerations require the conclusion, as we believe, that prima facie there was either a pure accident, or, if there was negligence, that the negligence of the plaintiff was nevertheless the proximate cause of the injury. It seems to us that evidence that a plaintiff received an injury at a railroad crossing of itself neither proves negligence on the part of the company nor the absence of contributory fault on the part of the injured person. But on this question there is conflict of authority, for many courts of high standing hold that the presumption is that there was no contributory negligence on the part of the plaintiff.[131] The rule supported by the weight of author-

L. R. A. 521; Howard v. St. Paul &c. R. Co. 32 Minn. 214; 20 N. W. 93.

[130] Cincinnati &c. R. Co. v. Butler, 103 Ind. 31; 2 N. E. 138; Rainey v. New York &c. R. Co. 68 Hun (N. Y.), 495; 23 N. Y. S. 80; Miller v. Louisville &c. R. Co. 128 Ind. 97; 27 N. E. 339; 25 Am. St. 416; Cleaves v. Pigeon &c. Co. 145 Mass. 541; 14 N. E. 646; Tucker v. Duncan, 9 Fed. 867; Bates v. New York &c. R. Co. 84 Hun (N. Y.), 287; 32 N. Y. S. 337. See, also, O'Connor v. New York &c. R. Co. 189 Mass. 361; 75 N. E. 614.

[131] Mynning v. Detroit &c. R. Co. 64 Mich. 93; 31 N. W. 147; 8 Am. St. 804; 28 Am. & Eng. R. Cas. 665; Glasscock v. Central &c. R. Co. 73 Cal. 137; 14 Pac. 518; Lyman v. Boston &c. R. Co. 66 N. H. 200; 20 Atl. 976; 11 L. R. A. 364; 45 Am. & Eng. R. Cas. 163; 20 Atl. 976; McBride v. Northern &c. R. Co. 19 Ore. 64; 23 Pac. 814; Smith v. Chicago &c. R. Co. 4 S. Dak. 71; 55 N. W. 717; 56 Am. & Eng. R. Cas. 123; Crumpley v. Hannibal &c. R. Co. 111 Mo. 152; 19 S. W. 820. See, also, Texas &c. Ry. Co. v. Gentry, 163 U. S. 353, 366; 16 Sup. Ct. 1104; Baltimore &c. R. Co. v. Landrigan, 191 U. S. 461, 474; 24 Sup. Ct. 137; Weller v. Chicago

ity is, as we have already said, that the burden of proving contributory negligence is on the defendant,[132] but upon this question there is great conflict of authority.[133] Granting, however, that the rule is that in cases other than actions to recover for injuries at crossings the burden is on the defendant, there is, nevertheless, ample reason for holding that it should not apply in crossing cases. Where there is a controversy as to the facts, or where the facts are such that men of fair intelligence may draw different conclusions, the question of contributory negligence on the part of a traveler is a question of fact for the jury,[134] but the jury as to the law must act upon the in-

&c. R. Co. 164 Mo. 180; 64 S. W. 141; 86 Am. St. 592; Pittsburg &c. R. Co. v. Reed, 36 Ind. App. 67; 75 N. E. 50; Nichols v. Baltimore &c. R. Co. 33 Ind. App. 229, 240, 241; 71 N. E. 170, and numerous authorities there cited. But this presumption cannot be indulged as against facts to the contrary. Woolf v. Washington R. &c. Co. 37 Wash. 491; 79 Pac. 997; Rollins v. Chicago &c. R. Co. 139 Fed. 639.

[132] Of the many cases affirming that the burden is on the defendant, we cite: Railroad Co. v. Gladmon, 15 Wall. (U. S.) 401; Indianapolis &c. R. Co. v. Horst, 93 U. S. 291; Montgomery &c. Co. v. Montgomery &c. R. Co. 86 Ala. 372; 5 So. 735; Louisville &c. R. Co. v. Goetz, 79 Ky. 442; 42 Am. R. 227; Northern &c. R. Co. v. State, 31 Md. 357; Hicks v. Pacific &c. R. Co. 65 Mo. 34; Northern Pac. R. Co. v. O'Brien, 1 Wash. 599; 21 Pac. 32; Cleveland &c. R. Co. v. Crawford, 24 Ohio St. 631; 15 Am. R. 633; Cassidy v. Angell, 12 R. I. 447; 34 Am. R. 690; Danner v. South Carolina R. Co. 4 Rich. L. (S. C.) 329; 55 Am. Dec. 678; Milwaukee &c. R. Co. v. Hunter, 11 Wis. 160; 78 Am. Dec. 699; Sanderson v. Frazier, 8 Colo. 79; 54 Am. R. 544. See, also, under late Indiana statute, Pittsburg &c. R. Co. v. Reed 36 Ind. App. 67; 75 N. E. 50, 51.

[133] Of the many cases affirming that the burden is on the plaintiff, we cite: Wheelright v. Boston &c. R. Co. 135 Mass. 225; 16 Am. & Eng. R. Cas. 315; Willoughby v. Chicago &c. R. Co. 37 Iowa, 432; Kauffman v. Cleveland &c. R. Co. 144 Ind. 456; 43 N. E. 446; Perkins v. Eastern &c. R. Co. 29 Me. 307; 50 Am. Dec. 589; Mississippi &c. R. Co. v. Mason, 51 Miss. 234; Moore v. Mayor of Shreveport, 3 La. Ann. 645; Prather v. Richmond &c. R. Co. 80 Ga. 427; 9 S. E. 530; 12 Am. St. 263; Owens v. Richmond &c. R. Co. 88 N. C. 502; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Walsh v. Oregon &c. R. Co. 10 Ore. 250; Galena &c. R. Co. v. Fay, 16 Ill. 558; 63 Am. Dec. 323; Park v. O'Brien, 23 Conn. 339; Greenleaf v. Illinois &c. R. Co. 29 Iowa, 14; 4 Am. R. 181; Kansas &c. R. Co. v. Pointer, 14 Kan. 37; Reynolds v. New York &c. R. Co. 58 N. Y. 248; Boss v. Providence &c. R. Co. 15 R. I. 149; 1 Atl. 9; Lesan v. Maine &c. R. Co. 77 Me. 85; 23 Am. & Eng. R. Cas. 245.

[134] Cincinnati &c. R. Co. v. Grames, 136 Ind. 39, 49; 34 N. E.

structions of the court. A railway company[135] and a traveler are bound to exercise ordinary care,[136] but, as we have elsewhere shown, what is ordinary care generally depends upon the facts of the particular case, and, in most instances, is a question of fact for the jury under instructions from the court.[137] The care of a traveler must be such, in cases where he is not misled, without fault on his part, by the negligence of the company, as would be exercised by a man of ordinary prudence who knows that he is about to go into a place where there is constant danger,[138] who knows that the trains of the company have a prior right of passage,[139] and who knows, also, that he cannot omit precautions on his part upon the assumption that there will not be negligence on the part of the employes of the com-

714; McKeever v. Market St. &c. R. Co. 59 Cal. 294, 300; Longenecker v. Pennsylvania &c. R. Co. 105 Pa. St. 328; Fernandes v. Sacramento &c. R. Co. 52 Cal. 45, 50; Young v. Detroit &c. R. Co. 56 Mich. 430; 23 N. W. 67; 19 Am. & Eng. R. Cas. 417; Palmer v. Detroit &c. R. Co. 56 Mich. 1; 22 N. W. 88; Tyler v. New York &c. R. Co. 137 Mass. 238; 19 Am. & Eng. R. Cas. 296; Schmidt v. Burlington &c. R. Co. 75 Iowa, 606; 39 N. W. 916; Conway v. Troy &c. R. Co. 41 Hun (N. Y.) 639; Friedman v. Dry Dock &c. R. Co. 110 N. Y. 676; 18 N. E. 482; Geist v. Detroit &c. R. Co. 91 Mich. 446; 51 N. W. 1112; Kane v. New York &c. R. Co. 132 N. Y. 160; 30 N. E. 256; Philadelphia &c. R. Co. v. Carr, 99 Pa. St. 505; Johnson v. Gulf &c. R. Co. 2 Tex. Civ. App. 139; 21 S. W. 274; McGhee v. White, 66 Fed. 502; Chicago &c. R. Co. v. Sharp, 63 Fed. 532; Heath v. Stewart, 90 Wis. 418; 63 N. W. 1051; St. Louis &c. R. Co. v. Box. 52 Ark. 368; 12 S. W. 757. It is a mixed question of law and fact in such cases as those referred to in the text, inasmuch as it is the duty of the court to declare the law, and of the jury to accept the law as declared by the court.

[135] Garraher v. San Francisco &c. R. Co. 81 Cal. 98; 22 Pac. 480; Houston &c. R. Co. v. Brin, 77 Tex. 174; 13 S. W. 886. See Becke v. Missouri &c. R. Co. 102 Mo. 544; 13 S. W. 1053; 9 L. R. A. 157.

[136] Chicago &c. R. Co. v. Fisher, 49 Kan. 460; 30 Pac. 462. See, generally, Olson v. Chicago &c. R. Co. 81 Wis. 41; 50 N. W. 1096; Hicks v. Missouri &c. R. Co. 46 Mo. App. 304.

[137] Winstanley v. Chicago &c. R. Co. 72 Wis. 375; 39 N. W. 856; Duame v. Chicago &c. R. Co. 72 Wis. 523; 40 N. W. 394; 7 Am. St. 879.

[138] Daniel v. Metropolitan &c. R. Co. L. R. 5 H. L. 45; L. R. 3 C. P. 391; State v. Maine Central R. Co. 76 Me. 357; 49 Am. R. 622.

[139] Brown v. Texas &c. R. Co. 42 La. Ann. 350; 7 So. 682; 21 Am. St. 374; Continental Improvement Co. v. Stead, 95 U. S. 161; Davey v. London &c. R. Co. L. R. 12 Q. B. D. 70; Indiana &c. R. Co. v. Hammock, 113 Ind. 1; 14 N. E. 737.

pany.[140] Where the measure of duty is prescribed by law, and there is no controversy as to the facts, and but one reasonable inference to be fairly and justly drawn from such facts, the question whether due care was exercised is one of law for the court.[141] Where the case goes to the jury, it is the duty of the court to instruct the jury as to the law, and, as we have said, the question of negligence is usually, but not always, one of mixed law and fact.[142]

§ 1164. Contributory negligence at crossings—Illustrative cases. —It is held to be contributory negligence, in a case where the view is obstructed, for a traveler to drive so rapidly in approaching a crossing as to drown the noise of moving trains,[143] and so it is held of one

[140] Howard v. Kansas City &c. R. Co. 41 Kan. 403; 21 Pac. 267; New York &c. R. Co. v. Kellam, 83 Va. 851; 3 S. E. 703; Runyon v. Central R. Co. 25 N. J. L. 556; Murray v. Pontchartrain Railway Co. 31 La. Ann. 490; Childs v. New Orleans &c. Railway Co. 33 La. Ann. 154; Houston v. Vicksburgh R. Co. 39 La. Ann. 796; 2 So. 562; Weeks v. New Orleans &c. R. Co. 40 La. Ann. 800; 5 So. 72; 8 Am. St. 560; post, § 1165.

[141] Post, § 1179; Faris v. Hoberg, 134 Ind. 269; 33 N. E. 1028; 39 Am. St. 261; Parks v. Ross. 11 How. (U. S.) 362; Hoye v. Chicago &c. R. Co. 62 Wis. 666; 23 N. W. 14; West Chester &c. R. Co. v. McElwee, 67 Pa. St. 311; Colorado &c. R. Co. v. Holmes, 5 Colo. 197; Pike v. Grand Trunk &c. R. Co. 39 Fed. 255; Northern Pac. R. Co. v. Freeman, 174 U. S. 379; 19 Sup. Ct. 763; Conkling v. Erie R. Co. 63 N. J. L. 338; 43 Atl. 666, 667 (citing text). But in order to authorize the court to direct a verdict the case must be a clear one. Detroit &c. R. Co. v. Van Steinburg, 17 Mich. 99, 120; Walsh v. Oregon &c. R. Co. 10 Ore. 250. There must, according to what we regard as the better opinion, be more than a scintilla of evidence in order to carry the case to the jury. Hathaway v. East Tenn. &c. R. Co. 29 Fed. 489; Goodlett v. Louisville &c. R. Co. 122 U. S. 391; 7 Sup. Ct. 1254; Beaulien v. Portland &c. R. Co. 48 Me. 291; 6 Thompson Negligence (2d Ed.), 7393.

[142] Wallace v. Western &c. R. Co. 98 N. Car. 494; 4 S. E. 503; 2 Am. St. 346; Rogers v. Leyden, 127 Ind. 50; 26 N. E. 210; Metropolitan &c. R. Co. v. Jackson, 3 L. R. App. Cas. 193; Manzoni v. Douglas, L. R. 6 Q. B. D. 145; Central &c. R. Co. v. Henigh, 23 Kan. 347; 33 Am. R. 167; Wabash &c. R. Co. v. Shacklet, 105 Ill. 364; 44 Am. R. 791; Kansas &c. R. Co. v. Ward, 4 Colo. 30; Knight v. Pontchartrain &c. R. Co. 23 La. Ann. 462; 6 Thomp. Neg. (2d ed.) § 7408; Beach Contributory Negligence, § 444.

[143] Pepper v. Southern &c. R. Co. 105 Cal. 389; 38 Pac. 974. See Wilson v. New York &c. R. Co. 18 R. I. 598; 29 Atl. 300; Crandall v. Lehigh &c. R. Co. 72 Hun (N. Y.) 431; 25 N. Y. S. 151; McKinney v. Chicago &c. R. Co. 87 Wis. 282; 58

who occupies such a position in the vehicle as prevents him from seeing an approaching engine.[144] Where one approaches a railroad crossing with his eyes or ears so covered as to prevent him from seeing or hearing approaching trains, and does not resort to other means to ascertain whether a train is approaching, he is guilty of contributory negligence.[145] One who suffers his attention to be attracted to the movements of another person, and takes no precautions to avoid danger from moving trains, cannot recover damages for injuries caused by a collision.[146] A man who crosses behind a freight train

N. W. 386; Thomas v. Chicago &c. R. Co. 86 Mich. 496; 49 N. W. 547; Nash v. New York &c. R. Co. 125 N. Y. 715; 26 N. E. 266; Philadelphia &c. R. Co. v. Peebles, 67 Fed. 591; Ward v. Richmond &c. R. Co. 43 Fed. 422; Blackwell v. St. Louis &c. R. Co. 47 La. Ann. 268; 16 So. 818; 49 Am. St. 371; Reeves v. Dubuque &c. R. Co. 92 Iowa 32; 60 N. W. 243; Brunette v. Chicago &c. R. Co. 86 Wis. 197; 56 N. W. 478; Dullea v. Chicago &c. R. Co. 86 Wis. 173; 56 N. W. 477; Littaur v. Narragansett &c. R. Co. 61 Fed. 591. Or to protect himself from injury after reaching a point where he can discover the train. Washington &c. R. Co. v. Lacey, 94 Va. 460; 26 S. E. 834 (citing text). But see Alexander v. Richmond &c. R. Co. 112 N. Car. 720; 16 S. E. 896.

[144] Atchison &c. R. Co. v. Booth, 53 Ill. App. 303. See Grostick v. Detroit &c. R. Co. 90 Mich. 594; 51 N. W. 667; 49 Am. & Eng. R. Cas. 332. But it has been held not to be negligence for the driver of a wagon to sit on it in the usual manner adopted by persons engaged in the same business, although in thus sitting he was so low that he could not readily obtain a view of the track nor readily control his team. Bates v. New York &c. R. Co. 60 Conn. 259; 22 Atl. 538. The doctrine of the case cited is of doubtful soundness. Brady v. Toledo &c. R. Co. 81 Mich. 616; 45 N. W. 1110.

[145] Texas &c. R. Co. v. Fuller, 5 Tex. Civ. App. 660; 24 S. W. 1090. See, generally, Horn v. Baltimore &c. R. Co. 54 Fed. 301; Garlich v. Northern Pac. R. Co. 131 Fed. 837; Colorado &c. R. Co. v. Thomas, 33 Colo. 517; 81 Pac. 801. In Blight v. Camden &c. R. Co. 143 Pa. St. 10; 21 Atl. 995, it was held that failure to see a train because of rain and an umbrella did not excuse the traveler, and in Rodrian v. New York &c. R. Co. 125 N. Y. 526; 26 N. E. 741; 11 Am. St. 917, it was held that a woman who attempted to cross with her head covered with a shawl was guilty of contributory negligence. But see Petrie v. Columbia &c. R. Co. 29 S. Car. 303; 7 S. E. 515.

[146] Adams v. New York &c. R. Co. 21 N. Y. Supp. 681; 66 Hun (N. Y.) 634. As we have elsewhere shown, a person about to get upon a railroad track must not suffer his attention to be absorbed so that he cannot exercise care proportionate to the danger before him, and upon this principle it is held that one who permits his attention to be absorbed by an effort to get on a train

which obscures his view is held to be guilty of negligence if he proceeds without waiting until the train has moved a sufficient distance to enable him to obtain a clear view of the track.[147] A person who goes upon a railroad track in a vehicle, with others who are singing and shouting in such a manner as to prevent the approach of trains from being heard, is guilty of negligence.[148] It is held to be negligence for a person to rush rapidly across the tracks without making a careful observation to ascertain whether trains are approaching,[149] and so it is for a person who attempts to cross in front of a locomotive which is standing still, but is about to be set in motion, as anyone could see.[150] Where, however, there is no indication that the locomotive is to be put in motion, it may not be per se negligence to cross in front of it.

is guilty of contributory negligence. Weeks v. New Orleans &c. R. Co. 40 La. Ann. 800; 5 So. 72; 8 Am. St. R. 560. So of one who is engaged in conversation with a companion. Jensen v. Michigan &c. R. Co. 102 Mich. 176; 60 N. W. 57.

[147] Kraus v. Pennsylvania &c. R. Co. 139 Pa. St. 272; 20 Atl. 993; Daniels v. Staten Island &c. R. Co. 125 N. Y. 407; 26 N. E. 466. See Chicago &c. R. Co. v. Florens, 32 Ill. App. 365; Baltimore &c. R. Co. v. Walborn, 127 Ind. 142; 26 N. E. 207. See, also, Jackson v. Mobile &c. R. Co. (Miss.); 42 So. 236. It is held that one does not become a trespasser by passing around a car obstructing the crossing, though he steps into the yard of the company in so doing. Chicago &c. R. Co. v. McGrath, 107 Ill. App. 100, affirmed in 203 Ill. 511; 68 N. E. 69.

[148] Koehler v. Rochester &c. R. Co. 66 Hun (N. Y.) 566; 21 N. Y. S. 844.

[149] Chicago &c. R. Co. v. Fitzsimmons, 40 Ill. App. 360. See McNamara v. New York &c. R. Co. 19 N. Y. S. 497; Whalen v. New York &c. R. Co. 61 Hun (N. Y.) 623; 15 N. Y. S. 941; Smith v. New York &c. R. Co. 63 Hun (N. Y.) 624; 17 N. Y. S. 400; Southern R. Co. v. Carroll, 138 Fed. 638.

[150] Mehegan v. New York &c. R. Co. 64 Hun (N. Y.) 637; 19 N. Y. S. 444; Guta v. Lake Shore &c. R. Co. 81 Mich. 291; 45 N. W. 821. See, also, Chicago &c. R. Co. v. Laughlin (Kans.); 87 Pac. 749. We suppose that it cannot invariably be held negligence for a traveler to cross in front of a motionless locomotive (quoted in St. Louis &c. R. Co. v. Dawson, 64 Kans. 99; 67 Pac. 521, 525); but if he knows, or ought to know by the exercise of care proportionate to the dangers incident to railroad crossings, that the locomotive is about to be put in motion or be started, he is guilty of negligence if he assumes to risk crossing before it has passed. If the locomotive appears to be about ready to be started then it is negligence, as we think, for the traveler to take the chance of crossing before it moves. Union Pacific R. Co. v. Hutchinson, 39 Kan. 485; 18 Pac. 705.

§ 1165. Duty of traveler—Generally.—The duty of a traveler in attempting to cross or in crossing a railroad track, is to exercise ordinary care. This duty rests upon him in all cases, but what is ordinary care may in some instances depend upon the particular facts. As we shall see further on, the rule as to the quantum of care required at railroad crossings is different from the rule which ordinarily prevails. The duty to exercise ordinary care exists in all cases, but what is ordinary care in one case may not be ordinary care in another.[151] Care, it is said, is never ordinary care unless it is proportionate to the known danger.[152] The traveler is not relieved from the duty of exercising care by a breach of duty on the part of the railroad company. A violation of a municipal ordinance or of a statute is ordinarily negligence on the part of the railroad company, but the violation of an ordinance or a statute does not relieve the traveler from the duty which the law imposes upon him.[153] In all cases where

[151] Continental Improvement Co. v. Stead, 95 U. S. 161; Baltimore &c. R. Co. v. Griffith, 159 U. S 603; 16 Sup. Ct. 105.

[152] Washington &c. R. Co. v. Lacey, 94 Va. 460; 26 S. E. 834, 839 (citing text); Stokes v. Southern R. Co. 104 Va. 817; 52 S. E. 855. See, also, Chicago &c. R. Co. v. Thomas, 155 Ind. 634; 58 N. E. 1040. More care or greater precaution may be required where view is obstructed than might otherwise be required. Atlantic &c. R. Co. v. Rieger, 95 Va. 418; 28 S. E. 590; Southern R. Co. v. Jones (Va.); 56 S. E. 155.

[153] Miller v. Terre Haute &c. R. Co. 144 Ind. 323; 43 N. E. 257; Cleveland &c. Railroad Co. v. Elliott, 28 Ohio St. 340; Pennsylvania Co. v. Rathgeb, 32 Ohio St. 66; Horn v. Baltimore &c. R. Co. 54 Fed. 301; Collins v. New York &c. R. Co. 92 Hun (N. Y.) 563; 36 N. Y. S. 942; Blackwell v. St. Louis &c. R. Co. 47 La. Ann. 268; 16 So. 818; 49 Am. St. 371; Delaware &c. R. Co. v. Heferan, 57 N. J. L. 578; 30 Atl. 578; Chicago &c. R. Co. v. Hedges, 118 Ind. 5, 9; 20 N. E. 530; Schofield v. Chicago &c. R. Co. 114 U. S. 615; 5 Sup. Ct. 1125; Ernst v. Hudson River &c. R. Co. 39 N. Y. 61; 100 Am. Dec. 405, and note; Chicago &c. R. Co. v. Crisman, 19 Colo. 30; 34 Pac. 286; Moore v. Keokuk &c. R. Co. 89 Iowa, 223; 56 N. W. 430; Marty v. Chicago &c. R. Co. 38 Minn. 108; 35 N. W. 670; Hinckley v. Cape Cod &c. R. Co. 120 Mass. 257; Richardson v. New York &c. R. Co. 45 N. Y. 846; Brown v. Milwaukee &c. R. Co. 22 Minn. 165; Freeman v. Duluth &c. R. Co. 74 Mich. 86; 41 N. W. 872; 3 L. R. A. 594, and note. See, also, Payne v. Chicago &c. R. Co. 136 Mo. 562; 38 S. W. 308, 317 (citing text). "Negligence of the company's employes, in their particular capacity, was no excuse for negligence on her (plaintiff's) part." Per Court in Railroad Co. v. Houston, 95 U. S. 697. See, generally, Allyn v. Boston &c. R. Co. 105

the right of recovery is based upon negligence the rule supported by authority is, that, in order to recover, the plaintiff must himself exercise care, and is not absolved from this duty no matter how clear the negligence of the defendant.[154] Where, however, the acts and conduct of the defendant are such as may be justly regarded as willful, the general rule does not apply, nor, we may say in passing, does it fully apply where the defendant is negligent and the negligence is such as to mislead the plaintiff. But the plaintiff cannot be heard to say that he has been misled unless he has used such care under the circumstances to ascertain the nature of the danger and guard against it, as a man of ordinary prudence would have exercised under similar conditions.[155] It cannot be inferred from the mere fact that a defendant was guilty of negligence that the plaintiff was misled. The fact that there was negligence on the part of the defendant must be supplemented by evidence that there were such acts as would mislead a man of ordinary prudence or the plaintiff cannot successfully assert that he was misled by the defendant. As a railroad track is a warning of danger, one who attempts to cross it must act with care proportionate to the danger, and not suffer his attention to be diverted from the danger before him, and he must keep his faculties in active exercise. It is his duty to keep his faculties in condition for exercise and to exercise them.[156] Mental absorption or reverie

Mass. 77; 2 Thomp. Neg. (2d ed.) § 1606; Beach Contr. Neg. § 188. The fact that a train is moving at a rate of speed forbidden by statute or by ordinance will not excuse a traveler who attempts to cross in front of it. Korrady v. Lake Shore &c. R. Co. 131 Ind. 261, 265; 29 N. E. 1069; Railroad Co. v. Houston, 95 U. S. 697; Cadwallader v. Louisville &c. R. Co. 128 Ind. 518; 27 N. E. 161.

[154] Text quoted as stating the true rule in White v. Chicago &c. R. Co. 102 Wis. 489; 78 N. W. 585, 588.

[155] Korrady v. Lake Shore &c. R. Co. 131 Ind. 261; 29 N. E. 1069; Cadwallader v. Louisville &c. R. Co. 128 Ind. 518; 27 N. E. 161; White v. Chicago &c. R. Co. 102 Wis. 489; 78 N. W. 585, 586 (citing text). See, also, Moore v. Keokuk R. Co. 89 Ia. 223; 56 N. W. 430; Greenwood v. Railroad Co. 124 Pa. St. 572; 17 Atl. 188; 3 L. R. A. 44; 10 Am. St. 614; Randall v. Railroad Co. 104 N. Car. 410; 10 S. E. 691; Russell v. Railroad Co. 118 N. Car. 1098; 24 S. E. 512; Brennan v. Pennsylvania R. Co. (N. J.) 62 Atl. 177, 178.

[156] In Oleson v. Lake Shore &c. R. Co. 143 Ind. 405; 42 N. E. 736; 32 L. R. A. 149, after reviewing the authorities, the court said: "There is no exception to the rule stated as to the traveler's duty at a crossing, except where the traveler, by some act of the company, has been misled or thrown off his guard, and thus prevented from taking proper

will not excuse the traveler who omits to perform the duty of looking and listening.[157] If the traveler could have seen the train by looking, the presumption is that he did not look, or if he did look did not heed what he saw.[158] This presumption, in conjunction with the fact that the courts judicially know that great throngs of persons daily cross railroad tracks without receiving injury, seems to us to render logical the conclusion that prima facie an accident at a crossing is attributable to the negligence of the traveler. A traveler who knows that a train is due must take care to avoid it, and this knowledge imposes upon him a somewhat higher exercise of care than if he was not in possession of such knowledge.[159] Principle requires that in such a case the person who attempts to cross the track should be

precautions." See, generally, Lake Erie &c. R. Co. v. Stick, 143 Ind. 449; 41 N. E. 365; Hinken v. Iowa Central R. Co. 27 Iowa, 603; 66 N. W. 882; Cincinnati &c. R. Co. v. Duncan, 143 Ind. 524; 42 N. E. 37; Louisville &c. R. Co. v. Stommel, 126 Ind. 35; 25 N. E. 863. The decision in Indianapolis &c. R. Co. v. Neubacher, 16 Ind. App. 21; 43 N. E. 576; 44 N. E. 669, seems to us to be opposed to the decisions of the supreme court of that state and to the general current of opinion.

[157] Havens v. Erie R. Co. 41 N. Y. 296; Mann v. Belt R. Co. 128 Ind. 138, 143; 26 N. E. 819; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Davis v. New York &c. R. Co. 47 N. Y. 400; Butterfield v. Western R. Co. 10 Allen (Mass.) 532; 87 Am. Dec. 678; Allyn v. Boston &c. R. Co. 105 Mass. 77; Wheelock v. Boston &c. R. Co. 105 Mass. 203; Lake Shore &c. R. Co. v. Sunderland, 2 Bradw. (Ill.) 307; Oleson v. Lake Shore &c. R. Co. 143 Ind. 405; 42 N. E. 736; 32 L. R. A. 149. See, also, Hood v. Lehigh &c. R. Co. (N. Y.) 78 N. E. 1105.

[158] Wilcox v. Rome &c. R. Co. 39 N. Y. 358; 100 Am. Dec. 440; Oleson v. Lake Shore &c. R. Co. 143 Ind. 405; 42 N. E. 736; 32 L. R. A. 149; Haetsch v. Chicago &c. R. Co. 87 Wis. 304; 58 N. W. 393; Smith v. Philadelphia &c. R. Co. 160 Pa. St. 117; 28 Atl. 641; Brown v. Milwaukee &c. R. Co. 22 Minn. 165; Weyl v. Chicago &c. R. Co. 40 Minn. 350; 42 N. W. 24; Myers v. Baltimore &c. R. Co. 150 Pa. St. 386; 24 Atl. 747; Miller v. Truesdale, 56 Minn. 274; 57 N. W. 661; Conkling v. Erie R. Co. 63 N. J. 338; 43 Atl. 666, 668 (quoting text); Green v. Los Angeles &c. R. Co. 143 Cal. 31; 76 Pac. 719; 101 Am. St. 68; Payne v. Chicago &c. R. Co. 136 Mo. 562; 38 S. W. 308; Hook v. Missouri Pac. R. Co. 162 Mo. 569; 63 S W. 360; Marshall v. Green Bay &c. R. Co. 125 Wis. 96; 103 N. W. 249; Rollins v. Chicago &c. R. Co. 139 Fed. 639. But see Birmingham So. R. Co. v. Lintner, 141 Ala. 420; 38 So. 363; Kansas City &c. R. Co. v. Weeks, 135 Ala. 614; 34 So. 16.

[159] Palys v. Erie R. Co. 30 N. J. Eq. 604; Brooks v. Buffalo &c. R. Co. 1 Abb. App. Dec. 211; Reynolds v. New York &c. R. Co. 58 N. Y. 248.

held guilty of negligence as matter of law if there are obstructions to sight or hearing, since no one can be said to exercise ordinary care who voluntarily encounters a danger that he knows is imminent, unless the situation and conditions are such as to enable him to see that he can proceed with safety. Analogous cases emphatically affirm that one who assumes to proceed upon a calculation of chances is guilty of negligence, and the rule established by those cases applies to such cases as we have mentioned.

§ 1166. Duty of the traveler to look and listen.—The overwhelming weight of authority affirms the rule to be that a traveler approaching a railroad crossing must look and listen.[160] If this duty is omitted the court is bound to instruct, as matter of law, that a

[160] Elliott v. Chicago &c. R. Co. 150 U. S. 245; 14 Sup. Ct. 85; Louisville &c. R. Co. v. Richards, 100 Ala. 365; 13 So. 944; Blount v. Grand Trunk &c. R. Co. 61 Fed. 375; St. Louis &c. R. Co. v. Martin, 61 Ark. 549; 33 S. W. 1070; Louisville &c. R. Co. v. Stephens, 13 Ind. App. 145; 40 N. E. 148; Steinhofel v. Chicago &c. R. Co. 92 Wis. 123; 65 N. W. 852; Denver &c. R. Co. v. Gustafson, 21 Colo. 393; 41 Pac. 505; Engrer v. Ohio &c. R. Co. 142 Ind. 618; 42 N. E. 217; Romeo v. Boston &c. R. Co. 87 Me. 540; 33 Atl. 24; Lake Erie &c. R. Co. v. Stick, 143 Ind. 449; 41 N. E. 365; Hayden v. Missouri &c. R. Co. 124 Mo. 566; 28 S. W. 74; Sprow v. Boston &c. R. Co. 163 Mass. 330; 39 N. E. 1024; Schlimgen v. Chicago &c. R. Co. 90 Wis. 186; 62 N. W. 1045; Johnson v. Chesapeake &c. Co. 91 Va. 171; 21 S. E. 238; Connerton v. Delaware &c. Co. 169 Pa. St. 339; 32 Atl. 416; Gardiner v. Detroit &c. R. Co. 97 Mich. 240; 56 N. W. 603; Pennsylvania Co. v. Leary, 56 N. J. L. 705; 29 Atl. 678; Owmsbee v. Boston &c. R. Co. 14 R. I. 102; 51 Am. R. 354, and note; Wabash &c. R. Co. v. Wallace, 110 Ill. 114; 19 Am. & Eng. R. Cas. 359; Gora v. Southern R. 67 S. Car. 347; 45 S. E. 810; White v. Chicago &c. R. Co. 102 Wis. 489; 78 N. W. 585, 587 (citing text); Stowell v. Erie R. Co. 98 Fed. 520; Pennsylvania R. Co. v. Pfuelb, 60 N. J. L. 278; 37 Atl. 1100; Little Rock &c. R. Co. v. Blewett, 65 Ark. 235; 45 S. W. 548, 549 (citing text); Pierce on Railroads, 343; Beach Contributory Negligence, §§ 181, 184; Wood Railroads, 1518; Elliott Roads and Streets (2d Ed.) 796; 2 Thompson on Neg. (2d Ed.) § 1637, et seq. See Cincinnati &c. R. Co. v. Wright, 16 Ky. L. 1277; 34 S. W. 526; Central &c. R. Co. v. Bush (Tex. Civ. App.), 34 S. W. 133; Texas &c. R. Co. v. Spradling, 72 Fed. 152. Also, Atchison &c. R. Co. v. Shaw, 56 Kan. 519; 43 Pac. 1129. But compare Gulf &c. R. Co. v. Melville (Tex. Civ. App.), 87 S. W. 863; Wilson v. Chesapeake &c. R. Co. 27 Ky. 778; 86 S. W. 690. See Butler v. New York &c. R. Co. 177 Mass. 191; 58 N. E. 592 (citing text).

verdict be returned in favor of the defendant company,[161] except in cases of a peculiar nature, where there are facts excusing the performance of the duty.[162] The quantum of care in such cases is prescribed by law,[163] according to the rule in most jurisdictions, and it

[161] Tolman v. Syracuse &c. R. Co. 98 N. Y. 198; 50 Am. 649; Railroad Co. v. Houston, 95 U. S. 697; Durkee v. President &c. Co. 88 Hun (N. Y.) 471; 34 N. Y. S. 978. See post, § 1179; Schofield v. Chicago &c. R. Co. 114 U. S. 615; 5 Sup. Ct. 1128; Cowen v. Dietrich, 101 Md. 46; 60 Atl. 282; O'Connor v. New York &c. R. Co. 189 Mass. 361; 75 N. E. 614; Little Rock &c. R. Co. v. Blewett, 65 Ark. 235; 45 S. W. 548, 549 (citing text).

[162] In Tiffin v. St. Louis &c. R. Co. (Ark.); 93 S. W. 564, 566, it is said: "The exceptions to the general rule usually fall within the following classes of cases: (1) Where the circumstances were such that it would have availed nothing in preventing the injury if the injured party had looked and listened. This exception is recognized in the case of Martin v. Little Rock &c. R. Co. 62 Ark. 156; 34 S. W. 545, where it is said that "it is only when it appears from the evidence that he might have seen had he looked, or might have heard had he listened, that his failure to look and listen will necessarily constitute negligence." (2) Where the circumstances were so unusual as that the injured party could not reasonably have expected the approach of a train at the time he went upon the track. French v. Railroad Co. 116 Mass. 537; McGhee v. White, 66 Fed. 502; 13 C. C. A. 608; Bonnell v. Delaware &c. R. Co. 39 N. J. L. 189. (3) Where the injured person was a passenger or escort going to or alighting from a train, and hence under an implied invitation and assurance by the company that he could cross the track in safety. Railway Co. v. Johnson, 59 Ark. 122; 26 S. W. 593; St. Louis &c. R. Co. v. Tomlinson, 69 Ark. 489; 64 S. W. 347; Wheelock v. Boston &c. R. Co. 105 Mass. 203. (4) Where the direct act of some agent of the company had put the person off his guard and induced him to cross the track without precaution. 3 Elliott Railroads, § 1171; 2 Wood Railroads, p. 1546; Chicago &c. R. Co. v. Prescott, 59 Fed. 237; 8 C. C. A. 109; 23 L. R. A. 654; Eddy v. Powell, 49 Fed. 814; 1 C. C. A. 448; Merrigan v. Boston &c. R. Co. 154 Mass. 189; 28 N. E. 149; Directors &c. v. Wales, L. R. 7 H. of L. 12; Cleveland &c. R. Co. v. Keely, 138 Ind. 600; 37 N. E. 406; Abbett v. Chicago &c. R. Co. 30 Minn. 482; 16 N. W. 266."

[163] Smith v. Wabash R. Co. 141 Ind. 92; 40 N. E. 270; Mann v. Belt R. Co. 128 Ind. 138, 142 (citing Beach Contributory Neg. § 63; Ohio &c. R. Co. v. Hill, 117 Ind. 56; 18 N. E. 461); Pennsylvania Co. v. Beale, 73 Pa. St. 504; 13 Am. R. 753; State v. Maine &c. R. Co. 76 Me. 357; 49 Am. R. 622; Payne v. Chicago &c. R. Co. 136 Mo. 562; 38 S. W. 308, 311; Atchison &c. R. Co. v. Holland, 60 Kans. 209; 56 Pac. 6; and see, also, Woolf v. Washington R. &c. Co. 37 Wash. 491; 79

is a breach of duty precluding a recovery for the traveler to omit to look and listen. It is as much a breach of duty on the part of the traveler to omit to look and listen as it is for a railroad company to omit the signals required by law, because a duty may be as effectively prescribed by the common law as by legislative enactment.[164] The fact that a flagman signals the traveler to cross does not absolutely relieve the latter from the duty of looking and listening,[165] but that fact may be sufficient to carry the case to the jury.[166] The general rule is that it is not sufficient to look in one direction, but the traveler is under a duty to look in both directions.[167] The duty to look and listen requires the traveler to exercise care to select a position from which an effective observation can be made.[168] The mere fact

Pac. 997; Northern Pac. R. Co. v. Freeman, 174 U. S. 379; 19 Sup. Ct. 763; Grand Trunk R. Co. v. Cobleigh, 78 Fed. 784.

[164] Some of the courts hold, correctly as we believe, that the rule that the plaintiff must look and listen is a rule of law, and not merely a rule of evidence. Aiken v. Pennsylvania R. Co. 130 Pa. St. 380; 18 Atl. 619; 17 Am. St. 775. See Union &c. R. Co. v. State, 72 Md. 153; 19 Atl. 449; 42 Am. & Eng. R. Cas. 172; Allen v. Maine &c. R. Co. 82 Me. 111; 19 Atl. 105; Kohler v. Pennsylvania &c. R. Co. 135 Pa. St. 346; 19 Atl. 1049; Brown v. Texas &c. R. Co. 42 La. Ann. 350; 7 So. 682; 21 Am. St. 374; McBride v. Northern Pacific R. Co. 19 Ore. 64; 23 Pac. 814; Donnelly v. Boston &c. R. Co. 151 Mass. 210; 24 N. E. 38; 42 Am. & Eng. R. Cas. 182, and authorities in last preceding note. Contra, Terre Haute &c. R. Co. v. Voelker, 129 Ill. 540; 22 N. E. 20; 39 Am. & Eng. R. Cas. 615; Chicago &c. R. Co. v. Robinson, 127 Ill. 9; 18 N. E. 772; 4 L. R. A. 126; 11 Am. St. 87.

[165] Denver &c. R. Co. v. Gustafson, 21 Colo. 393; 41 Pac. 505; Berry v. Pennsylvania R. Co. 48 N. J. L. 141; 4 Atl. R. 303. In the case last cited it was said, in speaking of the plaintiff: "He must not rely entirely on the flagman." See, also, Brennan v. Pennsylvania R. Co. (N. J.); 62 Atl. 177, 178.

[166] Buchanan v. Chicago &c. R. Co. 75 Iowa, 393; 39 N. W. 663.

[167] Nixon v. Chicago &c. R. Co. 84 Iowa, 331; 51 N. W. 157; Mann v. Belt &c. R. Co. 128 Ind. 138; 26 N. E. 819; Thornton v. Cleveland &c. R. Co. 131 Ind. 492; 31 N. E. 185; Dunning v. Bond, 38 Fed. 813; McGee v. Consolidated &c. R. Co. 102 Mich. 107; 60 N. W. 293; 26 L. R. A. 300, and note; 47 Am. St. 507. See, generally, Bloomfield v. Burlington &c. R. Co. 74 Iowa, 607; 38 N. W. 431; Thompson v. New York &c. R. Co. 110 N. Y. 636; 17 N. E. 690; Marland v. Pittsburg &c. R. Co. 123 Pa. St. 487; 16 Atl. 623; 10 Am. St. 541; New York &c. R. Co. v. Kellam, 83 Va. 851; Glascock v. Central &c. R. Co. 73 Cal. 137; 14 Pac. 518; Griffie v. St. Louis &c. R. Co. (Ark.); 96 S. W. 750.

[168] In Owens v. Pennsylvania Co.

of looking and listening is not always a performance of the duty incumbent upon the traveler, for he must also exercise care to make the act of looking and listening reasonably effective,[169] and must usually continue to be on the lookout and exercise his faculties until he has crossed.[170] The fact that one train has passed is not such an assurance of safety as authorizes the traveler to make the attempt to cross without carefully looking and listening for other trains.[171] The traveler has no right to confine his precautions to trains scheduled to

41 Fed. 187, it was said, in speaking of the duty of the traveler: "It was the duty of the plaintiff to select such a point as would enable him to see along the track both ways. If he could not see it, it was his business to stop, or to select some other place at which he could make the observation." See, also, Fowler v. New York &c. R. Co. 74 Hun (N. Y.) 141; 26 N. Y. S. 218; Weyl v. Chicago &c. R. Co. 40 Minn. 350; 42 N. W. 24; Burns v. Louisville &c. R. Co. 136 Ala. 522; 33 So. 891; Colorado &c. R. Co. v. Thomas, 33 Colo. 517; 81 Pac. 801; Nelson v. Duluth &c. R. Co. 88 Wis. 392; 60 N. W. 703; Houghton v. Chicago &c. R. Co. 99 Mich. 308; 58 N. W. 314; Philadelphia &c. R. Co. v. Peebles, 67 Fed. 591; Malott v. Hawkins, 159 Ind. 127; 63 N. E. 308, 311 (citing text, stating however, that the precise number of feet at which the traveler must do so cannot, ordinarily, be exactly affirmed as a matter of law).

[169] Lennon v. New York &c. R. Co. 65 Hun (N. Y.) 578; 20 N. Y. S. 557; Washington &c. R. Co. v. Lacey, 94 Va. 460; 26 S. E. 834, 839; McCanna v. New England &c. R. Co. 20 R. I. 439; 39 Atl. 891, 892; Conkling v. Erie R. Co. 63 N. J. L. 338; 43 Atl. 666 (the last three all citing text). See §§ 1164, 1167, 1170; Schmolze v. Chicago &c. R. Co. 83 Wis. 659; 53 N. W. 743; 54 N. W. 106; Urias v. Pennsylvania R. Co. 152 Pa. St. 326; 25 Atl. 566.

[170] Kelsey v. Missouri Pac. Ry. Co. 129 Mo. 362; 30 S. W. 339, 341; Mann v. Belt R. Co. 128 Ind. 138, 144; 26 N. E. 819; Haetsch v. Chicago &c. R. Co. 87 Wis. 304; 58 N. W. 393; Schlimgen v. Chicago &c. R. Co. 90 Wis. 186; 62 N. W. 1045, and authorities cited in last preceding note.

[171] Baltimore &c. R. Co. v. Talmage, 15 Ind. App. 203; 43 N. E. 1019. Some of the decisions of the Indiana appellate court seem to conflict with the doctrine of the case cited, but if so they are in conflict with the great weight of authority. McKinney v. Chicago &c. R. Co. 87 Wis. 282; 59 N. W. 499; Stopp v. Fitchburg Co. 80 Hun (N. Y.) 178; 29 N. Y. S. 1008; Schlimgen v. Chicago &c. R. Co. 90 Wis. 186; 62 N. W. 1045; Purdy v. New York &c. R. Co. 87 Hun (N. Y.) 97; 33 N. Y. S. 952; Guta v. Lake Shore &c. R. Co. 81 Mich. 291; 45 N. W. 821; Indianapolis &c. R. Co. v. Wilson, 134 Ind. 95; 33 N. E. 793; Martin v. Little Rock &c. R. Co. 62 Ark. 156; 34 S. W. 545; Bush v. Union Pac. R. Co. 62 Kans. 709; 64 Pac. 624.

pass at a designated time, but he must take precautions against all trains, "extra trains" and "wild trains," as well as against regular trains.[172] Trains may pass the crossing at any time, and the traveler must act upon the assumption that trains may pass at any time, and exercise care proportionate to the danger from the frequent movement of trains. He must look and listen for all trains and not merely for some trains, for he has no right to proceed upon the assumption that trains will cross only at specified times. He has, indeed, no right in any case to omit to take precautions for his own safety upon the supposition or assumption that he may safely cross the track, for, under all circumstances, he must himself exercise ordinary care, and must not rely entirely upon the acts of others,[173] but, as we have said, what is or is not ordinary care depends very often upon the facts of the particular case. Under the rule just stated, namely, that whether due care was exercised depends upon the facts of the particular case, the question whether the traveler stopped at a proper place is gen-

[172] Wilcox v. Rome &c. R. Co. 39 N. Y. 358, 362; 100 Am. Dec. 440; Salter v. Utica &c. R. Co. 75 N. Y. 273; Toledo &c. R. Co. v. Jones, 76 Ill. 311; Schofield v. Chicago &c. R. Co. 114 U. S. 615; 5 Sup. Ct. 1125; Cincinnati &c. R. Co. v. Howard, 124 Ind. 280; 24 N. E. 892; 8 L. R. A. 593; 19 Am. St. 96; Durbin v. Oregon &c. R. Co. 17 Ore. 5; 17 Pac. 5; 11 Am. St. 778; Judson v. Great Northern R. Co. 63 Minn. 248; 65 N. W. 447; Carlson v. Chicago &c. R. Co. 96 Minn. 504; 105 N. W. 555; Bush v. Union Pac. R. Co. 62 Kans. 709; 64 Pac. 624. See, also, Jackson v. Mobile &c. R. Co. (Miss.) 42 So. 236.

[173] Drake v. Chicago &c. R. Co. 51 Mo. App. 562; Chicago &c Board v. Chicago &c. R. Co. 44 Ill. App. 253; Duncan v. Missouri &c. R. Co. 46 Mo. App. 198; Beyel v. Newport News &c. R. Co. 34 W. Va. 538; 12 S. E. 532; 45 Am. & Eng R. Cas. 188; Greenwood v. Philadelphia &c. R. Co. 124 Pa. St. 572; 17 Atl. 188; 3 L. R. A. 44; 10 Am. St. 614; Lake Shore &c. R. Co. v. Frantz, 127 Pa. St. 297; 18 Atl. 22; 4 L. R. A. 389. See Jennings v. St. Louis &c. R. Co. 112 Mo. 268; 20 S. W. 490. "It is well settled in this state that, when a traveler approaches a railroad crossing, he must look both ways, and listen for coming trains, and the negligence of the company in failing to give proper signals will not excuse the traveler's duty to look and listen. Fletcher v. Railroad, 64 Mo. 484; Zimmerman v. Railroad, 71 Mo 476; Baker v. Kansas City &c. R. Co. 122 Mo. 533; 26 S. W. 20; Purl v. Railroad, 72 Mo. 168; Donohue v. Railroad, 91 Mo. 357; 2 S. W. 424; 3 S. W. 848; Butts v. Railroad, 98 Mo. 272; 11 S. W. 754; Schmidt v. Railroad, 191 Mo. 215; 90 S. W. 136; 3 L. R. A. (N. S.) 196." Porter v. Missouri Pac. R. Co. (Mo.) 97 S. W. 880, 883.

erally a question for the jury, but it is sometimes a question of law. If there is but one reasonable inference that men of average intelligence can justly draw from the facts, the question is one of law to be disposed of by the court.

§ 1166a. Rule requiring traveler to look and listen not invariable and arbitrary as to time and place.—As stated in the last preceding section, a traveler, especially when familiar with the crossing, must exercise care to make his observation effective, but it cannot always be said that he is guilty of contributory negligence as matter of law because he looked and listened from one point rather than another, or because he did not continue to look and listen at all times continuously for approaching trains, where he was misled by the company or his attention was rightfully directed to something else as well. Thus, in a recent case, it is said: "The law does not say how near the track the traveler shall make his observations. There is no arbitrary rule in this respect. What the law requires is that the traveler shall choose, in the vicinity of the crossing, according to environments, a place reasonably calculated to afford full opportunity for seeing and hearing."[174] He should usually continue to look and listen, and to vigilantly exercise his faculties, until he has passed the crossing, but the law does not arbitrarily and invariably fix the distance at which he must begin to look and listen, provided, in ordinary cases, that it is at a sufficient distance to enable him to discover the approaching train and avoid injury by the exercise of reasonable and ordinary care, nor require him in all cases to continue to do so at his peril, regardless of circumstances, especially when he has already made an observation that ought to be reasonably effective, and is misled, without his fault, by the wrongful act of the company.[175]

[174] Greenwaldt v. Lake Shore &c. R. Co. 165 Ind. 219; 73 N. E. 910.

[175] See Stoy v. Louisville &c. R. Co. 160 Ind. 144; 66 N. E. 615; Cleveland &c. R. Co. v. Harrington, 131 Ind. 426; 30 N. E. 37; Chicago &c. R. Co. v. Turner, 33 Ind. App. 264; 69 N. E. 484; Wabash &c. R. Co. v. Biddle, 27 Ind. App. 161; 59 N. E. 248; 60 N. E. 12; Louisville &c. R. Co. v. Williams, 20 Ind. App. 576; 51 N. E. 128; Pennsylvania Co. v. Fertig, 34 Ind. App. 459; 70 N. E. 834; Cleveland &c. R. Co. v. Penbeth, 27 Ind. App. 210; 60 N. E. 1095; Pittsburg &c. R. Co. v. Martin, 82 Ind. 476; Greaney v. Long Island &c. R. Co. 101 N. Y. 419; 5 N. E. 425; Oldenburg v. New York &c. R. Co. 124 N. Y. 414; 26 N. E. 1021; Newark &c. R. Co. v. Block, 55 N. J. L. 605; 27 Atl. 1067; Farrell

It has also been held that the observation of the traveler "need not," at least as a matter of law, "extend beyond the distance within which vehicles moving at lawful speed would endanger him."[176]

§ 1167. Duty of the traveler to stop and look and listen.—Ordinary care often requires that the traveler should stop, look and listen for moving trains, from a place where danger can be discerned and precaution taken to avert it. If, for instance, the noise is so great that an approaching train can not be heard, and the obstructions are such that it cannot be seen, then the traveler must come to a halt and look and listen. It cannot be said that one who simply looks and listens where he knows, or should know, such acts are fruitless and unavailing, exercises that degree of care which the law requires. While it cannot be justly affirmed, as we believe, as matter of law, that there is a duty to stop in all cases,[177] yet there are cases where the failure to stop must be deemed such a breach of duty as will defeat a recovery by the plaintiff. There are very many cases holding that the surroundings may be such as to impose upon the traveler the duty of stopping, looking and listening, and these cases, as we think, assert the true doctrine.[178] Some of the courts, in well reasoned cases, press

v. Erie R. Co. 138 Fed. 28; Chicago &c. R. Co. v. Pearson, 184 Ill. 386; 56 N. E. 633; Jennings v. St. Louis &c. R. Co. 20 S. W. 490; Arnold v. Philadelphia &c. R. Co. 161 Pa. St. 1; 28 Atl. 941; Clark v. Boston &c. R. Co. 164 Mass. 434; 41 N. E. 666; Woehrle v. Minnesota &c. Co. 82 Minn. 165; 84 N. W. 791; 52 L. R. A. 348; Coffee v. Pere Marquette R. Co. 139 Mich. 378; 102 N. W. 953; O'Keefe v. St. Louis &c. R. Co. 108 Mo. App. 177; 83 S. W. 308. See, also, Hinkle v. Railroad Co. 109 N. Car. 472; 13 S. E. 884; 26 Am. St. 581; Lloyd v. Railroad Co. 118 N. Car. 1010; 24 S. E. 805; 54 Am. St. 764; Mayer v. Railway Co. 119 N. Car. 758; 26 S. E. 148; Loreny v. Burlington &c. R. Co. 115 Ia. 377; 88 N. W. 835; 56 L. R. A. 752.

[176] Newark &c. R. Co. v. Block, 55 N. J. L. 605; 27 Atl. 1067; 22 L. R. A. 374; Farrell v. Erie R. Co. 138 Fed. 28. See, also, Marden v. Portsmouth &c. R. 100 Me. 41; 60 Atl. 530; 69 L. R. A. 300.

[177] Winstanley v. Chicago &c. R. Co. 72 Wis. 375; 39 N. W. 856; Reed v. Chicago &c. R. Co. 74 Iowa, 188; 37 N. W. 149; Union Pac. R. Co. v. Ruzicka, 65 Neb. 621; 91 N. W. 543; Peck v. Oregon &c. R. Co. 25 Utah, 21; 69 Pac. 153. "Exceptional circumstances may also require him to stop, although this proposition generally presents itself as a mixed question of law and fact." Malott v. Hawkins, 159 Ind. 127; 63 N. E. 308, 311 (citing text).

[178] Houghton v. Chicago &c. R. Co. 99 Mich 308; 58 N. W. 314 (citing, among other cases, Chase

the rule further, and hold that the traveler must, in all cases, stop, look and listen.[179] As we have said, we do not think that it can justly

v. Maine &c. R. Co. 78 Me. 346; 5 Atl. 771; Brady v. Toledo &c. R. Co. 81 Mich. 616; 45 N. W. 1110; Greenwood v. Philadelphia &c. R. Co. 124 Pa. St. 572; 17 Atl. 188; 3 L. R. A. 44; 10 Am. St. 614; Northern Pac. R. Co. v. Holmes, 3 Wash. Ter. 202; 14 Pac. 688); Chicago &c. R. Co. v. Williams, 56 Kan. 333; 43 Pac. 246; Abbot v. Dwinnell, 74 Wis. 515; 43 N. W. 496; Olson v. Chicago &c. R. Co. 81 Wis. 41; 50 N. W. 412; Tucker v. Duncan, 9 Fed. 867; Sullivan v. New York &c. R. Co. 154 Mass. 524; 28 N. E. 911; Shufelt v. Flint &c. R. Co. 96 Mich. 327; 55 N. W. 1013; Louisville &c. R. Co. v. French, 69 Miss. 121; 12 So. 338; Pennsylvania Co. v. Morel, 40 Ohio St. 338; Clark v. Northern Pac. R. Co. 47 Minn. 380; 50 N. W. 365; Hass v. Grand Rapids &c. R. Co. 47 Mich. 401; 11 N. W. 216; Kelly v. Chicago &c. R. Co. 88 Mo. 534; Missouri &c. R. Co. v. Jenkins (Kans.), 87 Pac. 702. See, also, Atchison &c. R. Co. v. Townsend, 39 Kan. 115; 17 Pac. 804; Flemming v. Western &c. R. Co. 49 Cal. 253; Seefeld v. Chicago &c. R. Co. 70 Wis. 216; 35 N. W. 278; 5 Am. St. 168; Mantel v. Chicago &c. R. Co. 33 Minn. 62; Merkle v. New York &c. R. Co. 49 N. J. L. 473; 9 Atl. 680; Ellis v. Lake Shore &c. R. Co. 138 Pa. St. 506; 21 Atl. 140; 21 Am. St. 914; Ash v. Wilmington &c. R. Co. 148 Pa. St. 133; 23 Atl. 898; Fletcher v. Fitchburg R. Co. 149 Mass. 127; 21 N. E. 302; 3 L. R. A. 743, and note; Henze v. St. Louis R. Co. 71 Mo. 636; Chicago &c. R. Co. v. Fisher, 49 Kan. 460; 30 Pac. 462; Blackburn v. Southern Pac. Co. 34 Oreg. 215; 55 Pac. 225, 227; Rogers v. Boston &c. R. Co. 187 Mass. 217; 72 N. E. 945; Chase v. Maine Cent. R. Co. 167 Mass. 383, 388; 45 N. E. 911; Louisville &c. R. Co. v. Crominanty, 86 Miss. 464; 38 So. 633; Phillips v. Detroit &c. R. Co. 111 Mich. 274; 66 Am. St. 392; 69 N. W. 946; Colorado &c. R. Co. v. Thomas, 33 Colo. 517; 81 Pac. 801.

[179] Ely v. Pittsburgh &c. R. Co. 158 Pa. St. 233; 27 Atl. 970; North Pennsylvania R. Co. v. Heileman, 49 Pa. St. 60; 88 Am. Dec. 482; Pennsylvania Co. v. Beale, 73 Pa. St. 504; 13 Am. 753; Cincinnati &c. R. Co. v. Howard, 124 Ind. 280; 24 N. E. 892; 8 L. R. A. 593; 19 Am. St. 96; Louisville &c. R. Co. v. Stommel, 126 Ind. 35; 25 N. E. 863. But see Cohen v. Philadelphia &c. R. Co. 211 Pa. St. 227; 60 Atl. 729. In a note to the case of Illinois Central R. Co. v. Nowicki, 148 Ill. 29; 35 N. E. 358; 60 Am. & Eng. R. Cas. 690, 694, a great number of cases are collected, and they are, impliedly, at least, asserted to support the position that the general rule is that the traveler must always stop, but many of the cases cited do not go so far. There is, however, substantial agreement upon the proposition that when a reasonably effective observation cannot be made without stopping, then the traveler must stop and look and listen. We think it entirely safe to affirm that the pres-

be affirmed, as matter of law, that there is a duty to stop in all cases, but we do think that the duty exists in cases where there is an obstruction to sight or hearing, and that where the surroundings are such that but one conclusion can be reasonably drawn, and that conclusion is that it is negligence to proceed without halting, the court should without hesitation direct a verdict if no halt is made.[180] In the majority of cases, however, the question is one of fact, or a mixed question of law and fact, rather than a pure question of law.[181]

§ 1168. Attempting to cross in front of an approaching engine or train.—The general rule is that it is negligence for a traveler to attempt to cross closely in front of an engine or train which he sees or knows is approaching the crossing, for a person who knows of danger is under an obligation to refrain from incurring it and endeavoring to avoid it upon a calculation of chance.[182] Where a train is at such

ence of obstructions invariably requires increased care and vigilance on the part of the traveler. In Terre Haute &c. R. Co. v. Clark, 73 Ind. 168, Woods, J. said: "The counsel for the appellees insist that the presence of the houses obstructing the view, and the fact that it was snowing, were circumstances that made it gross negligence on the part of the appellant to move the train at the rate of speed at which it was running at the time of the accident. It seems to us, on the contrary, that there were circumstances which enhanced the degree of caution with which the deceased ought to have approached the crossing." It seems, also, that under peculiar circumstances ordinary and reasonable care may require the traveler to even get out of his vehicle and look, or lead his horse. Pennsylvania Co. v. Beale, 73 Pa. St. 504; 13 Am. R. 753; Kintner v. Pennsylvania R. Co. 204 Pa. St. 497; 54 Atl. 276; 93 Am. St. 795; Chicago &c. R. Co. v. Thomas, 155 Ind. 634, 640; 58 N. E. 1040.

[180] Blackburn v. Southern Pac. Co. 34 Oreg. 215; 55 Pac. 225, 227 (quoting text). See, also, Philadelphia &c. R. Co. v. Holden, 93 Md. 417; 49 Atl. 625; Hook v. Missouri Pac. R. Co. 162 Mo. 569; 63 S. W. 360; Shotte v. Erie R. Co. 121 Fed. 678.

[181] Gray v. Pennsylvania Co. 172 Pa. St. 383; 33 Atl. 697; Davidson v. Lake Shore &c. R. Co. 171 Pa. St. 522; 33 Atl. 86; Southern R. Co. v. Davis, 34 Ind. App. 377; 72 N. E. 1053, 1054 (citing text, but holding the plaintiff guilty of contributory negligence).

[182] Wendell v. New York &c. R. Co. 91 N. Y. 420; Grows v. Maine Central &c. R. Co. 67 Me. 100; Korrady v. Lake Shore &c. R. Co. 131 Ind. 261; 29 N. E. 1069; Railroad Co. v. Houston, 95 U. S. 697; Schofield v. Chicago &c. R. Co. 114 U. S. 615; 5 Sup. Ct. 1125; Horn v. Baltimore &c. R. Co. 54 Fed. 301; Young v. Old Colony R. Co. 156

a distance as that an ordinarily prudent man would, without hesitation, attempt to cross the track, it may be that there is no negligence.[183] But where an attempt to cross in front of an approaching train is voluntarily made upon a nice calculation of chances the person making the attempt will be regarded as negligent if he undertakes to proceed upon the assumption that he has correctly calculated the chances of crossing in safety[184] and is thereby injured. The failure of the employes of the company to give warning through the appropriate signals is not the proximate cause of the injury where the plaintiff sees the train and assumes the risk of crossing in front of it,[185] so that in such a case there are really two grounds of defense,

Mass. 178; 30 N. E. 560; Carney v. Chicago &c. R. Co. 46 Minn. 220; 48 N. W. 912; Marks v. Petersburg R. Co. 88 Va. 1; 13 S. E. 299; McNeal v. Pittsburgh &c. R. Co. 131 Pa. St. 184; 18 Atl. 1026; Watson v. Mound City &c. R. Co. 34 S. W. 573. See, also, Belton v. Baxter, 54 N. Y. 245; 13 Am. R. 578; Buzby v. Philadelphia &c. R. Co. 126 Pa. St. 559; 17 Atl. 895; 12 Am. St. 919; Davenport v. Brooklyn City Railroad Co. 100 N. Y. 632; 3 N. E. 305; Ohio &c. R. Co. v. Maisch, 29 Ill. App. 640; Lewis v. Puget Sound R. Co. 4 Wash. 188; 29 Pac. 1061; Studley v. St. Paul &c. R. Co. 48 Minn. 249; 51 N. W. 115; Collins v. Long Island &c. R. Co. 56 Hun (N. Y.) 647; 10 N. Y. S. 701; Hovenden v. Pennsylvania R. Co. 180 Pa. St. 731; 36 Atl. 731; Southern R. Co. v. Carroll, 138 Fed. 638; Porter v. Missouri Pac. R. Co. (Mo.) 97 S. W. 880. See, also, Chicago &c. R. Co. v. Laughlin (Kans.), 87 Pac. 749.

[183] Detroit &c. R. Co. v. Van Steinburg, 17 Mich. 99; Langhoff v. Milwaukee &c. R. Co. 19 Wis. 489; Baxter v. Second Ave. R. Co. 30 How. Pr. R. 219; Mentz v. Second Ave. R. Co. 3 Abb. App. 274; Bonnell v. Delaware &c. R. Co. 39 N. J. L. 189; Thomas v. Delaware &c. R. Co. 8 Fed. 729. See, also, Illinois Cent. R. Co. v. Hays, 27 Ky. 91; 84 S. W. 338; Ward v. Marshalltown &c. R. Co. (Ia.) 108 N. W. 323.

[184] Hansen v. Chicago &c. R. Co. 83 Wis. 631; 53 N. W. 909; Wendell v. New York &c. R. Co. 91 N. Y. 420; Purl v. St. Louis &c. Railroad Co. 72 Mo. 168; Graf v. Chicago &c. R. Co. 94 Mich. 579; 54 N. W. 388; Lake Shore &c. R. Co. v. Geiger, 8 Ohio C. C. 41; Bishop Non-Contract Law, § 1045; 2 Thompson on Neg. (2d Ed.) § 1669; Shearman & Redf. Negligence, § 475. See, also, McGee v. Consolidated St. R. Co. 102 Mich. 107; 60 N. W. 293; 26 L. R. A. 300; 47 Am. St. 507; Terien v. St. Paul City R. Co. 70 Minn. 532; 73 N. W. 412; Watson v. Mound City R. Co. 133 Mo. 246; 34 S. W. 573. But see Olsen v. Oregon &c. R. Co. 9 Utah, 129; 33 Pac. 623; Alexander v. Richmond &c. R. Co. 112 N. Car. 720; 16 S. E. 896.

[185] In Pakalinsky v. New York &c. R. Co. 82 N. Y. 424, the court, in speaking of the question of proxi-

contributory negligence and the failure to show that the negligence of the defendant was the proximate cause of the injury.[186]

§ 1169. Passing under, over or between cars.—Although a railroad company may be guilty of negligence in suddenly moving cars without warning which it has left at a crossing, with a space between them inviting people to pass through,[187] yet there can be no recovery for mere negligence in this respect if the injured party is guilty of contributory negligence.[188] In such cases questions of negligence on the part of the company and that of contributory negligence on the part of the person injured are usually questions of fact for the jury to determine under all the circumstances.[189] But where no space is

mate cause, said: "He thus had all the notice the ringing of a bell could have given him, and the omission had nothing whatever to do with the accident." See, generally, Helm v. Louisville &c. R. Co. (Ky.) 16 S. W. 125; Gresham v. Louisville &c. R. Co. 15 Ky. L. 599; 24 S. W. 869; Belton v. Baxter, 54 N. Y. 245; 13 Am. R. 78; Culhane v. New York &c. R. Co. 60 N. Y. 133; Sheldon v. Hudson River &c. R. Co. 14 N. Y. 218; 67 Am. Dec. 155.

[186] Text quoted in Chicago &c. R. Co. v. Williams (Tex. Civ. App.) 41 S. W. 501, 502. See, also, Guilmont's Adm'r v. Central Vt. R. Co. 78 Vt. 185; 62 Atl. 54.

[187] Schmitz v. St. Louis &c. R. Co. 119 Mo. 256; 24 S. W. 472; 23 L. R. A. 250; Cleveland &c. R. Co. v. Keely, 138 Ind. 600; 37 N. E. 406; Ft. Worth &c. R. Co. v. Dennis (Tex.) 33 S. W. 884.

[188] See authorities cited in following notes. Thus, in a recent case, where cars had been left at a crossing with an open space between them, while the trainmen were switching, and the plaintiff's intestate was found caught between them after the space was closed up, but no one saw the accident or knew what care, if any, he exercised, it was held that there could be no recovery, as the burden was upon the plaintiff to show freedom from contributory negligence, and that the court properly directed a verdict for the defendant. Kauffman v. Cleveland &c. R. Co. 144 Ind. 456; 43 N. E. 446. So, in Passman v. West Jersey &c. R. Co. 68 N. J. L. 719; 54 Atl. 809; 61 L. R. A. 609; 96 Am. St. 573, it is held that cutting cars at a crossing is not an invitation to cross without using senses and taking reasonable precaution, and that bicycle riders, as well as pedestrians must do so.

[189] Weber v. Atchison &c. R. Co. 54 Kan. 389; 38 Pac. 569; Fort Worth &c. R. Co. v. Dennis (Tex.), 33 S. W. 884; Schmitz v. St. Louis &c. R. Co. 119 Mo. 256; 24 S. W. 472; 23 L. R. A. 250; Cleveland &c. R. Co. v. Keely, 138 Ind. 600; 37 N. E. 406; Chicago &c. R. Co. v. Prescott, 59 Fed. 237; 23 L. R. A. 654; Burger v. Missouri Pac. Co. 112 Mo. 238; 20 S. W. 439; 34 Am. St. 379; Henderson v. St. Paul &c. R. Co. 52 Minn. 497; 55 N. W. 53;

left between the cars, and an engine is attached to them which is liable to move them at any moment, one who attempts to pass under or between them may be declared guilty of contributory negligence as matter of law.[190] The same is true where he attempts to climb over them without looking to see whether they are attached to an engine or not and is injured in consequence thereof,[191] or to pass between cars which had broken loose, and which he knows, or ought to know by using his faculties, are likely to move at any moment.[192] So, it has been held that a child, only thirteen years old, was guilty of negligence as matter of law in attempting to pass between two sections of a freight train eight feet apart, although they were at a standstill when she reached the crossing, but were started together just before she stepped on the track between them.[193]

Baltimore &c. R. Co. v. Fitzpatrick, 35 Md. 32; Vicksburg &c. R. Co. v. Alexander, 62 Miss. 496. See, also, Murray v. Fitchburg R. Co. 165 Mass. 448; 43 N. E. 190.

[190] Andrews v. Central R. Co. 86 Ga. 192; 10 L. R. A. 58; 45 Am. & Eng. R. Cas. 171; Hudson v. Wabash &c. R. Co. 123 Mo. 445; 27 S. W. 717; McMahon v. Northern &c. R. Co. 39 Md. 438; Lewis v. Baltimore &c. R. Co. 38 Md. 588; 17 Am. R. 521; Chicago &c. R. Co. v. Dewey, 26 Ill. 255; 79 Am. Dec. 374; Central R. Co. v. Dixon, 42 Ga. 327; Russell v. Central &c. R. Co. 119 Ga. 705; 46 S. E. 858; Rodriguez v. International &c. R. Co. 27 Tex. Civ. App. 325; 64 S. W. 1005; Studer v. Southern Pac. Co. 121 Cal. 400; 53 Pac. 942; 66 Am. St. 39; Rauch v. Lloyd, 31 Pa. St. 358; 72 Am. Dec. 747; Memphis &c. R. Co. v. Copeland, 61 Ala. 376; Haldan v. Great Western R. Co. 30 U. C. C. P. 89; Rumpel v. Oregon &c. R. Co. 4 Idaho, 13; 35 Pac. 700; Howard v. Kansas City &c. R. Co. 41 Kan. 403; 21 Pac. 267 (held where he climbed over at the suggestion of the brakeman). Contra, Spencer v. Baltimore &c. R. Co. 4 Mackey (D. C.) 138; 54 Am. R. 269; 2 Thompson Neg. (2d Ed.) § 1674; Shearm. & Redf. Neg. § 490. And see Sheridan v. Baltimore &c. R. Co. 101 Md. 50; 60 Atl. 280.

[191] Corcoran v. St. Louis &c. R. Co. 105 Mo. 399; 16 S. W. 411; 24 Am. St. 394; Hudson v. Wabash R. Co. 101 Mo. 13; 14 S. W. 15; O'Mara v. Delaware &c. Canal Co. 18 Hun (N. Y.) 192; Magoon v. Boston &c. R. Co. 67 Vt. 177; 31 Atl. 156. See, also, Hall v. Cleveland &c. R. Co. 15 Ind. App. 496; 44 N. E. 489.

[192] Lake Shore &c. R. Co. v. Pinchin, 112 Ind. 592; 13 N. E. 677. Approved in Magoon v. Boston &c. R. Co. 67 Vt. 177; 31 Atl. 156. See, also, Lake Shore &c. R. Co. v. Clemens, 5 Ill. App. 77; Flynn v. Eastern R. Co. 83 Wis. 238; 53 N. W. 494; Pannell v. Nashville &c. R. Co. 97 Ala. 298; 12 So. 236; Hall v. Cleveland &c. R. Co. 15 Ind. App. 496; 44 N. E. 489. See, also, Illinois Cent. R. Co. v. Broughton (Ky.), 78 S. W. 876.

[193] Wallace v. New York &c. R.

§ 1170. Smoke and like obstructions to the view.—Where the smoke emitted from moving trains obscures the view it is the duty of the traveler to wait until the smoke has disappeared and the view becomes unobstructed.[194] Cases of the class to which we have referred illustrate and enforce the general principle that it is not enough that the traveler looks and listens, but he must also exercise care to choose a place where the act of looking and listening will enable him to discover and avoid danger from moving trains. The mere fact that the traveler looked and listened will not be a performance of the duty required of him by law, inasmuch as looking and listening from a position where such an act will be unavailing does not come up to the standard prescribed.[195]

Co. 165 Mass. 236; 42 N. E. 1125. See, also, Shirk v. Wabash R. Co. 14 Ind. App. 126; 42 N. E. 656; Central &c. R. Co. v. Rylee, 87 Ga. 491; 13 S. E. 584; 13 L. R. A. 634; Pittsburgh &c. R. Co. v. Redding, 140 Ind. 101; 39 N. E. 921; 34 L. R. A. 767. But compare Philadelphia &c. R. Co. v. Layer, 112 Pa. St. 414; 3 Atl. 874.

[194] Beynon v. Pennsylvania R. Co. 168 Pa. St. 642; 32 Atl. 84; Hovenden v. Pennsylvania R. Co. 180 Pa. St. 731; 36 Atl. 731; West Jersey &c. R. Co. v. Ewan, 55 N. J. L. 574; 27 Atl. 1064; Oleson v. Lake Shore &c. R. Co. 143 Ind. 405; 42 N. E. 736; 32 L. R. A. 149; Heaney v. Long Island &c. R. Co. 112 N. Y. 122; 19 N. E. 422; McCrory v. Chicago &c. R. Co. 31 Fed. 531; Baltimore &c. R. Co. v. McClellan, 69 Ohio St. 142; 68 N. E. 816. See Powell v. New York &c. R. Co. 109 N. Y. 613; 15 N. E. 891; Gorton v. Erie R. Co. 45 N. Y. 660; Shaber v. St. Paul &c. R. Co. 28 Minn. 103; 9 N. W. 575; Stowell v. Erie R. Co. 98 Fed. 520; Grand Trunk R. Co. v. Cobleigh, 78 Fed. 785. See, also, Baker v. Tacoma &c. R. Co. (Wash.) 87 Pac. 826. In Chicago &c. R. Co. v. Fisher, 49 Kan. 460; 30 Pac. 462; 55 Am. & Eng. R. Cas. 223, it was held that where the view was obstructed by clouds of dirt it was negligence on the part of the traveler to attempt to cross. The court cited, among others, the following cases: Union Pac. Railway Co. v. Adams, 33 Kan. 427; 6 Pac. 529; 19 Am. & Eng. R. Cas. 376; Atchison &c. Railroad Co. v. Townsend, 39 Kan. 115; 17 Pac. 804; Fletcher v. Fitchburg Railroad Co. 149 Mass. 127; 21 N. E. 302; 3 L. R. A. 743, and note; Blight v. Camden Railroad Co. 143 Pa. St. 10; 21 Atl. 995; Flemming v. Western &c. Railroad Co. 49 Cal. 253. See, for an extreme application of the general doctrine, Pennsylvania R. Co. v. Beale, 73 Pa. St. 504; 13 Am. R. 753.

[195] The general doctrine stated is illustrated in a great variety of cases. Jobe v. Memphis &c. R. Co. 71 Miss. 734; 15 So. 129; Merkle v. New York &c. R. Co. 49 N. J. L. 473; 9 Atl. 680; Syme v. Richmond &c. R. Co. 113 N. Car. 558; 18 S. E. 114; Frost v. Milwaukee &c. R. Co. 96 Mich. 470; 56 N. W. 19; Littaur v. Narragansett &c. R. Co. 61

§ 1171. Misleading traveler—Invitation to cross.—Where the employes of a railroad company by negligent or wrongful acts mislead a traveler, and put him off his guard, the company may be liable although the traveler may have done that which, but for the wrongful or negligent acts of the company, must have been considered negligence on his part.[196] The negligence of the company will not, however, excuse the traveler for a failure to himself exercise ordinary care. As we have elsewhere shown, the better reasoned decisions adjudge that in all cases the traveler must himself exercise due care, and not rely entirely upon flagmen or other employes of the company.[197] Where the employes of the company direct or invite a

Fed. 591; Highland &c. R. Co. v. Maddox, 100 Ala. 618; 13 So. 615; Hayden v. Missouri &c. R. Co. 124 Mo. 566; 28 S. W. 74; Philadelphia &c. R. Co. v. Peebles, 67 Fed. 591; Bates v. New York &c. R. Co. 84 Hun (N. Y.) 287; 32 N. Y. S. 337; Gangawer v. Philadelphia &c. R. Co. 168 Pa. St. 265; 32 Atl. 21; McPeak v. New York &c. R. Co. 85 Hun (N. Y.) 107; 32 N. Y. S. 647; Dirk v. Northern &c. R. Co. 164 Pa. St. 243; 30 Atl. 231; Nelson v. Duluth &c. R. Co. 88 Wis. 392; 60 N. W. 703; Jensen v. Michigan &c. R. Co. 102 Mich. 176; 60 N. W. 57; Atchison &c. R. Co. v. Booth, 53 Ill. App. 303; Plummer v. New York &c. R. Co. 168 Pa. St. 62; 31 Atl. 887; Reeves v. Dubuque &c. R. Co. 32 Iowa 92; 60 N. W. 243.

[196] Eddy v. Powell 49 Fed. 814; Scaggs v. Delaware &c. R. Co. 74 Hun (N. Y.), 198; 26 N. Y. S. 323; Kleiber v. People's &c. R. Co. 107 Mo. 240; 17 S. W. 946; 14 L. R. A. 613; Whelan v. New York &c. R. Co. 38 Fed. 15; Pennsylvania R. Co. v. Stegemeier 118 Ind. 305; 20 N. E. 843; 10 Am. St. 136; Chicago &c. R. Co. v. Clough, 134 Ill. 586; 25 N. E. 664; 29 N. E. 184; Central &c. Co. v. Wabash R. Co. 27 Fed. 159. See Feeney v. Long Island &c. R. Co. 116 N. Y. 375; 22 N. E. 402; 39 Am. & Eng. R. Cas. 639; 5 L. R. A. 544; Tiffin v. St. Louis &c. R. Co. (Ark.); 93 S. W. 564, 566 (citing text). Woehrle v. Minnesota &c. Co. 82 Minn. 165; 84 N. W. 791; 52 L. R. A. 348. Messinger v. Pennsylvania R. Co. (Pa.); 64 Atl. 682. The rule where the flagman does not see the traveler, Louisville &c. R. Co. v. Webb, 90 Ala. 185; 8 So. 518; 11 L. R. A. 674; Little Rock &c. R. Co. v. Cullen, 54 Ark. 431; 16 S. W. 169. The absence of a flagman where one is occasionally kept is not an invitation to cross. Whalen v. New York &c. R. Co. 58 Hun (N. Y.), 431; 12 N. Y. 527.

[197] Berry v. Pennsylvania &c. R. Co. 48 N. J. L. 141; 4 Atl. 303; Denver &c. R. Co. v. Gustafson, 21 Colo. 393; 41 Pac. 505. In the case cited it was said: "It was error for the court to charge the jury as a matter of law that the plaintiff was excused from doing anything for his own safety except to obey the signals of the flagman." See, also, Conkling v. Erie R. Co. 63 N. J. 338; 43 Atl. 666, 669 (citing text);

traveler to cross the track the traveler may rely upon such invitation, provided it is not plainly and clearly imprudent or hazardous to attempt to do so.[198] If, however, the danger is such that a man of ordinary prudence would not undertake to cross, then it may be contributory negligence to undertake to cross.[199] And an adult traveler has no right to act entirely upon directions or invitations of employes and to omit the exercise of his own faculties, for under all circumstances he is bound to exercise care proportionate to the dangers of the place of which dangers he is bound to take notice. Some of the decisions hold that the fact that statutory signals are not given, or municipal ordinances obeyed, is sufficient evidence of an invitation to cross, and excuses want of care on the part of the traveler,[200] but this is certainly a mistake. If the failure to obey statutory requirements

Swanson v. Central R. Co. 63 N. J. L. 605; 44 Atl. 852; Brennan v. Pennsylvania R. Co. (N. J.); 62 Atl. 177, 178; Missouri Pac. Ry. Co. v. Ray, 25 Tex. Civ. App. 567; 63 S. W. 912; Lake Erie &c. R. Co. v. Fike, 35 Ind. App. 554; 74 N. E. 636.

[198] Chicago &c. R. Co. v. Prescott, 59 Fed. 237; 23 L. R. A. 654 (citing Grand Trunk R. Co. v. Ives, 144 U. S. 408; 12 Sup. Ct. 679; 55 Am. & Eng. R. Cas. 159; Hoye v. Chicago &c. R. Co. 62 Wis. 672; 19 Am. & Eng. R. Cas. 347; Philadelphia &c. R. Co. v. Killips, 88 Pa. St. 405; Chicago &c. R. Co. v. Hutchinson, 120 Ill. 587; 11 N. E. 855; Directors &c. v. Wanless, L. R. 7 H. of L. 12; Wheelock v. Boston &c. R. Co. 105 Mass. 203; Eddy v. Powell, 49 Fed. 814; Bond v. New York &c. R. Co. 69 Hun (N. Y.), 476; 23 N. Y. S. 450; Henning v. Caldwell 63 Hun (N. Y.), 635; 18 N. Y. S. 339; Lunt v. London &c. R. Co. L. R. 1 Q. B. 277; Cleveland &c. R. Co. v. Keely, 138 Ind. 600; 37 N. E. 406; Chaffee v. Boston &c. R. Co. 104 Mass. 108; Wheelock v. Boston &c. R. Co. 105 Mass. 203; Spencer v. Illinois &c. R. Co. 29 Iowa, 55; Sweeny v. Old Colony &c. R. Co. 10 Allen (Mass.) 368; 87 Am. Dec. 644, and note; Robbins v. Fitchburg &c. R. Co. 161 Mass. 145; 36 N. E. 752; St. Louis &c. Ry. Co. v. Stonecypher, 25 Tex. Civ. App. 569; 63 S. W. 946; Lake Erie &c. R. Co. v. Fike, 35 Ind. App. 564; 74 N. E. 636. The extent to which he may do so is said to usually be a question of fact unless he relied exclusively thereon. Woehrle v. Minnesota &c Co. 82 Minn. 165; 84 N. W. 791; 52 L. R. A. 348.

[199] But in almost all such cases the question is one of fact for the jury.

[200] Pittsburg &c. R. Co. v. Martin, 82 Ind. 476. The decision in the case cited seems to be contrary to the later decisions of the same court. Miller v. Terre Haute &c. R. Co. 144 Ind. 323; 43 N. E. 257; Cincinnati &c. R. Co. v. Howard, 124 Ind. 280; 24 N. E. 892; 8 L. R. A. 593; 19 Am. St. 96. But other recent cases cite it with approval on some phases of the general subject.

or provisions of municipal ordinances excused the traveler from himself exercising the care which the law requires of him there would seldom be any question of contributory negligence, and a multitude of decisions would be rendered nugatory. The omission of signals or the like cannot ordinarily be regarded as a direction or invitation to cross, or as an assurance that there is no danger.[201] It is the duty of a railway company to exercise ordinary care in the management of gates at crossings, and it is responsible to a traveler who is himself without fault and is injured by a negligent management of such gates.[202] A traveler who fails to keep a vigilant lookout for signals

[201] Ante, § 1158; Connerton v. Delaware &c. R. Co. 169 Pa. St. 339; 32 Atl. 416; Smith v. Wabash &c. R. Co. 141 Ind. 92; 40 N. E. 270; Cadwallader v. Louisville &c. R. Co. 128 Ind. 518; 27 N. E. 161; Blackwell v. St. Louis &c. R. Co. 47 La Ann. 268; 16 So. 818; 49 Am. St. 371; Delaware &c. R. Co. v. Hefferan, 57 N. J. L. 149; 30 Atl. 578; Chicago &c. R. Co. v. Nuney, 19 Colo. 36; 34 Pac. 288; Pittsburgh &c. R. Co. v. Bennett, 9 Ind. App. 92; 35 N. E. 1033; Blount v. Grand Trunk &c. R. Co. 61 Fed. 375; Gardner v. Detroit &c. R. Co. 97 Mich. 240; 56 N. W. 603; Krauss v. Wallkill &c. R. Co. 69 Hun (N. Y.), 482; 23 N. Y. S. 432; Hogan v. Tyler, 90 Va. 19; 17 S. E. 723; Drake v. Chicago &c. R. Co. 51 Mo. App. 562; Studley v. St. Paul &c. R. Co. 48 Minn. 249; 51 N. W. 115; Louisville &c. R. Co. v. Webb, 90 Ala. 185; 8 So. 518; 11 L. R. A. 674. But, see, Sullivan v. Missouri &c. R. Co. 117 Mo. 214; 23 S. W. 149; Cincinnati &c. R. Co. v. Farra, 66 Fed. 496; Jennings v. St. Louis &c. R. Co. 112 Mo. 268; 20 S. W. 490. See, also, Cleveland &c. Ry. Co. v. Heine, 28 Ind. App. 163; 62 N. E. 455.

[202] Feeney v. Long Island &c. R. Co. 116 N. Y. 375; 22 N. E. 402; 5 L. R. A. 544; 39 Am. & Eng. R. Cas. 639 (citing, as to the degree of care required of the traveler, Weber v. New York &c. R. Co. 58 N. Y. 451, 456; Barker v. Savage, 45 N. Y. 191; 6 Am. R. 66; Newson v. New York &c. R. Co. 29 N. Y. 383; McGovern v. New York &c. R. Co. 67 N. Y. 417; Beisiegel v. New York &c. R. Co. 34 N. Y. 622; 90 Am. Dec. 741, and note; Bernhard v. Rennselaer &c. R. Co. 1 Abb. App. Dec. 131; Callaghan v. Delaware &c. R. Co. 52 Hun (N. Y.), 276 5 N. Y. S. 285; Whelan v. New York &c. R. Co. 38 Fed. 15; Pennsylvania &c. R. Co. v. Stegemeier, 118 Ind. 305; 20 N. E. 843; 10 Am. St. 136). See, upon general subject of negligence of gateman, Fletcher v. Fitchburg R. Co. 149 Mass. 127; 3 L. R. A. 743; Parsons v. New York &c. R. Co. 113 N. Y. 355; 3 L. R. A. 683; 10 Am. St. 450. As to the duty of the traveler to exercise due care, see Greenwood v. Philadelphia &c. R. Co. 124 Pa. St. 572; 17 Atl. 188; 3 L. R. A. 42; 10 Am. St. 614; Lake Shore &c. R. Co. v. Frantz, 127 Pa. St. 297; 18 Atl. 22; 4 L. R. A. 389.

of gatemen or flagmen, or who gives them no heed, is guilty of negligence,[203] at least under ordinary circumstances.

§ 1172. Children and infirm persons.—There is much confusion and conflict upon the question as to whether persons of non-age may be guilty of contributory negligence; not, indeed, as to whether persons, although not of full legal age, may be guilty of contributory negligence, but upon the question as to what age shall be deemed the age of discretion so as to make it the duty of a person of non-age to exercise that degree of care required of adult persons at railroad crossings. We think that, as a rule, children of "a tender age," that is, very young children, cannot as a matter of law be deemed guilty of contributory negligence for failing to look and listen at railroad crossings,[204] but that where the age and intelligence of the child are such that it can understand the dangers of the place it may be deemed guilty of contributory negligence in attempting to cross without exercising care.[205] In many instances the question as to whether the per-

[203] Deikman v. Morgan &c. R. Co. 40 La. Ann. 787; 5 So. 76; Baltimore &c. R. Co. v. Colvin, 118 Pa. St. 230; 12 Atl. 337. But see Kelly v. Southern &c. R. Co. 28 Minn. 98; 9 N. W. 588. See, generally, Union &c. R. Co. v. State, 72 Md. 153; 19 Atl. 449; Allerton v. Boston &c. R. Co. 146 Mass. 241; 15 N. E. 621; Salmon v. New York &c. R. Co. 52 Hun (N. Y.), 612; 5 N. Y. S. 225; Lake Shore &c. R. Co. v. Ehlert, 63 Ohio St. 320; 58 N. E. 812. Attention directed to a train that had previously passed held no excuse for not looking and listening in Bush v. Union Pac. R. Co. 62 Kans. 709; 64 Pac. 624.

[204] Baker v. Flint &c. R. Co. 68 Mich. 90; 35 N. W. 836. The case cited carries the doctrine very far. Central &c. R. Co. v. Golden, 93 Ga. 510; 21 S. E. 68; Cleveland &c. R. Co. v. Tartt, 64 Fed. 830. See, Lake Shore &c. R. Co. v. Orvis, 1 Ohio Dec. (C. C.) 492. Compare Cox v. New York &c. R. Co. 69 App. Div. (N. Y.) 451; 74 N. Y. S. 1011.

[205] In Shirk v. Wabash &c. R. Co. 14 Ind. App. 126; 42 N. E. 656, a girl of twelve years of age was held guilty of contributory negligence, but in Citizens' Street R. Co. v. Stoddard, 10 Ind. App. 278; 37 N. E. 723, the same court held that a child five years of age could not be guilty of contributory negligence, citing Terre Haute &c. R. Co. v. Tappenbock, 9 Ind. App. 422; 36 N. E. 915, in which it was held that a child nine years of age could not be presumed to be incapable of exercising ordinary care. In Wendell v. New York &c. R. Co. 91 N. Y. 131, a boy seven years of age was held to be guilty of contributory negligence. Atchison &c. R. Co. v. Todd, 54 Kan. 551; 38 Pac. 804; Chicago &c. R. Co. v. White, 46 Ill. App. 446; Lennon v. New York &c. R. Co. 65 Hun (N.

son is so young as to excuse the failure to exercise care, or at least as to whether he exercised the care and discretion ordinarily possessed and exercised by children of the same age, capacity and intelligence, is a question of fact for the jury,[206] but there are unquestionably cases in which the court may adjudge as matter of law that the age of the person, although majority had not been attained, is such as to require the same measure of care as that required of adult persons,[207] or at least a certain amount of vigilance and caution. The

Y.), 578; 20 N. Y. S. 557; Marden v. Boston &c. R. Co. 159 Mass. 393; 34 N. E. 404; Friess v. New York &c. R. Co. 67 Hun (N. Y.), 205; 22 N. Y. S. 104. But see Omaha &c. R. Co. v. Morgan, 40 Neb. 604; 59 N. W. 81; Spillane v. Missouri &c. R. Co. 111 Mo. 555; 20 S. W. 293. In Chicago &c. R. Co. v. Russell (Neb.); 100 N. W. 156, it is said that it is no arbitrary rule as to the exact age. In Anderson v. Central R. Co. 68 N. J. L. 269; 53 Atl. 391, a verdict was directed for the defendant where a child nine years of age failed to look and listen. And in several other cases children from ten to fourteen years of age were held guilty of contributory negligence. Studer v. Southern Pac. Co. 121 Cal. 400; 53 Pac. 942; 66 Am. St. 39; Givens v. Kentucky Cent. R. Co. 12 Ky. L. 950; 15 S. W. 1057; Chicago &c. R. Co. v. Laughlin (Kans.); 87 Pac. 749; Sheets v. Connolly St. R. Co. 54 N. J. L. 518; 24 Atl. 483; Tucker v. New York &c. R. Co. 124 N. Y. 308; 26 N. E. 916; 21 Am. St. 670. But there are decisions to the contrary, especially where there was something to mislead or distract attention. Louisville &c. R. Co. v. Rush, 127 Ind. 545; 26 N. E. 1010; Cleveland &c. R. Co. v. Miles, 162 Ind. 646, 654; 70 N. E. 985; Finklestein v. New York &c. R. Co. 41 Hun (N. Y.), 34; McGuire v. Chicago &c. R. Co. 37 Fed. 54.

[206] Central &c. Co. v. Wabash R. Co. 31 Fed. 246; O'Flaherty v. Union R. Co. 45 Mo. 70; 100 Am. Dec. 343; Mangam v. Brooklyn &c. R. Co. 38 N. Y. 455; 98 Am. Dec. 66, and note; Pittsburgh &c. R. Co. v. Caldwell, 74 Pa. St. 421; North Pennsylvania R. Co. v. Mahoney, 57 Pa. St. 187; Bay Shore R. Co. v. Harris, 67 Ala. 6; Houston &c. R. Co. v. Simpson, 60 Tex. 103; Manly v. Wilmington &c. R. Co. 74 N. Car. 655; Byrne v. New York &c. R. Co. 83 N. Y. 620; Barry v. New York &c. R. Co. 92 N. Y. 289; 44 Am. R. 377. See, generally, Weber v. Atchison &c. R. Co. 54 Kan. 389; 38 Pac. 569; Payne v. Chicago &c. R. Co. 129 Mo. 405; 31 S. W. 885; East Tennessee &c. R. Co. v. Harshaw, 16 Ky. L. 526; 29 S. W. 289; Mulligan v. Curtis, 100 Mass. 512; 97 Am. Dec. 121; Wright v. Detroit &c. R. Co. 77 Mich. 123; 43 N. W. 765; Hemmingway v. Chicago &c. R. Co. 72 Wis. 42; 37 N. W. 804; 7 Am. St. 823, and note; Twist v. Winona &c. R. Co. 39 Minn. 164; 39 N. W. 402; 12 Am. St. 626.

[207] Lofdahl v. Minneapolis &c. R. Co. 88 Wis. 421; 60 N. W. 795. See,

age of the injured child is always proper matter for consideration in determining whether there was contributory negligence, but age is by no means the only matter to be considered, unless the child is so young that as matter of law it can be adjudged incapable of exercising care for its own safety.[208] Where the employes of a railroad company see a young child on the track they cannot rightfully act upon the presumption which prevails in cases of adults that it will leave the track in time to avoid injury.[209] A person who in appearance is of mature age may, where there is nothing to indicate the contrary, be reasonably expected to leave the track before the train is upon him, but in many instances the question whether the employes were justified in acting upon the presumption referred to must be a question of fact and not of law. A blind or deaf person is not absolved from the duty to exercise due care at railroad crossings, and the general rule is that where there is a destruction or impairment of the faculties more care in some respects is required than in the case of persons in the full possession of their faculties.[210] We suppose, it is quite clear, however, that if the employes of the company had knowl-

also, Cox v. New York &c. R. Co. 69 App. Div. (N. Y.) 451; 74 N. Y. S. 1011; Anderson v. Central &c. R. Co. 68 N. J. L. 269; 53 Atl. 391. But a comparatively young child is not necessarily required to exercise the same care as an adult. Texas &c. R. Co. v. Ball (Tex. Civ. App.); 85 S. W. 456; Thompson v. Missouri Pac. R. Co. 93 Mo. App. 548; 67 S. W. 693.

[208] Schmitz v. St. Louis &c. R. Co. 119 Mo. 256; 24 S. W. 472; 23 L. R. A. 250; Texas &c. R. Co. v. Fletcher, 6 Tex. Civ. App. 736; 26 S. W. 446.

[209] Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179; 6 N. E. 310; 10 N. E. 70; 58 Am. R. 387. See for case in which company was held liable where the engineer with defective sight and the fireman with defective hearing did not discover the child. Missouri &c. R. Co. v. Nesbit (Tex. Civ. App.); 97 S. W. 825.

[210] Marks v. Petersburg &c. R. Co. 88 Va. 1; 13 S. E. 299; Maloy v. Wabash &c. R. Co. 84 Mo. 270; Zimmerman v. Hannibal &c. R. Co. 71 Mo. 476; Purl v. St. Louis &c. R. Co. 72 Mo. 168; Central &c. R. Co. v. Fellar, 84 Pa. St. 226; Morris &c. R. Co. v. Haslan, 33 N. J. L. 147; Johnson v. Louisville &c. R. Co. 91 Ky. 651; 25 S. W. 754; International &c. R. Co. v. Garcia, 75 Tex. 583; 13 S. W. 223; Cleveland &c. R. Co. v. Terry, 8 Ohio St. 570; Illinois Cent. R. Co. v. Buckner, 28 Ill. 299; 81 Am. Dec. 282; West v. New Jersey &c. R. Co. 32 N. J. L. 91; Elkins v. Boston &c. R. Co. 115 Mass. 190; Tyler v. Sites, 88 Va. 470; 13 S. E. 978; Galveston &c. R. Co. v. Ryon, 80 Tex. 59; 15 S. W. 588. See, also, Oliver v. Iowa Cent. R. Co. 122

edge of the infirmities of the person upon or near the track they would have no right to act upon the presumption, which obtains in cases of adult persons really or apparently in possession of their faculties, that they will leave the track in time to avoid injury.[211] The fact that a person crossing a track is intoxicated does not absolve him from the duty to exercise that degree of care which the law requires of adult persons who undertake to cross railway tracks,[212] and the fact that a traveler is intoxicated is often a strong circumstance tending to prove contributory negligence.[213] A drunken man is not, however, an outcast, and if he is so drunk as to be helpless or irresponsible, and that fact is known to the employes of the company, it is their duty to exercise reasonable care to avoid injuring him.[214] But if the employes do not know of the condition of the intoxicated person, they may, as a rule, act upon the presumption that he will exercise care and leave the track in time to avoid injury, for

Ia. 217; 97 N. W. 1072. But it has been held that a person with an impediment in his walk is not required to exercise more care than one not so afflicted. Gulf &c. R. Co. v. Melville (Tex. Civ. App.); 87 S. W. 863.

[211] The rule is well settled that the presumption is that an adult person will leave the track in time to avert a collision with the train. Ohio &c. R. Co. v. Walker, 113 Ind. 196; 15 N. E. 234; 3 Am. St. 638; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Terre Haute &c. R. Co. v. Graham, 95 Ind. 286; 48 Am. R. 719; Beach Contributory Negligence (12 ed.), §§ 191, 394; 2 Wood Railroads, 1330. See, also, Porter v. Missouri Pac. Ry. Co. (Mo.); 97 S. W. 880. There may, of course, be circumstances which would make the general rule stated inapplicable. Louisville &c. R. Co. v. Phillips, 112 Ind. 59; 13 N. E. 132; 2 Am. St. 155.

[212] Norfolk &c. R. Co. v. Harman, 83 Va. 553; 8 S. E. 251; Houston &c. R. Co. v. Sympkins, 54 Tex. 615; 38 Am. R. 632; Illinois Cent. R. Co. v. Hutchinson, 47 Ill. 408; Kean v. Baltimore &c. R. Co. 61 Md. 154; Toledo &c. R. Co. v. Riley, 47 Ill. 514; Yarnall v. St. Louis &c. R. Co. 75 Mo. 575. But see Mercer v. Southern R. Co. 66 S. Car. 246; 44 S. E. 750.

[213] Herring v. Wilmington &c. R. Co. 10 Iredell L. 402; 51 Am. Dec. 395; Little Rock &c. R. Co. v. Pankhurst, 36 Ark. 371; Carlin v. Chicago &c. R. 37 Iowa, 316; Richardson v. Wilmington &c. R. Co. 8 Rich. (S. C.) 120. See, also, Stewart v. North Carolina R. Co. 136 N. Car. 385; 48 S. E. 793.

[214] Cincinnati &c. R. Co. v. Cooper, 120 Ind. 469; 22 N. E. 340; 6 L. R. A. 241, and note; 16 Am. St. 334; Atchison &c. R. Co. v. Weber, 33 Kan. 543; 6 Pac. 877; 52 Am. R. 543; Railway Co. v. Valleley, 32 Ohio St. 345; 30 Am. R. 601.

they are under no obligation to take unusual precautions to protect a man from the consequences of his own folly or wrong.[215]

§ 1173. Sudden peril as affecting the duty of a traveler.—Where the traveler is placed in a position of sudden peril by the negligence of the railroad company, the omission on his part to exercise such care as one not influenced by sudden danger would exercise is not necessarily a breach of duty constituting negligence. A person placed in a position of sudden peril by the negligence of a railroad company is not necessarily guilty of contributory negligence unless he acts recklessly and heedlessly. Where one is deprived of the power to act deliberately and calmly, the person whose wrongful act took from him that power cannot justly be permitted to aver that such precautions as under ordinary circumstances would be necessary were not taken. The cases generally recognize and enforce the doctrine we have stated, and as to the general doctrine itself there is no substantial conflict,[216] but there is some diversity of opinion as to the manner and extent of its application. The peril which will exonerate the traveler from the exercise of that care which the law requires of travelers at railroad crossings must be in its nature an ex-

[215] Cincinnati &c. R. Co. v. Cooper, 120 Ind. 469; 22 N. E. 340; 6 L. R. A. 241; 16 Am. St. 334; Welty v. Indianapolis &c. R. Co. 105 Ind. 55; 4 N. E. 410; McClelland v. Louisville &c. R. Co. 94 Ind. 276; Louisville &c. R. Co. v. Sullivan, 81 Ky. 624; 50 Am. R. 186.

[216] Central Trust Co. v. Wabash &c. R. Co. 27 Fed. 159; Pennsylvania &c. R. Co. v. Stegemeier, 118 Ind. 305; 20 N. E. 843; 10 Am. St. 136; Cody v. New York &c. R. Co. 151 Mass. 462; 24 N. E. 402; 8 L. R. A. 486, and note; Pennsylvania &c. Co. v. Varnau (Pa. St.); 15 Atl. 624; Barton v. Springfield, 110 Mass. 131; Weare v. Fitchburg, 110 Mass. 334; Voak v. Northern &c. R. Co. 75 N. Y. 320; Southwestern &c. Co. v. Paulk, 24 Ga. 356; Gumz v. Chicago &c. Co. 52 Wis. 672; 10 N. W. 11; Chesapeake &c. R. Co. v. Ogles, 24 Ky. L. 2160; 73 S. W. 751; Middleburg R. Co. v. Stallard, 24 Ky. L. 1666; 72 S. W. 17; Houston &c. R. Co. v. Byrd, (Tex. Civ. App.); 61 S. W. 147. See, generally, Schall v. Cole, 107 Pa. St. 1; Woolery v. Louisville &c. R. Co. 107 Ind. 381; 8 N. E. 226; 57 Am. R. 114; Reary v. Louisville &c. R. Co. 40 La. Ann. 32; 3 So. 390; 8 Am. St. 497; Wright v. Great Northern &c. R. Co. 8 Irish L. R. 257; Northeastern &c. R. Co. v. Wanless, L. R. 7 H. L. Cas. 12 (L. R. 6 Q. B. 481); Chicago &c. R. Co. v. Parkinson, 56 Kans. 652; 44 Pac. 615; Sullivan v. New York &c. R. Co. 154 Mass. 524; 28 N. E. 911; Bilton v. Southern Pac. R. Co. 148 Cal. 443; 83 Pac. 440.

traordinary one, in the sense that it is not such as ordinarily pertains to railroad crossings, for, as matter of fact and of law, such crossings are places of great danger, exacting from the traveler care and caution. Where a traveler, not being in fault himself, in endeavoring to escape from a sudden and threatening peril caused by the negligence of the company, places himself in a position of danger, his act is generally held not to proximately contribute to the injury, and the sole proximate cause of the injury is the negligence of the railroad company. The rule, however, cannot obtain where the danger is one incident to the place, its use or surroundings, for such danger is not a sudden peril within the meaning of the law, but a danger to be anticipated and guarded against by proper care and precaution. The rule, however, in some jurisdictions, goes further than to exonerate the traveler where the peril is caused by the act of the railroad company, for, if without fault himself, the traveler is placed in a position of sudden peril by a third person or by some accident, as, for instance, by horses running away, he may be absolved from exercising that degree of care required of one under ordinary circumstances.[217] Some of the courts carry the rule very far, for it is held that where the attention of the traveler is distracted by a commotion in the street or highway he will be excused,[218] but while there may be cases in which this doctrine should prevail, it is one to be cautiously applied and carefully limited.[219] If there is time for deliberation it

[217] Moore v. Central &c. R. Co. 47 Iowa, 688. See, generally, Coulter v. American Express Co. 56 N. Y. 585; Dublin &c. Co. v. Slattery, L. R. 3 App. Cas. 1155; Collins v. Davidson, 19 Fed. 83; Knapp v. Sioux City &c. Co. 65 Iowa, 91; 21 N. W. 198; 54 Am. R. 1; Wesley Coal Co. v. Healer, 84 Ill. 126; Iron &c. R. Co. v. Mowery, 36 Ohio St. 418; 38 Am. R. 597; Stickney v. Maidstone, 30 Vt. 738.

[218] Alabama &c. R. Co. v. Lowe, 73 Miss. 203; 19 So. 96; Chattanooga Elec. Ry. Co. v. Cooper, 109 Tenn. 308; 70 S. W. 72 (quoting text). In Cassida v. Oregon &c. R. Co. 14 Ore. 551; 13 Pac. 438, it was held that a child, who, in endeavoring to escape from cattle, ran on a trestle, was not guilty of contributory negligence, but great stress was placed upon the fact that the child had not reached the years of discretion. The court cited Hurst v. Burnside, 12 Ore. 520; 8 Pac. 888; McGovern v. New York &c. R. Co. 67 N. Y. 417; Eckert v. Long Island &c. R. Co. 43 N. Y. 502; 3 Am. R. 721.

[219] Ordinarily, it would seem the rule should be confined to cases in which the peril was caused by the defendant, or the like. See Woolery v. Louisville &c. R. Co. 107 Ind. 381, 387; 8 N. E. 226; 57 Am. R.

will generally be negligence, on the part of the traveler, to omit reasonable precautions, and so it will be if his attention is diverted where there is no element of danger and there is nothing more than curiosity to know what the commotion means. Where the sudden peril is attributable to the negligence of the plaintiff he cannot successfully assert that he is absolved from the duty to exercise due care. If the plaintiff voluntarily goes into a place of danger without exercising the care required by law, he is guilty of negligence although after so getting into the place of danger he exercises his judgment to the best of his ability,[220] to escape from the danger. Care is required to keep out of danger as well as to avoid it after getting into it, and the rule that sudden peril excuses does not govern where the plaintiff without exercising due care goes into a place of danger, such as a railroad crossing is, and of which danger the track itself is a warning.[221] Where there is evidence that there was a sudden peril, that is, a peril not incident to railroad crossings, the question whether the plaintiff was guilty of contributory negligence is generally one of fact,[222] but where there is no evidence of sudden peril, then the question is often one of law.

§ 1174. Negligence of driver of vehicle not imputed to passenger therein.—The general rule is that the negligence of the driver of a vehicle with whom the injured person is riding will not be imputed to such injured person.[223] But where persons riding in a

114; Sutherland v. Cleveland &c. R Co. 148 Ind. 308; 47 N. E. 624; Baltzer v. Chicago &c. R. Co. 83 Wis. 459; 53 N. W. 885; Briscoe v. Southern R. Co. 103 Ga. 224; 28 S. E. 638; Richfield v. Mich. Cent. R. Co. 110 Mich. 406; 68 N. W. 218; Weeks v. Wilmington &c. R. Co. 131 N. Car. 78; 42 S. E. 541.

[220] Leiman v. Chicago &c. R. Co. 82 Wis. 286; 52 N. W. 91; 33 Am. St. 37. See, also, Wabash R. Co. v. Keister, 163 Ind. 609, 616; 67 N. E. 521 (citing text); Barr v. Southern Ry. Co. 105 Tenn. 544; 58 S. W. 849. But compare Houston &c. R. Co. v. Byrd (Tex Civ. App.); 61 S. W. 147; Missouri &c. Ry. Co. v. Oslin, 26 Tex. Civ. App. 370; 63 S. W. 1039.

[221] Wabash R. Co. v. Keister, 163 Ind. 609, 616, 617; 67 N. E. 521 (quoting text).

[222] Louisville &c. R. Co. v. Stewart, 128 Ala. 313; 29 So. 562, 568; Chicago &c. R. Co. v. Smith, 180 Ill. 453; 54 N. E. 325.

[223] The doctrine of Thorogood v. Bryan, 8 C. B. 115, is generally denied, but there are cases approving it. Prideaux v. Mineral Point, 43 Wis. 513; 28 Am. R. 558; Houfe v. Fulton, 29 Wis. 296; 9 Am. R. 568;

vehicle all take part in managing it and the team drawing it, there is reason for holding that all are bound to exercise ordinary care to avoid collisions with railroad trains.[224] Where the driver is the agent

Artz v. Chicago &c. R. Co. 34 Iowa, 153; Slater v. Burlington &c. R. Co. 71 Iowa, 209; 32 N. W. 264; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274. Denying the doctrine are the cases of Carlisle v. Sheldon, 38 Vt. 440; Little v. Hackett, 116 U. S. 366; 6 Sup. Ct. 391; The Berninia, L. R. 12 Prob. Div. 58; 57 Am. R. 494, and note; Chartered &c. Bank v. Netherlands &c. Co. L. R. 9 Q. B. Div. 118; Street Railway Co. v. Eadie, 43 Ohio 91; 54 Am. R. 802; Robinson v. New York &c. R. Co. 66 N. Y. 11; 23 Am. R. 1, and note; Pittsburgh &c. R. Co. v. Spencer, 98 Ind. 186; Michigan City v. Boeckling, 122 Ind. 39; 23 N. E. 518; Lake Shore &c. R. Co. v. Boyts, 16 Ind. App. 640; 45 N. E. 812; Indianapolis St. R. Co. v. Johnson, 163 Ind. 518; 72 N. E. 571; Hot Springs R. Co. v. Hildreth, 72 Ark. 572; 82 S. W. 245; Robinson v. New York &c. R. Co. 66 N. Y. 11; 23 Am. R. 1; Masterson v. New York &c. R. Co. 84 N. Y. 247; 38 Am. R. 510; Bennett v. New Jersey &c. R. Co. 36 N. J. 225; 13 Am. R. 435; New York &c. R. Co. v. Steinbrenner, 47 N. J. L. 161; 54 Am. R. 126; State v. Boston &c. R. Co. 80 Me. 430; 15 Atl. 36; 38 Alb. L. J. 269; Wabash &c. R. Co. v. Shacklet, 105 Ill. 364; 44 Am. R. 791; West Chicago St. R. Co. v. Daugherty, 209 Ill. 241; 70 N. E. 586; Duval v. Atlantic Coast &c. R. Co. 134 N. Car. 331; 46 S. E. 750; 65 L. R. A. 722, 728; Central Tex. &c. R. Co. v. Gibson (Tex. Civ. App.); 83 S. W. 862; Danville &c. Co. v. Stewart, 2 Metc. (Ky.) 119; Tompkins v. Clay St. &c. R. Co. 66 Calf. 163; 4 Pac. 1165; Noyes v. Boscawen, 64 N. H. 361; 10 Atl. 690; 10 Am. St. 410; Follman v. Mankato, 35 Minn. 522; 29 N. W. 318; 59 Am. R. 340; 57 Am. R. 488; Philadelphia &c. R. Co. v. Hogeland, 66 Md. 149; 7 Atl. 105; 59 Am. R. 159; 57 Am. R. 402; Albion v. Hetrick, 90 Ind. 545; 46 Am. R. 230; Randolph v. O'Riordon, 155 Mass. 331; 29 N. E. 583; Larkin v. Burlington &c. R. Co. 85 Iowa, 492; 52 N. W. 480; Becke v. Missouri &c. R. Co. 102 Mo. 544; 13 S. W. 1053; 9 L. R. A. 157, and note; Sluder v. St. Louis Transit Co. 189 Mo. 107; 88 S. W. 648; East Tennessee &c. R. Co. v. Markens, 88 Ga. 60; 13 S. E. 855; 14 L. R. A. 281; Lapsley v. Union &c. R. Co. 50 Fed. 172; Cahill v. Cincinnati &c. R. Co. 92 Ky. 345; 18 S. W. 2; Transfer Co. v. Kelly, 36 Ohio St. 86; 33 Am. R. 558; Whelan v. New York &c. R. Co. 38 Fed. 15. In Nesbit v. Gainer, 75 Iowa, 314; 1 L. R. A. 152, and note; 9 Am. St. 486, the earlier cases are explained, and in Dean v. Pennsylvania R. Co. 129 Pa. St. 514; 18 Atl. 718; 6 L. R. A. 143; 15 Am. St. 733, it is said that the doctrine of Thorogood v. Bryan, 8 C. B. 115, was partially adopted in Pennsylvania. But see Dryden v. Pennsylvania R. Co. 211 Pa. St. 620; 61 Atl. 249; Evensen v. Lexington &c. R. Co. 187 Mass. 77; 72 N. E. 355; Lightfoot v. Winnebago Trac. Co. 123 Wis. 479; 102 N. W. 30.

[224] Nesbit v. Gainer, 75 Iowa, 314; 39 N. W. 516; 1 L. R. A. 152, and

or servant of the injured person it is held that the negligence of the former is attributable to the latter.[225] It is obvious that where the negligence of the person who receives the injury contributes to the injury he cannot escape the consequences of his own carelessness.[226] Thus where one person riding with another saw the headlight of an approaching locomotive it was held that he was guilty of contributory negligence in failing to warn the driver of the vehicle in which he was riding.[227] If the person riding in the vehicle knows that the driver is negligent, and he takes no precautions to guard against injury, he cannot recover, for in such case the negligence is his own, and not simply that of the driver.[228] The plaintiff cannot rightfully omit to use care in blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge. It has been held that where a child of tender years is entrusted to the care of the driver of the vehicle the contributory negligence of the driver will defeat a recovery by the child,[229] but if the doctrine of the

note; 9 Am. St. R. 486; Brannen v. Kokomo &c. Co. 115 Ind. 115; 17 N. E. 202; 7 Am. St. 411; Colorado &c. R. Co. v. Thomas, 33 Colo. 517; 81 Pac. 801.

[225] Brickell v. New York &c. R. Co. 120 N. Y. 290; 24 N. E. 449; Markowitz v. Metropolitan St. R. Co. 186 Mo. 350; 85 S. W. 351; 69 L. R. A. 389. See, generally, Georgia &c. R. Co. v. Underwood, 90 Ala. 49; 80 So. 116; 24 Am. St. 756. But compare Howe v. Minneapolis &c. R. Co. 62 Minn. 11; 64 N. W. 102; 30 L. R. A. 684, 688; 54 Am. St. 616.

[226] Miller v. Louisville &c. R. Co. 128 Ind. 97; 27 N. E. 339; 25 Am. St. 416; Hoag v. New York &c. R. Co. 111 N. Y. 199; 18 N. E. 648; Brickell v. New York &c. R. Co. 120 N. Y. 290; 24 N. E. 449; 17 Am. St. 648; Dean v. Pennsylvania R. Co. 129 Pa. St. 514; 18 Atl. 718; 6 L. R. A. 143; 15 Am. St. 733; Cincinnati &c. R. Co. v. Howard, 124 Ind. 280; 24 N. E. 892; 8 L. R. A. 593; 19 Am. St. 96; Durkee v. President &c. 88 Hun (N. Y.), 471; 34 N. Y. S. 978.

[227] Smith v. Maine Central R. Co. 87 Me. 339; 32 Atl. 967. See Howe v. Minneapolis &c. R. Co. 62 Minn. 71; 64 N. W. 102; 30 L. R. A. 684; 54 Am. St. 616.

[228] Township of Crescent v. Anderson, 114 Pa. St. 643; 8 Atl. 379; 60 Am. R. 367; O'Toole v. Pittsburgh &c. R. Co. 158 Pa. St. 99; 27 Atl. 737; 22 L. R. A. 606; 38 Am. St. 830; Willfong v. Omaha &c. R. Co. 116 Ia. 548; 90 N. W. 358 (wife riding with husband); Illinois Cent. R. Co. v. McLeod, 78 Miss. 334; 29 So. 76; 52 L. R. A. 954; 84 Am. St. 630; Fechley v. Springfield Trac. Co. 119 Mo. App. 358; 96 S. W. 421, 423 (citing text).

[229] Prideaux v. Mineral Point, 43 Wis. 513; 28 Am. 560; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Payne v. Chicago &c. R. Co. 39 Iowa, 523; Elkins v. Boston &c. R. Co. 115 Mass. 190.

cases referred to can be regarded as sound in any event it cannot, as we think, be so regarded where the child is riding as a passenger in a public conveyance.

§ 1175. Negligence after discovery of traveler's danger—Last clear chance—Wilfulness.—Although, as we have already shown, the general rule is that contributory negligence will defeat a recovery, yet there is an exception to the rule, or perhaps it would be better to say that the rule does not apply, where the injury is wilfully inflicted[230] or the failure of the company to exercise reasonable care after discovering the traveler's peril is the proximate cause of the injury.[231] In this connection, however, it is necessary to bear in mind

But see Mattson v. Minnesota &c. R. Co. 95 Minn. 477; 104 N. W. 443; 111 Am. St. 483; Hampel v. Detroit &c. R. Co. 138 Mich. 1; 100 N. W. 1002. See, generally, upon the subject of imputed negligence, Alabama &c. R. Co. v. Davis, 69 Miss. 444; 13 So. 693; 60 Am. & Eng. R. Cas. 719; Pennsylvania R. Co. v. Goodenough, 55 N. J. L. 577; 28 Atl. 3; Honey v. Chicago &c. R. Co. 59 Fed. 423; Lake Shore &c. R. Co. v. McIntosh, 140 Ind. 261; 38 N. E. 476; Chicago &c. R. Co. v. Spilker, 134 Ind. 380; 33 N. E. 280; 34 N. E. 218; 55 Am. & Eng. R. Cas. 200. It is to be said of the last named case that in some respects the doctrine it asserts is erroneous.

[230] Palmer v. Chicago &c. R. Co. 112 Ind. 250; 14 N. E. 70; Chicago &c. R. Co. v. Hedges, 105 Ind. 398, 404; 7 N. E. 801; Belt R. Co. v. Mann, 107 Ind. 89; 7 N. E. 893; Wabash R. Co. v. Speer, 156 Ill. 244; 40 N. E. 835; Georgia Pac. R. Co. v. Lee, 92 Ala. 262; 9 So. 230; Louisville &c. R. Co. v. Webb, 97 Ala. 308; 12 So. 374; Brownell v. Flagler, 5 Hill (N. Y.), 282; Sanford v. Eighth Ave. R. Co. 23 N. Y. 343; 80 Am. Dec. 286; Louisville &c. R. Co. v. Collins, 2 Duv. (Ky.) 114; 87 Am. Dec. 486; 2 Thomp. Neg. (2d ed.) § 1627; Beach Contrib. Neg. § 64. As to what is not wilfullness, see Gibson v. Southern Ry. Co. 140 Fed. 410; Cleveland &c. R. Co. v. Miller, 149 Ind. 490; 49 N. E. 445; Louisville &c. R. Co. v. Muscat (Ala.) 41 So. 302.

[231] Grand Trunk R. Co. v. Ives, 144 U. S. 408; 12 Sup. Ct. 676; Island &c. Coasting Co. v. Tolson, 139 U. S. 551; 11 Sup. Ct. 653; Kean v. Baltimore &c. R. Co. 61 Md. 154; 19 Am. & Eng. R. Cas. 321; Baltimore &c. R. Co. v. Kean, 65 Md. 394; 5 Atl. 325; 28 Am. & Eng. R. Cas. 580; Donohue v. St. Louis &c. R. Co. 91 Mo. 357; 2 S. W. 424; 3 S. W. 848; Cleveland &c. R. Co. v. Crawford, 24 Ohio St. 631; 15 Am. R. 633; Lake Erie &c. R. Co. v. Juday, 19 Ind. App. 436; 49 N. E. 843; Judson v. Great Northern R. Co. 63 Minn. 248; 65 N. W. 447; Texas &c. R. Co. v. Spradling, 72 Fed. 152; Atchison &c. R. Co. v. Walz, 40 Kans. 433; 19 Pac. 787; Valin v. Milwaukee &c. R. Co. 82 Wis. 1; 51 N. W. 1084; 33 Am. St. 17; Keefe v. Chicago &c. R. Co

the rule that the company, or its employes, have a right to presume, under ordinary circumstances, that an adult who is upon or near the track, and apparently able to take care of himself will do so, and stay off or get off in due time.[232] Some of the courts, misapplying, as we think, the doctrine of an old English case,[233] have held that the company is liable not only where it discovers the danger of the traveler in time to avoid the effect of his negligence, and fails to exercise reasonable care to avoid it, but also where it fails to exercise reasonable care to look out for the traveler, and thus fails to discover his danger in the first instance, or if it might, in any event, have avoided the consequences of the plaintiff's negligence by the exercise of reasonable care.[234] It seems to us that while this doctrine may be applicable in some cases it is much like the exploded doctrine of

92 Iowa, 182; 60 N. W. 503; Carrico v. West Virginia &c. R. Co. 35 W. Va. 389; 14 S. E. 12; Evansville &c. R. Co. v. Hiatt, 17 Ind. 102; Cincinnati &c. R. Co. v. Kassen, 49 Ohio St. 230; 31 N. E. 282; 16 L. R. A. 674; Denver &c. Co. v. Dwyer, 20 Colo. 132; 36 Pac. 1106; 2 Thomp. Neg. (2d ed.) § 1601; Beach Contrib. Neg. § 54, et seq; Busw. Law of Pers. Inj. § 101. In Bogan v. Carolina Cent. R. Co. 129 N. Car. 154; 39 S. E. 808; 55 L. R. A. 418, it is held that the company is liable where it discovered or should have discovered the plaintiff's peril in time to have avoided the injury by the exercise of ordinary care, and numerous authorities upon the general subject of the "last clear chance" are reviewed in the note to the case as reported in 55 L. R. A. 418. See, also, Galveston &c. R. Co. v. Murray (Tex. Civ. App); 99 S. W. 144.

[232] Authorities in support of this proposition have already been cited, but we call attention to the case of Gahagan v. Boston &c. R. Co. 70 N. H. 441; 50 Atl. 146; 55 L. R. A. 426, and authorities cited in note, and to Woolf v. Washington Ry. Co. 37 Wash. 491; 79 Pac. 997. See, also, ante, § 153, and post, §§ 1253, 1257. In Green v. Los Angeles &c. R. Co. 143 Cal. 31; 76 Pac. 719; 101 Am. St. 68, it is held that a traveler is not in a position of peril charging the engineer until he steps upon the track.

[233] Davies v. Mann, 10 Mees. & W. 546.

[234] See Lloyd v. St. Louis &c. R. Co. 128 Mo. 595; 29 S. W. 153; 31 S. W. 110; Bergman v. St. Louis &c. R. Co. 88 Mo. 678; 28 Am. & Eng. R. Cas. 588; Louisville &c. R. Co. v. Krey, 16 Ky. L. 797; 29 S. W. 869; Gass v. Missouri Pac. R. Co. 57 Mo. App. 574; Battishill v. Humphreys, 64 Mich. 514; 38 N. W. 581; Tuff v. Warman, 5 C. B. N. S. 573; McGuire v. Vicksburg &c. R. Co. 46 La. Ann. 1543; 16 So. 457; Patterson's Ry. Acc. Law, 51. See, also, Grand Trunk &c. R. Co. v. Ives, 144 U. S. 408; 12 Sup. Ct. 679. But compare Holwerson v. St. Louis & Suburban Ry. Co. 157 Mo. 216; 57 S. W. 770; 50 L. R. A. 850, 855.

comparative negligence, and that, unless it is limited in its application, it loses sight of the elements of duty and of proximate cause, and virtually nullifies the doctrine of contributory negligence. We think the better rule is that, except where the injury is wilfully inflicted, or is inflicted under such circumstances as to amount to wilfulness, the rule that contributory negligence is a good defense applies without qualification unless the company is guilty of negligence subsequent to that of the plaintiff, and not merely contemporaneous and concurrent with that of the plaintiff. In other words, while the company may be liable where it fails to exercise reasonable care, by which it could have avoided the consequences of the plaintiff's negligence after discovering it and his danger, or if reasonable care requires that it should have made such discovery after the plaintiff had negligently incurred the danger, and it fails to do so, and to use reasonable care by which injury could have been avoided, yet it is stating the rule too broadly to say that the company is liable if it might have avoided the injury or the consequences of the plaintiff's negligence by the exercise of reasonable care.[235] So, it does not always follow that the company is liable because the engineer did not do the best thing possible upon the spur of the moment,[236] and where it was

[235] International &c. R. Co. v. Eason (Tex.); 35 S. W. 208; Galveston &c. R. Co. v. Murray, (Tex. Civ. App.) 99 S. W. 144, 148; Indiana &c. Co. v. Stewart, 7 Ind. App. 563; 34 N. E. 1019; Maryland Cent. R. Co. v. Neubeur, 62 Md. 391; Kean v. Baltimore &c. R. Co. 61 Md. 154; 19 Am. & Eng. R. Cas. 321; Texas &c. R. Co. v. Nolan, 62 Fed. 552, 556; Schmolze v. Chicago &c. R. Co. 83 Wis. 659; 54 N. W. 106; St. Louis &c. R. Co. v. Ross, 61 Ark. 617; 33 S. W. 1054; Murphy v. Deane, 101 Mass. 455; 3 Am. R. 390; Kirtley v. Chicago &c. R. Co. 65 Fed. 386; Gilbert v. Erie R. Co. 97 Fed. 747; New York &c. R. Co. v. Kelly, 93 Fed. 745; Hot Springs R. Co. v. Johnson, 64 Ark. 420; 42 S. W. 833; Dull v. Cleveland &c. R. Co. 21 Ind. App. 571, 593; 52 N. E. 1013; Holwerson v. St. Louis & Suburban R. Co. 157 Mo. 216; 57 S. W. 770; 50 L. R. A. 850, 855 (quoting text); 2 Thomp. Neg. (2d ed.) § 1597, et seq.; Beach Contrib. Neg. § 56. Such a rule would do away with the doctrine of contributory negligence almost entirely and make the company liable if the injury could have been avoided by it by due care in the first instance regardless of the contributory negligence of the plaintiff thereafter. But see Bogan v. Carolina Cent. R. Co. 129 N. Car. 154; 39 S. E. 808; 55 L. R. A. 418, and note. See, also, as to its application to licensees and trespassers, ante, §§ 1050–1057.

[236] Dull v. Cleveland &c. R. Co. 21 Ind. App. 571, 591, 592, 593; 52

conclusively shown that it was impossible for the engineer to avoid collision after he saw the vehicle in which the plaintiff's intestate was riding, it was held error, in a recent case, for the court to submit the issue of discovered peril to the jury.[237]

§ 1176. Injuries at defective crossings.—Where a railroad company, whose duty it is to restore and keep in repair a highway crossing, negligently fails to perform that duty, it will be liable to a traveler upon the highway who, in the exercise of due care, is injured thereby.[238] It has also been held that if it constructs a crossing at a point where all the travel is, although not the true line of the highway as established, it is liable for a defect in such crossing the same as if it were on the true line of the highway.[239] A hole in the crossing may constitute such a defect as will render the company liable to one injured thereby,[240] and so may a defect in the planking between the

N. E. 1013; Kirtley v. Chicago &c. R. Co. 65 Fed. 386, 391. See, also, Rowe v. Southern R. Co. (Cal. App.); 87 Pac. 220; Pittsburgh &c. R. Co. v. Ferrell (Ind. App.); 78 N. E. 988.

[237] Colorado &c. R. Co. v. Thomas, 33 Colo. 517; 81 Pac. 801.

[238] Oakland &c. R. Co. v. Fielding, 48 Pa. St. 320; Pittsburgh &c. R. Co. v. Dunn, 56 Pa. St. 280; International &c. R. Co. v. Douglas, 7 Tex. Civ. App. 554; 27 S. W. 793; Tobias v. Michigan &c. R. Co. 103 Mich. 330; 61 N. W. 514; Jeffrey v. Detroit &c. R. Co. 108 Mich. 221; 65 N. W. 755; 31 L. R. A. 170; Hanson v. Chicago &c. R. Co. 94 Iowa 409; 62 N. W. 788; O'Connor v. Boston &c. R. Co. 135 Mass. 352; Omaha &c. R. Co. v. Ryburn, 40 Neb. 87; 58 N. W. 541; Omaha &c. R. Co. v. Brady, 39 Neb. 27; 57 N. W. 767; Johnson v. St. Paul &c. R. Co. 31 Minn. 283; 17 N. W. 622; Snow v. Housatonic R. Co. 8 Allen (Mass.), 441; 85 Am. Dec. 720; Veazie v. Penobscot &c. R. Co. 49 Me. 119; Paine v. Grand Trunk &c. R. Co. 58 N. H. 611; Mann v. Central Vermont R. Co. 55 Vt. 484; 45 Am. R. 628; 14 Am. & Eng. R. Cas. 620; Lake Shore &c. R. Co. v. McIntosh, 140 Ind. 261; 38 N. E. 476; Grand Trunk R. Co. v. Sibbald, 20 Can. S. C. R. 259; Oliver v. Northeastern R. Co. L. R. 9 Q. B. 409; Kearney v. London &c. R. Co. L. R. 5 Q. B. 411. The defect in the crossing must, however, be a proximate cause of the injury. Murphy v. Michigan Cent. R. Co. 108 Mich. 221; 65 N. W. 753; 31 L. R. A. 170.

[239] Taylor &c. R. Co. v. Warner, (Tex. Civ. App.); 31 S. W. 66. See, also, Texas &c. R. Co. v. Neill (Tex. Civ. App.); 30 S. W. 369; Missouri Pac. R. Co. v. Bridges, 74 Tex. 520; 12 S. W. 210; 15 Am. St. R. 856; Ruddell v. Seaboard &c. R. Co. (S. Car.); 55 S. E. 528.

[240] Washburn v. Chicago &c. R. Co. 68 Wis. 474; 32 N. W. 234; Georgia &c. R. Co. v. Parks, 93

tracks.[241] Thus, where a greater space is left between the planking and the rail than is required for the running of trains and the operation of the road, the company is liable to one who, while exercising due care, gets his foot, or that of his horse, fastened therein, and is run over or otherwise injured by the negligence of the company in that regard.[242] So, where the company left its rails projecting four or five inches above the surface of the street, without any planking or filling between them, it was held that it was for the jury to determine whether it was negligent, and therefore liable to a traveler who was injured at the crossing.[243] And where a railroad company permitted "engineer stakes" to remain upon a street, and a traveler on such street was injured by falling over the stakes, the company was held liable therefor.[244] In another case the company had left its track nine inches above the surface of the highway, and it was held liable for the death of the plaintiff's horse from the extraordinary exertion in pulling a loaded wagon over the obstruction.[245] In

Ga. 228; 18 S. E. 652; Louisville &c. R. Co. v. Pritchard, 131 Ind. 564; 31 N. E. 358; 31 Am. St. 451. See, also, Potter v. Bunnell, 20 Ohio St. 150; Oakland R. Co. v. Fielding, 48 Pa. St. 320.

[241] Tetherow v. St. Joseph &c. R. Co. 98 Mo. 74; 11 S. W. 310; 14 Am. St. 617, and note; Pennsylvania R. Co. v. Boylan, 104 Ill. 595; Lillstrom v. Northern Pac. R. Co. 53 Minn. 464; 55 N. W. 624; 20 L. R. A. 587; Retan v. Lake Shore &c. R. Co. 94 Mich. 146; 53 N. W. 1094; Dillingham v. Fields (Tex.), 29 S. W. 214; Payne v. Troy &c. R. Co. 83 N. Y. 572; O'Connor v. Boston &c. R. Corp. 135 Mass. 352.

[242] Spooner v. Delaware &c. R. Co. 115 N. Y. 22; 21 N. E. 696; Payne v. Troy &c. R. Co. 83 N. Y. 572; 6 Am. & Eng. R. Cas. 54; Elgin &c. R. Co. v. Raymond, 148 Ill. 241; 35 N. E. 729; Toledo &c. R. Co. v. Clark, 49 Ill. App. 17; Louisville &c. R. Co. v. Phillips, 112 Ind. 59; 13 N. E. 132; 2 Am. St. R. 155; Burlington &c. R. Co. v. Koonce, 34 Neb. 479; 51 N. W. 1033.

[243] Wasmer v. Delaware &c. R. Co. 80 N. Y. 212; 36 Am. R. 608. See, also, Evansville &c. R. Co. v. Pritchard, 131 Ind. 564; 31 N. E. 358; 31 Am. St. 451; Milwaukee &c. R. Co. v. Hunter, 11 Wis. 160; 78 Am. Dec. 699; Louisville &c. R. Co. v. Hubbard (Ala.), 41 So. 814.

[244] Gudger v. Western &c. R. Co. 87 N. Car. 325. See, also, Judson v. New York &c. R. Co. 29 Conn. 434 (liability to traveler falling into culvert); Bowen v. Detroit &c. R. Co. 54 Mich. 496; 20 N. W. 559; 52 Am. R. 822 (liability for failing to remove snow as required by ordinance).

[245] Evansville &c. R. Co. v. Carvener, 113 Ind. 51; 14 N. E. 738. It is not, perhaps, altogether certain that the plaintiff was free from contributory negligence in this case, but the court, while admitting that contributory negligence would bar a recovery, held that

still another case, decided by the same court, the railroad company was held liable where it had so constructed the crossing as to leave an obstruction, or embankment in the highway, which was the plaintiff's only means of access to his home, and the plaintiff, without fault on his part, while riding homeward, was severely injured by reason of such obstruction, combined with the fright of his horse at a hand-car negligently managed by the company's employes.[246] So, railroad companies have been held liable in other cases for injuries caused by their failure to construct barriers or guards where they were necessary to make the crossing reasonably safe.[247] It should not be forgotten, however, that contributory negligence will prevent a recovery here as in other cases.[248] Nor does the law require the exercise of extraordinary care and vigilance on the part of a railroad company to keep its crossings safe for travelers upon the highway,[249] and it has been held that the company is not liable for an injury received by such a traveler because of its crossing being out of repair, unless it had notice thereof, or unless the defect had existed for such a length of time that it ought to have taken, or may be presumed to have had, notice of such defect.[250]

§ 1177. Evidence of subsequent repairs and other accidents at the same place.—Evidence of repairs made, or precautions taken, after the injury was received, is not competent to prove antecedent

he had a right to use the crossing and could not have anticipated any such result.

[246] Evansville &c. R. Co. v. Crist, 116 Ind. 446; 19 N. E. 310; 2 L. R. A. 450; 9 Am. St. 865.

[247] Veazie v. Penobscot R. Co. 49 Me. 119; Evansville &c. R. Co. v. Allen, 34 Ind. App. 636; 73 N. E. 630; Atlanta &c. R. Co. v. Wood, 48 Ga. 565; Queen v. Rigley, 14 Q. B. 687; Oliver v. Northeastern R. Co. L. R. 9 Q. B. 409. And for defects in approaches, Southern Indiana R. Co. v. McCarrell, 163 Ind. 469; 71 N. E. 156. But see Gulf &c. R. Co. v. Sneed, 84 Miss. 252; 36 So. 261.

[248] International &c. R. Co. v. Robertson (Tex. Civ. App.); 27 S. W. 564; Ford v. Chicago &c. R. Co. 91 Iowa, 179; 59 N. W. 5; 24 L. R. A. 657, and note; Reynolds v. Missouri &c. Ry. Co. 70 Kans. 340; 78 Pac. 801. But see See v. Wabash R. Co. 123 Ia. 443; 99 N. W. 106.

[249] Terre Haute &c. R. Co. v. Clem, 123 Ind. 15; 23 N. E. 965; 7 L. R. A. 588; 18 Am. St. 303, and note; 42 Am. & Eng. R. Cas. 229; St. Louis &c. Ry. Co. v. Johnson, (Tex. Civ. App.); 85 S. W. 476.

[250] Mann v. Chicago &c. R. Co. 86 Mo. 347. See, also, Hill v. Port Royal &c. R. Co. 31 So. Car. 393; 10 S. E. 91; 5 L. R. A. 349; 39 Am. & Eng. R. Cas. 607.

negligence,[251] according to the better rule, nor is evidence that other persons have been injured at the same place.[252] But evidence of both of these things may sometimes be competent for other purposes. Thus, for the purpose of showing notice of the defect on the part of the company, evidence that others have been injured from the same defect is admissible in a proper case.[253] So, evidence of other acci-

[251] Morse v. Minneapolis &c. Co. 30 Minn. 465; 16 N. W. 358; disapproving earlier Minnesota cases. Terre Haute &c. R. Co. v. Clem, 123 Ind. 15; 23 N. E. 965; 7 L. R. A. 588; 18 Am. St. 303, and note; Ely v. St. Louis &c. Co. 77 Mo. 34; Nalley v. Hartford &c. Co. 51 Conn. 524; 50 Am. R. 47; Hodges v. Percival, 132 Ill. 53; 23 N. E. 423; Isaacs v. Southern Pac. R. Co. 49 Fed. 797; Dale v. Delaware &c. R. Co. 73 N. Y. 468; Hudson v. Chicago R. Co. 59 Iowa, 581; 13 N. W. 735; 44 Am. R. 692, and note; 8 Am. & Eng. R. Cas. 464, See v. Wabash R. Co. 123 Ia. 443; 99 N. W. 106; Dougan v. Champlain Co. 56 N. Y. 1; Board of Comrs. v. Pearson, 129 Ind. 456; 28 N. E. 1120; Menard v. Boston &c. R. Co. 150 Mass. 386; 23 N. E. 214; Heucke v. Milwaukee &c. R. Co. 69 Wis. 401; 34 N. W. 243; Sappenfield v. Main St. &c. R. Co. 91 Cal. 48; 27 Pac. 590, citing Elliott Roads and Streets, 646–649. See, also, 2 Elliott Ev. § 228; Pennsylvania Co. v. Henderson, 51 Pa. St. 315; West Chester &c. R. Co. v. McElwee, 67 Pa. St. 311; Martin v. Towle, 59 N. H. 31; Galveston &c. R. Co. v. Evansich, 63 Tex. 54. See, also, St. Joseph &c. R. Co. v. Chase, 11 Kans. 47; Kansas Pac. R. Co. v. Miller, 2 Colo. 442; Augusta &c. R. Co. v. Renz, 55 Ga. 126; Lederman v. Penna. R. Co. 165 Pa. St. 118; 30 Atl. 735; 3 Elliott Ev. § 2516; 44 Am. St. 644;

[252] Richards v. City of Oshkosh, 81 Wis. 226; 51 N. W. 256, 257; 42 Am. & Eng. Corp. Cas. 109, 111, citing Elliott Roads and Streets, 646, 647; Dubois v. Kingston, 102 N. Y. 219; 6 N. E. 273; 55 Am. R. 804; O'Hagan v. Dillon, 76 N. Y. 170; Cleveland &c. R. Co. v. Wynant, 114 Ind. 525; 17 N. E. 118; 5 Am. St. 644; Hudson v. Chicago &c. R. Co. 59 Iowa 581; 13 N. W. 735; 44 Am. R. 692, and note; 8 Am. & Eng. R. Cas. 464; Davis v. Oregon &c. R. Co. 8 Ore. 172; Chicago &c. R. Co. v. Lee, 60 Ill. 501; 3 Elliott Ev. § 2506. But see Gordon v. Boston &c. R. Co. 58 N. H. 396; Mobile &c. R. Co. v. Ashcraft 48 Ala. 15; 3 Elliott Ev. § 2506; Stone v. Seattle 33 Wash. 644; 74 Pac. 808; Wooley v. Grand St. R. Co. 83 N. Y. 121. In Birmingham &c. R. Co. v. Alexander 93 Ala. 133, 9 So. 525, it was held proper to show that others crossed safely about the same time. See, also, Nivitte v. New Orleans &c. R. C. 42 La. Ann. 1153; 8 So. 581. But compare Mobile &c. R. Co. v. Vallowe, 214 Ill. 124; 73 N. E. 416.

[253] District of Columbia v. Armes, 107 U. S. 519; 2 Sup. Ct. 840; Delphi v. Lowery, 74 Ind. 520; 39 Am. 98; Augusta v. Hafers, 61 Ga. 48; 34 Am. R. 95; Chicago v. Powers, 42 Ill. 169; 89 Am. Dec. 418; Darling v.

dents at the same place is sometimes admissible for the same purpose, or to show its condition or the like.[254] But the court, upon proper request, should, by instructions, restrict the evidence to the point upon which it is competent, and not permit it to be considered as proof of antecedent negligence.[255]

§ 1178. Collisions with street cars.—The rules which we have heretofore stated in regard to the respective rights of railroad companies and travelers upon a highway apply as between the railroad company and a street railway company. Their rights and duties are, in a sense, mutual and reciprocal, but the cars of the commercial or steam railroad company have the superior right of way or passage.[256] As to the railroad company, the driver or other proper employe of the street car company should exercise the same care as the driver of a private vehicle.[257] But as between the street car company and its passengers, he is required, as in other cases, to exercise the higher

Westmoreland, 52 N. H. 401; 13 Am. R. 55; Pomfrey v. Saratoga Springs, 104 N. Y. 459; 11 N. E. 43; Hill v. Portland R. Co. 55 Me. 438; 92 Am. Dec. 601; Elliott Roads and Streets (2d ed.) § 628; Jeffersonville v. McHenry, 22 Ind. App. 10; 53 N. E. 183. But see Collins v. Dorchester, 6 Cush. (Mass.) 396; Blair v. Pelham, 118 Mass. 420.

[254] Phelps v. Winona &c. R. Co. 37 Minn. 485; 35 N. W. 273; 5 Am. St. R. 867; Kolsti v. Minneapolis &c. R. C. 32 Minn. 133; 19 N. W. 655; Mackie v. Central R. Co. 54 Iowa 405; 6 N. W. 723; Hirsch v. Buffalo, 107 N. Y. 671; 14 N. E. 608; Chicago v. Dalle, 115 Ill. 386; 5 N. E. 578; Chicago &c. R. C. v. Netolicky, 67 Fed. 665; Lafayette v. Weaver, 92 Ind. 477. So, evidence of the condition of the track near by has been held admissible to show the surroundings as part of the res gestae. Tetherow v. St. Joseph &c. R. Co. 98 Mo. 74; 11 S. W. 310; 14 Am. St. 617; Sparkbracker v. Larrabee, 64 Wis. 573; 25 N. W. 555; Armstrong v. Ackley, 71 Iowa 76; 32 N. W. 180; Aurora v. Hillman, 90 Ill. 61. But see Dundas v. Lansing, 75 Mich. 499; 42 N. W. 1011; 5 L. R. A. 143, and note; 13 Am. St. 457; Hiner v. Fond du Lac, 71 Wis. 74; 31 N. W. 632; Pittsburgh &c. R. Co. v. Williams, 74 Ind. 462; Reed v. New York &c. R. Co. 45 N. Y. 574. See generally 3 Elliott Ev. §§ 2506, 2516.

[255] Richards v. Oshkosh, 81 Wis. 226; 51 N. W. 256; 42 Am. & Eng. Corp. Cas. 109, citing Elliott Roads and Streets 650; Sewell v. City of Cohoes, 11 Hun (N. Y.), 626; Lafayette v. Weaver, 92 Ind. 477.

[256] DuBois &c. R. Co. v. Buffalo &c. R. Co. 10 Pa. Co. R. 401, affirmed in 149 Pa. St. 1.

[257] Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91; 2 Am. Eng. R. Cas. 172. See, also, Minneapolis St. R. Co. v. Chicago &c. R. Co. 33 Minn. 62; 21 N. W. 853; 19 Am. & Eng. R. Cas. 362.

care which is due to its passengers by such a carrier.[258] It has been held, however, that the fact that a street car driver has been instructed to obey the signal of a flagman employed by the commercial railroad company does not make such flagman an agent of the street car company so as to render it responsible for his negligence.[259] The contributory negligence of the employes of the street railway company is not to be imputed to a passenger in its car in an action by him against the commercial railroad company for negligently injuring him in a collision.[260] He may maintain an action against either company by whose

[258] Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91; 2 Am. & Eng. R. Cas. 172; West Chicago St. R. Co. v. Martin, 47 Ill. App. 610. See, also, Central Passenger R. Co. v. Kuhn, 86 Ky. 578; 6 S. W. 441; 9 Am. St. 309; Watkins v. Atlantic Ave. R. Co. 20 Hun (N. Y.) 237; Smith v. St. Paul &c. R. Co. 32 Minn. 1; 18 N. W. 827; 50 Am. R. 550, and note; Booth Street Railways, §§ **324, 327, 328**; Douglass v. Sioux City St. R. Co. 91 Ia. 94; 58 N. W. 1070; Graham v. Great Western R. Co. 41 U. C. Q. B. 324.

[259] Chicago R. Co. v. Volk, 45 Ill. 175. Compare Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91.

[260] Gulf &c. R. Co. v. Pendery, 87 Tex. 553; 29 S. W. 1038; 47 Am. St. 125; Baltimore &c. R. Co. v. State, 79 Md. 335; 29 Atl. 578; 47 Am. St. 415, and note; Holzab v. New Orleans &c. R. Co. 38 La. Ann. 185; 58 Am. R. 177; Bennett v. New Jersey R. Co. 36 N. J. L. 225; 13 Am. 435; New York &c. R. Co. v. Steinbrenner, 47 N. J. L. 161; 54 Am. R. 126, and note; Little Rock &c. R. Co. v. Harrell, 58 Ark. 454; 25 S. W. 117; Pittsburgh &c. R. Co. v. Spencer, 98 Ind. 186; 21 Am. & Eng. R. Cas. 478; Little v. Hackett, 116 U. S. 366; 6 Sup. Ct. 391; Transfer Co. v. Kelly, 36 Ohio St. 86; 38 Am. R. 558; New York &c. R. Co. v. Cooper, 85 Va. 939; 9 S. E. 321; 37 Am. & Eng. R. Cas. 33; note to Gray v. Philadelphia &c. R. Co. 22 Am. & Eng. R. Cas. 351; Elliott Roads and Streets, 632; 1 Thomp. Neg. (2d ed.) § 500; Beach Contrib. Neg. § **110**; Booth Street Railways § **362**. But see Lockhart v. Lichtenthaler, 46 Pa. St. 151, with which compare O'Toole v. Pittsburgh &c. R. Co. 158 Pa. St. 99; 27 Atl. 737; 22 L. R. A. 606. The same rule obtains where one is riding in the private vehicle of another, and the doctrine of Thorogood v. Bryan, 8 C. B. 115, is now denied both in England and in nearly all of the states. The Bernina L. R. 12 Prob. Div. 58, reported also in note to Borough of Carlisle v. Brisbane, 113 Pa. St. 544; 6 Atl. 372; 57 Am. R. 483, 494; Masterson v. New York &c. R. Co. 84 N. Y. 247; 38 Am. R. 510; Robinson v. New York &c. R. Co. 66 N. Y. 11; 23 Am. R. 1; Knightstown v. Musgrove, 116 Ind. 121; 18 N. E. 452; 9 Am. St. 827; Philadelphia &c. R. Co. v. Hogeland, 66 Md. 149; 7 Atl. 105; 59 Am. R. 159; 57 Am. R. 492; Louisville &c. R. Co. v. Creek, 130 Ind. 139; 29 N. E. 481; 14 L. R. A. 733, and note; Lake Shore &c. R. Co. v. McIntosh, 140 Ind. 261; 38 N. E.

negligence he is injured,[261] and if his injury is caused by the concurrent negligence of both of them he is not obliged to sue them severally, but may sue them jointly.[262] Further consideration of this subject at this place is unnecessary, as it has already been treated in the chapters on street railroads and crossings of highways and railroads.

§ 1179. Directing a verdict in crossing cases.—Where there is an omission of the duty of the traveler to look and listen before attempting to cross a railroad track, and such omission is a proximate cause of the injury complained of, the general rule is that it is the duty

476; Street Railway Co. v. Eadie, 43 Ohio St. 91; 1 N. E. 519; 54 Am. R. 802; Nesbit v. Garner, 75 Iowa, 314; 39 N. W. 516; 1 L. R. A. 152, and note; Roach v. Western &c. R. Co. 93 Ga. 785; 21 S. E. 67; Alabama &c. R. Co. v. Davis, 69 Miss. 444; 13 So. 693, and text books above cited. But see Prideaux v. City of Mineral Point, 43 Wis. 513; 28 Am. 558; Carlisle v. Sheldon, 38 Vt. 440; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Mullen v. Owosso, 100 Mich. 103; 58 N. W. 663; 43 Am. St. 436, and note; Whittaker v. Helena, 14 Mont. 124; 35 Pac. 904; 43 Am. St. 621. Where, however, he has control and should look out for himself, his failure to do so may prevent a recovery. Brickell v. New York &c. R. Co. 120 N. Y. 290; 24 N. E. 449; 17 Am. St. 648; Dean v. Pennsylvania R. Co. 129 Pa. St. 514; 18 Atl. 718; 6 L. R. A. 143; 15 Am. St. 733; Miller v. Louisville &c. R. Co. 128 Ind. 97; 27 N. E. 339; 25 Am. St. 416, and note; Louisville &c. R. Co. v. Stommel, 126 Ind. 35; 25 N. E. 863; Yahn v. Ottumwa, 60 Iowa, 429; 15 N. W. 257; Galveston &c. R. Co. v. Kutac, 76 Tex. 473; 13 S. W. 327.

[261] Wabash &c. R. Co. v. Shacklet, 105 Ill. 364; 44 Am. 791, and cases cited in following note.

[262] Tompkins v. Clay St. R. Co. 66 Cal. 163; 4 Pac. 1165 (may sue both, and, by dismissing as to one which the evidence does not make a case against, recover from the other upon sufficient evidence); Barrett v. Third Ave. R. Co. 45 N. Y. 628; Schneider v. Second Ave. R. Co. 133 N. Y. 583; 30 N. E. 752; Flaherty v. Northern Pac. R. Co. 39 Minn. 328; 40 N. W. 160; 1 L. R. A. 680, and note; 12 Am. St. 654; Georgia Pac. R. Co. v. Hughes, 87 Ala. 610; 6 So. 413; Cuddy v. Horn, 46 Mich. 596; 10 N. W. 32; 41 Am. R. 178; Colegrove v. New York &c. R. Co. 20 N. Y. 492; 75 Am. Dec. 418, and note; Louisville &c. R. Co. v. Case, 9 Bush. (Ky.) 728; Downey v. Philadelphia &c. R. Co. 161 Pa. St. 588; 29 Atl. 126; 58 Am. & Eng. R. Cas. 594. But where both companies were in fault it was held that neither could recover against the other and that the jury in returning a verdict against both could not at the same time return a verdict over in favor of one of them against the other. Texas &c. R. Co. v. Doherty (Tex. Civ. App.) 15 S. W. 44.

of the trial court to direct a verdict for the defendant.[263] In such cases the duty of the traveler, in most jurisdictions, is definitely fixed by law, and there is no question of fact to be submitted to the jury.[264] There may be cases where the facts are such that it would

[263] Braudy v. Detroit &c. R. Co. 107 Mich. 100; 64 N. W. 1056; Gardner v. Detroit &c. R. Co. 97 Mich. 240; 56 N. W. 603; Mobile &c. R. Co. v. Coerner, 112 Fed. 489; Rollins v. Chicago &c. R. Co. 139 Fed. 639; Blount v. Grand Trunk &c. R. Co. 61 Fed. 375 (citing Union Pac. R. Co. v. McDonald, 152 U. S. 262; 14 Sup. Ct. 619; Delaware &c. R. Co. v. Converse, 139 U. S. 469; 11 Sup. Ct. 569; Elliott v. Chicago &c. R. Co. 150 U. S. 245; 14 Sup. Ct. 85); Conkling v. Erie R. Co. 63 N. J. 338; 43 Atl. 666, 667 (citing text); Blackburn v. Southern Pac. R. Co. 34 Oreg. 215; 55 Pac. 225, 229 (citing text). The rule in relation to directing a verdict was thus stated in North Pennsylvania R. Co. v. Commercial Bank, 123 U. S. 727, 733; 8 Sup. Ct. 266: "It would be an idle proceeding to submit the evidence to the jury when they could justly find only in one way." See, also, Schofield v. Chicago &c. R. Co. 114 U. S. 615, 618; 5 Sup. Ct. 1125; Randall v. Baltimore &c. R. Co. 109 U. S. 478, 482; 3 Sup. Ct. 322; Blumenthal v. Boston &c. R. Co. 97 Me. 255; 54 Atl. 747; Oleson v. Lake Shore &c. R. Co. 143 Ind. 405; 42 N. E. 736 (citing Elliott Gen. Practice, § 889); 32 L. R. A. 149; Grippen v. New York &c. R. Co. 40 N. Y. 34, 47; Heaney v. Long Island &c. R. Co. 112 N. Y. 122; 19 N. E. 422; McCrory v. Chicago &c. R. Co. 31 Fed. 531; Cordell v. New York &c. R. Co. 70 N. Y. 119, 125; 26 Am. R. 550; Sala v. Chicago &c. R. Co. 85 Iowa, 678; 52 N. W. 664; Woolf v. Washington R. &c. Co. 37 Wash. 491; 79 Pac. 997, 999 (citing text). The cases of Nixon v. Chicago &c. R. Co. 84 Iowa, 331; 51 N. W. 187, and Shufelt v. Flint &c. R. Co. 96 Mich. 327; 55 N. W. 1013, supply apt examples of the duty of the court to direct a verdict.

[264] Beach Contributory Negligence (2nd ed.), § 180; Woolf v. Washington Ry. &c. Co. 37 Wash. 491; 79 Pac. 997, 999 (quoting text). See, also, Chicago &c. R. Co. v. Rossow, 117 Fed. 491; Missouri &c. Ry. Co. v. Bussey, 66 Kans. 735; 71 Pac. 261; Steber v. Chicago &c. R. Co. 115 Wis. 200; 91 N. W. 654. In Hollinger v. Canadian &c. R. Co. 20 Ont. App. 244; 55 Am. & Eng. R. Cas. 269; 21 Ont. App. 705; 55 Am. & Eng. R. Cas. 192, a somewhat different view is taken, but it is difficult to reconcile that view with the doctrine of the English courts. Davey v. London &c. R. Co. L. R. 11 Q. B. D. 213; L. R. 12 Q. B. D. 70; Scott v. Dublin &c. R. Co. 11 Irish C. L. 377. The conclusion asserted in the case first cited is certainly in conflict with the great number of cases which hold that the negligence of the defendant does not absolve the plaintiff from the duty of exercising ordinary care. The true rule is that laid down in Grippen v. New York &c. R. Co. 40 N. Y. 34, where it was held that: "The law will not permit a party to neglect

not be proper for the court to direct a verdict although the plaintiff did not look and listen, as, for instance, where, without any fault, he was misled by the negligent acts of the company, and so, on the other hand, there may be cases where it would be proper to direct a verdict although the plaintiff did look and listen, as, for instance, where he looked and listened only from a place where he knew that looking and listening would be of no avail, or recklessly took the chances of crossing immediately in front of a rapidly moving train.

§ 1179a. Question of contributory negligence left to the jury.—Questions of negligence and of contributory negligence are usually questions of fact, or mixed questions of law and fact. Where the evidence is without conflict, and an absolute standard of care exists or is prescribed, or but one reasonable inference can be drawn, the question usually becomes one of law for the court, and, in many instances, the court can well say that there are at least some things that must usually be done in order to constitute reasonable and ordinary care. This is, perhaps peculiarly true in railroad crossing cases, and many decisions, some of which are referred to in the next section, illustrate this doctrine. But "circumstances alter cases," and there are not only some jurisdictions in which the inclination is to leave the question of contributory negligence to be nearly always determined by the jury under all the circumstances, but there are also cases in nearly every jurisdiction in which it has been left to the jury to determine whether the traveler looked and listened at such a time and place and in such a manner as to constitute reasonable and ordinary care, whether his failure, if any, was a proximate cause of his injury, or the like, and even, in some instances, whether, under the peculiar circumstances, he was excused from looking and listening, or, at least, from not looking and listening to such an extent as might otherwise have been required. The following are some of the cases that seem to go the furthest in this direction. Where the plaintiff was struck on the

his own means of self-preservation on the plea that he assumed that other parties would be duly careful, and for that reason subject himself to injury, which by due care he might nevertheless have avoided. The right to assume that others will perform their duty to be duly careful does not warrant him in omitting due precautions. On the contrary, such an omission makes the negligence of both concur in producing the result." See, also, McGrath v. New York &c. R. Co. 59 N. Y. 468, 473; 17 Am. R. 359, and note.

south-bound track while a north-bound train was passing on the next track furtherest from him, and he could have seen the approaching train by which he was struck if he had looked before he stepped on the track, it was held that the question of contributory negligence was for the jury.[265] In a New York case, where a woman was injured at a crossing, the court said: "Whether she looked exactly at the right moment, or in each direction in proper succession, or from the place most likely to afford information, cannot be determined as matter of law, and whether upon the whole, and in view of all the surrounding circumstances, including the negligent conduct of defendant, she exercised due care, was a question which the trial court could not properly decide for itself, but was bound to submit to the jury as one which they alone could answer."[266] And in another case decided by the same court a similar ruling was made.[267] It has also been held that

[265] Chicago &c. R. Co. v. Pearson, 184 Ill. 386; 56 N. E. 633. And in the course of the opinion it is said: "It is not a rule of law that the omission of the duty to look and listen will bar a recovery where there are facts excusing the performance of that duty (Elliott Railroads, § 1166), and it is the settled rule of this court that it cannot be said as a matter of law, that a person is in fault in failing to look and listen if misled without his fault, or where the surroundings may excuse such failure. Pennsylvania Co. v. Frana, 112 Ill. 398; Chicago &c. R. Co. v. Dunleavy, 129 Ill. 132; 22 N. E. 15; Chicago &c. R. Co. v. Hansen, 166 Ill. 623; 46 N. E. 1071; Terre Haute &c. R. Co. v. Voelker, 129 Ill. 540; 22 N. E. 20. The jury were to determine, as a question of fact, in view of all the surroundings, whether the deceased was guilty of negligence in failing to look and listen for the other train."

[266] Greany v. Long Island R. Co. 101 N. Y. 419; 5 N. E. 425. See, also, Minot v. Boston &c. R. Co. 73 N. H. 317; 61 Atl. 509; Chicago &c. R. Co. v. Keegan, 112 Ill. App. 338.

[267] Oldenburg v. New York &c. R. Co. 124 N. Y. 414; 26 N. E. 1021. The court, referring to the plaintiff, said: "Had he stopped and looked toward the west at the instant that he reached the said point (a point five feet from the track), he could have seen the danger in time to avoid it, but less than two steps forward brought him in contact with the crossbeam of the tender, which projected about two feet beyond the rails of the track on each side, and he was thrown under the wheels and killed. He did not look toward the west at the critical moment when he could have seen the engine, but went with his head down, as if looking at the sidewalk, which was rough, and the planks composing it very uneven. The gateman had begun to lower the south gate, and it was half down when the accident happened. As he was lowering the gate, he shouted

one approaching a railroad crossing in a city "is not bound to anticipate that an approaching train will proceed at an unlawful or an unusual rate of speed, and is not chargeable with negligence, as matter of law, in attempting to cross, if, in view of the distance at which the track seems to be clear, he would have time to cross before a train going at the usual and lawful speed would reach the crossing."[268] Again, in a recent case, where the plaintiff's intestate was killed while crossing a side-track, by a work train which was backed against him, and there was no proof that he knew an engine was attached to the cars on the side-track, and if he did there was nothing to show that he might not reasonably have assumed that the train would pull out of the switch forward, and not backward, it was held that, though he was not justified in ignoring the probability of the train backing toward him, and in failing to keep a lookout therefor, yet it was for the jury to consider whether decedent might not, in the discharge of the duty of looking both ways for his own safety, have reasonably relaxed his vigilance in failing to look toward the rear of that train.[269] Even in Indiana, where the rule as to looking and listening is well established, it is held that particular circumstances requiring the traveler to direct his attention temporarily elsewhere, or misleading him, may make the case one for the jury, and that the rule is not inflexible

to the deceased, who paid no attention, and whether he heard or not was a question of fact, under the circumstances. The space between the middle and south tracks, where Oldenburg could have stood without danger from the passenger coach behind or the advancing tender in front, was only three feet long. In order to reverse this judgment, it is necessary to hold that, notwithstanding the peculiar facts surrounding him, he was bound, as matter of law, while passing over this distance of three feet, to look to the west so as to see the engine, or else to look in front of him and up high enough to see the gate as it began to fall. We do not think that the law required this, but agree with the courts below in holding that the question of contributory negligence, under all the circumstances, was one of fact for the jury and not of law for the court. . . . While he was bound to use his eyes, we cannot say that he was bound to use them in a particular manner, at a particular instant of time."

[268] Farrell v. Erie R. Co. 138 Fed. 29.

[269] Choctaw &c. R. Co. v. Baskins (Ark.); 93 S. W. 757. See, also, St. Louis &c. R. Co. v. Tomlinson, 69 Ark. 489; 64 S. W. 347, 349; Atlantic City R. Co. v. Goodin, 62 N. J. L. 394; 42 Atl. 333; 45 L. R. A. 671; 72 Am. St. 652; St. Louis &c. R. Co. v. Hill — (Ark.), 88 S. W. 908, 990.

and unvarying as to time and place, so as to always, and under all circumstances, require the case to be taken from the jury merely because the traveler might have seen the train if he had looked in the right direction at a particular instant from a particular place.[270]

§ 1179b. Question of contributory negligence decided by court. —In many jurisdictions, as already shown, the quantum of care required of a traveler at a railroad crossing is prescribed by law, and it is held that, under ordinary circumstances, he must at least look and listen, and even in jurisdictions in which this is not laid down as an absolute rule of law verdicts have often been directed or new trials granted on the ground of contributory negligence on the part of the traveler where he did not look or listen and was deemed to have failed to exercise reasonable care. In this section an attempt will be made to collect and review some of the strongest and most extreme cases in which verdicts were so directed or the question decided as one of law. In one case a girl only twelve years old was held guilty of contributory negligence as a matter of law where the special verdict showed that she attempted to walk across a railroad track in front of an approaching train which she could have seen if she had looked when five feet from the track.[280] So, in a number of other cases, travelers have been held guilty of contributory negligence as a matter of law where there were obstructions or the like and they did not look or listen from a point at which such observation would be availing, even though such point was only a short distance from the track.[281] In many other cases where the undis-

[270] See Louisville &c. R. Co. v. Williams, 20 Ind. App. 576; 51 N. E. 128; Greenwaldt v. Lake Shore &c. R. Co. 165 Ind. 219; 74 N. E. 1081; Cleveland &c. R. Co. v. Harrington, 131 Ind. 426; 30 N. E. 37; Malott v. Hawkins, 159 Ind. 127; 63 N. E. 308. See, also, Hopson v. Kansas City &c. R. Co. 87 Miss. 789; 40 So. 872; Chicago &c. R. Co. v. Clough, 134 Ill. 586; 25 N. E. 664; Chicago &c. R. Co. v. Hutchinson, 120 Ill. 82; 11 N. E. 855; Jennings v. St. Louis &c. R. Co. 112 Mo. 268; 20 S. W. 490; Richmond v. Chicago &c. R. Co. 87 Mich. 374; 49 N. W. 621; Coffee v. Pere Marquette R. Co. 139 Mich. 378; 102 N. W. 953; Nutter v. Boston &c. R. Co. 60 N. H. 483, 485; Wabash &c. R. Co. v. Biddle, 27 Ind. App. 161; 59 N. E. 284; St. Louis &c. R. Co. v. Hitt, 76 Ark. 227; 88 S. W. 908, 911, 990; New York &c. R. Co. v. Robbins, (Ind. App.); 76 N. E. 804.

[280] Shirk v. Wabash R. Co. 14 Ind. App. 126; 42 N. E. 656.

[281] Weyl v. Chicago &c. R. Co. 40 Minn. 350, 352, 353; 42 N. W. 24;

puted physical facts showed that the plaintiff could and should have known of the approach of the train in time to have avoided injury if he had properly looked and listened a like ruling has been made.[282] Again, in a recent case,[283] applying this rule, it is said: When the uncontradicted evidence conclusively shows that the colliding train must have been plainly visible from the point at which the testimony shows that the injured or killed person looked and listened for the train, the law conclusively presumes either that he did not look and listen, or that if he did look or listen, or both, he afterwards heedlessly disregarded the knowledge thus obtained and negligently went into an obvious danger. In neither view is the company operating the train responsible under ordinary circumstances for the damages consequent upon the collision, of which the person injured or killed was the proximate cause.[284] . . . If that point

Clark v. Northern Pac. R. Co. 47 Minn. 380; 50 N. W. 365; Jobe v. Memphis &c. R. Co. 71 Miss. 734; 15 So. 129; Cleveland &c. R. Co. v. Coffman, 30 Ind. App. 462; 64 N. E. 233; Derk v. Northern Cent. R. Co. 164 Pa. St. 243; 30 Atl. 231; Gardner v. Detroit R. Co. 97 Mich. 240; 56 N. W. 603. See, also, Chicago &c. R. Co. v. Hedges, 118 Ind. 5, 9, 10, 11; 20 N. E. 530; Baltimore &c. R. Co. v. Reynolds, 33 Ind. App. 219; 71 N. E. 250; Louisville &c. R. Co. v. Stommel, 126 Ind. 35, 41; 25 N. E. 863; Owens v. Pennsylvania R. Co. 41 Fed. 187, 191; Washington &c. R. Co. v. Lacey, 94 Va. 460; 26 S. E. 834, 839; Green v. Los Angeles &c. R. Co. 143 Cal. 31; 76 Pac. 719; 101 Am. St. 68; Coleman v. New York &c. R. Co. 98 App. Div. (N. Y.) 349; 90 N. Y. S. 264; Phillips v. Detroit &c. R. Co. 111 Mich. 274; 69 N. W. 496; 66 Am. St. 392.

[282] See ante, § 1165; also Rollins v. Chicago &c. R. Co. 139 Fed. 639; Northern Pac. Ry. Co. v. Freeman, 174 U. S. 379; 19 Sup. Ct. 763; Kemp v. Northern Pac. R. Co. 89 Minn. 139; 94 N. W. 439; Marshall v. Green Bay &c. R. Co. 125 Wis. 96; 103 N. W. 249; Southern R. Co. v. Davis, 34 Ind. App. 377; 72 N. E. 1053; Cleveland &c. R. Co. v. Coffman, 30 Ind. App. 462; 64 N. E. 233; Sims v. St. Louis &c. R. Co. 116 Mo. App. 572; 92 S. W. 909; Stowell v. Erie R. Co. 98 Fed. 520. See, also, McCann v. Chicago &c. R. Co. 105 Fed. 480; Work v. Chicago &c. R. Co. 105 Fed. 874; Quinn v. Chicago &c. R. Co. 162 Ind. 442; 70 N. E. 526.

[283] Carlson v. Chicago &c. R. Co. 96 Minn. 504; 105 N. W. 555.

[284] Citing Brown v. St. Paul R. Co. 22 Minn. 165, 167; Miller v. Truesdale, 56 Minn. 274; 57 N. W. 661; Weyl v. Chicago &c. R. Co. 40 Minn. 350; 42 N. W. 24; Howe v. Minneapolis R. Co. 62 Minn. 78; 64 N. W. 102; 30 L. R. A. 684; 54 Am. St. 616; Nelson v. St. Paul &c. R. Co. 76 Minn. 193; 78 N. W. 1041; 79 N. W. 530; Schmidt v. Great Northern R. Co. 83 Minn. 105; 85 N. W 935; Kemp v. Northern Pac.

be so far distant from the track as to enable the person injured or killed to know of the approaching train in due season[285] to avoid the

R. Co. 89 Minn. 139, 142; 94 N. W. 439; Chicago &c. R. Co. v. Andrews, 130 Fed. 65; 64 C. C. A. 399; Northern Pac. R. Co. v. Freeman, 174 U. S. 379; 19 Sup. Ct. 763; 43 L. Ed. 1014; Wardner v. Great Northern R. Co. 96 Minn. 382; 104 N. W. 1084.

[285] Citing Blount v. Grand Trunk R. Co. 61 Fed. 375; 9 C. C. A. 526; Straugh v. Detroit &c. R. Co. 65 Mich. 706; 36 N. W. 161; Huggart v. Mo. Pac. R. Co. 134 Mo. 673; 36 S. W. 220; Stopp v. Fitchburg R. Co. 80 Hun (N. Y.), 178; 29 N. Y. Supp. 1008; Morris v. Lake Shore R. Co. 148 N. Y. 182; 42 N. E. 579; Maryland v. Pittsburg &c. R. Co. 123 Pa. 487; 16 Pa. 624; 10 Am. St. 541; Butler v. Gettysburg &c. R. Co. 126 Pa. 160; 19 Atl. 37. In the course of the opinion it is also said: "Another principle is well established: That a person crossing as deceased was could not rely upon signals to remind him of danger. He is bound to be awake and alive for his own protection." Lewis, J., in Sandberg v. Railway Co. 80 Minn. 442; 83 N. W. 411. Accordingly, the failure of plaintiff's intestate to look and listen would be negligence or not according to the circumstances, but without being controlled by the defendant's failure to do its duty. Beach Con. Neg. § 185; Schneider v. Northern Pac. R. Co. 81 Minn. 383; 84 N. W. 124. Negligence of the defendant's employes in failing to whistle or ring a bell at a crossing is no excuse for negligence on the part of the person about to cross in failing to use the senses to discover danger. Chicago &c. R. Co. v. Houston, 95 U. S. 697, 702; 24 L. Ed. 542; Northern Pac. R. Co. v. Freeman, 174 U. S. 379; 19 Sup. Ct. 763; 43 L. Ed. 1014. And see cases collected in Judson v. Great Northern R. Co. 63 Minn. 248, 254; 65 N. W. 447. The duty of exercising caution in attempting to cross a railway track, a place of known danger, is not relaxed by the opportunity or occasion for theorizing or difference of opinion as to whether a train is or is not likely to pass. Observation, not logic, is the proper precaution. Dodge, J., in Guhl v. Whitcomb, 109 Wis. 69; 85 N. W. 142; 83 Am. St. Rep. 889. That the train which did the damage in this case was an "extra" did not relieve either party from the respective duty of the exercise of care. Swiftly moving and irregular trains are to be expected, and it is the duty of persons about to go upon crossings to look and listen for such trains, as well as those on time or which run slowly. Collins, J., in Judson v. Great Northern R. Co., 63 Minn. 248, 254; 65 N. W. 447. It is true that, in the absence of evidence to the contrary, there is sometimes a presumption that one was killed while crossing a railroad track stopped, looked, and listened before attempting to cross the track. Texas &c. R. Co. v. Gentry, 163 U. S. 353, 366; 16 Sup. Ct. 1104; 41 L. Ed. 186; Baltimore &c. R. Co. v. Landrigan, 91 U. S. 461, 474; 24 Sup. Ct. 137; 48 L. Ed. 262. But in this case the plaintiff introduced evidence of the daughter of deceased, who was driving

collision with it, he is guilty of contributory negligence as a matter of law, and there is nothing for a jury to pass upon."

§ 1179c. Collision with traction engines.—The right to move traction engines along a public highway exists in most of the states, although, in many of them, under certain statutory restrictions intended to minimize the likelihood of injuries to other users of the road or street.[286] These machines are not so constructed as to easily go over a ridge in the highway and have a tendency to stall at highway crossings and numerous collisions have resulted from this cause. In the main the law relating to the care to be exercised by the railroad company and the drivers of vehicles generally at crossings, apply to traction engines under the same circumstances.[287] Thus in Tennessee where the statute makes it the duty of a person using a traction engine on a highway to have a watchman two hundred yards in advance of the machine, it has been held that a recovery for injuries in a collision with a railroad train was not barred to one who failed to obey the statute, unless the failure to have the watchman contributed to the accident.[288] On the question of the amount of

with him, as to what happened. Moreover, when it appears from the undisputed evidence that, if deceased had looked and listened before driving upon the crossing, he must have seen and heard the train approaching, as was the case here, the presumption is destroyed. Rollins v. Chicago &c. R. Co. 139 Fed. 639. Accordingly, upon appellant's own view of the facts in this case, that deceased looked up the track at a point 50 feet from it, it is not necessary to determine how far there is to be applied to it the ordinary rule that one who attempts to cross a railroad is bound to use his senses continually while approaching and while crossing the place of known danger (Rogstad v. St. Paul R. Co. 31 Minn. 208; 17 N. W. 287; Sandberg v. St. Paul &c. R. Co. 80 Minn. 442; 83 N. W. 411; Wright v. Cincinnati &c. R. Co. 94 Ky. 114; 21 S. W. 581; Renwick v. New York &c. R. Co. 36 N. Y. 132; Whitman v. Pennsylvania R. Co. 156 Pa. 175; 27 Atl. 290; Thompson v. New York &c. R. Co. 110 N. Y. 636; 17 N. E. 690; Moore v. Chicago &c. R. Co. 102 Iowa, 595; 71 N. W. 569), in view of the fact that he was riding in a covered carriage, making it inconvenient for him to look up and down the road. See Stackus v. New York &c. R. Co. 79 N. Y. 464; Hicks v. New York &c. R. Co. 164 Mass. 424; 41 N. E. 721; 49 Am. St. 471."

[286] 1 Thomp. Neg. (2d ed.) 1312.

[287] Chesapeake &c. R. Co. v. Crews (Tenn.), 99 S. W. 368.

[288] Chesapeake &c. R. Co. v. Crews (Tenn.), 99 S. W. 368.

the damages for an injury to a traction engine in a collision, it has been held that the owner was entitled to recover the reasonable cash value of the engine just before the injury less the reasonable cash value after the injury, or if the engine could be restored, then he was entitled to the reasonable cash value of making the repairs, together with the reasonable cash value of the use of the engine during the time it would reasonably take to repair the same.[289]

§ 1179d. Injuries to bicyclists at crossings.—The bicyclist approaching a crossing is subject to the same duty as any other traveler to look and listen before venturing upon the track. Where his view of the track is obstructed and his hearing dulled by other sounds he should not proceed across the track without having his bicycle under such control that he can stop and avoid accident if necessary.[290] It has been held that a bicyclist crossing a series of tracks and required to be alert in looking for approaching trains from different directions, was not indisputably negligent in failing to notice a defect in the crossing into which he ran his wheel and was thrown and injured.[291] A bicyclist riding his wheel along a railroad right of way, between the tracks at a place other than a crossing, is a trespasser and is entitled to no greater degree of care from the railroad company than any other trespasser. In one case where a bicyclist was thus riding in an open space ten or twelve feet wide between the tracks, where persons did and could ride with safety, it was held that this circumstance did not show that he was in peril or made it the duty of the engineer of an approaching train to stop the train to avoid injuring him, on the theory that he might possibly fall or be thrown upon the tracks.[292]

§ 1179e. Leaving objects on or near highway calculated to frighten horses.—A railroad company, like any other corporation or per-

[289] Davidson v. Chicago &c. R. Co. 98 Mo. App. 142; 71 S. W. 1069.

[290] Waddell v. New York Cent. &c. R. Co. 98 App. Div. (N. Y.) 343; 90 N. Y. S. 239. See, also, Cleveland &c. R. Co. v. Heine, 28 Ind. App. 163; 62 N. E. 455. There may be cases in which he should stop and alight, but this is not always necessary as a matter of law. Cleveland &c. R. Co. v. Penketh, 27 Ind. App. 210, 215; 60 N. E. 1095.

[291] Sonn v. Erie R. Co. 67 N. J. L. 350; 51 Atl. 1109, affirming 66 N. J. L. 428; 49 Atl. 458.

[292] Seaboard &c. R. Co. v. Vaughan, 104 Va. 113; 51 S. E. 452.

son, is liable for injuries caused by leaving on or near a public highway, objects, the natural tendency of which is to frighten horses of ordinary gentleness.[293] And it is not everywhere essential that the road should have been a legally traveled highway, but there is authority fixing this liability where the object calculated to cause fright was near a road which was not a legal highway, but had been used by the public to the knowledge of the railroad company and without its protest.[294] Actionable negligence by a railroad company may consist in leaving cars on or near a highway crossing in such a way as to frighten horses of ordinary gentleness, and this, whether the obstruction is in a traveled part of the road or not.[295] It has been held that the mere fact that a train was allowed to stand across a highway for more than two minutes in violation of a statute imposing a penalty for so doing, so that a traveler's horses, after he had been compelled to wait for the train to get out of the way, took fright when the train began to move, and was killed, did not entitle the owner to damages. This statute being designed merely to prevent travelers being delayed at a crossing, it is clear that the injury was not the proximate cause of the violation of the statute, but was collateral to it.[296] Railroad companies have been held liable for injuries caused by the fright of horses at such objects, for example, as the carcasses of animals killed by the cars and allowed to remain in the sight of passing horses beyond a time reasonably sufficient for their removal,[297] derricks used for unloading freight into the highway,[298] a pile of cinders left on the railroad right of way within the limits of the highway and partially hidden from view by weeds, until horses would be very close to it,[299] a handcar so placed as to assume an

[293] 1 Thomp. Neg. (2d ed.) 1257 et seq.

[294] Texas &c. R. Co. v. McManus, 15 Tex. Civ. App. 122; 38 S. W. 241.

[295] Missouri &c. R. Co. v. Jones, 13 Tex. Civ. App. 376; 35 S. W. 322; Selleck v. Lake Shore &c. R. Co. 93 Mich. 375; 53 N. W. 556; 18 L. R. A. 154; Baltimore &c. R. Co. v. Faith, 71 Ill. App. 59. But see Atchison &c. R. Co. v. Morris, 64 Kan. 411; 67 Pac. 837, where it is held that railroad cars are not of such a terrifying nature that their presence in a street is per se dangerous.

[296] Hall v. Brown, 54 N. H. 495.

[297] Baxter v. Chicago &c. R. Co. 87 Ia. 488; 54 N. W. 350; Chicago &c. R. Co. v. Scranton, 95 Ill. App. 619 (delay of two hours not unreasonable).

[298] Jones v. Housatonic R. Co. 107 Mass. 261.

[299] Illinois &c. R. Co. v. Griffin, 184 Ill. 9; 56 N. E. 337, affirming 84 Ill. App. 152.

appearance calculated to frighten roadwise animals,[300] a lot of culvert pipes piled on the right of way in the highway,[1] a mail crane.[2]

§ 1179f. Horses frightened by the operation of handcars.—Generally speaking no liability will be attached to the railroad company from the fact that the traveler's horses became frightened through the usual and necessary operation of the handcar, where the operatives proceeded with reasonable care and caution having due regard to the rights of the traveling public.[3] And where the view of the track is not obstructed and the traveler's eyesight is good, the failure of the operatives to signal or give notice of the approach of the handcar at the crossing will not alone charge the railroad company with negligence to one whose injury was caused by the fright of his horse at the car.[4] But a railroad company was held liable where its employes drove a handcar at great speed over a highway crossing when they saw the fright of plaintiff's horse, but made no effort to stop the car, where if they had done so, the plaintiff could have recovered control of his horse and escaped injury.[5]

§ 1179g. Acts of intermeddlers.—Where the railroad company has placed a car or other object where it will not obstruct the highway or tend to frighten passing horses, and the car or object is afterwards moved into the highway by intermeddlers, it has been held that the company is not liable for injuries caused thereby, unless it allowed the car or object to remain on or in near proximity to the highway

[300] Sherman &c. R. Co. v. Bridges, 16 Tex. Civ. App. 64; 40 S. W. 536; Ohio &c. R. Co. v. Trowbridge, 126 Ind. 391; 26 N. E. 64.

[1] Witham v. Bangor &c. R. Co. 96 Me. 326; 52 Atl. 764 (delay of four days in removing and placing pipe not unreasonable).

[2] Cleghorn v. Western R. Co. 134 Ala. 601; 33 So. 10; 60 L. R. A. 269. See, also, post, § 1264. But see for cases in which there was held no liability for fright at a car or the like, Hohman v. New York &c. R. Co. 90 N. Y. S. 882, affirmed in 184 N. Y 591; 77 N. E. 1189; Cleveland &c. R. Co. v. Wynant, 100 Ind. 160, 165, 166; Gilbert v. Flint &c. R. Co. 51 Mich. 488; 16 N. W. 868; Everett v. Great Northern R. Co. (Minn.) 111 N. W. 281.

[3] Lake Erie &c. R. Co. v. Juday, 19 Ind. App. 436; 49 N. E. 834.

[4] Chicago &c. R. Co. v. Vremeister, 112 Ill. App. 346. See, also, Clinebell v. Chicago &c. R. Co. (Neb.) 110 N. W. 347; post, § 1264.

[5] Lake Erie &c. R. Co. v. Juday, 19 Ind. App. 436; 49 N. E. 834. See, also, Houston &c. R. Co. v. Beard (Tex. Civ. App.), 93 S. W. 532; post, § 1264.

for an unreasonable time.[6] But the company may be negligent in not properly looking after its cars and preventing such intermeddling when it knows, or ought to know, that it is likely to occur.

§ 1179h. Closing without warning a train open at a crossing.—In cases where trains are open at crossings to allow the use of the highway, it is the plain duty of those in charge of the train to give signals or timely warnings of an intention to connect the train, so that those using the street or highway will have an opportunity to get out of danger.[7] Thus, it was held that a railroad company was liable to a boy, free from contributory negligence, for injuries received while attempting to pass between parts of a freight train at a crossing, by the sudden backing of part of the train without previous warning, and it further appeared that the crossing had been blocked for an unreasonable time.[8] A South Carolina statute providing that if an engine or cars be at a standstill within less than one hundred rods of a highway crossing, the bell shall be rung or the whistle sounded for at least twenty seconds before the engine is moved and shall be kept ringing until the engine has crossed such highway, has been held to apply to a train standing across a highway so that a pedestrian, who was injured by catching his foot between the bumpers of the cars of a freight train, stopped across the highway and moved without the statutory warning, had an action against the company for damages.[9]

§ 1179i. Travelers struck by trains on parallel tracks.—A not unusual form of crossing accident is where a traveler crosses behind one train and is struck by an engine or train coming from an opposite direction on a parallel track. In most such cases, the accident could have been avoided had the traveler looked or listened before going forward, and recoveries have been generally defeated on the principle of contributory negligence for failure to observe these precautions.[10]

[6] Cleveland &c. R. Co. v. Wynant, 114 Ind. 525; 17 N. E. 118.

[7] Weber v. Atchison &c. R. Co. 54 Kan. 389. See, also, Golden v. Pennsylvania &c. R. Co. 187 Penn. 635; 41 Atl. 302; Schmitz v. St. Louis &c. R. Co. 46 Mo. App. 380; Ft. Worth &c. R. Co. v. Dennis (Tex.), 33 S. W. 884.

[8] Golden v. Pennsylvania &c. R. Co. 187 Penn. 635; 41 Atl. 302.

[9] Littlejohn v. Richmond &c. R. Co. 49 S. C. 12; 26 S. E. 967.

[10] See, generally, Holland v. Chicago &c. R. Co. 18 Fed. 243; Daniels v. Staten Island &c. R. Co. 125 N. Y. 407; 26 N. E. 466; Smith v. Philadelphia &c. R. Co. 160 Pa. St.

But there are some cases which hold that persons so injured are not guilty of contributory negligence as a matter of law, and that the question is one for the jury, under the particular circumstances, although the traveler may have failed to continuously look or listen for the train which ran upon him,[11] or, having looked once, attempted to cross without giving a second look.[12] Judge Thompson, after an examination of a great number of cases, sums up his views on this branch of the law of negligence in these words: "A very numerous class of railway accidents has arisen from the fact that the traveler, attempting to cross behind one train where there are two or more parallel tracks, fails to look to see whether another train may not be coming on another track from the opposite direction, and gets in front of the second train and is killed or injured by it. In these cases the circumstances tend to excuse the negligence of the traveler much more than when he is approaching a crossing having but a single track. The receding train obscures from his view the coming train, and the noise of the receding train prevents him from distinguishing the noise of the coming train. Nevertheless, the books show that, in a majority of accidents of this kind, the judges hold that the

117; 28 Atl. 641; Butts v. St. Louis &c. R. Co. 98 Mo. 272; 11 S. W. 754; Allerton v. Boston &c. R. Co. 146 Mass. 241; 15 N. E. 621; Guta v. Lake Shore &c. R. Co. 81 Mich. 291; 45 N. W. 821; Daily v. Richmond &c. R. Co. 106 N. C. 301; 11 S. E. 320; Ensley R. Co. v. Chewning, 93 Ala. 24; 9 So. 458; Duvall v. Michigan &c. R. Co. 105 Mich. 386; 63 N. W. 437; Derk v. Northern &c. R. Co. 164 Pa. St. 243; 30 Atl. 231; Hughes v. Delaware &c. Canal Co. 176 Pa. St. 254; 35 Atl. 190; West Jersey R. Co. v. Ewan, 55 N. J. L. 574; 27 Atl. 1064; Stowell v. Erie &c. R. Co. 98 Fed. 520; Quinn v. Chicago &c. R. Co. 162 Ind. 442; 70 N. E. 526; Meinrenken v. New York &c. R. Co. 81 App. Div. (N. Y.) 132; 80 N. Y. S. 1074.

[11] Daume v. Chicago &c. R. Co. 72 Wis. 523; 40 N. E. 394; 7 Am. St. 879; Brown v. Griffin, 71 Tex. 654; 9 S. W. 546; Crone v. New York &c. R. Co. 48 N. Y. St. Rep. 409; 20 N. Y. S. 529; White v. New York &c. R. Co. 42 N. Y. St. Rep. 24; 16 N. Y. S. 788; Laible v. New York &c. R. Co. 13 App. Div. (N. Y.) 574; 43 N. Y. S. 1003; Indianapolis &c. R. Co. v. Neubacher, 16 Ind. App. 21; 43 N. E. 576, rehearing denied, 44 N. E. 669; Lake Shore &c. R. Co. v. Ehlert, 19 Ohio C. C. 177; 10 Ohio C. D. 443; Roberts v. Boston &c. R. Co. 69 N. H. 354; 45 Atl. 94; Chicago &c. R. Co. v. Pearson, 82 Ill. App. 605. See, also, Schrems v. Pere Marquette R. Co. (Mich.) 108 N. W. 698; Hopson v. Kansas City &c. R. Co. 87 Miss. 789; 40 So. 872; ante, §§ 1166a, 1179a.

[12] Brown v. Adgarton, 58 Kan. 815; 49 Pac. 159.

contributory negligence of the confused and bewildered traveler prevents any recovery of damages, as matter of law."[13] Another species of injury properly classified at this place, is where a traveler at a crossing leaves a position of safety at the side of the track and places himself between parallel tracks so close together that he is injured by contact with cars moving in opposite directions as they pass the place where he stands. The traveler has been held clearly negligent in such a case.[14] But the cases are not harmonious, and one case holds that a person has a right to assume that the space between railroad tracks is sufficient to allow him to stand midway of such space without risk of injury.[15]

§ 1179j. Traveler struck by train closely following another.—It is a matter of common knowledge that trains follow each other at varying intervals, and this knowledge makes it the duty of the traveler, stopped at a crossing by a passing train, to wait long enough after the train has passed to see whether another train is following before entering upon the crossing. The cases very generally ascribe

[13] 2 Thomp. Neg. (2d ed.) § 1679, citing Stowell v. Erie &c. R. Co. 98 Fed. 520; Daily v. Richmond &c. R. Co. 106 N. C. 301; 11 S. E. 320; Gebhard v. Detroit &c. R. Co. 79 Mich. 586; 44 N. W. 1045; Guta v. Lake Shore &c. R. Co. 81 Mich. 291; 45 N. W. 821; Allerton v. Boston &c. R. Co. 146 Mass. 241; 15 N. E. 621; Butts v. St. Louis &c. R. Co. 98 Mo. 272; 11 S. W. 754; Holland v. Chicago &c. R. Co. 18 Fed. 243; Hovenden v. Pennsylvania R. Co. 180 Pa. St. 244; 36 Atl. 731; Kraus v. Pennsylvania R. Co. 139 Pa. St. 272; 20 Atl. 993; West Jersey R. Co. v. Ewan, 55 N. J. L. 574; 27 Atl. 1064; Duvall v. Michigan &c. R. Co. 105 Mich. 386; 63 N. W. 437; Schmidt v. Philadelphia R. Co. 149 Pa. St. 357; 24 Atl. 218; Adams v. New York &c. R. Co. 49 N. Y. St. Rep. 854; 21 N. Y. S. 681; Purdy v. New York &c. R. Co. 87 Hun (N. Y.), 97; 67 N. Y. St. Rep. 676; 33 N. Y. S. 952; Hughes v. Delaware &c. Canal Co. 176 Pa. St. 254; 35 Atl. 190; Derk v. Northern &c. R. Co. 164 Pa. St. 243; 30 Atl. 231; Ensley R. Co. v. Chewning, 93 Ala. 24; 9 So. 458; Norfolk &c. R. Co. v. Wilson, 90 Va. 263; 18 S. E. 35; Smith v. Philadelphia &c. R. Co. 160 Pa. St. 117; 28 Atl. 641; Bjork v. Illinois &c. R. Co. 85 Ill. App. 269 (foot traveler attempted to cross several tracks on which trains were coming from opposite directions, and, in escaping from one, was injured by another, there being nothing to obstruct the view of either train,—no question for the jury); Daniels v. Staten Island &c. R. Co. 125 N. Y. 407; 26 N. E. 466.

[14] McCann v. Chicago &c. R. Co. 105 Fed. 480.

[15] Eichorn v. New Orleans &c. Light Co. 112 La. Ann. 236; 36 So. 335.

contributory negligence to a traveler who neglects this precaution and as a result is struck by the following engine or train.[16] Thus it has been held that a person, attempting to cross a railroad track on a public highway, who was familiar with and relied on a rule of the company which prohibited trains from following one another within ten minutes, was chargeable with contributory negligence in going on the track without looking or listening for approaching trains, though the train which caused the injury was a "wild train," and followed the preceding one within one or two minutes.[17] But running trains so close together as to render the statutory signal unavailing, may, under the circumstances, operate to mislead a traveler to some extent, and prevent him from being adjudged guilty of contributory negligence as a matter of law under particular circumstances.[18]

[16] Purdy v. New York &c. R. Co. 87 Hun (N. Y.), 97; 33 N. Y. S. 952; Fletcher v. Fitchburg R. Co. 149 Mass. 127; 21 N. E. 302; 3 L. R. A. 743; Schmidt v. Philadelphia &c. R. Co. 149 Pa. St. 357; 24 Atl. 218; Benson v. Chicago &c. R. Co. 41 Ill. App. 227; Baltimore &c. R. Co. v. Talmage, 15 Ind. App. 203; 43 N. E. 1019

[17] Bush v. Union Pac. R. Co. 62 Kan. 709; 64 Pac. 624.

[18] See Chicago &c. R. Co. v. Boggs, 101 Ind. 522; Cleveland &c. R. Co. v. Miles, 162 Ind. 646; 70 N. E. 985; Davidson v. Lake Shore &c. R. Co. 179 Pa. 227; 36 Atl. 291; also, ante, §§ 1166a; 1179a.

CHAPTER L.

DUTY TO FENCE AND INJURIES TO ANIMALS.

§ 1180. Common-law rule.—At common law, as it existed in England and in a great number of states in this country, the owner of animals is bound, at his peril, to keep them confined on his own premises.[1] If he does not keep them so confined and they escape to the premises of others he may be held liable for the trespass.[2] No person is obliged, according to the common-law rule, to fence his premises against the animals of others but has a right to rely on others performing their duty by keeping their animals confined. Since this rule is applicable to all owners of property it follows that at common law railway companies are not bound to fence their tracks so as to prevent animals from entering thereon.[3] If animals escape from their owner's premise and find their way onto the right of way of a railway company and are injured the railway company is not liable at common law unless the injuries inflicted on the animals are the result of wantonness or willfulness on the part of the railway employes.[4] If the injuries sustained by the animals are caused by

[1] 3 Blackst. Com. 211; Rust v. Low, 6 Mass. 90; Bostwick v. Minneapolis &c. Co. 2 N. Dak. 440; 51 N. W. 781; 49 Am. & Eng. R. Cas. 527; 12 Am. & Eng. Ency. of Law (2nd ed.), 1039, 1040, and authorities there cited. But as there shown on pages 1041, 1042, in a number of states this doctrine has not been adopted.

[2] Savannah &c. Co. v. Geiger, 21 Fla. 669. See, also, Stackpole v. Healy, 16 Mass. 33; 8 Am. Dec. 121, and note; 58 Am. R. 697, and notes.

[3] Cornwall v. Sullivan &c. Co. 28 N. H. 161; Hurd v. Rutland &c. Co. 25 Vt. 116; Boston &c. Co. v. Briggs, 132 Mass. 24; 7 Am. & Eng. R. Cas. 541; Eames v. Salem &c. Co. 98 Mass. 560; 96 Am. Dec. 676, and note; Stuckee v. Milwaukee &c. Co. 9 Wis. 202; Perkins v. Eastern &c. Co. 29 Me. 307; 50 Am. Dec. 589; Morse v. Rutland &c. Co. 27 Vt. 49; Chapin v. Sullivan &c. Co. 39 N. H. 53; 75 Am. Dec. 207; Tower v. Providence &c. Co. 2 R. I. 404; Pennsylvania Co. v. Riblet, 66 Pa. St. 164; 5 Am. R. 360; Indianapolis &c. Co. v. Harter, 38 Ind. 557; Williams v. New Albany &c. R. Co. 5 Ind. 111; Bostwick v. Minneapolis &c. Co. 2 N. Dak. 440; 51 N. W. 781; 49 Am. & Eng. R. Cas. 527; Baltimore &c. Co. v. Lamborn, 12 Md. 257; Robinson v. Flint &c. Co. 79 Mich. 323; 44 N. W. 779; 19 Am. St. 174; Henry v. Dubuque &c. Co. 2 Iowa, 288; North Eastern &c. Co. v. Sineath, 8 Rich. (S. Car.) 185; Mangold v. St. Louis &c. R. Co. 116 Mo. App. 606; 92 S. W. 753 (citing text).

[4] Maynard v. Boston &c. Co. 115 Mass. 458; 15 Am. R. 119; Williams v. Michigan &c. Co. 2 Mich. 259; 55 Am. Dec. 59; Halloran v. New York &c. Co. 2 E. D. Smith (N. Y.), 257; Bennett v. Chicago &c. Co. 19 Wis. 145; Vandegrift v. Rediker, 22 N. J. L. 185; 51 Am. Dec. 262; Woolson v. Northern &c. Co. 19 N. H. 267; Spinner v. New York &c.

mere negligence on the part of the company or its employes the company is not, ordinarily, liable where this rule obtains, although there are some authorities which hold that if the company is guilty of negligence even where the common-law rule is in force, it will be liable.[5]

Co. 67 N. Y. 153; Indianapolis &c. Co. v. Harter 38 Ind. 557; Stucke v. Milwaukee &c. Co. 9 Wis. 202; Louisville &c. Co. v. Ballard, 2 Metc. (Ky.) 165; Tower v. Providence &c. Co. 2 R. I. 404; Perkins v. Eastern &c. Co. 29 Me. 307; 50 Am. Dec. 589; Railroad Co. v. Skinner, 19 Pa. St. 298; 57 Am Dec. 654; Pittsburgh &c. Co. v. Stuart, 71 Ind. 500; Atchison &c. Co. v. Betts, 10 Colo. 431; 15 Pac. 821; 31 Am. & Eng. R. R. Cas. 563; Drake v. Philadelphia &c. Co. 51 Pa. St. 240; Central Branch &c. Co. v. Lea, 20 Kan. 353; International &c. Co. v. Cocke, 64 Tex. 151; 23 Am. & Eng. R. Cas. 226; Denver &c. Co. v. Olsen, 4 Colo. 239; Fisher v. Farmers' &c. Co. 21 Wis. 73; Price v. New Jersey &c. Co. 32 N. J. L. 19; Darling v. Boston &c. Co. 121 Mass. 118; Jeffersonville &c. Co. v. Underhill, 48 Ind. 389. The rule is thus stated in the comparatively recent case of Moses v. Southern Pacific R. Co. 18 Ore. 385; 23 Pac. 498; 42 Am. & Eng. R. Cas. 555: "As the plaintiff is bound at common law to keep his cattle within his own enclosure, and is liable for all damages done by them when they stray upon the lands of others, he is the party in fault, and it results, if he suffers them to stray upon the track of a railroad, they are there without right, and as trespassers, through his wrongful conduct, and, if injured or killed by the negligence of the railroad or its agents, in the management of its train, he must abide the consequences, upon the ground that the defendant company owes no duty of care to trespassing cattle on their tracks, except not wantonly or wilfully to destroy them, and that, in permitting the cattle to be at large wrongfully or by his own fault, he has contributed to produce the injury of which he complains, and is precluded from a recovery. When such a state of facts exists, nothing but wilfulness on the part of the agents of the company, or, as the authorities sometimes put it, such negligence as would amount to wilfulness, would make the company liable in damages for the killing of cattle upon their tracks, so exposed by the fault of their owner." See, also, Campbell v. New York &c. R. Co. 50 Conn. 128; Birmingham &c. R. Co. v. Parsons, 100 Ala. 662; 13 So. 602; 46 Am. St. 92; Jones v. Western &c. R. Co. 95 N. Car. 328.

[5] Gorman v. Pacific &c. R. Co. 26 Mo. 441; 72 Am. Dec. 220; Isbell v. New York &c. R. Co. 27 Conn. 393; 71 Am. Dec. 78; Rockford &c. R. Co. v. Irish, 72 Ill. 404; McCoy v. California &c. R. Co. 40 Cal. 532; 6 Am. R. 623; Vicksburg &c. R. Co. v. Patton, 31 Miss. 156; New Orleans &c. R. Co. v. Field, 46 Miss. 573; Trout v. Virginia &c. R. Co. 23 Gratt. (Va.) 619; South &c. R. Co. v. Williams, 65 Ala. 74; Kentucky &c. R. Co. v. Lebus, 14 Bush. (Ky.) 518; Needham v. San Francisco &c. R. Co. 37 Cal. 409; With-

The weight of authority is to the effect, however, that it is liable only for willfulness or gross negligence amounting to wantonness. Since such animals as find their way onto the premises of a railway company are wrongfully there, being trespassers, it follows that if they cause any injury to the trains of the railway company their owner will be liable for such injuries.[6] In a number of states in this country, however, the strict rule of the common law requiring the owner of animals to keep them confined has not been adopted.[7] The rigidity of the rule has been greatly relaxed in several jurisdictions and where it is the general custom to permit cattle and other animals to run at large on uninclosed lands it is held that an owner is guilty of no wrong in not keeping his animals confined.[8] The

erell v. Milwaukee &c. R. Co. 24 Minn. 410; Cincinnati &c. R. Co. v. Smith, 22 Ohio St. 227; 10 Am. R. 729; Jackson v. Rutland &c. Co. 25 Vt. 150; 60 Am. Dec. 246.

[6] Child v. Hearn, L. R. 9 Exch. 176; Annapolis &c. R. Co. v. Baldwin, 60 Md. 88; 45 Am. R. 711; Housatonic &c. R. Co. v. Knowles, 30 Conn. 313; Sinram v. Pittsburgh &c. R. Co. 28 Ind. 244; Railroad Co. v. Skinner, 19 Pa. St. 298; 57 Am. Dec. 654; Hannibal &c. R. Co. v. Kenney, 41 Mo. 271; Drake v. Philadelphia &c. Co. 51 Pa. St. 240.

[7] Louisville &c. R. Co. v. Cochran, 105 Ala. 354; 16 So. 797; Campbell v. Bridwell, 5 Ore. 311; Moses v. Southern Pacific R. Co. 18 Ore. 385; 23 Pac. 498; 8 L. R. A. 135, and note; 42 Am. & Eng. R. Cas. 555; Savannah &c. R. Co. v. Geiger, 21 Fla. 669; 29 Am. & Eng. R. Cas. 274; Alabama &c. R. Co. v. Jones, 71 Ala. 487; Alabama &c. Co. v. McAlpine, 71 Ala. 545; Campbell v. New York &c. R. Co. 50 Conn. 128; Little Rock &c. R. Co. v. Finley, 37 Ark. 562; Blaine v. Chesapeake &c. R. Co. 9 W. Va. 252; Timm v. Northern &c. R. Co. 3 Wash. Ter. 299; 13 Pac. 415; Evans v. Burlington &c. R. Co. 21 Iowa, 374; Farmer v. Wilmington &c. R. Co. 88 N. Car. 564.

[8] Kerwhaker v. Cleveland &c. R. Co. 3 Ohio St. 172; 62 Am. Dec. 246; Central Ohio &c. R. Co. v. Lawrence, 13 Ohio St. 66. See, also, 12 Am. & Eng. Ency. of Law (2d ed.) 1041–1044, and other cases there cited. The reason for the modification of the rule is thus stated in Kerwhaker v. Cleveland &c. R. Co. 3 Ohio St. 172: "Admitting the rule of the common law of England in relation to cattle and other live stock running at large to be such as stated, the question arises whether it is applicable to the condition and circumstances of the people of this state, and in accordance with their habits, understandings, and necessities. . . . Cattle, hogs, and all other kinds of live stock not known to be breachy and unruly and dangerous, have been allowed at all times and in all parts of the state to run at large and graze on the range of uncultivated and uninclosed lands. And this prevails not only throughout the country, but also in the villages and cities, except where it may be,

modification of the rule has not the effect, however, of requiring owners of premises to fence against animals running at large, in all jurisdictions. Since in many jurisdictions it is held that animals may lawfully be at large it necessarily results that if they enter upon uninclosed premises of third persons they are not necessarily trespassers and their owner is not liable for trespass in such cases. This modification of the common-law rule in some jurisdictions has this effect upon the duty of railway companies to animals upon their tracks: It makes them liable for injuries negligently inflicted where, as we have seen, under the ancient common-law rule they were liable

to a limited extent, restrained by local municipal ordinances. For many years, in the early settled parts of the state, the people were unable, and at the present time in some parts of the state they are yet unable to clear and inclose more ground than that actually needed for cultivation, and there is not at this time inclosed pasture lands sufficient to confine one-half of the live stock in the state. Even a statutory enactment, imposing the severest criminal punishment for permitting these animals to run at large, could not be enforced without either slaughtering or driving a large portion of them from the state. It has been the habit of the people to inclose their grounds for the purpose of cultivation, and to fence against the animals running at large. And it has been only within a few years, and that only in the better improved parts of the state, that uncultivated pasture grounds have been inclosed. And this has not been done because the owners considered themselves required by law to confine their stock within inclosures, but for their own convenience and advantage. So that it has been the general custom of the people of this state, since its first settlement, to allow their cattle, hogs, horses, etc., to run at large and range upon the uninclosed lands of the neighborhood in which they are kept; and it has never been understood by them that they were tortfeasors, and liable in damages for letting their stock thus run at large. The existence or enforcement of such a law would have greatly retarded the settlement of the country, and have been against the policy of both the general and the state governments. The common understanding upon which the people of this state have acted since its first settlement has been that the owner of land was obliged to inclose it, with a view to its cultivation; that without a lawful fence he could not, as a general thing, maintain an action for a trespass thereon by the cattle of his neighbor running at large, and that to leave uncultivated lands uninclosed was an implied license to cattle and other stock at large to traverse and graze them. Not only, therefore, was this alleged rule of the common law inapplicable to the circumstances and conditions of the people of this state, but inconsistent with the habits,

only for injuries wantonly or willfully inflicted.[9] And in such cases the owner of animals is not guilty of contributory negligence in permitting his animals to run at large.[10] But where he allows them to run at large in the immediate vicinity of an uninclosed railroad he can not, perhaps, be said to be exercising such a degree of care as would ordinarily be exercised by a prudent man and there are some authorities which deny his right to recover under such circumstances.[11]

§ 1181. Statutory duty to fence.—As we have seen, at common law no duty rested upon a railway company to fence its track and it was not liable to animals killed or injured upon its tracks merely because it failed to erect fences. And this is true even in many states in which the ancient common law rule is not adopted or followed. There are some authorities, however, which seem to hold that a railway company is obliged to fence its track independent of statutory enactment,[12] but the overwhelming weight of authority is that such duty exists only as a result of legislative enactments.[13] Although it is not bound to fence at common law, yet if a company fails to do so it may be held to a greater degree of care in the management of its trains than if its tracks were fenced.[14] There now

the interests, necessities and understanding of the people." See, also, Buford v. Houtz, 133 U. S. 320; 10 Sup. Ct. 305.

[9] Little Rock &c. Co. v. Finley, 37 Ark. 562; 11 Am. & Eng. R. Cas. 469; Williams v. Northern &c. R. Co. 3 Dak. 168; 14 N. W. 97; 11 Am. & Eng. R. Cas. 421; Savannha &c. R. Co. v. Geiger, 21 Fla. 669; 58 Am. R 697, and note; Louisville &c. R. Co. v. Milton, 14 B. Mon. (Ky.) 75; 58 Am. Dec. 647; Donovan v. Hannibal &c. R. Co. 89 Mo. 147; 1 S. W. 232; Jones v. Columbia &c. R. Co. 20 S. Car. 249; New Orleans &c. R. Co. v. Field, 46 Miss. 573; Georgia &c. R. Co. v. Neely, 56 Ga. 540; Smith v. Chicago &c. R. Co. 34 Iowa, 506; Kuhn v. Chicago &c. R. Co. 42 Iowa, 420; Mobile &c. R. Co. v. Williams, 53 Ala. 595; Gorman v. Pacific &c. R. Co. 26 Mo. 441; 72 Am. Dec. 220.

[10] Rensselaer &c. R. Co. Matter of, 4 Paige (N. Y.) 553.

[11] North Pennsylvania &c. R. Co. v. Rehman, 49 Pa. St. 101; 88 Am. Dec. 491; Drake v. Philadelphia &c. R. Co. 51 Pa. St. 240.

[12] Trow v. Vermont &c. Co. 24 Vt. 487; 58 Am. Dec. 191, and note; Quimby v. Vermont &c. Co. 23 Vt. 387.

[13] Campbell v. New York &c. Co. 50 Conn. 128; 13 Am. & Eng. R. R. Cas. 589; Clark v. Ohio &c. Co. 34 W. Va. 200; 12 S. E. 505; 45 Am. & Eng. R. Cas. 475; Blaine v. Chesapeake &c. Co. 9 W. Va. 252.

[14] Morss v. Boston &c. Co. 2 Cush. (Mass.) 636; Joliet &c. Co. v. Jones, 20 Ill. 221; Atlantic &c. Co.

exist in nearly all of the states statutes imposing the duty upon a railway company to fence both sides of its right of way at all points where inconvenience will not result to the public or to the company in the transaction of its business,[15] or the like. Such statutes are not construed so as to have a retroactive effect,[16] but they generally apply to roads already constructed at the time of their passage,[17] unless it is clear that they are intended only to be applicable to roads therafter to be constructed.[18] These statutes usually apply to companies from the time they begin to run trains,[19] but in some states a specified time is given the company after the completion

v. Burt, 49 Ga. 606; Memphis &c. Co. v. Orr, 43 Miss. 279; Boston &c. Co. v. Briggs, 132 Mass. 24; 7 Am. & Eng. R. Cas. 541; Kerwhaker v. Cleveland &c. Co. 3 Ohio St. 172; Fernon v. Dubuque &c. Co. 22 Iowa, 528; Macon &c. Co. v. Vaughn, 48 Ga. 464; Vicksburg &c. Co. v. Patton, 31 Miss. 156; 66 Am. Dec. 552; New Orleans &c. Co. v. Field, 46 Miss. 573; Gorman v. Pacific &c. Co. 26 Mo. 441; 72 Am. Dec. 220.

[15] Moses v. Southern Pacific Co. 18 Ore. 385; 23 Pac. 498; 8 L. R. A. 135, and note; 42 Am. & Eng. R. Cas. 555; Donnegan v. Erhardt, 119 N. Y. 468; 23 N. E. 1051; 7 L. R. A. 527; 42 Am. & Eng. R. Cas. 580. Sometimes there is difficulty in determining which of two statutes applies when an animal is killed. See Frisch v. Chicago &c. R. Co. 95 Minn. 398; 104 N. W. 228; Chicago &c. R. Co. v. Brown, 33 Ind. App. 603; 71 N. E. 908.

[16] Girtman v. Central &c. Co. 1 Ga. 173; Stearns v. Old Colony &c. Co. 1 Allen (Mass.) 493. They apply only to animals killed after the passage of the law. Indianapolis &c. Co. v. Kercheval, 16 Ind. 84.

[17] Boston &c. Co. v. Briggs, 132 Mass. 24; Galena &c. Co. v. Crawford, 25 Ill. 529; Shurley v. New York &c. Co. 121 Pa. St. 511; 15 Atl. 567; Bulkley v. New York &c. R. Co. 27 Conn. 479; Wilder v. Maine Cent. R. Co. 65 Me. 332; 20 Am. R. 698. Even though a foreign corporation, Chicago &c. R. Co. v. Fitzhugh (Ark.), 100 S. W. 1149.

[18] Sawyer v. Vermont &c. Co. 105 Mass. 196; Baxter v. Boston &c. Co. 102 Mass. 383. Where the defendant purchased the railroad, franchise and assets of another company, and did not assume liability for torts of the grantor company, it was held that it was not liable for injury to animals and crops caused by the failure of the grantor company to fence. Porter v. Illinois So. R. Co. 116 Mo. App. 526; 92 S. W. 744. See, also, Lawson v. Illinois So. R. Co. 116 Mo. App. 690; 94 S. W. 807.

[19] Baltimore &c. Co. v. McClellan, 59 Ind. 440; Holden v. Rutland &c. Co. 30 Vt. 297; Clark v. Vermont &c. Co. 28 Vt. 103; Comings v. Hannibal &c. Co. 48 Mo. 512; Continental &c. Co. v. Ives, 30 Mich. 448; Silver v. Kansas City &c. Co. 78 Mo. 528; 19 Am. & Eng. R. Cas. 642; 47 Am. R. 118. See, also, Glandon v. Chicago &c. R. Co. 68 Ia. 457.

of its road in which to construct fences. And if injuries occur before the expiration of the time allowed the company in which to fence its track its liability will be governed by the principles of the common law,[20] but after the expiration of such time the liability will be governed by the provisions of the statute.[21] While the duty rests upon the company to fence its track there is some question as to whether the company can be made to perform that duty by an individual. Since the company is liable for all damages which result from its failure to perform its duty in regard to fencing the track it is argued that this is a sufficient remedy by aggrieved persons. The consequent liability for a failure to perform its duty to fence may be sufficient to compel the performance of the duty, but there are cases in which resort has been had to the courts to compel the company to properly fence its track. It has been held that mandamus is a proper remedy to compel the performance of this duty.[22] In some of the statutes provision is made by which landowners may, after notice to a railway company and its refusal to construct a fence, build the fence and recover the cost from the railway company.[23] As to the liability of a company for its failure to fence its track the general rule is that where animals come upon the track by reason of there being no proper fence and are injured the company is liable irrespective of the manner in which it operates its trains.[24] Negligence in failing to fence is the gist of the action under

[20] Rockford &c. Co. v. Connell, 67 Ill. 216; Gilman &c. Co. v. Spencer, 76 Ill. 192; McCall v. Chamberlain, 13 Wis. 637. Six months' time is given in Illinois. St. Louis &c. R. Co. v. Smith, 216 Ill. 339; 74 N. E. 1063.

[21] Toledo &c. Co. v. Crane, 68 Ill. 355; Peoria &c. Co. v. Barton, 80 Ill. 72. See, also, Cincinnati &c. Co. v. Harris, 61 Ind. 290, where the time in which to construct a fence was fixed by agreement between the company and a land-owner conveying a right of way.

[22] People v. Rochester &c. Co. 76 N. Y. 294; 14 Hun (N. Y.) 371; Ohio &c. Co. v. People, 121 Ill. 483; 13 N. E. 236; 30 Am. & Eng. R. Cas. 427. But see Columbus &c. R. Co. v. Watson, 26 Ind. 50.

[23] Welles v. Northern Central &c. Co. 150 Pa. St. 620; 25 Atl. 51. See, also, Toledo &c. R. Co. v. Siebens, 63 Ill. 217; Logansport &c. R. Co. v. Wray, 52 Ind. 578; Warner v. Baltimore &c. R. Co. 31 Ohio St. 265; Terre Haute &c. R. Co. v. Earhart, 35 Ind. App. 56; 73 N. E. 711; Terre Haute &c. R. Co. v. Salmon, 161 Ind. 131; 67 N. E. 918; Terre Haute &c. R. Co. v. Salisbury (Ind. App.); 77 N. E. 1097; Vandalia R. Co. v. Kanarr (Ind. App.); 77 N. E. 1135.

[24] Blair v. Milwaukee &c. Co. 20

such statutes and where it is shown that the animals entered upon the track where it was not properly fenced a prima facie case is made out,[25] and it has been held that a railway company is liable in damages because it fails to fence, thus rendering an abutting farm less valuable.[26] Where a railway was built through a fenced pasture and the company failed to fence its track thus compelling the owner of the pasture to keep watch over his cattle to prevent them from destroying his other crops and from trespassing on the lands of others it was held that he was entitled to recover from the railway company reasonable compensation for his extra efforts necessitated in the care of his cattle.[27] Where the duty rests upon the company to fence its track the company must, as a general rule, erect the fences along the margin or border of the entire right of way.[28]

§ 1182. Statutes rest upon police power.—The running of a railway trains and locomotives is necessarily attended with many dangers. This results from the great force used, the large bodies placed in motion, and the rapidity with which trains are run. The object of a railway being the carrying of passengers and freight from place to place, and as the performance of such an object is necessarily

Wis. 254; Toledo &c. Co. v. Lavery, 71 Ill. 522; Hindman v. Oregon &c. Co. 17 Ore. 614; 22 Pac. 116; 38 Am. & Eng. R. Cas. 310; Chicago &c. Co. v. James, 26 Neb. 194; 41 N. W. 993; Minneapolis &c. Co. v. Beckwith, 129 U. S. 26; 9 Sup. Ct. 207; McDonnell v. Pittsfield &c. Co. 115 Mass. 564; Keliher v. Connecticut &c. Co. 107 Mass. 411; Jacksonville &c. Co. v. Harris, 33 Fla. 217; 14 So. 726; 61 Am. & Eng. R. Cas. 379; Hill v. Missouri &c. Co. 121 Mo. 477; 26 S. W. 576; 61 Am. & Eng. R. Cas. 412.

[25] Missouri &c. Co. v. Bradshaw, 33 Kan. 533; 6 Pac. 917; Missouri &c. Co. v. Baxter, 45 Kan. 520; 26 Pac. 49; 45 Am. & Eng. R. Cas. 471; Eaton v. Oregon &c. Co. 19 Ore. 391; 24 Pac. 415; 45 Am. & Eng. R. Cas. 481; Wadsworth v. Union &c. Co. 18 Colo. 600; 33 Pac. 515; 23 L. R. A. 812; 36 Am. St. 309; 56 Am. & Eng. R. Cas. 145.

[26] Nelson v. Minneapolis &c. Co. 41 Minn. 131; 42 N. W. 788; 40 Am. & Eng. R. Cas. 234; Emmons v. Minneapolis &c. Co. 38 Minn. 215; 36 N. W. 340; 35 Am. & Eng. R. Cas. 126; St. Louis &c. R. Co. v. Ritz, 33 Kans. 404; 6 Pac. 533. But it is held otherwise where the statute specifies the liability as only for injury to cattle or the like. Mangold v. St. Louis &c. R. Co. 116 Mo. App. 606; 92 S. W. 753.

[27] Nelson v. St. Louis &c. Co. 49 Kan. 165; 30 Pac. 178.

[28] Ohio &c. R. Co. v. People, 121 Ill. 483; 13 N. E. 236; Gould v. Great Northern R. Co. 63 Minn. 37; 65 N. W. 125; 30 L. R. A. 590; 56 Am. St. 453.

attended with many dangers, it follows that every practicable safeguard should be used and every precaution taken to prevent injury to persons or property carried. One of the sources of danger to railway trains is from collisions with animals on the track. Such danger has been recognized by nearly all of our state legislatures and their statutory enactments are for the purpose of reducing this danger as much as possible. Where any particular kind of property is inherently dangerous, or the operation of certain property is necessarily dangerous, it is within the power of the state under what is called its police power to prescribe such regulations in the use of such property as will render consequent danger as small as possible. Since imposing upon the railway companies the duty of fencing their tracks is for the sole purpose of lessening the danger in running trains it is held that the enactment of such fencing statutes is a valid exercise of the police power and it is upon that power that such statutes rest.[29]

[29] Wadsworth v. Union Pacific Co. 18 Colo. 600; 33 Pac. 515; 23 L. R. A. 812; 36 Am. St. 309; 56 Am. & Eng. R. Cas. 145; Thorpe v. Rutland Railroad Co. 27 Vt. 140; 62 Am. 625; Illinois &c. R. Co. v. Crider, 91 Tenn. 489; 19 S. W. 618; 56 Am. & Eng. R. Cas. 157; Gorman v. Pacific R. Co. 26 Mo. 441; 72 Am. Dec. 220; Wilder v. Maine &c. R. Co. 65 Me. 332; 20 Am. R. 698; Small v. Chicago &c. R. Co. 50 Iowa, 338; Missouri &c. Co. v. Humes, 115 U. S. 512; 6 Sup. Ct. 110; 22 Am. & Eng. R. Cas. 557; Missouri &c. R. Co. v. Harrelson, 44 Kan. 253; 24 Pac. 465; Missouri &c. Co. v. Eckel, 49 Kan. 794; 31 Pac. 693; 56 Am. & Eng. R. Cas. 174; Corwin & New York &c. Co. 13 N. Y. 42; Blair v. Milwaukee &c. Co. 20 Wis. 254; Indianapolis &c. Co. v. Parker, 29 Ind. 471; Toledo &c. Co. v. Fowler, 22 Ind. 316; Indianapolis &c. Co. v. Kercheval, 16 Ind. 84; Davis v. Hannibal &c. Co. 19 Mo. App. 425; Minneapolis &c. Co. v. Beckwith, 129 U. S. 26; 9 Sup. Ct. 207; 38 Am. & Eng. R. Cas. 267; Missouri &c. Co. v. Roads, 33 Kan. 640; 7 Pac. 213; 23 Am. & Eng. R. Cas. 165; Campbell v. New York &c. Co. 50 Conn. 128; 13 Am. & Eng. R. Cas. 89. See, also, Atchison &c. R. Co. v. Mathews, 174 U. S. 96; 19 Sup. Ct. 609; Lake Shore &c. R. Co. v. Ohio, 173 U. S. 285; 19 Sup. Ct. 465; Yazoo &c. R. Co. v. Harrington, 85 Miss. 366; 37 So. 1016; Sanger v. Chesapeake &c. R. Co. 102 Va. 86; 45 S. E. 750. In Sullivan v. Oregon &c. Co. 19 Oreg. 319; 24 Pac. 408; 42 Am. & Eng. R. Cas. 625, it is said: "That the legislature, in the exercise of the police power of the state, may require all railroads to fence their track, and for neglect or failure to perform this duty render them liable for whatever injury is done, or for double the value of the stock killed, and that such legislation is not obnoxious to the clause of the constitution in question, has

§ 1183. Constitutionality of statutes imposing duty to fence.—Legislative enactments imposing upon railway companies the duty to fence their tracks usually impose burdens in addition to the mere duty to fence. While, perhaps, the statutes of no two states are alike, among all the statutes of the different states will be found many provisions imposing different burdens upon the company. Besides the duty to fence will be found provisions rendering the company liable for double damages, for the plaintiff's attorney fee, changing the burden of proof, requiring signals, and imposing absolute liability. The question of the constitutionality of these statutes and their various provisions has been presented and decided in many cases, and some of the provisions have been held constitutional and some unconstitutional. A provision merely requiring the company to fence and rendering it liable for negligence in failing to do so is constitutional.[30] Such a provison is, as we have seen, a valid exercise of the

been frequently decided, and cannot be questioned. The danger attending the running of steam railway cars, and liability to serious injury or loss of life of its passengers by collisions with animals straying upon its track where allowed to roam at large, makes it a requirement of duty to exercise the utmost care, and to take every precaution to keep its track clear, so as to prevent accidents from such collisions. How can this be better done, and the track kept comparatively secure from stock going upon it, than by requiring the railroad company to fence its track, and in default thereof, to hold it liable for the value of the stock killed by such collision, when the plaintiff is not contributorily negligent? Such a precaution, where stock is allowed to run at large, is a police regulation, and as a security against the loss of life and property in the operation of dangerous machinery, is based upon the same principle, and finds its authority in the same power, which regulates the storage of gunpowder or other dangerous explosives. This being so, the legislature may require railroad companies to inclose their tracks with fences, and provide that they may be held liable for all stock killed, caused by their neglect to maintain such fences; and, if the act in question has imposed this duty on the defendant, and attached a liability for its neglect, it is a valid exercise of the police power, and not subject to the constitutional objection urged." See, also, Jolliffe v. Brown, 14 Wash. 155; 44 Pac. 149.

[30] Chicago &c. R. Co. v. Dumser, 109 Ill. 402; Kansas &c. R. Co. v. Mower, 16 Kan. 573; Thorpe v. Rutland &c. R. Co. 27 Vt. 140; 62 Am. Dec. 625; Railroad Co. v. Crider, 91 Tenn. 489; 19 S. W. 618; Blair v. Milwaukee &c. R. Co. 20 Wis. 254; Pennsylvania R. Co. v. Riblet, 66 Pa. St. 164; 5 Am. R. 360; Small v. Chicago &c. R. Co. 50 Iowa, 338; Missouri &c. R. Co. v. Harrelson,

police power and on that ground its constitutionality is upheld.[31] Where a statute provided that a railway company should be required to put in fences and cattle guards when the land-owner, through whose lands the right of way passed, demanded it, it was held not to be unconstitutional on the ground that it made the land-owner sole judge of the necessity of the fence.[32] Statutes frequently provide that a railway company killing stock shall be liable for double damages where the stock was killed because of the failure of the company to discharge its duty to fence. Such statutes are not unconstitutional on the ground that they deny to companies the equal protection of the laws or deprive them of their property without due process of law.[33] Double damages are imposed in the nature of a penalty for a failure to perform a statutory duty and it is held that

44 Kan. 253; 24 Pac. 465; 45 Am. & Eng. R. Cas. 457; Ohio &c. R. Co. v. McClelland, 25 Ill. 140; Schmidt v. Milwaukee &c. R. Co. 23 Wis. 186; Louisville &c. R. Co. v. Belcher, 89 Ky. 193; 12 S. W. 195; 40 Am. & Eng. R. Cas. 228.

[31] Ante, § 1182; Hayes v. Michigan &c. R. Co. 111 U. S. 228; 4 Sup. Ct. 369; Barnett v. Atlantic &c. R. Co. 68 Mo. 56; 30 Am. R. 773; Cairo &c. R. Co. v. Peoples, 92 Ill. 97; 34 Am. R. 112, and note; Dacres v. Oregon &c. Navigation Co. 1 Wash. St. 525; 20 Pac. 601; Wilder v. Maine &c. R. Co. 65 Me. 332; 20 Am. R. 698. "Authority for exacting it (the duty to fence) is found in the general police power of the state to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations. Under this power the state, or the municipality exercising a delegated authority, prescribes the manner in which buildings in cities shall be constructed, and the thickness and height of their walls; excludes the use of all inflammable materials, forbids the storage therein of powder, nitroglycerine and other explosive substances, and compels the removal of decayed vegetable and animal matter, which would otherwise infect the air and engender disease. In few instances could the power be more wisely or beneficently exercised than in compelling railroad corporations to enclose their roads with fences, having gates at crossings, and cattle-guards. The speed and momentum of the locomotive render such protection against accident in thickly settled portions of the country absolutely essential." Missouri &c. R. Co. v. Humes, 115 U. S. 512; 6 Sup. Ct. 110.

[32] Birmingham &c. Co. v. Parsons, 100 Ala. 662; 13 So. 602; 56 Am. & Eng. R. Cas. 223; 27 L. R. R. 263; 46 Am. St. 92. Contra, Owensboro &c. R. Co. v. Todd, 91 Ky. 175; 15 S. W. 56; 45 Am. & Eng. R. Cas. 461; 11 L. R. A. 285.

[33] Minneapolis &c. R. Co. v. Beckwith, 129 U. S. 26; 9 Sup. Ct. 207.

the legislature may prescribe to what extent such damages may be awarded.[34] And a provision that the plaintiff may recover a reasonable attorney's fee in addition to the actual damage done has also been held constitutional in some jurisdictions.[35] In some of the states statutes have been passed imposing an absolute liability on railway companies for animals killed or injured on their tracks independent of negligence or failure to comply with the statute on the part of the company. Such statutes are unconstitutional for they violate the provision of the constitution against taking property without due process of law,[36] and a statute which provided that when animals were killed on a railway track they should be appraised and their value thus determined should thereupon become due and payable was held unconstitutional in recent cases as denying the right of trial by jury.[37] So, where a statute provided that killing stock by a railway company should be a misdemeanor and subjected the officials of the roads to indictment unless the damages were paid

[34] Missouri &c. R. Co. v. Humes, 115 U. S. 512; 6 Sup. Ct. 110; Minneapolis &c. R. Co. v. Beckwith, 129 U. S. 26; 9 Sup. Ct. 207; Minneapolis &c. R. Co. v. Emmons, 149 U. S. 364; 13 Sup. Ct. 870; Day v. Woodworth, 13 How. (U. S.) 363; Phillips v. Missouri &c. R. Co. 86 Mo. 540; 24 Am. & Eng. R. Cas. 368. But see ante, § 669.

[35] Perkins v. St. Louis &c. R. Co. 103 Mo. 52; 15 S. W. 320; 11 L. R. A. 426, and note; Kansas Pacific &c. R. Co. v. Yanz, 16 Kan. 583; Peoria &c. R. Co. v. Duggan, 109 Ill. 537; 50 Am. R. 619; Indianapolis &c. R. Co. v. Buckles, 21 Ill. App. 181. Contra, Wilder v. Chicago &c. R. Co. 70 Mich. 382; 38 N. W. 289; Schut v. Chicago &c. Co. 70 Mich. 433; 38 N. W. 291; Rinear v. Grand Rapids &c. R. Co. 70 Mich. 620; 38 N. W. 599. See post, § 1220.

[36] Oregon &c. R. Co. v. Smalley, 1 Wash. 206; 23 Pac. 1008; 22 Am. St. 143; 42 Am. & Eng. R. Cas. 550; Bielenberg v. Montana &c. R. Co. 8 Mont. 271; 20 Pac. 314; 2 L. R. A. 813; 38 Am. & Eng. R. Cas. 275; Jensen v. Union &c. R. Co. 6 Utah, 253; 21 Pac. 994; 4 L. R. A. 724; Cateril v. Union &c. R. Co. 2 Idaho, 540; 21 Pac. 416; Dacres v. Oregon &c. R. Co. 1 Wash. 525; 20 Pac. 601; Zeigler v. South &c. R. Co. 58 Ala. 594; Memphis &c. Co. v. Lyon, 62 Ala. 71; Thompson v. Northern &c. R. Co. 8 Mont. 279; 21 Pac. 25; Denver &c. R. Co. v. Outcalt, 2 Colo. App. 395; 31 Pac. 177; Birmingham &c. R. Co. v. Parsons, 100 Ala. 662; 13 So. 602; 46 Am. St. 92; 27 L. R. A. 263; Denver &c. R. Co. v. Wheatley, 7 Colo. App. 284; 43 Pac. 450. But see Illinois Cent. R. Co. v. Crider, 91 Tenn. 489; 19 S. W. 618; Ft. Worth &c. R. Co. v. Swan, 97 Tex. 338; 78 S. W. 920.

[37] Dacres v. Oregon &c. R. Co. 1 Wash. 525; 20 Pac. 601; Graves v. Northern &c. R. Co. 5 Mont. 556; 6 Pac. 16; 51 Am. R. 81.

within a certain time it was held to be unconstitutional.[38] A statute, which provided, however, that absolute liability could be escaped by the erection of a proper fence was upheld as constitutional.[39] Suits for injuries to animals usually fall within general statutes of limitation, but it has been held that a special statute or clause in the charter of a railway company providing that an action for injury to stock shall be brought within a particular time is constitutional.[40] And a statute which changes the rules of evidence by casting the burden of proof upon the defendant to relieve itself of the prima facie case arising from proof of the killing has also been held constitutional.[41]

§ 1184. Kind of fence required.—Since railway companies are required to fence their track it necessarily follows, that, in order to make the performance of the duty to fence meet the objects which it was intended to accomplish, there must be some rule prescribing what kind of a fence shall be built. Some of the statutes imposing the duty to fence define what kind of a fence shall be deemed sufficient, and in such cases the company is bound to construct such a fence as that prescribed by the statute.[42] Where a railway fence statute is silent as to the kind of fence that shall be constructed it is held that a company is bound to construct such a fence as required by a general fence law,[43] or such a one as a good husbandman generally keeps in the vicinity where the fence is required.[44] Where

[38] State v. Divine, 98 N. Car. 778; 4 S. E. 477.

[39] Kansas &c. R. Co. v. Mower, 16 Kan. 573.

[40] O'Bannon v. Louisville &c. R. Co. 8 Bush. (Ky.) 348; Mortimer v. Louisville &c. R. Co. 10 Bush. (Ky.) 485; Lucas v. Kentucky &c. R. Co. 12 Ky. L. 652; 14 S. W. 965; 45 Am. & Eng. R. Cas. 520.

[41] Lucas v. Kentucky &c. R. Co. 12 Ky. L. 652; 14 S. W. 965; 45 Am. & Eng. R. Cas. 520. See, also, on the subject of this section, post, §§ 1213, 1219, 1220; and see Pecos Valley &c. R. Co. v. Cazier (N. Mex.); 79 Pac. 714.

[42] Lee v. Minneapolis &c. R. Co. 66 Iowa, 131; 23 N. W. 299; Chicago &c. R. Co. v. James, 26 Neb. 194; 41 N. W. 993; Brown v. Milwaukee &c. R. Co. 21 Wis. 39; 91 Am. Dec. 456; Chicago &c. R. Co. v. Umphenour, 69 Ill. 198; Bay City &c. R. Co. v. Austin, 21 Mich. 390.

[43] Toledo &c. R. Co. v. Thomas, 18 Ind. 215; Enright v. San Francisco &c. R. Co. 33 Cal. 230; King v. Chicago &c. R. Co. 79 Mo. 328; Halverson v. Minneapolis &c. R. Co. 32 Minn. 88; 19 N. W. 392; 19 Am. & Eng. R. Cas. 526.

[44] Toledo &c. R. Co. v. Thomas, 18 Ind. 215; Ferris v. Van Buskirk,

no certain kind of fence is required by statute or general fence laws the kind of fence may be determined by agreement between the parties,[45] and in some cases where the statute does not require a particular kind of fence such fences as are required as division fences between different land-owners are adopted as the standard.[46] Fences are not required to be such that they shall prove to be barriers under exceptional or unusual circumstances. If they are such as confine cattle or animals of ordinary disposition they will be deemed sufficient. If animals are breachy or become restive because of lack of food furnished them by the owner and get on the track and are injured because of such disposition to be breachy or because of such restiveness the company will not be held liable.[47] A bluff, embankment or hedge may be a sufficient fence if it is as effective to prevent the entry of animals as an artificial fence.[48] Fences may ordinarily be erected of any material used for fences. They may be erected of wire,[49] but as a wire fence, if a barbed one, is dangerous to animals,

18 Barb. (N. Y.) 397; Eames v. Salem &c. R. Co. 98 Mass. 560; 96 Am. Dec. 676, and note; Bronson v. Coffin, 108 Mass. 175; 11 Am. R. 335. "The requirement is that the railroad company shall be liable if it fails to fence its road against live stock running at large. This means such a fence as is reasonably sufficient to prevent live stock from going upon the track. The term 'fence' has a signification and meaning well understood in the law, as well as in common parlance. It does not mean an impassable barrier, or such a structure as is absolutely insurmountable by any live stock, however breachy or vicious the animals may be. Farmers, or others, desiring to protect their lands and crops from the incursions of live stock, erect such fences as are reasonably sufficient for that purpose; and we think that where there is a requirement to erect fences, such as are usually understood to be sufficient must be held to have been in the mind of the legislature." Shellabarger v. Chicago &c. R. Co. 66 Iowa, 18; 23 N. W. 158; 19 Am. & Eng. R. Cas. 527.

[45] Enright v. San Francisco &c. R. Co. 33 Cal. 230; Ellis v. London &c. R. Co. 2 H. & N. 424. That is, the owner of the stock cannot complain if the fence is such as was agreed upon between him and the company.

[46] Corwin v. New York &c. R. Co. 13 N. Y. 42; Davidson v. Michigan &c. R. Co. 49 Mich. 428; 13 N. W. 804.

[47] Toledo &c. R. Co. v. Thomas, 18 Ind. 215; Chicago &c. R. Co. v. Utley, 38 Ill. 410.

[48] Hilliard v. Chicago &c. R. Co. 37 Iowa, 442. But not where there is free access at each end. Taylor v. Spokane &c. R. Co. 32 Wash. 450; 73 Pac. 499. See, also, Ft. Worth &c. R. Co. v. Swan, 97 Tex. 338; 78 S. W. 920.

[49] Halverson v. Minneapolis &c.

the company may be liable for injuries to animals caused by running against the fence.[50] If, however, it appears that wire fences such as that erected by the company are in general use in the vicinity we do not believe the company would be liable for injuries caused by animals running against such a fence unless there was some negligence on the part of the company.[51] Where the fence attempted to be erected by a railway company is such that it will cause injury to the lands of an adjoining proprietor its erection may be enjoined. Thus, where the company commenced to plant a row of willows along its right of way, expecting them to serve as a fence and as posts on which to nail boards, an adjoining land-owner was granted an injunction on showing that the roots of the willows would extend into his soil and destroy its usefulness.[52] When the company is required to fence the fence must be reasonably sufficient to protect all domestic animals, and swine fall within the rule the same as larger animals.[53] But where the statute only requires a fence sufficient to turn stock, as is generally the case, the company is not required to fence against persons.[54] Evidence of a competent witness that the fence was such a fence as good husbandmen usually kept was held admissible in one case,[55] but in other cases expert or opinion evidence as to the sufficiency of a fence has been rejected.[56]

R. Co. 32 Minn. 88; 19 N. W. 392; 19 Am. & Eng. R. Cas. 526. See, also, Bishop v. Gulf &c. R. Co. (Tex. Civ. App.); 75 S. W. 1086.

[50] Atlanta &c. R. Co. v. Hudson, 62 Ga. 679; Gould v. Bangor &c. R. Co. 82 Me. 122; 19 Atl. 84.

[51] Guilfoos v. New York &c. R. Co. 69 Hun (N. Y.) 593; 23 N. Y. S. 925. See Perkins v. St. Louis &c. R. Co. 103 Mo. 52; 15 S. W. 320; 11 L. R. 426, and note.

[52] Brock v. Connecticut &c. R. Co. 35 Vt. 373.

[53] Lee v. Minneapolis &c. R. Co. 66 Iowa, 131; 23 N. W. 299; 20 Am. & Eng. R. Cas. 476; Missouri &c. R. Co. v. Roads, 33 Kan. 640; 7 Pac. 213; 23 Am. & Eng. R. Cas. 165. And sheep. Cotton v. Wiscasset &c. R. Co. 98 Me. 511; 57 Atl. 785. See, also, Missouri &c. R. Co. v. Baxter, 45 Kan. 520; 26 Pac. 49; 45 Am. & Eng. R. Cas. 471. But where there was a law in a certain township against hogs running at large it seems that in such township a railway company was under no obligation to fence against them. Atchison &c. R. Co. v. Yates, 21 Kan. 613; Leebrick v. Republican Valley &c. R. Co. 41 Kan. 756; 21 Pac. 796.

[54] Lake Shore &c. R. Co. v. Liidke, 69 Ohio St. 384; 69 N. E. 653.

[55] Louisville &c. R. Co. v. Spain, 61 Ind. 460.

[56] Enright v. San Francisco &c. R. Co. 33 Cal. 230; Sowers v. Dukes, 8 Minn. 23; Green v. Hornellsville &c. R. Co. 24 App. Div. (N. Y.) 434; 48 N. Y. S. 576; Concord R. Co. v. Greely, 23 N. H. 237; Smead

§ 1185. Repair of fences—Casualties and Trespassers.—Where a railway company has performed its duty by the erection of proper fences along its right of way there still remains the additional obligation of using ordinary care in maintaining such fences or seeing that they are kept in proper repair.[57] The reason for this rule is apparent. If the company were not required to keep up its fences they would soon fall into decay so that they would not accomplish the object for which they were intended. Accidents and casualties may also happen which injure or destroy the usefulness of a fence. Whether a company is liable for injuries to stock caused by reason of its fences being out of repair must depend upon the degree of diligence exercised by the company in the discovery of the defect and repairing it after discovered. Having once erected such fences as the company is bound to erect it may assume that they will remain in repair for a reasonable length of time, and if injuries occur on account of defects within a reasonable time after the erection of the fence the company will not be liable unless it had actual notice of the defects or ought to have had notice thereof and a sufficient time had elapsed in which to make repairs.[58] And even where the company has no

v. Lake Shore &c. R. Co. 58 Mich. 200; 24 N. W. 761.

[57] Chicago &c. R. Co. v. Guertin, 115 Ill. 466; 4 N. E. 507; 24 Am. & Eng. R. Cas. 385; Young v. Hannibal &c. R. Co. 82 Mo. 428; Chubbuck v. Hannibal &c. R. Co. 77 Mo. 591; Pittsburg &c. R. Co. v. Smith, 38 Ohio, 410; 13 Am. & Eng. R. Cas. 579; Henderson v. Chicago &c. R. Co. 43 Iowa, 620; Stephenson v. Grand Trunk &c. R. Co. 34 Mich. 323; Estes v. Atlantic &c. R. Co. 63 Me. 308; Lemmon v. Chicago &c. R. Co. 32 Iowa, 151; Clardy v. St. Louis &c. R. Co. 73 Mo. 576; 7 Am. & Eng. R. Cas. 555; Carey v. Chicago &c. R. Co. 61 Wis. 71; 20 N. W. 648; 20 Am. & Eng. R. Cas. 469; Robinson v. Grand Trunk &c. R. Co. 32 Mich. 322; Miller v. Chicago &c. Co. 66 Iowa, 546; 24 N. W. 36; 23 Am. & Eng. R. Cas. 235. "The duty to maintain a legal fence is as urgent as the duty to erect one. The same reasons and policy apply to each." Congdon v. Central Vermont &c. R. Co. 56 Vt. 390; 48 Am. R. 793; 26 Am. & Eng. R. Cas. 460. See, also, Hendrickson v. Philadelphia &c. R. Co. 68 N. J. L. 612; 54 Atl. 831; Chicago &c. R. Co. v. Bourne, 105 Ill. App. 27. Permitting a cattle-guard to be filled with snow and ice so as to furnish no obstruction to the passage of animals has been held a failure to maintain a proper and sufficient cattle-guard. Paul v. Chicago &c. R. Co. 120 Ia. 224; 94 N. W. 498. See, also, Bumpas v. Wabash R. Co. 103 Mo. App. 202; 77 S. W. 115.

[58] Illinois &c. R. Co. v. McKee, 43 Ill. 119; Illinois &c. R. Co. v. Dickerson, 27 Ill. 55; 79 Am. Dec. 394; Atchison &c. R. Co. v. Kavanaugh, 163 Mo. 54; 63 S. W. 374.

right to rely on the assumption that a fence will remain in repair a reasonable length of time it must have notice, either actual or constructive, of a defect and a reasonable time in which to repair it after notice before it can be held liable.[59] But where the company has failed to erect any fence at all the rule requiring notice and a reasonable time in which to make the repairs does not apply.[60] Notice of the defect need not be actual; notice will be presumed where the defect has existed for a sufficient length of time to charge the company with notice.[61] What will be a sufficient length of time to

[59] Brady v. Rensselaer &c. R. Co. 1 Hun (N. Y.) 378; Murray v. New York &c. R. Co. 4 Keyes (N. Y.) 274; Chicago &c. R. Co. v. Barrie, 55 Ill. 226; Robinson v. Grand Trunk &c. R. Co. 32 Mich. 322; Brown v. Milwaukee &c. R. Co. 21 Wis. 40; Davis v. Chicago &c. R. Co. 40 Iowa, 292; Chicago &c. R. Co. v. Saunders, 85 Ill. 288; Norris v. Androscoggin &c. R. Co. 39 Me. 273; 63 Am. Dec. 621; Chicago &c. R. Co. v. Umphenour, 69 Ill. 198; Stephenson v. Grand Trunk &c. R. Co. 35 Mich. 323; Hilliard v. Chicago &c. R. Co. 37 Iowa, 442; Clardy v. St. Louis &c. R. Co. 73 Mo. 576; 7 Am. & Eng. R. Cas. 555. See, also, Dietrich v. Hannibal &c. R. Co. 89 Mo. App. 36. In Ohio, where the statute imposed upon the company the duty of keeping the fence in repair it was held that the company could not escape liability by showing that it had no notice of the defects. Pittsburg &c. R. Co. v. Smith, 38 Ohio St. 410; 13 Am. & Eng. R. Co. 579.

[60] Hannibal &c. R. Co. v. Morris, 79 Mo. 367; 19 Am. & Eng. R. Cas. 666. The rule requiring a railway company to keep its fences in repair is thus stated in the case of Hannibal &c. R. Co. v. Rutledge, 78 Mo. 286; 19 Am. & Eng. R. Cas. 669: "It does not perform its duty to the public by merely erecting a fence. It must keep it up and in repair. It does not, however, become the absolute insurer of the fence. The fence is liable to many casualties, against which no reasonable care and vigilance could guard. A wind storm, a water freshet, a fire, breachy stock or trespassers might destroy it. In such a case it would be utterly unreasonable to hold the corporation liable for stock killed which entered through a defect thus occasioned. The law allows reasonable time to discover the defect and repair it. In other words, it holds the company to the exercise of due care and no more."

[61] Fritz v. Kansas City &c. R. Co. 61 Iowa, 323; 16 N. W. 144; 13 Am. & Eng. R. Cas. 558; Wirstlin v. Chicago &c. R. Co. 124 Ia. 170; 99 N. W. 697; Jebb v. Chicago &c. R. Co. 67 Mich. 160; 34 N. W. 538; 54 Am. R. 805; 31 Am. & Eng. R. Cas. 532; Baltimore &c. R. Co. v. Schultz, 43 Ohio 270; 1 N. E. 324; 22 Am. & Eng. R. Cas. 579; Varco v. Chicago &c. R. Co. 30 Minn. 18; 13 N. W. 921; 11 Am. & Eng. R. Cas. 419; King v. Chicago &c. R. Co. 90 Mo. 520; 3 S. W. 217; Brentner v. Chicago &c. R. Co. 58 Iowa, 625; 12 N.

charge the company with notice of the defect must depend on the circumstances of each case and is usually a question of fact for the jury.[62] It has been held that if a land-owner knows of the existence of a defect in a railway fence between the right of way and his land it is his duty to notify the company of the defect. If he fails to do so and his stock get upon the track because of such defect and are injured he will in some jurisdictions at least, be held guilty of such contributory negligence as will preclude a recovery.[63] And where a land-owner has agreed or assumed to maintain a fence along his land it is his duty to repair defects in the fence and he will be guilty of contributory negligence if he fails to do so.[64] After a company has notice of defects in its fences, whether actual or constructive, a reasonable time must elapse in which to make the repairs before the company can be held liable.[65] If, after knowledge, the company negligently delays in making the necessary repairs it may be held liable. The question of whether or not the company was negligent in making the repairs after the defects were discovered is ordinarily one to be submitted to and determined by the jury.[66] Where the de-

W. 615. For cases in which the time was held insufficient to charge the company, see Goodrich v. Kansas City &c. R. Co. 152 Mo. 222; 53 S. W. 917; Illinois Cent. R. Co. v. Swearingen, 47 Ill. 206.

[62] Evans v. St. Paul &c. Co. 30 Minn. 489; 16 N. W. 271; Wait v. Burlington &c. Co. 74 Iowa, 207; 37 N. W. 159; 35 Am. & Eng. R. Cas. 194. See, also, Peet v. Chicago &c. R. Co. 88 Ia. 520; 55 N. W. 508.

[63] Carey v. Chicago &c. R. Co. 61 Wis. 71; 20 N. W. 648; 20 Am. & Eng. R. Cas. 469; Poler v. New York &c. R. Co. 16 N. Y. 476; Chicago &c. R. Co. v. Seirer, 60 Ill. 295. Compare Dunn v. Chicago &c. R. Co. 58 Iowa, 674; 12 N. W. 734; 7 Am. & Eng. R. Cas. 573.

[64] Pittsburgh &c. R. Co. v. Heiskell, 38 Ohio St. 666; 13 Am. & Eng. R. Cas. 555.

[65] Cleveland &c. R. Co. v. Brown, 45 Ind. 90; Perry v. Dubuque &c. R. Co. 36 Iowa, 102; Chicago &c. R. Co. v. Harris, 54 Ill. 528; Chicago &c. R. Co. v. Barrie, 55 Ill. 226; Toledo &c. R. Co. v. Cohen, 44 Ind. 444; McDowell v. New York &c. R. Co. 37 Barb. (N. Y.) 195; Henderson v. Chicago &c. R. Co. 43 Iowa, 620; Crosby v. Detroit &c. R. Co. 58 Mich. 458; 25 N. W. 463; 23 Am. & Eng. R. Cas. 191. Whether or not the company had sufficient time in which to make repairs is a matter of defense which it must set up. St. Louis &c. R. Co. v. Busby, 81 Mo. 43; 22 Am. & Eng. R. Cas. 589.

[66] Chicago &c. R. Co. v. Saunders, 85 Ill. 288; McDowell v. New York &c. R. Co. 37 Barb. (N. Y.) 195; Indianapolis &c. R. Co. v. Hall, 88 Ill. 368. In the case of Crosby v. Detroit &c. R. Co. 58

fects are caused by casualties or by trespassers the rule above given still prevails, that is, the company can not be held responsible until it is shown that it had, or ought to have had, knowledge of the defects and a reasonable time in which to repair them.[67] The burden of showing that a company had knowledge of defects in its fences is on the plaintiff.[68] When it becomes necessary for the company to re-

Mich. 458; 25 N. W. 463; 23 Am. & Eng. R. Cas. 191, section men going along a track on a pleasant day, just before sundown, discovered a gap in the fence along the right of way. No steps were taken to repair it that evening, but it was repaired early the next morning. In the meantime plaintiff's animal got on the track through this gap and was injured. There was evidence tending to show that the gap could have been repaired the evening before the injury, and the court submitted the question of negligence in using diligence in making the repair to the jury. On appeal this was held to be no error, the court saying, inter alia: "A railroad corporation should be held to the same vigilance and activity in keeping a fence in repair as good business men engaged in any calling or industry where fences are required would naturally exercise in the prudent care of their own property liable to be injured or destroyed by the breaking or burning of a fence. And the question whether an ordinarily prudent farmer, having crops inclosed from animals running outside, discovering such a break in his fence as this, at the time of the day these trackmen found this gap, would not at once have set about repairing it, is, in my view of the law, a fair question to submit to a jury, if it is not absolutely certain that he would do so. I think no fair, unbiased panel of twelve men would answer such a question in the negative. And even if there is a fair chance of difference among candid, unprejudiced men upon any question of this kind, then it cannot be taken by a court away from the jury. And a disregard of the same degree of care in saving the property of others from injury by its action that an ordinarily prudent man would exercise in protecting his own property, is negligence in this corporation, as it would be in an individual."

[67] Great Western &c. R. Co. v. Helm, 27 Ill. 198; 81 Am. Dec. 226; Chicago &c. R. Co. v. Saunders, 85 Ill. 288; Norris v. Androscoggin &c. R. Co. 39 Me. 273; 63 Am. Dec. 621; Brown v. Milwaukee &c. R. Co. 21 Wis. 39; 91 Am. Dec. 456; Spinner v. New York &c. R. Co. 67 N. Y. 153; Chicago &c. R. Co. v. Barrie. 55 Ill. 226; Indianapolis &c. R. Co. v. Hall, 88 Ill. 368; Fitterling v. Missouri Pacific Co. 79 Mo. 504; Walthers v. Missouri &c. Co. 78 Mo. 617; Case v. St. Louis &c. R. Co. 75 Mo. 668. See, also, Perrault v. Minneapolis &c. R. Co. 117 Wis. 520; 94 N. W. 348.

[68] Comstock v. Des Moines &c. R. Co. 32 Iowa, 376; New Orleans &c. R. Co. v. Enochs, 42 Miss. 603; Toledo &c. Co. v. Cohen, 44 Ind. 444; Aylesworth v. Chicago &c. R. Co. 30 Iowa 459; Perry v. Dubuque &c.

pair a defective fence it must furnish the material; it has no right to take timber or poles from adjoining lands.[69]

§ 1186. Transfer of duty to fence.—The general rule is that where a duty is imposed upon a property owner by statute he can not escape liability for a failure to properly perform that duty by employing a third person to do it. Applying this rule to a railroad company, where the railway company is under a statutory obligation to fence its track it cannot escape liability on account of its track not being properly fenced by claiming that it has employed a third person to perform that duty.[70] If the company employs a third person to erect the fence it is still charged with seeing that the fence is a sufficient one and if injuries occur because of the insufficiency of the fence the company will be liable.[71] The duty of fencing rests upon the company owning the road and that duty continues, in the absence of statutory enactments exempting it from liability, even in cases where the trains are run by contractors in the work of construction,[72] or, as a general rule, by other persons operating the road with the consent of the owner.[73]

§ 1187. Fence erected by land-owner.—It frequently happens

R. Co. 36 Iowa, 102. But see Busby v. St. Louis &c. R. Co. 81 Mo. 43.

[69] Carey v. Milwaukee &c. R. Co. 61 Wis. 71; 20 N. W. 648; 20 Am. & Eng. R. Cas. 469.

[70] Silver v. Kansas City &c. R. Co. 78 Mo. 528; 47 Am. R. 118; 19 Am. & Eng. R. Cas. 642; Shepard v. Buffalo &c. R. Co. 35 N. Y. 641; Hole v. Sittingbourne &c. R. Co. 6 Hurl. & N. 488; Ryder v. Thomas, 13 Hun (N. Y.) 296; McCafferty v. Spuyton &c. R. Co. 61 N. Y. 178; 19 Am. R. 267. See, also, New Albany &c. R. Co. v. Tilton, 12 Ind. 73; 74 Am. Dec. 195; Indianapolis &c. R. Co. v. Thomas, 84 Ind. 194.

[71] Illinois &c. R. Co. v. Swearingen, 47 Ill. 206; Norris v. Androscoggin &c. R. Co. 39 Me. 273; 63 Am. Dec. 621; Gill v. Atlantic &c. R. Co. 27 Ohio St. 240.

[72] Houston &c. R. Co. v. Meador, 50 Tex. 77; Chicago &c. R. Co. v. McCarthy, 20 Ill. 385; Huey v. Indianapolis &c. R. Co. 45 Ind. 320.

[73] Indianapolis &c. R. Co. v. Solomon, 23 Ind. 534; Kansas City &c. R. Co. v. Ewing, 23 Kans. 273; Wyman v. Penobscot &c. R. Co. 46 Me. 162; Fort Wayne &c. R. Co. v. Hinebaugh, 43 Ind. 354. Operators also are generally liable. Illinois Cent. R. Co. v. Kanouse, 79 Ill. 272; 89 Am. Dec. 307; Ohio &c. R. Co. v. Russell, 115 Ill. 52; 3 N. E. 561; Cincinnati &c. R. Co. v. McDougall, 108 Ind. 179; 8 N. E. 571; Davis v. Central R. Co. 75 Ga. 645; Gould v. Bangor &c. R. Co. 82 Me. 122; 19 Atl. 84; Missouri Pac. R. Co. v. Ricketts, 45 Kans. 617; 26 Pac. 50. See, also, as to lessee, St. Louis &c. R. Co. v. Hale (Ark.), 100 S. W. 1148.

that where a railway company does not erect fences along its right of way they are erected by the adjoining proprietor of lands. Often the land-owner erects fences by virtue of an agreement between himself and the railway company,[74] but there are a great number of cases in which fences have been voluntarily erected by the land-owner. In some states, as we have heretofore seen,[75] where the company refuses to erect the fence, the adjoining land-owner may do so and recover the cost from the railway company. Where, without any agreement between an adjoining land-owner and the railway company, such land-owner erects a fence between his lands and the right of way the company is not necessarily exempted from liability for non-performance of its statutory duty and may be held liable for stock killed or injured which got on the track where the company had so failed to erect the fence.[76] But if it appears that the fence erected by the adjoining land-owners, although erected without any agreement, were sufficient, or in other words, were as good fences as the company could have been required to erect in the performance of its statutory duty then it is not liable as for a failure to erect and maintain a fence.[77]

§ 1188. Agreement to fence.—Agreements to fence are often made between adjoining land-owners and railway companies. Such contracts have been held valid notwithstanding a statutory duty rests upon a railway company to see that its track is securely fenced.[78] Where the owner of lands adjoining the right of way of a railway

[74] Post, § 1188.

[75] Ante, § 1181.

[76] Louisville &c. R. Co. v. White, 94 Ind. 257; 20 Am. & Eng. R. Cas. 449; Jeffersonville &c. R. Co. v. Sullivan, 38 Ind. 262; Fort Wayne &c. R. Co. v. Mussetter, 48 Ind. 286.

[77] Jeffersonville &c. R. Co. v. Sullivan, 38 Ind. 262. In Hovorka v. Minneapolis &c. R. Co. 31 Minn. 221; 17 N. W. 376; 13 Am. & Eng. R. Cas. 605, it was said: "Where the owner of the adjoining lands builds the fence, the railroad company may, with his assent, or acquiescence, adopt it. In the absence of any agreement it will still be its duty to maintain it in good condition and to restore it if removed by the owner. But so long as it remains and is kept in good condition, no matter by whom, so that domestic animals do not get upon the track by reason of any defect in it, the company is not liable as for failure to perform the duty to fence imposed on it by the statute. The statute duty is discharged, though performed for the company by a mere volunteer."

[78] Jackson v. Rutland &c. R. Co. 25 Vt. 150; 60 Am. Dec. 246.

company agrees with the company to construct and maintain proper fences between his lands and the railway company's right of way the track will be regarded as fenced as to such owner and if his stock get upon the track by reason of his failure to perform his agreement to fence and are injured the railway company is not liable,[79] unless it appear that the injuries were willfully or wantonly inflicted.[80] Such a contract to fence, is not binding, however, on third persons unless they hold under such owner or are in privity with him[81] and as to such persons the company is bound to fence. Contracts to fence may be oral or written or even implied.[82] When they are oral they are usually binding only between the parties by whom they were made,[83] but where they are written they are charges which run with the land

[79] Terre Haute &c. R. Co. v. Smith, 16 Ind. 102; Pittsburgh &c. R. Co. v. Heiskell, 38 Ohio St. 666; 13 Am. & Eng. R. Cas. 555; Ells v. Pacific &c. R. Co. 48 Mo. 231; Busby v. St. Louis &c. R. Co. 81 Mo. 43; Evansville &c. R. Co. v. Mosier, 101 Ind. 597. In the case of Bond v. Evansville &c. R. Co. 100 Ind. 301; 23 Am. & Eng. R. Cas. 200, it is said: "It has long been held by this court that where a person, through whose land a railroad is constructed, agrees to build and maintain fences along the right of way, the road will be regarded as fenced as to him, and that if he fails to build and maintain such fences, and his animals pass to the track and are killed, he cannot recover from the company on the ground that it has not fenced the track as required by statute." But see Shepard v. Buffalo &c. R. Co. 35 N. Y. 641. See, generally, Tonawanda R. Co. v. Munger, 5 Denio (N. Y.) 255; 49 Am. Dec. 239; Wilder v. Maine Cent. R. Co. 65 Me. 332; 20 Am. R. 698; Whittier v. Chicago &c. R. Co. 24 Minn. 394; Jackson v. Rutland &c. R. Co. 25 Vt. 150; 60 Am. Dec. 246; Tower v. Providence &c. R. Co. 2 R. I. 404.

[80] Cincinnati &c. R. Co. v. Waterson, 4 Ohio St. 424.

[81] Cincinnati &c. R. Co. v. Ridge, 54 Ind. 39; Bond v. Terre Haute &c. R. Co. 100 Ind. 301; Wabash R. Co. v. Williamson, 104 Ind. 154; 3 N. E. 814; 23 Am. & Eng. R. Cas. 203; Gilman v. European &c. R. Co. 60 Me. 235; Silver v. Kansas City &c. R. Co. 78 Mo. 528; 47 Am. R. 118; Hamilton v. Missouri &c. R. Co. 87 Mo. 85. See, also, Corry v. Great Western R. Co. 7 Q. B. Div. 322; Warren v. Keokuk &c. R. Co. 41 Ia. 484.

[82] Bond v. Terre Haute &c. R. Co. 100 Ind. 301. See, also, Arkansas Midland R. Co. v. Whitley, 54 Ark. 199; 15 S. W. 465; 11 L. R. A. 621, and note.

[83] Wilder v. Maine &c. R. Co. 65 Me. 332; 20 Am. R. 698; St. Louis &c. R. Co. v. Todd, 36 Ill. 409; Day v. New York &c. R. Co. 53 Barb. (N. Y.) 250; Vandergrift v. Delaware R. Co. 2 Hous. (Del.) 287; Kentucky &c. R. Co. v. Kenney, 82 Ky. 154; 20 Am. & Eng. R. Cas. 458.

and bind subsequent grantees of the original parties.[84] A land-owner's contract to maintain a fence between his lands and a railway right of way is binding on his tenant and the tenant cannot recover for stock injured on the railway tracks.[85] The remedy for a failure to erect a fence according to agreement is an action for breach of contract and not for tort.[86] Such agreements not being binding on third persons who are entitled to recover for stock injured or killed on a railway track not properly fenced, it has been held that if such injuries were caused by the failure of the adjoining land-owner to erect fences according to agreement and the company has been compelled to respond in damages it has its remedy against the land-owner therefor.[87] Agreements to fence are often made in which the company instead of the adjoining owner agrees to maintain the fence. Companies often take such an obligation upon themselves in consideration of a grant of right of way across an owner's lands. Where a railway company obtains a right of way through a farm, and in consideration of the grant of such right of way agrees to erect and maintain secure fences it is bound to pay for animals

[84] Easter v. Little Miami &c. R. Co. 14 Ohio St. 48; Cook v. Milwaukee &c. R. Co. 36 Wis. 45; Gill v. Atlantic &c. R. Co. 27 Ohio St. 240. See, also, Varner v. St. Louis &c. R. Co. 55 Ia. 677. But compare Vandegrift v. Delaware &c. R. Co. 2 Houst. (Del.) 289. In Kentucky &c. R. Co. v. Kenney, 82 Ky. 154; 20 Am. & Eng. R. Cas. 458, the court said: "It is equally certain, however, that a written agreement, such as this deed embraces, showing an intention to charge the land by the covenant, which in its very nature inheres in the land and contains mutual promises connected with the grant as a part of it, runs with the land, and is enforceable by and against subsequent grantees." Midland R. Co. v. Fisher, 125 Ind. 19; 24 N. E. 756; 8 L. R. A. 604, and note; 21 Am. St. 789.

[85] St. Louis &c. R. Co. v. Washburn, 97 Ill. 253; Indianapolis &c. R. Co. v. Shimer, 17 Ind. 295. See, also, Ells v. Pacific R. Co. 48 Mo. 231; Cincinnati &c. R. Co. v. Waterson, 4 Ohio St. 425; Indianapolis &c. R. Co. v. Petty, 25 Ind. 413. Contra, Corry v. Great Western R. Co. L. R. 7 Q. B. D. 322; 2 Am. & Eng. R. Cas. 612. In Howard v. Maysville &c. R. Co. 24 Ky. L. 1051; 70 S. W. 631, the tenant recovered where the company failed to perform its agreement with the land-owner to fence.

[86] Chicago &c. R. Co. v. Barnes, 116 Ind. 126; 18 N. E. 459. Equity will not rescind such a contract on the ground that its breach can be adequately compensated for in damages. Stringer v. Keokuk &c. R. Co. 59 Iowa, 277; 13 N. W. 308; 11 Am. & Eng. R. Cas. 608.

[87] Warren v. Kansas &c. R. Co. 41 Iowa, 484.

killed or injured by its trains in cases where the animals come upon the track through the fault of the company in failing to erect fences according to the terms of its contract.[88] Such agreements when recited in the condemnation proceedings or the instrument by which the railway company obtains its rights are charges which run with the land and are binding upon the company even after the land-owner has conveyed to subsequent grantees.[89] If the company fails to perform an agreement to fence, and animals are killed by reason therof, the measure of damages is not what it would cost to erect the fence, but the value of the animals killed or injured or other damage done.[90] Or, in other words, the company will be liable for all damages which proximately flow from its failure to perform its contract duty.

§ 1189. Waiver of duty to fence.—In the preceding section we have seen that an adjoining owner of lands may contract to construct and maintain fences himself, and if he fails to do so and his stock are injured on account of such failure, he cannot recover. Since the owner is permitted to contract for the construction of the fence by himself, and since his right to recover in such cases depends upon whether or not he has performed his duty, it would seem to follow on principle that an owner could agree with a company that no fence at all should be erected along his lands or that he should waive the performance of the duty imposed upon the railway company to see that its track is securely fenced. Such is the rule, for it is firmly established that the owner of adjoining lands may waive

[88] Donald v. St. Louis &c. R. Co. 44 Iowa, 157; Fernow v. Dubuque &c. R. Co. 22 Iowa, 528; Conger v. Chicago &c. R. Co. 15 Ill. 366; Poler v. New York &c. R. Co. 16 N. Y. 476; Raridon v. Central Iowa &c. R. Co. 65 Iowa, 640; 22 N. W. 909; 19 Am. & Eng. R. Cas. 615; Smith v. Chicago &c. R. Co. 38 Iowa, 518; Chicago &c. R. Co. v. Ward, 16 Ill. 522; Hull v. Chicago &c. R. Co. 65 Iowa, 713; 22 N. W. 940; Chicago &c. R. Co. v. Barnes, 116 Ind. 126; 18 N. E. 459; Hull v. Chicago &c. R. Co. 65 Iowa, 713; 22 N. W. 940; 20 Am. & Eng. R. Cas. 341. See, also, Evans v. Southern R. Co. 133 Ala. 482; 32 So. 138. Its liability in such case is the same as in those cases where the duty to fence is statutory. Gulf &c. R. Co. v. Washington, 49 Fed. 347.

[89] Huston v. Cincinnati &c. R. Co. 21 Ohio St. 235.

[90] Louisville &c. R. Co. v. Sumner, 106 Ind. 55; 55 Am. R. 719; 24 Am. & Eng. R. Cas. 641; 5 N. E. 404; Chicago &c. R. Co. v. Barnes, 116 Ind. 126; 18 N. E. 459.

the building of a fence and thus cut off his right to recover if his animals are injured,[91] unless they are injured intentionally or negligently.[92] Such waiver of the duty to fence results from an agreement on the part of the adjoining owner to maintain the fences himself,[93] or there may be an express contract in which the duty is clearly and specifically waived. The waiver of the duty to fence, however, is valid, so far as exempting the railway company from liability for animals injured is concerned, only between the company and the land-owner and his privies. Third persons to whom the duty to fence is owing are not bound by such a waiver although their stock enter the track where the erection of a fence was waived.[94]

§ 1190. To whom duty to fence is owing.—Statutes requiring railway companies to erect and maintain fences along their rights of way rest, as we have heretofore seen,[95] upon the police power of the state. The exercise of the police power of the state by the enactment of police regulations is for the benefit of the whole public as a general rule. And since statutes imposing the duty to fence upon railway companies rest upon the police power it follows that they are for the benefit of the general public, and to this effect is the almost unanimous weight of judicial authority,[96] although the extent to

[91] Manwell v. Burlington &c. R. Co. 80 Iowa, 662; 45 N. W. 568; Hurd v. Rutland &c. R. Co. 25 Vt. 116.

[92] Jackson v. Rutland &c. R. Co. 25 Vt. 150; 60 Am. Dec. 246; Tyson v. Keokuk &c. R. Co. 43 Iowa, 207; Enright v. San Francisco &c. R. Co. 33 Cal. 230; Cornwall v. Sullivan &c. R. Co. 28 N. H. 161. Where there is such a waiver it is held that the parties stand as at common law. Tower v. Providence &c. R. Co. 2 R. I. 404.

[93] Indianapolis &c. R. Co. v. Petty, 25 Ind. 413; Eames v. Worcester &c. R. Co. 105 Mass. 193; Tombs v. Rochester &c. R. Co. 18 Barb. (N. Y.) 583.

[94] See authorities cited in note 2, p. 1822; Cincinnati &c. R. Co. v. Ridge, 54 Ind. 39.

[95] Ante, § 1182.

[96] New Albany &c. R. Co. v. Maiden, 12 Ind. 10; Indianapolis &c. R. Co. v. Guard, 24 Ind. 222; 87 Am. Dec. 327; Curry v. Chicago &c. R. Co. 43 Wis. 665; Indianapolis &c. R. Co. v. Townsend, 10 Ind. 38; Indianapolis &c. R. Co. v. McKinney, 24 Ind. 283; McCall v. Chamberlain, 13 Wis. 637; Fawcett v. York &c. R. Co. 16 Q. B. 610; Sherman v. Anderson, 27 Kan. 333; 41 Am. R. 414; Kaes v. Missouri Pacific R. Co. 6 Mo. App. 397; Oyler v. Quincy &c. R. Co. 113 Mo. App. 375; 88 S. W. 162; Ludtke v. Lake Shore &c. R. Co. 24 Ohio Cir. Ct. R. 120; Walsh v. Virginia &c. R. Co. 8 Nev.

which this doctrine is carried may depend upon the language and purpose of the particular statute.[97] Such statutes are not intended merely for the protection of the adjoining land-owners unless it clearly and unmistakably appears from the language used that it was the intention of the legislature to protect only such owners.[98] Where the animals are unlawfully on the adjoining premises from which they escape to the company's track, there is some conflict in the authorities as to whether or not the company is liable to the owner of such animals. The weight of authority is to the effect that the company may be liable in such cases,[99] and this we believe to be the correct rule although there are some authorities which hold that the company is not liable.[100] Where the animals are on the adjoining premise by consent of the owner of such premises there is no question as to the liability of the company.[101] And on the

110; Duncan v. St. Louis &c. R. Co. 91 Mo. 67; 8 S. W. 835; Laude v. Chicago &c. R. Co. 33 Wis. 640. The rule is thus stated in Missouri &c. R. Co. v. Roads, 33 Kan. 640; 7 Pac. 213; 23 Am. & Eng. R. Cas. 165: "Upon this question the general rule appears to be that where a statute requiring railroads to fence their tracks is a general police regulation, intended to protect domestic animals generally, and also for the safety of persons and property passing over the road, and is not designed merely for the benefit of the adjoining land-owner, that the railroad company is held to be under a general obligation to the public, and is liable for animals injured and killed on its unfenced track, even though they were unlawfully upon the land from which they passed onto the railroad track."

[97] See Mangold v. St. Louis &c. R. Co. 116 Mo. App. 606; 92 S. W. 753; Hynes v. San Francisco &c. R. Co. 65 Cal. 316; 4 Pac. 28; Walsh v. Virginia &c. R. Co. 8 Nev. 110; Russell v. Maine Cent. R. Co. 100 Me. 406; 61 Atl. 899; Delphia v. Rutland R. Co. 76 Vt. 84; 56 Atl. 279.

[98] Conway v. Canada &c. R. Co. 7 Ont. R. (Q. B. Div.) 673; 19 Am. & Eng. R. Cas. 650. Company held liable only to adjoining land-owner in Byrnes v. Boston &c. R. Co. 181 Mass. 322; 63 N. E. 897, and Russell v. Maine Cent. R. Co. 100 Me. 406; 61 Atl. 899. See, also, Houston &c. R. Co. v. Hollingsworth, 29 Tex. Civ. App. 306; 68 S. W. 724.

[99] Pittsburgh &c. R. Co. v. Allen, 40 Ohio St. 206; 19 Am. & Eng. R. Cas. 657; Purdy v. New York &c. R. Co. 61 N. Y. 353; Nashville &c. R. Co. v. Peacock, 25 Ala. 229.

[100] Towns v. Cheshire R. Co. 21 N. H. 363; Cornwall v. Sullivan R. Co. 28 N. H. 161; Bemis v. Connecticut &c. R. Co. 42 Vt. 375; 1 Am. R. 339; McDonnell v. Pittsfield &c. R. Co. 115 Mass. 564; Walsh v. Virginia City &c. R. Co. 8 Nev. 110; Pittsburgh &c. R. Co. v. Methven, 21 Ohio St. 586; Buxton v. Northeastern R. Co. L. R. 3 Q. B. 549.

[101] St. Louis &c. R. Co. v. Dud-

ground that a railway company cannot contract with another for the performance of a statutory duty imposed upon it and thus escape liability it is held liable to third persons whose stock get upon its track because of the failure of an adjoining owner to fulfill his agreement to fence.[102] Some statutes imposing upon the railway companies the duty to fence make the company liable for all injuries which are occasioned by reason of the failure to fence, while others limit the liability to animals and some, according to their language to particular species of animals. As to the liability, however, the general rule is that the statute is applicable to every kind of animal and this has been held to be so even though the statute designates a particular species of animal.[103] Thus the term "cattle" in a railway fence statute has been held to include horses, mules, sheep and swine,[104] and the term "cattle and horses" to include mules and asses.[105] The company is not bound to fence against dogs for they are animals that a fence does not ordinarily restrain.[106] But if a dog is on the track and the company negligently kill it, the company may be liable.[107] The same degree of diligence, however,

geon, 28 Kan. 283; Sawyer v. Vermont &c. R. Co. 105 Mass. 196.

[102] Ante, § 1189; Pittsburgh &c. R. Co. v. Allen, 40 Ohio St. 206; 19 Am. & Eng. R. Cas. 657.

[103] Halverson v. Minneapolis &c. R. Co. 32 Minn. 88; 19 N. W. 392; 19 Am. & Eng. R. Cas. 526; Missouri &c. R. Co. v. Baxter, 45 Kan. 520; 26 Pac. 49; Watier v. Chicago &c. R. Co. 31 Minn. 91; 16 N. W. 537. The statute applies to a "crazy" horse—one not possessed of even "horse sense." Liston v. Central &c. R. Co. 70 Iowa, 714; 29 N. W. 445; 26 Am. & Eng. R. Cas. 593.

[104] Child v. Hearn, L. R. 9 Exch. 176; Louisville &c. R. Co. v. Ballard, 2 Met. (Ky.) 177; Lee v. Minneapolis &c. R. Co. 66 Iowa, 131; 23 N. W. 299; 20 Am. & Eng. R. Cas. 476; Randall v. Richmond &c. R. Co. 104 N. Car. 410; 10 S. E. 691; Henderson v. Wabash &c. R. Co. 81 Mo. 606; McAlpin v. Grand Trunk R. Co. 38 U. C. Q. B. 446.

[105] Toledo &c. R. Co. v. Cole, 50 Ill. 184; Ohio &c. R. Co. v. Brubaker, 47 Ill. 462. A fencing statute has no application, however, to horses harnessed to a wagon. Cohoon v. Chicago &c. R. Co. 90 Iowa, 169; 57 N. W. 727; 61 Am. & Eng. R. Cas. 364. But it has been held that cattle yoked to a cart and in charge of a driver were within the provisions of a fencing statute. Randall v. Richmond &c. R. Co. 104 N. Car. 410; 10 S. E. 691.

[106] Bay City &c. R. Co. v. Austin, 21 Mich. 390. See, also, Moore v. Charlotte &c. R. 136 N. Car. 554; 67 L. R. A. 470; 48 S. E. 822. Nor a goose. Nashville &c. R. Co. v. Davis (Tenn.); 78 S. W. 1050.

[107] Wilson v. Wilmington &c. R. Co. 10 Rich. L. (S. C.) 52; St.

is not, it seems, required as in the case of other animals.[108] The tendency of the modern decisions is to make the statutes as broad as possible and to embrace all animals which are likely to be injured or to cause injury. The reason for requiring fences against animals is found in the fact that they are not possessed of intelligence sufficient to enable them to avoid injury. If animals were able to recognize the danger necessarily incurred in going upon a railway track there would be no need for fence laws and we would not find them on our statute books. On a somewhat similar reason is based the duty of a railway company to fence its track against children. Where a child non sui juris gets upon a railway track because it was not properly fenced and is injured, the company, it has been held, is liable upon the ground that it is as much the duty of the company to fence against such children as against animals, but this is a doc-

Louis &c. R. Co. v. Hauks, 78 Tex. 300; 14 S. W. 691; 11 L. R. A. 383; Fink v. Evans, 95 Tenn. 413; 32 S. W. 307; St. Louis &c. R. Co. v. Stanfield, 63 Ark. 643; 40 S. W. 126; 37 L. R. A. 659, and note (citing text). But compare Jemison v. Southwestern R. Co. 75 Ga. 444; 58 Am. R. 476; Strong v. Georgia &c. R. Co. 118 Ga. 515; 45 S. E. 366.

[108] In the case of Jones v. Bond, 40 Fed. 281, 40 Am. & Eng. R. Cas. 192, it was said: "I have, within my judicial experience, tried quite a number of cases for injuries to persons and property against railroad companies and receivers, from alleged carelessness and negligence on the part of employes operating railroad trains, and have read the opinions of the courts in many cases, but this is the first dog case that has been brought to my attention, and, therefore, I am at a loss to know what rule to apply. I presume the reason that other cases of like kind have not been before the courts is that the dog is very sagacious and watchful against hazards, and possesses greater ability to avert injury than almost any other animal; in other words, takes better care of himself against impending dangers than any others. He can mount an embankment, or escape from dangerous places, where a horse or cow would be altogether helpless; hence the same care to avoid injuries to an intelligent dog on a railroad is not required on the part of those operating a train that is required in regard to other animals. The presumption is that such dog has the instinct and ability to get out of the way of danger, and will do so, unless its freedom of action is interferred with other circumstances at the time and place." See, also, Moore v. Charlotte &c. R. Co. 136 N. Car. 554; 48 S. E. 822; 67 L. R. A. 470. See Fink v. Evans, 95 Tenn. 413; 32 S. W. 307; Citizens' Rapid Transit Co. v. Dew, 100 Tenn. 317; 45 S. W. 790; 66 Am. St. 754; 40 L. R. A. 518 (allowing recovery for dog).

trine that should be very carefully limited and applied.[109] The duty to fence, however, extends only to injuries which the child may

[109] Marcott v. Marquette &c. R. Co. 49 Mich. 99; 13 N. W. 374; 8 Am. & Eng. R. Cas. 306; Union Pacific R. Co. v. McDonald, 152 U. S. 262; 14 Sup. Ct. 619; 60 Am. & Eng. R. Cas. 1; Hayes v. Michigan &c. R. Co. 111 U. S. 228; 4 Sup. Ct. 369; 15 Am. & Eng. R. Cas. 394; Keyser v. Chicago &c. R. Co. 66 Mich. 390; 33 N. W. 67; 31 Am. & Eng. R. Cas. 399; Stuettgen v. Wisconsin &c. R. Co. 80 Wis. 498; 50 N. W. 407; Chicago &c. R. Co. v. Grablin, 38 Neb. 90; 56 N. W. 796; 57 N. W. 522; Isabel v. Hannibal &c. R. Co. 60 Mo. 475; Singleton v. Eastern &c. R. Co. 7 Com. B. (N. S.) 287. "The object of the statute requiring the company to fence its tracks was to prevent injury from passing trains to persons and animals coming upon and using the same, and when an injury occurs without fault of the plaintiff to either in consequence of the negligence of the company to maintain the required fence, it must be held such negligence as will authorize a remedy. The child in this case was too young to know or understand anything of the danger or consequences of going upon the track before a passing train, and, of course, no wrong, fault, or negligence could properly be attributable to him in going where he did, or in doing what he did. The statute requires the defendant to fence its road with a good fence, four and one-half feet high. It seems to me that it can not be successfully contended that such a fence would not have been a very formidable obstruction to the child's going upon the defendant's right of way. It may have been sufficient to prevent his going there entirely, and, if so, evidence of the negligence of the company to place the fence there was competent and material." Keyser v. Chicago &c. R. Co. 56 Mich. 559; 23 N. W. 311; 56 Am. R. 405; 19 Am. & Eng. R. Cas. 91. The rule does not apply to children of age sufficient to exercise discretion as to their own safety. Nolan v. New York &c. R. Co. 53 Conn. 461; 4 Atl. 106; 25 Am. & Eng. R. Cas. 342. See Fitzgerald v. St. Paul &c. R. Co. 29 Minn. 336; 13 N. W. 168; 43 Am. R. 212, and note; 8 Am. & Eng. R. Cas. 310, where a doctrine contrary to that stated in the text is laid down and enforced. Such statutes are not intended for the protection of adults voluntarily upon the tracks for their own convenience. Schreiner v. Great Northern R. Co. 86 Minn. 245; 90 N. W. 400; 58 L. R. A. 75. And, under some of them at least, their protection does not extend to a trespassing child though too young to be guilty of contributory negligence. Baltimore &c. R. Co. v. Bradford, 20 Ind. App. 348; 49 N. E. 388; 67 Am. St. 252. Others are broad enough to include such a child. Mattes v. Great Northern R. Co. (Minn); 110 N. W. 98; Rosse v. St. Paul &c. R. Co. 68 Minn. 216; 71 N. W. 20; 37 L. R. A. 591; 64 Am. St. 472, and note, citing the apparently conflicting cases on both sides.

receive on the railway company's premises. Its duty does not extend to fencing children from the premises of others.[110]

§ 1191. Injuries to passengers resulting from neglect of duty to fence.—Very frequently collisions with animals on the track of a railway train result disastrously both to the trains and persons on it. Trains are often thrown from the track, property destroyed and persons seriously injured. Where a railway company is engaged in carrying passengers the duty rests upon it to use the highest practicable degree of care for their safety, and as one of the safeguards for the protection of passengers on a train consists in keeping animals off the track and avoiding collisions, and since the duty to fence the right of way rests upon the police power, being a duty which the company owes to the public,[111] it is justly held that the duty to fence applies to passengers and they are entitled to a performance of that duty. That this duty is owing to passengers is declared in many cases.[112]

[110] Morrissey v. Providence &c. R. Co. 15 R. I. 271; 3 Atl. 10; O'Donnell v. Providence &c. R. Co. 6 R. I. 211. And the failure to fence when the basis of the action must be a proximate cause of the injury complained of. Fezler v. Willmar &c. R. Co. 85 Minn. 252; 88 N. W. 746; Wickham v. Chicago &c. R. Co. 95 Wis. 23; 69 N. W. 982; Paquin v. Wisconsin Cent. R. Co. (Minn.); 108 N. W. 882.

[111] "The law imposed upon the appellant the duty of fencing its road for the safety and protection of the public." Cincinnati &c. R. Co. v. Hildreth, 77 Ind. 504; Jeffersonville &c. R. Co. v. Dunlap, 112 Ind. 93; 13 N. E. 403, and cases cited.

[112] Briggs v. St. Louis &c. R. Co. 111 Mo. 168; 20 S. W. 32; Atchison &c. R. Co. v. Elder, 149 Ill. 173; 36 N. E. 565; Gulf &c. R. Co. v. Wilson, 79 Tex. 371; 15 S. W. 280; 11 L. R. A. 486; 23 Am. St. 345; Pittsburgh &c. R. Co. v. Allen, 40 Ohio St. 206; 19 Am. & Eng. R. Cas. 657; Blair v. Milwaukee &c. Co. 20 Wis. 254; Sullivan v. Philadelphia &c. R. Co. 30 Pa. St. 234; 72 Am. Dec. 698; Barnett v. Atlantic &c. Co. 68 Mo. 56; 30 Am. R. 773; Brown v. New York &c. Co. 34 N. Y. 404; Jones v. Seligman, 81 N. Y. 191; Tracy v. Troy &c. R. Co. 38 N. Y. 433; 98 Am. Dec. 54; Fleming v. St. Paul &c. R. Co. 27 Minn. 111; 6 N. W. 448. See Ditchett v. Spuyten-Duyvil &c. R. Co. 67 N. Y. 425. In a recent case, Fordyce v. Jackson, 56 Ark. 594; 20 S. W. 528; 20 S. W. 597, it was said: "It is apparent to those who operate railroads that roaming cattle are a constant menace to the safety of an unguarded track. The railway's obligation to every one whom it undertakes to carry in the relation of a passenger, is, that it will take every reasonable precaution to avert injury to his person, whether from collision with cattle or from other danger which it has reason to apprehend. The omis-

Where an animal got on the track and was struck by a train and was knocked off the track to one side, but so near the track that a train subsequently passing struck it and was derailed, thereby causing plaintiff's injury, it was held that the company was liable.[113]

§ 1192. Injuries to employes resulting from neglect of duty to fence.—The duty imposed upon a railway company to fence its track is held by some of the cases to be one owing to the employes[114] of the company, as well as to passengers, adjoining land-owners and the general public. Where animals come upon the track because of the failure of the company to discharge its duty to maintain proper fences to keep stock off the track, and injury results to an employe because of a collision with such animal, the company will, according to the weight of authority, be liable for such injury.[115] But where there is

sion of any reasonable precaution to effect that end is negligence. Arkansas &c. R. Co. v. Canman, 52 Ark. 517; 13 S. W. 280. This obligation requires of the employes in charge of trains faithful watchfulness, to prevent accidents by collision with cattle; and it requires the company to keep a clear right of way, to afford them the facility of performing that duty. If these or other precautions are insufficient to guard against the danger, and a fence will render the track safe from the intrusion of cattle, the company's obligation demands the more effective precaution. If the want of a proper fence makes the railway unsafe, and an accident happens to a passenger in consequence, the company are responsible to him, although they are under no obligation to the adjacent land-owner or the owner of cattle to fence the track. Buxton v. North Eastern R. Co. L. R. 3 Q. B. 549; Lackawanna &c. R. Co. v. Chenewith, 52 Pa. St. 382; 91 Am. Dec. 168; Gulf &c. R. Co. v. Wilson, 79 Tex. 371; 15 S. W. 280; 11 L. R. A. 486; 23 Am. St. 345; Cornwall v. Sullivan R. Co. 28 N. H. 161, 169."

[113] Mexican &c. R. Co. v. Lauricella, 87 Tex. 277; 28 S. W. 279; 47 Am. St. 103. This case, however, rests more on the negligence of the company in permitting the animal to remain in dangerous proximity to the track than on its failure to fence.

[114] There is conflict of authority upon the question of liability to employes, and there is reason for holding that in the absence of a specific statute there is no liability, but the weight of authority is that there is a general liability. Post, § 1270. See, also, Terre Haute &c. R. Co. v. Williams, 172 Ill. 379; 50 N. E. 116; 64 Am. St. 44, and note.

[115] Quackinbush v. Wisconsin &c. R. Co. 62 Wis. 411; 22 N. W. 519; Dickson v. Omaha &c. R. Co. 124 Mo. 140; 27 S. W. 476; 25 L. R. A. 320, and note; 46 Am. St. 429; 59 Am. & Eng. R. Cas. 305. The

neither a common law nor a statutory duty resting upon a railway company to fence its track it has been held that it is not liable for the death of an engineer caused by his train colliding with an animal on

recent case of Atchison &c. R. Co. v. Reesman, 60 Fed. 370, is one of the best reasoned cases, declaring the doctrine that there is a liability. In that case many cases are reviewed and cited. But see Carper v. Norfolk &c. R. Co. 78 Fed. 94; 35 L. R. A. 135, construing Virginia statute, with which, however, compare Sanger v. Chesapeake &c. R. Co. 102 Va. 86; 45 S. E. 750, construing such statute as amended. See Eames v. Texas &c. R. Co. 63 Tex. 660; 22 Am. & Eng. R. Cas. 540. A clear statement of the rule is found in the recent case of Donnegan v. Erhardt, 119 N. Y. 468; 23 N. E. 1051; 7 L. R. A. 527; 42 Am. & Eng. R. Cas. 580. That statement is as follows: "A railroad company, for the safety of its passengers, as well as its employes upon its engines and cars, is bound to use suitable care and skill in furnishing, not only adequate engines and cars, but also a safe and proper track and road-bed. The track must be properly laid, and the road-bed properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper care, such obstructions are permitted to be or come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company, upon plain common law principles, must be held responsible. Experience shows that animals may stray upon a railroad track, and that, if they do, there is danger that a train may come in collision with them, and be wrecked; and adequate measures, reasonable in their nature, must be taken to guard against such danger. Independently of any statutory requirement, a jury might find, upon the facts of a case, that it was the duty of a railroad company to fence its track, to guard against such danger. But, whatever the rule would be independently of the statute, there is no reasonable doubt that it imposes the absolute duty upon a railroad company to fence its tracks. That duty, it is reasonable to suppose, was imposed, not only to protect the lives of animals, but also to protect human beings upon railroad trains. It is made an unqualified duty; and for a violation thereof, causing injury the railroad company incurs responsibility." The court cited the following authorities: Corwin v. New York &c. R. Co. 13 N. Y. 42; Jetter v. Hudson &c. R. Co. 2 Keyes (N. Y.), 154; Staats v. New York &c. R. Co. 3 Keyes (N. Y.), 196; Brown v. New York &c. R. Co. 34 N. Y. 404; Shepard v. Buffalo &c. R. Co. 35 N. Y. 641; Purdy v. New York &c. R. Co. 61 N. Y. 353; Jones v. Seligman, 81 N. Y. 190; 3 Am. & Eng. R. Cas. 236; Graham v. Delaware &c. Canal Co. 46 Hun (N. Y.), 386. In the decision from which we just quoted the case of Langlois v. Buffalo &c. R. Co. 19 Barb. (N. Y.) 364, was overruled.

the track.[116] In a suit by an employe for damages on account of injuries received because the track was not properly fenced, the sufficiency of the fence, negligence in failing to maintain it, and other questions affecting the company's liability are governed by substantially the same rules respecting negligence and the like as other cases between employer and employe.[117] Some of the authorities place the liability of the company on the ground that the company as master owes the duty to the employe as servant to furnish him a safe place to work, and that the law of master and servant applies to such cases.[118] The rule that the employe assumes the risks of the service applies to such cases. Thus, where an employe took service with a railway company, knowing that its track was not fenced and he was afterward killed in a collision with an animal on the track, it was held that his death was caused by a risk of the service which he had assumed and that there could be no recovery.[119] But it has been held that where the accident was caused by a defect in the fence the employe cannot be held to have assumed such a risk although he knew that cattle had been seen on the track before, unless he had knowledge of the defect itself.[120]

§ 1193. Places allowed to remain unfenced—Highways and crossings.—Although the duty rests upon railway companies to securely fence their tracks, there are certain parts of the track which the company is under no obligation to fence. There are certain parts of the track which must necessarily be used by the public and to fence these parts would prevent their use by the public,[121] so that where the

[116] Cowan v. Union Pacific R. Co. 35 Fed. 43.

[117] Wabash &c. R. Co. v. Brown, 2 Bradw. (Ill.) 516; Dewey v. Chicago &c. R. Co. 31 Iowa, 373.

[118] See Dickson v. Omaha &c. R. Co. 124 Mo. 140; 27 S. W. 476; 25 L. R. A. 320, and note; 59 Am. & Eng. R. Cas. 305; 46 Am. St. R. 429.

[119] Sweeney v. Central Pacific R. Co. 57 Cal. 15; 8 Am. & Eng. R. Cas. 151; Fleming v. St. Paul &c. R. Co. 27 Minn. 111; 6 N. W. 448.

[120] Magee v. North Pacific R. Co. 78 Cal. 430; 21 Pac. 114; 12 Am. St. 69.

[121] In Atchison &c. R. Co. v. Shaft, 33 Kan. 521; 6 Pac. 908, it was said: "The great weight of authority, however, is that railroad companies are not absolved from complying with the express terms of the statutes requiring them to inclose their roads with good and lawful fences, except where some paramount interest of the public intervenes, or some paramount obligation or duty to the public rests upon the railroad companies rendering it im-

track must be used by the public for crossings and the like the company is excused from fencing.[122] When a public highway crosses a railway and the crossing is used by the public the company is not bound to fence its track at such point, and if animals are injured on the crossing the company is not liable unless guilty of negligence or willfulness.[123] Although a statute imposing the duty to fence may not in express terms except highways, the court, from the necessities of the case, will give the statute such a construction as to exempt the company from the duty to fence at a public crossing.[124] The question of whether or not a crossing is a public crossing is generally determined by the use to which it is put, and not by the manner

proper for them not to fence their roads." The court cited the following authorities: Tracy v. Troy &c. R. Co. 38 N. Y. 433; 98 Am. Dec. 54; Bradley v. Buffalo &c. R. Co. 34 N. Y. 427; Cleveland &c. R. Co. v. McConnell, 26 Ohio St. 57; Railroad Co. v. Newbrander, 40 Ohio St. 15; White Water Valley R. Co. v. Quick, 30 Ind. 384; Cleveland &c. R. Co. v. Crossley, 36 Ind. 370; Toledo &c. R. Co. v. Chapin, 66 Ill. 504; Latty v. Burlington &c. R. Co. 38 Iowa, 250; Mundhenk v. Central Iowa R. Co. 57 Iowa, 718; 11 N. W. 656; Flint &c. R. Co. v. Lull, 28 Mich. 510.

[122] The statutes imposing the duty to fence are construed so as not to lead to absurdity and injustice. Gallagher v. New York &c. R. Co. 57 Conn. 442; 18 Atl. 786; 5 L. R. A. 737, and note; 40 Am. & Eng. R. Cas. 197.

[123] Cox v. Minneapolis &c. R. Co. 41 Minn. 101; 42 N. W. 924; 38 Am. & Eng. R. Cas. 287; Soward v. Chicago &c. R. Co. 33 Iowa, 386; Flint &c. R. Co. v. Lull, 28 Mich. 510; Hurd v. Rutland &c. R. Co. 25 Vt. 116; Ohio &c. R. Co. v. Rowland, 50 Ind. 349; Iba v. Hannibal &c. R. Co. 45 Mo. 469; Indiana &c. R. Co. v. Quick, 109 Ind. 295; 9 N. E. 788, 925; Bechdolt v. Grand Rapids &c. R. Co. 113 Ind. 343; 15 N. E. 686; 35 Am. & Eng. R. Cas. 168; Atchison &c. R. Co. v. Holt, 29 Kan. 149; McPheeters v. Hannibal &c. R. Co. 45 Mo. 22; Long v. Central Iowa R. Co. 64 Iowa, 657; 21 N. W. 122; Blanford v. Minneapolis &c. R. Co. 71 Ia. 310; 32 N. W. 357; 60 Am. R. 795; International &c. R. Co. v. Cocke, 64 Tex. 151; Blair v. Milwaukee &c. R. Co. 20 Wis. 254. Where the animal goes through a defective fence and thence over a cattle-guard onto a public crossing where it is killed the company is liable. Kansas &c. R. Co. v. Burge, 40 Kan. 734, 736; 19 Pac. 791; 21 Pac. 589; 40 Am. & Eng. R. Cas. 181. It has also been held that streets which have been dedicated, though not yet opened, need not be fenced. Long v. Central Ia. R. Co. 64 Ia. 657; 21 N. W. 122; Meyer v. North Missouri R. Co. 35 Mo. 352. But see Iola Elec. R. Co. v. Jackson, 70 Kans. 791; 79 Pac. 662.

[124] Gallagher v. New York &c. R. Co. 57 Conn. 442; 18 Atl. 786; 5 L. R. A. 737, and note; 40 Am. & Eng. R. Cas. 197. See, also, Illinois Cent. R. Co. v. Davidson, 225 Ill. 618; 80 N. E. 250.

in which the crossing may have been acquired.[125] If the crossing is used by the public as a public highway the company is excused from fencing, and it is immaterial whether the right to cross was acquired by condemnation, prescription, dedication or otherwise.[126] Where a railroad is built longitudinally along and in the street the company is not bound to fence. The construction of a fence in such a case would prevent the use of the highway by the public, and on that ground its erection is excused.[127] But where a railway right of way runs parallel to a highway, the erection of a fence is required,[128] unless its erection would destroy the use of the highway as such. And the company is required to erect a fence in such cases although the entire width of the right of way cannot be enclosed and part of it has to be thrown into the highway.[129] But where one railway track runs parallel with another railway track only fifty feet away it is not required to erect a fence between the two tracks.[130] If a highway which crosses a railway right of way has been vacated or abandoned the company is bound to fence.[131] But it seems if the abandonment has been recent and there has been no order of vacation the erection of a fence is not required.[132] Where private crossings are constructed across the right of way the railway company is bound to fence at such crossing or to erect gates and bars sufficient to serve as a fence,[133]

[125] Atchison &c. R. Co. v. Griffis, 28 Kan. 539; 13 Am. & Eng. R. Cas. 532.

[126] Luckie v. Chicago &c. R. Co. 76 Mo. 639; Jenkins v. Chicago &c. R. Co. 27 Mo. App. 578; Dow v. Kansas City So. R. Co. 116 Mo. App. 555; 92 S. W. 744.

[127] Rippe v. Chicago &c. R. Co. 42 Minn. 34; 43 N. W. 652; 5 L. R. A. 864; 40 Am. & Eng. R. Cas. 231.

[128] Indianapolis &c. R. Co. v. McKinney, 24 Ind. 283; Andre v. Chicago &c. R. Co. 30 Iowa, 107; Rozzelle v. Hannibal &c. R. Co. 79 Mo. 349; Patton v. West End &c. R. Co. 14 Mo. App. 589; Rutledge v. Hannibal &c. R. Co. 78 Mo. 286; Sanger v. Chesapeake &c. R. Co. 102 Va. 86; 45 S. E. 750, 752 (citing text). But see Lee v. Brooklyn Heights R. Co. 97 App. Div. (N. Y.) 111; 89 N. Y. S. 652.

[129] Louisville &c. R. Co. v. Shanklin, 94 Ind. 297; Jeffersonville &c. R. Co. v. Sweeney, 32 Ind. 430; Emmerson v. St. Louis &c. R. Co. 35 Mo. App. 621; Evansville &c. R. Co. v. Tipton, 109 Ind. 197; Wabash R. Co. v. Forshee, 77 Ind. 158; Lake Erie R. Co. v. Rooker, 13 Ind. App. 600; 41 N. E. 470.

[130] Gallagher v. New York &c. R. Co. 57 Conn. 442; 40 Am. & Eng. R. Cas. 197; 18 Atl. 786; 5 L. R. A. 737, and note.

[131] Jeffersonville &c. R. Co. v. O'Connor, 37 Ind. 95; Louisville &c. R. Co. v. Shanklin, 94 Ind. 297.

[132] Indiana &c. R. Co. v. Gapen, 10 Ind. 292.

[133] Omaha &c. R. Co. v. Severin,

unless the land-owner has requested that the fence be left open.[134] In some states the matter of private crossings and the erection of fences and gates and bars is regulated by statute, and where such is the case the provisions of the statute must govern.[135]

§ 1194. Fences at depot and station grounds.—Railroad companies are not required to fence their tracks at their depots and about their station grounds. Where passengers and freight are received and discharged, public convenience requires that there should be unobstructed access to the buildings and tracks, and, therefore, fences are not required.[136] The company not being required to maintain fences at such places it follows that it will not be liable for stock there injured unless it was guilty of willfulness or negligence.[137] A number of

30 Neb. 318; 46 N. W. 842; 45 Am. & Eng. R. Cas. 122; McKinley v. Chicago &c. R. Co. 47 Iowa, 76; Mackey v. Central &c. R. Co. 54 Iowa, 540; 6 N. W. 723; Peoria &c. R. Co. v. Barton, 80 Ill. 72; Pittsburgh &c. R. Co. v. Cunnington, 39 Ohio St. 327.

[134] Indianapolis &c. R. Co. v. Shimer, 17 Ind. 295; Tyson v. Kansas &c. R. Co. 43 Iowa, 207; Bellefontaine &c. R. Co. v. Suman, 29 Ind. 40.

[135] In Indiana the owner must keep up the fence at private crossings. Louisville &c. R. Co. v. Etzler, 119 Ind. 39; 21 N. E. 466; 40 Am. & Eng. R. Cas. 205; Hunt v. Lake Shore &c. R. Co. 112 Ind. 69; 13 N. E. 263; Pennsylvania Co. v. Spaulding, 112 Ind. 47; 13 N. E. 268; 35 Am. & Eng. R. Cas. 184; Evansville &c. R. Co. v. Mosier, 114 Ind. 447; 17 N. E. 109.

[136] Schneekloth v. Chicago &c. R. Co. 108 Mich. 1; 65 N. W. 663; McGrath v. Detroit &c. R. Co. 57 Mich. 555; 24 N. W. 854; Rinear v. Grand Rapids &c. R. Co. 70 Mich. 620; 38 N. W. 599; 35 Am. & Eng. R. Cas. 166; Bechdolt v. Grand Rapids &c. R. Co. 113 Ind. 343; 15 N. E. 686; 35 Am. & Eng. R. Cas. 168; Galena &c. R. Co. v. Griffin, 31 Ill. 303; Smith v. Chicago &c. R. Co. 60 Iowa, 512; 15 N. W. 303; Atchison &c. R. Co. v. Shaft, 33 Kan. 521; 6 Pac. 908; Kobe v. Northern Pacific R. Co. 36 Minn. 518; 32 N. W. 783; Schooling v. St. Louis &c. R. Co. 75 Mo. 518; Acord v. St. Louis &c. R. Co. 113 Mo. App. 84; 87 S. W. 537, 541 (citing text); McGuire v. St. Louis &c. R. Co. 113 Mo. App. 79; 87 S. W. 564; Johnson v. Chicago &c. R. Co. 75 Iowa, 157; 39 N. W. 242; Peoria &c. R. Co. v. Barton, 80 Ill. 72; Louisville &c. R. Co. v. Hall, 93 Ind. 245; Schneir v. Chicago &c. R. Co. 40 Iowa, 337; Prickett v. Atchison &c. R. Co. 33 Kan. 748; 7 Pac. 611; Flagg v. Chicago &c. R. Co. 96 Mich. 30; 55 N. W. 444; 21 L. R. A. 835; Mills &c. Co. v. Chicago &c. R. Co. 94 Wis. 336; 68 N. W. 996.

[137] Bechdolt v. Grand Rapids &c. R. Co. 113 Ind. 343; 15 N. E. 686; Moses v. Southern Pacific R. Co.

recent decisions as to when a fence is or is not required will be found in the note below,[138] in addition to those reviewed in this and following sections. The exception applies to passenger stations,[139] freight depots,[140] and the space used for the convenience of the company in switching its cars and making up trains and supplying its engines with fuel and water.[141] The exemption of switch grounds is founded

18 Ore. 385; 23 Pac. 498; 8 L. R. A. 135, and note; 42 Am. & Eng. R. Cas. 555; Indiana &c. R. Co. v. Quick, 109 Ind. 295; 9 N. E. 788, 925; Indiana &c. R. Co. v. Sawyer, 109 Ind. 342; 10 N. E. 105.

[138] Places required to be fenced: Union Pac. R. Co. v. Knowlton, 43 Neb. 751; 62 N. W. 203; Smith v. St. Louis &c. R. Co. 111 Mo. App. 410; 85 S. W. 972; Foster v. Kansas City &c. R. Co. 112 Mo. App. 67; 87 S. W. 57; Mattes v. Great Northern R. Co. 95 Minn. 386; 104 N. W. 234; Dailey v. Chicago &c. R. Co. 121 Ia. 254; 96 N. W. 778; Chicago &c. R. Co. v. Hand, 113 Ill. App. 144. Places not required to be fenced: Schneekloth v. Chicago &c. R. Co. 108 Mich. 1; 65 N. W. 663; Katzinaki v. Grand Trunk R. Co. 141 Mich. 75; 104 N. W. 409; Acord v. St. Louis &c. R. Co. 113 Mo. App. 84; 87 S. W. 537; Hilleman v. Gray's Point &c. R. Co. 99 Mo. App. 271; 73 S. W. 220; Gulf &c. R. Co. v. Ellis 85 Miss. 586; 38 So. 210. See, also, Chicago &c. R. Co. v. Sevcek (Neb.); 101 N. W. 981 (modified in 101 N. W. 639); Fowbel v. Wabash R. Co. 125 Ia. 215; 100 N. W. 1121.

[139] Chicago &c. R. Co. v. Clonch, 2 Kan. App. 728; 43 Pac. 1140. "Depot or station grounds are a place where passengers get on and off the cars, and where goods are loaded and unloaded and all grounds necessary or convenient and actually used for these purposes." Fowler v. Farmers' &c. Trust Co. 21 Wis. 78.

[140] McGrath v. Detroit &c. R. Co. 57 Mich. 555; 24 N. W. 854; 22 Am. & Eng. R. Cas. 574. Three hundred feet from a highway crossing the track was unfenced. On the other side of the crossing there was a depot. It was held that the road should have been fenced beyond the crossing although freight was occasionally received and discharged there. Moser v. St. Paul &c. R. Co. 42 Minn. 480; 44 N. W. 530. See, also, Anderson v. Stewart, 76 Wis. 43; 44 N. W. 1091; Peyton v. Chicago &c. R. Co. 70 Iowa, 522; 30 N. W. 877.

[141] Davis v. Burlington &c. R. Co. 26 Iowa, 549; Swearingen v. Missouri &c. R. Co. 64 Mo. 73; Blair v. Milwaukee &c. R. Co. 20 Wis. 254; Flint &c. R. Co. v. Lull, 28 Mich. 510. In Peters v. Stewart, 72 Wis. 133; 39 N. W. 380, it is said: "It appears, in effect, from the undisputed evidence, that at the side of the main track, and opposite the side-track mentioned, there were at the time in question, a water-tank for replenishing engines, and another building, within which there was a telegraph office with telegraphic instruments, a ticket-office, and a place for eating and sleeping, and which building was occupied by the company's station men and agent, who operated

on the danger to employes which would necessarily result were the tracks fenced. The safety of the employes at points where they almost continually pass up and down the track in the performance of their duties is far more important than would be the safety afforded to animals and property from the erection of fences at such tracks.[142] So, it is justly held that the company is not bound to place fences or cattle-guards where they would materially interfere with the transaction of its business and performance of its duty to the public or endanger its employes.[143] The general rule, however, is that some public interest must intervene[144] rendering the construction and maintenance

the telegraph, sold tickets for the company to passengers, operated the switch and tank and handled baggage and freight; that there was a platform between the building and the track; that trains were in the habit of stopping there, and receiving and discharging passengers and freight. True, the accommodations were quite limited, but, under the decisions of this court, we must hold that this station building was a depot, and that the railroad grounds in connection therewith were 'depot grounds' within the meaning of the statute."

[142] See Cincinnati &c. R. Co. v. Jones, 111 Ind. 259; 12 N. E. 113; 31 Am. & Eng. R. Cas. 491; Cox v. Atchison &c. R. Co. 128 Mo. 362; 31 S. W. 3. In Penn. Co. v. Mitchell, 124 Ind. 473; 24 N. E. 1065, the court declared the rule as follows: "It is abundantly settled that a railroad company is not liable for injuries to animals that enter upon its track at places, where, to maintain fences, would interfere with the discharge of its duty to the public, or with the rights of the public in the use of the highway, or in doing business with the company, nor at any place where fences and connecting cattle-guards would make the running and handling of trains, or the necessary and proper switching of cars, more hazardous to its employes." Text is quoted with approval as to exemption of switch grounds and endangering employes in Rabidon v. Chicago &c. R. Co. 115 Mich. 390; 73 N. W. 386, 387; 39 L. R. A. 405.

[143] Lake Erie &c. R. Co. v. Kneadle, 94 Ind. 454; Evansville &c. R. Co. v. Willis, 93 Ind. 507; Acord v. St. Louis &c. R. Co. 113 Mo. App. 84; 87 S. W. 537, 541; Gerren v. Hannibal &c. R. Co. 60 Mo. 405; Gilpin v. Missouri &c. R. Co. 197 Mo. 319; 94 S. W. 869.

[144] Greeley v. St. Paul &c. R. Co. 33 Minn. 136; 22 N. W. 179; 53 Am. R. 16; Kobe v. Northern Pacific R. Co. 36 Minn. 518; 32 N. W. 783; Hurt v. St. Paul &c. R. Co. 39 Minn. 485; 40 N. W. 613; Bradley v. Buffalo &c. R. Co. 34 N. Y. 427; Toledo &c. R. Co. v. Chapin, 66 Ill. 504; Mundhenk v. Central Iowa R. Co. 57 Iowa, 718; 11 N. W. 656; Flint &c. R. Co. v. Lull, 28 Mich. 510. In International &c. R. Co. v. Cocke, 64 Tex. 151; 23 Am. & Eng. R. Cas. 226, the court said: "The general terms of our statute imposing a liability on railway companies for injuries done to animals, unless their

of fences inconvenient and dangerous or their erection will not be excused. A mere private convenience of the company,[145] or increased cost of constructing a fence is not sufficient to relieve the company from its duty to fence. A point remote from a depot, where freight is occasionally received, does not fall within the rule of exemption.[146] Where it is impossible to fence both sides of the track the railway company will not be required to do so,[147] and where a fence would interfere with the business of an adjoining owner of a saw-mill, hay-press or other business, it has been held that its erection will not be required.[148] It is held that the question as to whether the place at which an animal is killed or injured is reasonably necessary for depot purposes, may be for the jury,[149] but where only one conclusion can be drawn it is a question for the court.[150]

railways are fenced, do not apply to such places as public necessity or convenience require should be left unfenced, such as the streets of a city or town, depot, and contiguous grounds, the crossings of highways, and other like places." See, also, International &c. R. Co. v. Dunham, 68 Tex. 231; 2 Am. St. 484.

[145] Hurt v. St. Paul &c. R. Co. 39 Minn. 485; 40 N. W. 613; Tracy v. Troy &c. Co. 38 N. Y. 433; 98 Am. Dec. 54; Comstock v. Des Moines &c. R. Co. 32 Iowa, 376; Bellefontaine &c. R. Co. v. Reed, 33 Ind. 476; Morris v. St. Louis &c. R. Co. 58 Mo. 78; Acord v. St. Louis &c. R. Co. 113 Mo. App. 84; 87 S. W. 537 (citing text).

[146] Jaeger v. Chicago &c. R. Co. 75 Wis. 130; 43 N. W. 732; 40 Am. & Eng. R. Cas. 194; Dinwoodie v. Chicago &c. R. Co. 70 Wis. 160; 35 N. W. 296; Smith v. Chicago &c. R. Co. 60 Iowa, 512; 15 N. W. 303. Neither do switches and side tracks which are remote from and constitute no part of the depot yard. Chicago &c. R. Co. v. Hans, 111 Ill. 114. The question as to what is a station or the like in this connection is considered in a number of Missouri cases. See Moore v. St. Louis &c. R. Co. 117 Mo. App. 384; 93 S. W. 869, and cases there cited. See, also, and compare Stewart v. Pennsylvania R. Co. 2 Ind. App. 142; 28 N. E. 211; 50 Am. St. 231, and Michigan cases cited in the first note to this section.

[147] Indiana &c. R. Co. v. Leak, 89 Ind. 596.

[148] Indianapolis &c. R. Co. v. Kinney, 8 Ind. 402; Ohio &c. R. Co. v. Rowland, 51 Ind. 285; Cincinnati &c. R. Co. v. Wood, 82 Ind. 593.

[149] Grosse v. Chicago &c. R. Co. 91 Wis. 482; 65 N. W. 185, and cases cited. See, also, Acord v. St. Louis &c. R. Co. 113 Mo. App. 84; 87 S. W. 537, 544 (citing text); Pennsylvania Co. v. Lindley, 2 Ind. App. 111; 28 N. E. 106.

[150] See Grosse v. Chicago &c. R. Co. 91 Wis. 482; 65 N. W. 185; also Acord v. St. Louis &c. R. Co. 113 Mo. App. 84; 87 S. W. 537, 544; Jeffersonville &c. R. Co. v. Peters, 1 Ind. App. 69; 27 N. E.

§ 1195. Fences in cities, towns and villages.—Where a railway track passes through a city, town or village, the company is usually bound to fence the same as at other places,[151] unless it is exempted by statute[152] or the convenience of the public[153] requires that the track should not be fenced. But companies are often relieved from such duty in such localities either because the statute exempts them or does not apply by reason of the public inconvenience. It is not necessary that there should be an incorporated town; all that is necessary is that lots be regularly laid out and that the track be crossed by streets and alleys open to the public.[154] In many of the states in which statutes imposing the duty to fence are in force the statute itself in express

299; Pennsylvania Co. v. Lindley, 2 Ind. App. 111, 112, 113, 114; 28 N. E. 106; Stewart v. Pennsylvania R. Co. 2 Ind. App. 142, 145; 28 N. E. 211; 50 Am. St. 231; Louisville &c. R. Co. v. Worley, 107 Ind. 120, 123; 7 N. E. 215; McGratte v. Detroit &c. R. Co. 57 Mich. 559; 24 N. W. 854; Mills &c. Co. v. Chicago &c. R. Co. 94 Wis. 336; 68 N. W. 996, 997; Wilmot v. Oregon R. Co. (Oreg.); 87 Pac. 528.

[151] Flint &c. R. Co. v. Lull, 25 Mich. 510; Bradley v. Buffalo &c. R. Co. 34 N. Y. 427; Tracy v. Troy &c. R. Co. 38 N. Y. 433; 98 Am. Dec. 54; Cleveland &c. R. Co. v. McConnell, 26 Ohio St. 57; Greely v. St. Paul &c. R. Co. 33 Minn. 136; 53 Am. R. 16; 22 N. W. 179; 19 Am. & Eng. R. Cas. 559; Union &c. R. Co. v. Dyche, 28 Kans. 200; Ells v. Pacific R. Co. 48 Mo. 231; La Paul v. Truesdale, 44 Minn. 275; 46 N. W. 363; 45 Am. & Eng. R. Cas. 468; Nashville &c. R. Co. v. Hughes, 94 Tenn. 450; 29 S. W. 723; Coyle v. Chicago &c. R. Co. 62 Ia. 518; 77 N. W. 771. In Toledo &c. Co. v. Cupp, 9 Ind. App. 244; 36 N. E. 445, the rule is thus stated: "The fact that appellant's railroad passed through an addition to a city, which was laid out, platted and divided into streets and alleys, did not, of itself, absolve the railroad company from the duty of securely fencing its track; for wherever a railroad company can build and maintain a fence to inclose its track without interfering with the rights of the public, or with the free use of private property or of its own property, then it is bound to maintain the fence, whether it be in the country, in a village, in a town, or in a city. Ohio &c. R. Co. v. Rowland, 50 Ind. 349; Wabash R. Co. v. Forshee, 77 Ind. 158; Wabash R. Co. v. Tretts, 96 Ind. 450; Ohio &c. R. Co. v. Neady, 5 Ind. App. 328; 32 N. E. 213."

[152] Meyer v. North Missouri &c. R. Co. 35 Mo. 352; Elliott v. Hannibal &c. R. Co. 66 Mo. 683; Toledo &c. R. Co. v. Spangler, 71 Ill. 568; Illinois &c. R. Co. v. Bull, 72 Ill. 537. See Chicago &c. R. Co. v. Hogan, 30 Neb. 686; 46 N. W. 1015.

[153] Parker v. Rensselaer &c. R. Co. 16 Barb. (N. Y.) 315; Crawford v. New York Central R. Co. 18 Hun (N. Y.), 108; Towns v. Cheshire R. Co. 21 N. H. 363; Peoria &c. R. Co. v. Barton, 80 Ill. 72.

[154] Gerren v. Hannibal &c. R. Co.

terms exempts the company from the duty to fence in cities, towns and villages,[155] even where no such exemption is created by the statute the courts have created one, and it is now well settled that a railway company is not bound to fence its track in a city, town or village where the maintenance of a fence would interfere either with the rights of the public or the railway company in the discharge of its business and duties to the public.[156] Where the track extends along a street the company is not bound to fence,[157] neither is it required to fence at street crossings.[158] The test for determining whether a fence should be constructed in a city, town or village is whether or not the erection of a fence would interfere with the rights of the public or the discharge of the duties of the company. Where the track is crossed by streets or alleys at frequent intervals, such as streets and alleys between blocks and lots of ordinary size, no fence is required,[159] but where the lots of land are very large and the streets cross at wide intervals fences must be erected.[160] And where streets or platted grounds end at the right of way of a railway company it is bound to fence;[161] so it is at the edge or boundary of the city, town or village.[162]

§ 1196. Fences at embankments.—A railway company is ordi-

60 Mo. 405; Toledo &c. R. Co. v. Spangler, 71 Ill. 568; Illinois &c. Co. v. Williams, 27 Ill. 48.

[155] Note, 152 supra.

[156] Morris v. St. Louis R. Co. 58 Mo. 78; Atchison &c. R. Co. v. Shaft, 33 Kan. 521; 6 Pac. 908.

[157] Edwards v. Hannibal &c. R. Co. 66 Mo. 567; Rhea v. St. Louis &c. R. Co. 84 Mo. 345; Kobe v. Northern Pacific R. Co. 36 Minn. 518; 32 N. W. 783. See, also, Indianapolis &c. R. Co. v. Warner, 35 Ind. 516; Rippe v. Chicago &c. R. Co. 42 Minn. 34; 43 N. W. 652; 5 L. R. A. 864.

[158] St. Louis &c. R. Co. v. Francis, 58 Ind. 389; Wabash &c. R. Co. v. Forshee, 77 Ind. 158.

[159] Pittsburgh &c. R. Co. v. Laufman, 78 Ind. 319.

[160] Coyle v. Chicago &c. R. Co. 62 Iowa, 518; 17 N. W. 771; Wymore v. Hannibal &c. R. Co. 79 Mo. 247; 13 Am. & Eng. R. Cas. 523; Ells v. Pacific R. Co. 48 Mo. 231; International &c. R. Co. v. Dunham, 68 Tex. 231; 4 S. W. 472; Elliott v. Hannibal &c. R. Co. 66 Mo. 683. "There are places within a corporated town where the railroad may fence, as where there are no streets or alleys, and the public travel would not be interrupted by such fence." Young v. Hannibal &c. R. Co. 79 Mo. 336.

[161] Kirkland v. Missouri Pacific R. Co. 82 Mo. 466; La Paul v. Truesdale, 44 Minn. 275; 46 N. W. 363.

[162] Kirkland v. Missouri &c. R. Co. 82 Mo. 466; McCormick v. St. Louis &c. R. Co. 20 Mo. App. 640; Nashville &c. R. Co. v. Hughes, 94 Tenn. 450; 29 S. W. 723.

narily required to fence its track at embankments. The test is whether or not the embankment is as effectual a barrier against the entry of animals as a fence would be if erected. Where there is an embankment, bluff or other natural object which furnishes a security against the entry of animals as efficient as a fence the company will not be required to maintain a fence.[163] But where the embankment will not prevent the entry of animals the erection of a fence will not be excused.[164] Proof that animals habitually or frequently went over an embankment onto the railway company's tracks has been held conclusive evidence that it is not sufficient.[165] An embankment, on which the track of a railway company is laid, erected in the bed of a canal must be protected by proper fences.[166] And the road must be fenced, where it is erected on the tow-path of an abandoned canal.[167] Where a railway company has a bridge so near a public highway that animals may get onto the bridge from the highway the company is bound to take some steps to prevent animals from getting onto the bridge.[168]

§ 1197. Fences at oblique approaches to highways.—Where a railway crosses a highway at an oblique angle more or less difficulty exists in locating wing fences and cattle-guards so as to protect animals from injury at such places. To permit the wing fences at such places to be erected at right angles to the track would cause a part of the right of way without the limits of the highway to be thrown open or the highway to be obstructed, and a sort of pocket or trap would result into which animals might be caught and driven on the track and injured. The rule is that at such crossings the company must construct its cattle-

[163] Hilliard v. Chicago &c. R. Co. 37 Iowa, 442; ante, § 1184. Where a horse entered upon the railway track upon snow which had drifted against the company's fence and was killed it was held that the company was not liable since it was under no obligation to remove such snow-drifts. Patten v. Chicago &c. R. Co. 75 Iowa, 459; 39 N. W. 708.

[164] Toledo &c. R. Co. v. Sweeney, 41 Ill. 226; Shepard v. Buffalo &c. R. Co. 35 N. Y. 641.

[165] Toledo &c. R. Co. v. Sweeney, 41 Ill. 226; Veerhusen v. Chicago &c. R. Co. 53 Wis. 689; 11 N. W. 433.

[166] White Water &c. R. Co. v. Quick, 31 Ind. 127. See Schermerhorn v. Hudson River &c. R. Co. 38 N. Y. 103, where it was held that the railway company was not bound to fence its track, erected in and over a river.

[167] White Water &c. R. Co. v. Quick, 30 Ind. 384.

[168] Cincinnati &c. R. Co. v. Jones, 111 Ind. 259; 12 N. E. 113; 31 Am. & Eng. R. Cas. 491.

guards and erect its wings fences on the margin of the highway so that the highway is not encroached upon, and all of the right of way not in the highway is fenced and protected. If the company erects the fences back from the highway so as to form a pocket it may be liable for animals killed at such place on the ground that it has not properly fenced its tracks.[169] If a fence or cattle-guard is not placed on the margin of the highway where it is practicable to do so, and an animal is injured on the track between the margin of the highway and the point where the road is fenced, the company will be liable.[170]

§ 1198. Cattle-guards.—"Cattle-guards," or "cattle pits" as they are sometimes termed, are structures erected under or across the tracks of a railway company to prevent animals from going from adjacent lands or tracks into and upon inclosed lands or tracks.[171] Their erection is rendered necessary by reason of the fact that it would be impossible to maintain fences across the track.[172] Trains must run over tracks, and a barrier against animals must be of such a nature that it will not obstruct trains. The points at which a railway com-

[169] Andre v. Chicago &c. R. Co. 30 Iowa, 107; Ft. Wayne &c. R. Co. v. Herbold, 99 Ind. 91; Jeffersonville &c. R. Co. v. Morgan, 38 Ind. 190.

[170] White v. Utica &c. R. Co. 15 Hun (N. Y.), 333; Evansville &c. R. Co. v. Barbee, 74 Ind. 169; Ehret v. Kansas City &c. R. Co. 20 Mo. App. 251; Hamilton v. Missouri Pacific &c. R. Co. 87 Mo. 85; Coleman v. Flint &c. R. Co. 64 Mich. 160; 31 N. W. 47; Indianapolis &c. R. Co. v. Bonnell, 42 Ind. 539. See, also, Soward v. Chicago &c. R. Co. 30 Iowa, 551; Iola Elec. R. Co. v. Jackson, 70 Kans. 791; 79 Pac. 662; Union Pac. R. Co. v. Harris, 28 Kans. 206. Where the company has erected its cattle-guard as near the highway as could conveniently be done it will not be liable. Indianapolis &c. R. Co. v. Irish, 26 Ind. 268.

[171] Heskett v. Wabash &c. R. Co. 61 Iowa, 467; 16 N. W. 525; 13 Am. & Eng. R. Cas. 549; Missouri &c. R. Co. v. Morrow, 32 Kan. 217; 4 Pac. 87. In the latter case it was said: "Proper cattle-guards are such as will prevent cattle from passing along the right of way of the railway company into an improved or fenced field."

[172] In the case of Pennsylvania &c. R. Co. v. Spaulding, 112 Ind. 47; 13 N. E. 268, the court, in speaking of a statutory provision requiring a railway company to erect cattle-guards, said: "The reason of that requirement is that, at such open and public crossings there is no other way of preventing the ingress of animals to portions of the railroad not so crossed by the public."

pany must maintain cattle-guards are pretty clearly settled. The general rule is that wherever a railway company is under an obligation to fence its tracks it is bound to maintain cattle-guards at the boundary line between the fenced and unfenced parts of its track.[173] In some states the duty to maintain cattle-guards is imposed by statute in express terms.[174] Some authorities seem to hold that the company is not under any obligation to maintain cattle-guards unless that obligation is imposed by statute, contract or prescription,[175] but the great weight of authority is to the effect that if a fence is required cattle-guards are also required.[176] And under statutes imposing the duty to fence companies are bound to erect and maintain cattle-guards, for cattle-guards are regarded as part of a secure fence.[177]

[173] Missouri &c. R. Co. v. Ricketts, 45 Kan. 617; 26 Pac. 50; 45 Am. & Eng. R. Cas. 485. See, also, Toledo &c. R. Co. v. Franklin, 53 Ill. App. 632; Pittsburgh &c. R. Co. v. Eby, 55 Ind. 567; Ft. Wayne &c. R. Co. v. Herbold, 99 Ind. 91; Atchison &c. R. Co. v. Shaft, 33 Kans. 521; 6 Pac. 908. The duty can not be so delegated to a contractor as to relieve the company from liability. Houston &c. R. Co. v. Meador, 50 Tex. 77. "It is always the duty of a railroad company operating a railroad to see that proper cattle-guards exist wherever its railroad enters and leaves improved or fenced land, whether such railroad company owns the railroad, or is simply operating it under a lease." Missouri &c. R. Co. v. Morrow, 32 Kan. 217; 4 Pac. 87.

[174] Mundhenk v. Central &c. R. Co. 57 Iowa, 718; 11 N. W. 656; 11 Am. & Eng. R. Cas. 463; Corwin v. New York &c. R. Co. 13 N. Y. 42; Brady v. Rensselaer &c. R. Co. 1 Hun (N. Y.), 378. In McGhee v. Guyn, 98 Ky. 209; 32 S. W. 915, the court said: "It is well settled that a neglect on the part of the company to erect suitable cattle-guards at public crossings, and keep them in repair, when a statute so requires, renders it liable for injuries to cattle escaping from a highway upon its track by reason of such defect."

[175] Ward v. Paducah &c. R. Co. 4 Fed. 862.

[176] Pittsburgh &c. R. Co. v. Eby, 55 Ind. 567; Louisville &c. R. Co. v. Spain, 61 Ind. 460; Dunnigan v. Chicago &c. R. Co. 18 Wis. 28; 86 Am. Dec. 741; Evansville &c. R. Co. v. Barbee, 74 Ind. 169; Grand Rapids &c. R. Co. v. Jones, 81 Ind. 523; Texas &c. R. Co. v. Young, 60 Tex. 201; 13 Am. & Eng. R. Cas. 544.

[177] Indianapolis &c. R. Co. v. Irish, 26 Ind. 268; New Albany &c. R. Co. v. Pace, 13 Ind. 411; Evansville &c. R. Co. v. Barbee, 74 Ind. 169; Smith v. Chicago &c. R. Co 38 Iowa, 518; Towns v. Cheshire R. Co. 21 N. H. 363; Mackie v. Central &c. R. Co. 54 Iowa, 540; 6 N. W. 723; Nelson v. Vermont &c. R. Co. 26 Vt. 717; 62 Am. Dec. 614; Wait v. Bennington &c. R. Co. 61 Vt. 268; 17 Atl. 284. Cattle-guards, however, are not such a part of the fence as to authorize a person

In cities, towns and villages and other places where the company is excused from fencing because of public necessity or the inconvenience or danger to the employes of the company in the performance of their duties the company is not ordinarily bound to maintain cattle-guards.[178] But the company is bound to erect them at the margin of highways,[179] and at the edge of a town or a depot ground where the company's fence commences.[180] The true test, it seems to us, for

whose cattle are injured by reason of a defective cattle-guard to recover double damages as in the case of a defective fence. Moriarty v. Central Iowa R. Co. 64 Iowa, 696; 21 N. W. 143; 20 Am. & Eng. R. Cas. 438. In the case of Atchison &c. R. Co. v. Shaft, 33 Kan. 521; 6 Pac. 908; 19 Am. & Eng. R. Cas. 529, it was said: "Under the statute railroads must be 'enclosed'; in the language of the statute, they must be 'enclosed with a good and lawful fence, to prevent such animals from being on such road.' . . . Building fences along the sides of the railroad is not alone sufficient. The railroads must be 'enclosed,' as aforesaid, with fences or other barriers, and whenever for that purpose cattle-guards are necessary at the crossings of public highways or other public places, cattle-guards must be put in." The court cited the following authorities: Union Pacific R. Co. v. Harris, 28 Kan. 206; Missouri &c. R. Co. v. Manson, 31 Kan. 337; 2 Pac. 800; Missouri &c. R. Co. v. Morrow, 32 Kan. 217; 4 Pac. 87; Pittsburgh &c. R. Co. v. Eby, 55 Ind. 567; Bradley v. Buffalo &c. R. Co. 34 N. Y. 427; Tracy v. Troy &c. R. Co. 38 N. Y. 433; 98 Am. Dec. 54; Peoria &c. R. Co. v. Barton, 80 Ill. 72; Flint &c. R. Co. v. Lull, 28 Mich. 510; Cleveland &c. R. Co. v. Newbrander, 40 Ohio St. 15; 11 Am. & Eng. R. Cas. 480; Mundhenk v. Central Iowa R. Co. 57 Iowa, 718; 11 N. W. 656; 11 Am. & Eng. R. Cas. 463.

[178] Parker v. Rensselaer &c. R. Co. 16 Barb. (N. Y.) 315; Vanderkar v. Rensselaer &c. R. Co. 13 Barb. (N. Y.) 390. See, also, Gilpin v. Missouri &c. R. Co. 197 Mo. 319; 94 S. W. 869; Stern v. Michigan Cent. R. Co. 76 Mich. 591; 43 N. W. 557; Cleveland &c. R. Co. v. Newbrander, 40 Ohio St. 15.

[179] White Water R. Co. v. Bridgett, 94 Ind. 216; 20 Am. & Eng. R. Cas. 443. If an intervening space is left between the edge of the highway and the cattle-guard and an animal is there injured the company is liable. Louisville &c. R. Co. v. Porter, 97 Ind. 267; 20 Am. & Eng. R. Cas. 446.

[180] Missouri &c. R. Co. v. Manson, 31 Kan. 337; 2 Pac. 800; 13 Am. & Eng. R. Cas. 540; Mundhenk v. Central &c. R. Co. 57 Iowa, 718; 11 N. W. 656. Where the erection of cattle-guards would not obstruct the company's business, but would be a safeguard, they should be constructed, even in a town or village. Brace v. New York &c. R. Co. 27 N. Y. 269; Toledo &c. R. Co. v. Owen, 43 Ind. 405. A railway company is not guilty of negligence in constructing and maintaining a cattle-guard at a point where station grounds end and whence the com-

determining whether a cattle-guard should be erected at any particular point is whether the company is bound to fence at that point. Wherever the company's track emerges from ground which the company is bound to fence and passes onto ground which the company is not bound to fence there should be a cattleguard placed on the dividing line.[181] At private crossings the company is under no obligation to maintain cattle-guards,[182] unless the duty is imposed by statute,[183] or they are actually used by the public.[184]

§ 1198a. Cattle-guards—Sufficiency.—In determining what is a sufficient cattle-guard the weight of authority is perhaps to the effect that the question is one for the jury,[185] but it seems to us on principle, although not according to the weight of authority, that if a

pany is bound to fence its tracks. Fuller v. Lake Shore &c. R. Co. 108 Mich. 690; 66 N. W. 593.

[181] Missouri &c. R. Co. v. Morrow, 32 Kan. 217; 4 Pac. 87; 19 Am. & Eng. R. Cas. 630. See, also, Cleveland &c. R. Co. v. Newbrander, 40 Ohio St. 15; Illinois Cent. R. Co. v. Davidson, 225 Ill. 618; 80 N. E. 250 (citing text).

[182] Pennsylvania R. Co. v. Spaulding, 112 Ind. 47; 13 N. E. 268; Bartlett v. Dubuque &c. R. Co. 20 Iowa, 188; Cook v. Milwaukee &c. R. Co. 36 Wis. 45; Brooks v. New York &c. R. Co. 13 Barb. (N. Y.) 594; Sather v. Chicago &c. R. Co. 40 Minn. 91; 41 N. W. 458; 38 Am. & Eng. R. Cas. 283; Greeley v. St. Paul &c. R. Co. 33 Minn. 136; 22 N. W. 179; 53 Am. R. 16; Omaha &c. R. Co. v. Severin, 30 Neb. 318; 46 N. W. 842; 45 Am. & Eng. R. Cas. 122; Dent v. St. Louis &c. R. Co. 83 Mo. 496; Fitterling v. Missouri &c. R. Co. 79 Mo. 504; Bond v. Evansville &c. R. Co. 100 Ind. 301; 23 Am. & Eng. R. Cas. 200. And it is no defense to an action for killing an animal at a private crossing to show that cattle-guards were there erected unless they were erected in compliance with a statutory requirement. Pennsylvania R. Co. v. Spaulding, 112 Ind. 47; 13 N. E. 268.

[183] See Trout v. Virginia &c. R. Co. 23 Gratt. (Va.) 619; Chapin v. Sullivan &c. R. Co. 39 N. H. 564; 75 Am. Dec. 237; Birmingham &c. R. Co. v. Parsons, 100 Ala. 662; 13 So. 602; 46 Am. St. 92; 27 L. R. A. 268.

[184] Where they are actually used by the public, although there may be no duty to fence as to the landowner for whose convenience they are maintained, there may be a duty to fence or put in cattle-guards as to others. Evansville &c. R. Co. v. Mosier, 101 Ind. 597; Indiana Cent. R. Co. v. Leamon, 18 Ind. 173; Pittsburgh &c. R. Co. v. Cunningham, 39 Ohio St. 327; McKinley v. Chicago &c. R. Co. 47 Ia. 76; Jenkins v. Chicago &c. R. Co. 27 Mo. App. 578.

[185] Railroad Co. v. Newbrander, 40 Ohio St. 15; Swartout v. New York &c. R. Co. 7 Hun (N. Y.) 571; Chicago &c. R. Co. v. Farrelly, 3 Ill. App. 60.

company maintains such cattle-guards as are in general use by first-class railroads it has performed its duty,[186] and if cattle get over such a guard and are injured the company is not liable unless guilty of willfulness or negligence. In a recent case it is held that, under a statute requiring the company to construct suitable and safe cattle-guards, the fact that a cattle-guard does not prevent stock from passing over it is not conclusive that it is unsuitable or unsafe.[187] In another case, however, the same court held that while this is true, and that all that is required is that the cattle-guard should be made as suitable and safe as practicable, yet the question is usually for the jury and it is error to instruct that it is sufficient if the guard is similar to those used by other first-class railroads.[188] The company must use care to see that its cattle-guards are in proper repair[189] and to remove materials such as snow and ice which fill them up and thus impair their usefulness.[190] But where a snow-storm has been so great as to render it impossible for the company to even clear its tracks for the passage of trains it is not bound to clear its cattle-guards of snow.[191]

§ 1199. Wing fences.—What are known as wing fences are fences extending from the cattle-guards to and connecting with the fences erected along the margin of the right of way. Wherever the company is bound to fence, and has erected a cattle-guard it is bound to erect wing fences at such a point,[192] for a wing fence is regarded as

[186] The mere fact that an animal runs or jumps over a cattle-guard is not sufficient to establish that it was defective. Barnhart v. Chicago &c. R. Co. 97 Ia. 654; 66 N. W. 902; Timins v. Chicago &c. R. Co. 72 Iowa, 94; 33 N. W. 379.

[187] St. Louis &c. R. Co. v. Busick, 74 Ark. 589; 86 S. W. 674.

[188] Choctaw &c. R. Co. v. Goset, 70 Ark. 427; 68 S. W. 879. See, also, Seaboard Air Line R. Co. v. Wright (Ala.); 41 So. 461; Pennsylvania Co. v. Newby, 164 Ind. 109; 72 N. E. 1043; Johnston v. Detroit &c. R. Co. 139 Mich. 287; 102 N. W. 744; Yazoo &c. R. Co. v. Harrington, 85 Miss. 366; 37 So. 1016.

[189] Chicago &c. R. Co. v. Reid, 24 Ill. 144.

[190] Hance v. Cayuga &c. R. Co. 26 N. Y. 428; Dunnigan v. Chicago &c. Co. 18 Wis. 28; 86 Am. Dec. 741. Compare Blais v. Minneapolis &c. R. Co. 34 Minn. 57; 24 N. W. 558; 57 Am. R. 36.

[191] See Wait v. Bennington &c. R. Co. 61 Vt. 268; 17 Atl. 284; Stacey v. Winona &c. R. Co. 42 Minn. 158; 43 N. W. 905; 40 Am. & Eng. R. Cas. 217.

[192] Union &c. R. Co. v. Harris, 28 Kan. 206; Iola Elec. R. Co. v. Jackson, 70 Kan. 791; 79 Pac. 662. See

part of a secure fence,[193] and is necessary to render the track "securely fenced in."[194] The duty rests upon the company to protect its track for the full width of its right of way, and this duty must be discharged by the erection of proper cattle-guards and wing fences.[195] Wing fences must be placed along the margin of the highway. If they are erected at an improper distance from the margin and animals are killed within such distance the company will be liable.[196]

§ 1200. Gates and bars.—At private crossings, as we have before seen, railway companies are often bound to fence their tracks. But at such places a permanent and immovable fence cannot be maintained, for such a fence would prevent the crossing from being used. At such points openings are usually left in the fence and gates or bars erected through which the adjoining owners may pass, and at such places the railway company is bound to erect gates, bars or other appliances which will prevent the entry of animals and yet enable adjoining owners to pass over the right of way.[197] The com-

Brassfield v. Patton, 32 Mo. App. 572. But at private crossings wing fences are not required. Missouri &c. R. Co. v. Fitterling, 79 Mo. 594; 20 Am. & Eng. R. Cas. 454.

[193] Edwards v. Kansas City &c. R. Co. 74 Mo. 117; Jeffersonville &c. R. Co. v. Avery, 31 Ind. 277.

[194] In the case of Louisville &c. R. Co. v. Thomas, 106 Ind. 10; 5 N. E. 198, it was said: "There were no fences on either side of the cattle-guard, leading from it to the east and west fences on the north and south sides of appellant's railroad track. If there had been such wing fences leading out from the cattle-guard, and connecting with the east and west fences on each side of the railroad track, it could have been correctly said that such track, at the point where appellee's mare entered thereon, was, in the language of the statute, 'securely fenced in.' In that event the eastward journey of the mare on, along and over appellant's railroad track, would have terminated of necessity at the cattle-guard, and she would have gone no further, except in retracing her previous steps. As it was, in the absence of such wing fences leading out from the cattle-guard and connecting it, one on each side with the east and west fences, it cannot be said with legal accuracy that, at the point where appellee's mare entered upon appellant's railroad track, such track was then and there 'securely fenced in.'"

[195] Missouri &c. R. Co. v. Manson, 31 Kans. 337; 2 Pac. 800; 13 Am. & Eng. R. Cas. 540. See, also, Kansas City &c. R. Co. v. Spencer, 72 Miss. 491; 17 So. 168.

[196] Louisville &c. R. Co. v. Porter, 97 Ind. 267; 20 Am. & Eng. R. Cas. 446.

[197] Pittsburgh &c. R. Co. v. Cunningham, 39 Ohio St. 327; 13 Am. & Eng. R. Cas. 529; Hurd v. Rutland &c. R. Co. 25 Vt. 116; Mackie

pany must also exercise due care to see that gates and bars which it erects are kept in proper repair.[198] As a general rule it is the duty of the company to exercise care to keep gates and bars erected in fences along its right of way closed,[199] and to see that such gates are provided with proper fastenings for keeping them closed.[200] Where such gates are left open by the agents, servants or customers of the railway company the railway company will generally be liable for injuries to animals which come upon the track through such open gates.[201] And the company will generally be liable where the

v. Central &c. R. Co. 54 Iowa, 540; 6 N. W. 723; Payne v. Kansas City &c. R. Co. 72 Ia. 214; 33 N. W. 633; Estes v. Atlantic &c. R. Co. 63 Me. 308; Chicago &c. R. Co. v. Harris, 54 Ill. 528. See, also, Poler v. New York Cent. R. Co. 16 N. Y. 476; Tremont &c. R. Co. v. Pounder, 36 Neb. 247; 54 N. W. 509. The company may erect gates at places other than public crossings where their erection is deemed advisable. Detroit &c. R. Co. v. Hayt, 55 Mich. 347; 21 N. W. 367, 911.

[198] Illinois &c. R. Co. v. Arnold, 47 Ill. 173; Waldron v. Portland &c. R. Co. 35 Me. 422; Chicago &c. R. Co. v. Harris, 54 Ill. 528; Mackie v. Central &c. R. Co. 54 Iowa, 540; 6 N. W. 723; Hammond v. Chicago &c. R. Co. 43 Iowa 168. See, also, Adams v. Atchison &c. R. Co. 46 Kans. 161; 26 Pac. 439; Binicker v. Hannibal &c. R. Co. 83 Mo. 660; Lake Erie &c. R. Co. v. Beam, 60 Ill. App. 68. The company must take notice of the tendency of the material out of which gates or bars are constructed to decay and act accordingly. Hovorka v. Minneapolis &c. R. Co. 34 Minn. 281; 25 N. W. 595. And proof is admissible that gates or bars were repaired after an accident. Page v. Great Western &c. R. Co. 24 L. T. R. 585.

[199] Chicago &c. R. Co. v. Harris, 54 Ill. 528. See Savage v. Chicago &c. R. Co. 31 Minn. 419; 18 N. W. 272; 13 Am. & Eng. R. Cas. 566; Simmons v. Poughkeepsie &c. R. Co. 2 App. Div. (N. Y.) 117; 37 N. Y. S. 532; Wabash R. Co. v. Perbex, 57 Ill. App. 62; Wait v. Burlington &c. R. Co. 74 Ia. 207; 37 N. W. 159. But see Adams v. Atchison &c. R. Co. 46 Kans. 161; 26 Pac. 439.

[200] Payne v. Kansas City &c. R. Co. 72 Iowa, 214; 33 N. W. 633; 35 Am. & Eng. R. Cas. 113; Vernon v. Grand Trunk &c. R. Co. 2 Mont. (Can.) S. C. 181. See, also, Roberts v. Chicago &c. R. Co. 119 Mo. App. 290; 94 S. W. 838.

[201] Toledo &c. R. Co. v. Nelson, 77 Ill. 160; Chapman v. New York &c. R. Co. 33 N. Y. 369; 88 Am. Dec. 392; Spinner v. New York &c. R. Co. 67 N. Y. 153; Cleveland &c. R. Co. v. Swift, 42 Ind. 119; Brady v. Rensselaer &c. R. Co. 3 Thomp. & C. (N. Y.) 537. See Lemon v. Chicago &c. R. Co. 59 Mich. 618; 26 N. W. 791; Chicago &c. R. Co. v. Ramsey (Ind. App.); 78 N. E. 669, 670; 79 N. E. 1065 (quoting text). See, also, Missouri &c. R. Co. v. Armstrong (Tex. Civ. App.); 99 S. W. 431; High v. Southern Pac. Co. (Oreg.) 88 Pac. 961, 962 (citing text).

gates are left open by third persons or strangers if the company knows that they are open or they have been open for such a length of time as to charge the company with notice,[202] but not otherwise.[203] The company is entitled to a reasonable time in which to learn that gates and bars are open or out of repair, and it will not be liable until it has had reasonable opportunity to close the gate or bars or make repairs.[204] Where gates are left open by the adjoining owner for whose benefit they were erected, or by his servants, the company is not liable to him.[205] But if the animals belong to a third person,

[202] Bartlett v. Dubuque &c. R. Co. 20 Iowa, 188; Illinois &c. R. Co. v. Arnold, 47 Ill. 173; Chicago &c. R. Co. v. Magee, 60 Ill. 529; Chicago &c. R. Co. v. Saunders, 85 Ill. 288; Indianapolis &c. R. Co. v. Hall, 88 Ill. 368; Henderson v. Chicago &c. R. Co. 48 Iowa, 216; Davenport v. Chicago &c. R. Co. 76 Wis. 399; 45 N. W. 215.

[203] Texas &c. R. Co. v. Glenn, 8 Tex. App. 301; 30 S. W. 845; Koenigs v. Chicago &c. R. Co. 98 Iowa, 569; 65 N. W. 314; Box v. Atchison &c. R. Co. 58 Mo. App. 359; Ridenore v. Wabash &c. R. Co. 81 Mo. 227; Kavanaugh v. Atchison &c. R. Co. 163 Mo. 64; 63 S. W. 374; Peery v. Quincy &c. R. Co. (Mo. App.); 99 S. W. 14.

[204] In Jacksonville &c. R. Co. v. Harris, 33 Fla. 217; 14 So. 726; 39 Am. St. 127, the court, in speaking of the duty of a railway company to keep gates and bars closed and in repair, referred to the doctrine that a company had a reasonable time in which to discover and repair defects in fences, and held that the same doctrine was properly applicable to the case of open or defective gates and bars, saying: "A somewhat similar doctrine is applicable where bars or gates at a crossing are left open without the company's consent or fault." The court cited a great number of cases, among which were the following: Rutledge v. Hannibal &c. R. Co. 78 Mo. 286; Henderson v. Chicago &c. R. Co. 39 Iowa, 220; Munch v. New York &c. R. Co. 29 Barb. (N. Y.) 647; Lemon v. Chicago &c. R. Co. 59 Mich. 618; 26 N. W. 791; Goddard v. Chicago &c. R. Co. 54 Wis. 548; 11 N. W. 593; Chicago &c. R. Co. v. Saunders, 85 Ill. 288; Indianapolis &c. R. Co. v. Truitt, 24 Ind. 162.

[205] Eames v. Boston &c. R. Co. 14 Allen (Mass.) 151; Henderson v. Chicago &c. R. Co. 48 Iowa, 216; Waldron v. Portland &c. R. Co. 35 Me. 422; Richardson &c. R. Co. 56 Wis. 347; 14 N. W. 176; Chicago &c. R. Co. v. Seirer, 60 Ill. 295; Bond v. Evansville &c. R. Co. 100 Ind. 301; 23 Am. & Eng. R. Cas. 200; Hook v. Worcester &c. R. Co. 58 N. H. 251; Rouse v. Osborne, 3 Kan. App. 139; 42 Pac. 843. The person for whose benefit the gates are erected assumes the increased risk caused by having gates instead of fences. Evansville &c. R. Co. v. Mosier, 101 Ind. 597; 35 Am. & Eng. R. Cas. 196. See, also, Tombs v. Rochester &c. R. Co. 18 Barb. (N. Y.) 583; Henderson v. Chicago &c. R. Co. 43 Ia. 620; Har-

it has been held that the company may be liable to such person notwithstanding the gates were left open by the adjoining owner.[206] Where gates or bars are erected by land-owners for their own convenience at places along the right of way where the company is not bound to fence it is under no obligation to keep such gates closed.[207]

§ 1201. Place of entry of animals on railway track.—In suits for damages on account of injuries to animals on railway tracks the place where the animals came upon the track is nearly always a controlling element in determining the liability of the company. The general rule is that if the animals came upon the track at a place where the company was excused from fencing there can be no liability unless the injuries were wilfully or negligently inflicted.[208] The condition of the fence at the actual place of entry is the test for determining the company's liability.[209] If the animals entered at a place where a fence was required and are injured at a point where no fence is required, the company may be liable,[210] but if the animals

rington v. Chicago &c. R. Co. 71 Mo. 384.

[206] Laude v. Chicago &c. R. Co. 33 Wis. 640.

[207] Indianapolis &c. R. Co. v. Adkins, 23 Ind. 340; Indianapolis &c. R. Co. v. Shimer, 17 Ind. 295; Koutz v. Toledo &c. R. Co. 54 Ind. 515.

[208] Jeffersonville &c. R. Co. v. Huber, 42 Ind. 173; Illinois &c. R. Co. v. Bull, 72 Ill. 537; Indianapolis &c. R. Co. v. Warner, 35 Ind. 515; Davis v. Burlington &c. R. Co. 26 Iowa, 549; Peoria &c. R. Co. v. Barton, 80 Ill. 72; Weir v. St. Louis &c. R. Co. 48 Mo. 558; Bremmer v. Green Bay &c. R. Co. 61 Wis. 114; 20 N. W. 687; 19 Am. & Eng. R. Cas. 575; Great Western &c. R. Co. v. Morthland, 30 Ill. 451; Snider v. St. Louis &c. R. Co. 73 Mo. 465; 7 Am. & Eng. R. Cas. 558; Schneir v. Chicago &c. R. Co. 40 Iowa, 337; Asher v. St. Louis &c. R. Co. 79 Mo. 432; Louisville &c. R. Co. v. Harrigan, 94 Ind. 245.

[209] Indiana &c. R. Co. v. Quick, 109 Ind. 295; 9 N. E. 788, 925; Coryell v. Hannibal &c. R. Co. 82 Mo. 441; Chicago &c. R. Co. v. Farrelly, 3 Bradw. (Ill.) 60; Toledo &c. R. Co. v. Howell, 38 Ind. 447; Jeffersonville &c. R. Co. v. Lyon, 72 Ind. 107; Chicago &c. R. Co. v. Sevcek, (Neb.); 101 N. W. 981; Smith v. Missouri Pacific R. Co. 29 Mo. App. 65; Smith v. St. Louis &c. R. Co. 111 Mo. App. 410; 85 S. W. 972; Wabash &c. R. Co. v. Brown, 2 Bradw. (Ill.) 516; Wabash &c. R. Co. v. Tretts, 96 Ind. 450; Yeager v. Chicago &c. R. Co. 1 Mo. App. 434.

[210] Toledo &c. R. Co. v. Howell, 38 Ind. 447; Alsop v. Ohio &c. R. Co. 19 Ill. App. 292; Snider v. St. Louis &c. R. Co. 73 Mo. 465. And the company will be liable where stock entered at a place requiring a fence, although they afterward

entered at a point where a fence was not required, and were injured at a point where no fence was required, or even where one was required there is generally no liability, in the absence of wilfulness or negligence.[211] Yet where the animal entered upon the track at a highway or other place where a fence is not required and is chased along the track onto ground that should be fenced or properly guarded by cattle-guards, but is not, and the injury is caused because it is not, the company may be liable.[212] In the absence of wilfulness or negligence the material question is, was the track fenced at the point where the animal came upon it, for the negligence of the company in not fencing and thus keeping the animal out is regarded as the cause of the injury and it is on such negligence that a recovery is predicated.[213] In some jurisdictions the presumption is indulged, in the absence of anything to the contrary, where there is no fence or an insufficient fence at the place of the injury that the

wandered along and off the track and again entered it at a place where no fence was required. Jeffersonville &c. R. Co. v. Lyon, 72 Ind. 107; Atchison &c. R. Co. v. Cash, 27 Kan. 587.

[211] Atchison &c. R. Co. v. Cash, 27 Kan. 587; Great Western &c. R. Co. v. Morthland, 30 Ill. 451; Eaton v. Oregon &c. R. Co. 19 Ore. 371; 24 Pac. 413; Bennett v. Chicago &c. R. Co. 19 Wis. 145; Redmond v. Missouri &c. R. Co. 104 Mo. App. 651; 77 S. W. 768. See, also, Chicago &c. R. Co. v. Blair, 75 Ill. App. 659; Duggan v. Peoria &c. R. Co. 42 Ill. App. 536; Ward v. St. Louis &c. R. Co. 91 Mo. 168; 3 S. W. 481; Eaton v. McNeill, 31 Oreg. 128; 49 Pac. 875.

[212] Evansville &c. R. Co. v. Barbee, 74 Ind. 169; Jantzen v. Wabash &c. R. Co. 83 Mo. 171.

[213] See Cecil v. Pacific &c. R. Co. 47 Mo. 246; Foster v. St. Louis &c. R. Co. 90 Mo. 116; 2 S. W. 138; Moore v. Wabash &c. R. Co. 81 Mo. 499; Kirkpatrick v. Illinois &c. R. Co. (Mo. App.); 96 S. W. 1036; Alsop v. Ohio &c. R. Co. 19 Bradw. (Ill.) 292; Cox v. Minneapolis &c. R. Co. 41 Minn. 101; 42 N. W. 924; 38 Am. & Eng. R. Cas. 287; Sullivan v. Oregon &c. R. Co. 19 Ore. 319; 24 Pac. 408; 42 Am. & Eng. R. Cas. 625. In the case of Wabash &c. R. Co. v. Tretts, 96 Ind. 450, it was said: "The place of entry is the material question in cases of this character. If animals enter at a place where the railroad company is bound to fence, the company is liable, although they were killed at a point where the company was under no duty to fence." In Acord v. St. Louis &c. R. Co. 113 Mo. App. 84; 87 S. W. 537, 542, 543, it is said: "The point at which the animal enters upon the right of way determines the liability or non-liability of the railroad. . . . In the absence of evidence to the contrary, the law presumes that it came upon the road where it was killed."

animal entered at that point,[214] but in some other jurisdictions no such presumption is indulged.[215]

§ 1202. Determining places where fences are required—Questions of law and fact.—There are, as we have seen, certain places where railway companies are not bound to fence their tracks. Whether a company is under an obligation to fence its track at any particular point is, if the facts are undisputed, generally a question of law for the court.[216] Thus, where a company is excused from fencing at highway crossings, depot grounds or station grounds, it is a question for the court whether the company was bound to fence at those points.[217] Often, however, the question resolves itself into one of fact, or of mixed law and fact. While it is purely a question of law whether or not a railway company shall fence at its depot grounds or at points where the erection of a fence would interfere with the company in transacting its business, it is usually a question of fact whether a certain point constitutes part of the depot grounds[218] or whether the erection of a fence at any particular place would interfere with the company's employes in the performance of their duties.[219] Thus, it has been held for the jury to determine

[214] Johnson v. Chicago &c. R. Co. 27 Mo. App. 379; Jantzen v. Wabash &c. R. Co. 83 Mo. 171, and Missouri case cited in last note, supra; also, see Eaton v. Oregon R. &c. Co. 19 Oreg. 371; 24 Pac. 413; Mobile &c. R. Co. v. Tiernan, 102 Tenn. 704; 52 S. W. 179.

[215] Bremmer v. Green Bay &c. R. Co. 61 Wis. 114; 20 N. W. 687.

[216] Illinois &c. R. Co. v. Whalen, 42 Ill. 396; Chicago &c. R. Co. v. Engle, 76 Ill. 317. See Rinear v. Grand Rapids &c. R. Co. 70 Mich. 620; 38 N. W. 599.

[217] See ante, § 1194; note 136. See, also, Toledo &c. R. Co. v. Cory, 39 Ind. 218, where it was said: "It was for the court to tell the jury whether under the law the appellant was required to fence the road at the point where the cattle entered upon the track, but it was a question of fact, to be determined by the jury from the testimony of witnesses, whether the railroad had fenced its track in such a manner as to prevent cattle from entering thereon."

[218] Rhines v. Chicago &c. R. Co. 75 Iowa, 597; 39 N. W. 912; McDonough v. Milwaukee &c. R. Co. 73 Wis. 223; 40 N. W. 806; Grosse v. Chicago &c. R. Co. 91 Wis. 482; 65 N. W. 185; Acord v. St. Louis &c. R. Co. 113 Mo. App. 84; 87 S. W. 537, 544.

[219] Cleveland &c. R. Co. v. DeBolt, 10 Ind. App. 174; 37 N. E. 737; Bean v. St. Louis &c. R. Co. 20 Mo. App. 641. See, also, Baltimore &c. R. Co. v. Cumberland, 176 U. S. 232; 20 Sup. Ct. 380.

whether a company is excused from putting in cattle-guards at a particular point, on the ground that their erection would interfere with the employes of the company in the performance of their duties.[220]

§ 1203. Injuries to animals on highway.—Ordinarily where animals at large are injured on highways a railway company is not liable unless the injuries were wilfully or wantonly inflicted.[221] Some of the authorities, however, hold that the company is liable if the injuries were negligently inflicted,[222] but negligence in such cases is usually regarded as a failure to observe statutory precautions, or to exercise reasonable care after the discovery of the animals to prevent injury to them. The rule determining the company's liability is, however, materially affected by the question as to whether or not the injured animal was rightfully on the highway. If the animals are wrongfully in the highway it would seem that the company is liable only for wilful injuries,[223] but where the animals are rightfully in the highway the company is bound to use due care to

[220] Chicago &c. R. Co. v. Modesitt 124 Ind. 212; 24 N. E. 986. The court in that case said: "It was for the jury to determine, from the facts established by the evidence, whether the company was excused from putting in a cattle-guard for the reason that it would make it dangerous to use the track."

[221] Hindman v. Oregon &c. R. Co. 17 Ore. 614; 22 Pac. 116; 38 Am. & Eng. R. Cas. 310; Hanna v. Terre Haute &c. R. Co. 119 Ind. 316; 21 N. E. 903; Wabash &c. R. Co. v. Nice, 99 Ind. 152; Hance v. Cayuga &c. R. Co. 26 N. Y. 428; McDonnell v. Pittsfield &c. R. Co. 115 Mass. 564; Darling v. Boston &c R. Co. 121 Mass. 118; Munger v. Tonawanda &c. R. Co. 4 N. Y. 349; Blair v. Milwaukee &c. R. Co. 20 Wis. 254; Morris v. St. Louis &c. Co. 58 Mo. 78; Swearingen v. Missouri &c. R. Co. 64 Mo. 73; Comstock v. DesMoines &c. R. Co. 32 Iowa, 376; Chicago &c. R. Co. v. Campbell, 47 Mich. 265; 11 N. W. 152. Mere proof of the killing at such a place, without, at least, showing negligence, is not sufficient. International &c. R. Co. v. Carr (Tex. Civ. App.); 91 S. W. 858.

[222] Chicago &c. R. Co. v. McMorrow, 67 Ill. 218; Chapin v. Sullivan &c. R. Co. 39 N. H. 564; Indianapolis &c. R. Co. v. McKinney, 24 Ind. 283; Springfield &c. R. Co. v. Andrews, 68 Ill. 56.

[223] Fitch v. Buffalo &c. R. Co. 13 Hun (N. Y.) 668; Chicago &c. R. Co. v. Cauffman, 38 Ill. 424; Corwin v. New York &c. R. Co. 13 N. Y. 42; McDonnell v. Pittsfield &c. R. Co. 115 Mass. 564; Hance v. Cayuga, 26 N. Y. 428. See, also, Houston &c. R. Co. v. Atlas &c. Works (Tex. Civ. App.); 71 S. W. 792.

prevent injuring them.[224] This rule ordinarily applys only to animals which are being driven along the highway.[225] It does not apply to animals wrongfully running at large, for as to such animals the company is liable only for injuries wilfully inflicted.[226]

§ 1204. Rate of speed—Stopping train.—In the absence of statutory enactments regulating the speed of the railway trains railway companies may run their trains at any rate of speed which may best suit their convenience.[227] They are not bound to run at a slower rate of speed because animals may come upon the track and may receive injuries by reason of such high rate of speed.[228] Railway companies being engaged in the business of conveying passengers and property, and that business being regarded of the highest importance, the speed of trains may be regulated with that end in view.[229] The slight private interest which may exist because of danger of injury to animals straying upon the track must give way to the greater interests which exist in favor of the public. No rate of speed is negligence per se.[230] In some states, however, stat-

[224] Beers v. Housatonic R. Co. 19 Conn. 566. See Chicago &c. R. Co. v. Nash, 1 Ind. App. 298; 27 N. E. 564. This case, however, cannot be regarded as good authority, for the supreme court of Indiana has taken the opposite view of the law. Hanna v. Terre Haute &c. R. Co. 119 Ind. 316; 21 N. E. 903.

[225] Midland &c. Co. v. Daykin, 17 C. B. 126.

[226] Hanna v. Terre Haute &c. R. Co. 119 Ind. 316; 21 N. E. 903; Michigan &c. R. Co. v. Fisher, 27 Ind. 96. But there is some difference of opinion on this subject, and the authorities are somewhat divided. See note in 20 Am. St. 161.

[227] Stern v. Michigan Central R. Co. 76 Mich. 591; 43 N. W. 587; Seawell v. Raleigh &c. R. Co. 106 N. Car. 270; 10 S. E. 1045. See Molair v. Railway &c. R. Co. 31 S. Car. 510; 10 S. E. 243; Chicago &c. R. Co. v. Wheeler, 70 Kans. 755; 79 Pac. 673.

[228] Bemis v. Connecticut &c. R. Co. 42 Vt. 375; 1 Am. R. 339; New Orleans &c. R. Co. v. Field, 46 Miss. 573; Darling v. Boston &c. R. Co. 121 Mass. 118; Central Ohio &c. R. Co. v. Lawrence, 13 Ohio St. 66; Baltimore &c. R. Co. v. Mulligan, 45 Md. 486; Durham v. Wilmington &c. R. Co. 82 N. Car. 352; Texas &c. R. Co. v. Langham (Tex. Civ. App.); 95 S. W. 686. Text is quoted in Chicago &c. R. Co. v. Huggins, 4 Ind. Ter. 194; 69 S. W. 845, 848. But see Rafferty v. Portland &c. R. Co. 32 Wash. 259; 73 Pac. 382.

[229] Maynard v. Boston &c. R. Co. 115 Mass. 458; 15 Am. R. 119; Needham v. San Francisco &c. R. Co. 37 Cal. 409; Bunnell v. Rio Grande R. Co. 13 Utah, 314; 44 Pac. 927.

[230] Morse v. Rutland &c. R. Co. 27

utes are in force regulating the speed at which trains shall run at certain points.[231] And in municipalities there are generally ordinances in force which fix the maximum rate of speed at which trains may run within corporate limits. Where a recovery is sought on the ground that the company was running its train at the time of the injury in excess of the statutory or ordinance rate it must be made to appear before a recovery can be had that such excessive speed was the cause of the injury.[232] Mere proof of the excessive speed is not sufficient.[233] There must be a showing that but for such excessive speed the injury would not have occurred.[234] Where animals are discovered upon the track the engineer is ordinarily bound to exercise some degree of care to prevent injuring them, if such care can be exercised consistent with safety of the train or its passengers.[235] If danger would likely result to the train or pas-

Vt. 49; Toledo &c. R. Co. v. Barlow, 71 Ill. 640; New Orleans &c. R. Co. v. Field, 46 Miss. 574; Pacific R. Co. v. Houts, 12 Kan. 328; Latty v. Burlington &c. R. Co. 38 Iowa, 250; Maher v. Atlantic &c. R. Co. 64 Mo. 267; McKonkey v. Chicago &c. R. Co. 40 Iowa, 205; Western R. &c. Co. v. Sistrunk, 85 Ala. 352; 5 So. 79; Tonawanda R. Co. v. Munger, 5 Denio (N. Y.) 255; 49 Am. Dec. 239; East Tennessee &c. R. Co. v. Deaver, 79 Ala. 216. Greater care, however, may be due from the company where its trains pass through a thickly populated country than in unsettled country, and evidence of a high rate of speed has been admitted as evidence of negligence. Pryor v. St. Louis &c. R. Co. 69 Mo. 215; Edson v. Central &c. R. Co. 40 Iowa, 47.

[231] In Alabama a statute which provided that railway companies should slacken the speed of their trains at crossings in "a curve or cut, where the engineer cannot see at least one-fourth of a mile ahead," was held not to apply to crossings in straight track where the crossings were open and visible. Nashville &c. R. Co. v. Hembree, 85 Ala. 481; 5 So. 173; 38 Am. & Eng. R. Cas. 300.

[232] Louisville &c. R. Co. v. Caster (Miss.); 5 So. 388; Toledo &c. R. Co. v. Deacon, 63 Ill. 91; Monahan v. Keokuk &c. R. Co. 45 Iowa, 523; Houston &c. R. Co. v. Terry, 42 Tex. 451; Maher v. Atlantic &c. R. Co. 64 Mo. 267; Story v. Chicago &c. R. Co. 79 Iowa, 402; 44 N. W. 690.

[233] Plaster v. Illinois &c. R. Co. 35 Iowa, 449; Toledo &c. R. Co. v. Barlow, 71 Ill. 640; Lafayette &c. R. Co. v. Shriner, 6 Ind. 141.

[234] Chicago &c. R. Co. v. Richardson, 28 Neb. 118; 44 N. W. 103; 42 Am. & Eng. R. Cas. 592; Union Pac. R. Co. v. Rassmussen, 25 Neb. 810; 41 N. W. 778; 13 Am. St. 527. See Colorado &c. R. Co. v. Caldwell, 11 Colo. 545; 19 Pac. 542; Gulf &c. R. Co. v. Blake (Tex. Civ. App.); 95 S. W. 593.

[235] Newport News &c. R. Co. v. Hazelip, 17 Ky. L. 137; 34 S. W.

sengers from an effort to stop or slack the speed of the train there is no obligation to stop or slacken the speed, for the safety of the train and its passengers is of the highest importance and takes precedence over the safety of animals on the track.[236] And an engineer will be justified in increasing the speed of his train so as to throw animals away from the track where such a course will secure the greatest safety for the train and the property and persons being carried thereon.[237] But where it can be done consistently with the safety of the train, it is the duty of the engineer to use reasonable care to slacken the speed of the train, or even to stop it wherever it appears that it is necessary to avoid collision with animals on the track.[238] A collision not being imminent, however,

904; Carlton v. Wilmington &c. R. Co. 104 N. Car. 365; 10 S. E. 516; 40 Am. & Eng. R. Cas. 178; Chicago &c. R. Co. v. Kellam, 92 Ill. 245; 34 Am. R. 128; New Orleans &c. R. Co. v. Bourgeois, 66 Miss. 3; 5 So. 629; 14 Am. St. 534; Missouri &c. R. Co. v. Meithvein (Tex. Civ. App); 33 S. W. 1093. In the case last cited the court said: "We can affirm the judgment below on two grounds: 1st, because the appellant was guilty of negligence in not using efforts to stop the train. If this had been done, it is possible that the animal would not have been injured, or would not have been so severely injured. The facts in evidence warranted the inference that, if the engineer had exercised proper diligence when he discovered the animals on the track, he might have prevented the collision." Where reasonable effort is made to stop the train and prevent the accident the company will not be liable. McGhee v. Gaines, 98 Ky. 182; 32 S. W. 602.

[236] Missouri &c. R. Co. v. Reynolds, 31 Kan. 132; 1 Pac. 150; 13 Am. & Eng. R. Cas. 510; Cleveland &c. R. Co. v. Elliott, 4 Ohio St. 474; Witherell v. Milwaukee &c. R. Co. 24 Minn. 410; Parker v. Dubuque &c. R. Co. 34 Iowa, 399; East Tennessee &c. R. Co. v. Deaver, 79 Ala. 216; Sandham v. Chicago &c. R. Co. 38 Iowa, 88; Mobile &c. R. Co. v. Gunn, 68 Miss. 366; 8 So. 648; Central Ohio R. Co. v. Lawrence, 13 Ohio St. 66; Raiford v. Mississippi &c. R. Co. 43 Miss. 233; Texas &c. R. Co. v. Langham (Tex. Civ. App.); 95 S. W. 686.

[237] Bemis v. Connecticut &c. R. Co. 42 Vt. 375; 1 Am. R. 339; Louisville &c. R. Co. v. Milton, 14 B. Mon. (Ky.) 75; 58 Am. Dec. 647; Chicago &c. R. Co. v. Jones, 59 Miss. 465; 11 Am. & Eng. R. Cas. 450; Owens v. Hannibal &c. R. Co. 58 Mo. 386; Kerwhacker v. Cleveland &c. R. Co. 3 Ohio St. 172; 62 Am. Dec. 246; Louisville &c. R. Co v. Ballard, 2 Metc. (Ky.) 177.

[238] Yazoo &c. R. Co. v. Brumfield, 64 Miss. 637; 1 So. 905; Little Rock &c. R. Co. v. Trotter, 37 Ark. 593; 11 Am. & Eng. R. Cas. 475; St. Louis &c. R. Co. v. O'Loughlin, 49 Fed. 440. It has been held that the

no duty rests upon the company to even slacken the speed of the train.[239] And where it appears that an effort to slacken the speed would not avoid the collision with the animals the company is excused from making the effort.[240] Thus where an animal jumped suddenly in front of the locomotive, and it was impossible to avoid the collision, no liability attached.[241] The company will not

sufficiency of the engineer's efforts to stop the train is a question for the jury. Kansas City &c. R. Co. v. Doggett, 67 Miss. 250; 7 So. 278; Cage v. Louisville &c. R. Co. (Miss.); 7 So. 509.

[239] Little Rock &c. R. Co. v. Trotter, 37 Ark. 593; Louisville &c. R. Co. v. Ganote, 13 Am. & Eng. R. Cas. 519. Where animals are standing at the side of the track apparently at ease no obligation rests upon the company to slacken the speed of the train. Edson v. Central &c. R. Co. 40 Iowa, 47; Peoria &c. R. Co. v. Champ, 75 Ill. 577; St. Louis &c. R. Co. v. Russell, 39 Ill. App. 443; New Orleans &c. R. Co. v. Bourgeois, 66 Miss. 3; 5 So. 629; 14 Am. St. 534.

[240] Jones v. Chicago &c. R. Co. 77 Wis. 585; 46 N. W. 884; Savannah &c. R. Co. v. Geiger, 21 Fla. 669; Chicago &c. R. Co. v. Packwood, 59 Miss. 280; Alabama &c. R. Co. v. Smith, 85 Ala. 208; 30 So. 795; Kansas City &c. R. Co. v. Myers (Miss.); 7 So. 321; East Tennessee &c. R. Co. v. Deaver, 79 Ala. 216; Alabama &c. R. Co. v. McAlpine, 80 Ala. 73; Mobile &c. R. Co. v. Caldwell, 83 Ala. 196; 3 So. 445; Indiana &c R. Co. v. Overton, 117 Ind. 253; 20 N. E. 147; Georgia &c. R. Co. v. Wall, 80 Ga. 202; 7 S. E. 639; Georgia &c. R. Co. v. Harris, 83 Ga. 393; 9 S. E. 786. In Nashville &c. R. Co. v. Hembree, 85 Ala. 481; 5 So. 173; 38 Am. & Eng. R. Cas. 300, it was said: "Engineers are not required to do all in their power, nor to do anything, when it is manifest that nothing they can do can possibly prevent the injury." So in New Orleans &c. R. Co. v. Bourgeois, 66 Miss. 3; 14 Am. St. 534, the court said: "It cannot be said to be the duty of a railroad company to check the speed or stop its passing train every time an animal is seen near its track, unless there is something to indicate danger or the necessity of the animal going upon the track, and if an animal, when first discovered on the track, is so near the engine that collision cannot be prevented by the prompt use of all proper appliances, and the animal is killed or injured, no liability for damages is thereby incurred by the company. Impossibilities are no more required by law of railroad companies than of other persons." See, also, Newport News &c. R. Co. v. Mitchell, 17 Ky. L. 1086; 33 S. W. 622. The greater part of this section is quoted to this place in Chicago &c. R. Co. v. Huggins, 4 Ind. Ter. 194; 69 S. W. 845, 848.

[241] Little Rock &c. R. Co. v. Turner, 41 Ark. 161; Chicago &c. R. Co. v. Bradfield, 63 Ill. 220; Illinois &c. R. Co. v. Wren, 43 Ill. 77; Louisville &c. R. Co. v. Wainscott, 3 Bush. (Ky.) 149; Hyer v. Chamberlain, 46 Fed. 341. The general rule is very clearly stated in the case of

be liable where the employes in charge of the train exercised due care to prevent the accident unless there is a statutory right of recovery.[242]

§ 1205. Duty to look out for animals.—In addition to the duty resting upon the railway company to avoid injuring animals seen on its tracks wherever the same can be done without danger to the train, it has been held that the company is also bound to use ordinary care to discover animals upon the track.[243] It has been held

Alabama &c. R. Co. v. Moody, 90 Ala. 46; 80 So. 57; 45 Am. & Eng. R Cas. 524. In that case a cow ran in front of the locomotive and was killed, it being impossible to stop the train so as to avoid the collision. The defendant was held not liable. The court said: "When the animal is discovered in dangerous proximity to the track, his (the engineer's) duty depends upon the circumstances. If they are such as to indicate danger of its getting on the track, or to induce the supposition that it will attempt to cross, the usual means to frighten it away being unavailing, it becomes the duty of the engineer to arrest the motion of the train, if need be, or to check the speed so as to bring and keep it under control until the animal has crossed, or the danger passed, but if the circumstances do not indicate apparent danger or an attempt to get on the track, then the duty to check the train does not arise. In the latter case, if the animal suddenly and unexpectedly gets on the track when the train is so near that the use of all the means within the power of the engineer could not avail to stop in time to avoid injury, the omission to make the endeavor is not negligence, and the company is not liable for the ensuing injury. These principles have been so repeatedly and well settled by the decisions of this court that a reassertion will suffice without further consideration." The court cited: South &c. R. Co. v. Jones, 56 Ala. 507; East Tennessee &c. R. Co. v. Bayliss, 77 Ala. 429; 54 Am. R. 69; Alabama &c. R. Co. v. Chapman, 80 Ala. 615; 2 So. 738; 31 Am. & Eng. R. Cas. 394; Western R. Co. v. Lazarus, 88 Ala. 453; 6 So. 877. Compare, however, Western R. &c. v. Stone (Ala.); 39 So. 723; Texas &c. R. Co. v. Crutcher (Tex. Civ. App.); 82 S. W. 341.

[242] Tison v. Savannah &c. R. Co. 97 Ga. 366; 24 S. E. 456.

[243] Central &c. R. Co. v. Lee, 96 Ala. 444; 11 So. 424; Alabama &c. R. Co. v. Moody, 92 Ala. 279; 9 So. 238; Western &c. R. Co. v. Lazarus, 88 Ala. 453; 6 So. 877; Gulf &c. R. Co. v. Washington, 49 Fed. 347; Eddy v. Evans, 58 Fed. 151; Bemis v. Connecticut &c. R. Co. 42 Vt. 375; 1 Am. R. 339; South &c. R. Co. v. Williams, 65 Ala. 74; Memphis &c. R. Co. v. Sanders, 43 Ark. 225; 19 Am. & Eng. R. Cas. 497; Denver &c. R. Co. v. Henderson, 10 Colo. 1; 13 Pac. 910; 31 Am. & Eng. R. Cas. 559; Rockford &c. R. Co. v. Rafferty, 73 Ill. 58; Shuman v. In-

to be the duty of an engineer to keep a lookout ahead for animals on or near the track so that he may have time to take the necessary steps to avoid injury,[244] but some of the cases state the doctrine entirely too strongly. A failure to keep such a lookout has been held to be such negligence as to render the company liable for injuries which might have been avoided if proper vigilance in the discovery of the animals had been used.[245] It is held to be the

dianapolis &c. R. Co. 11 Ill. App. 472; Cincinnati &c. R. Co. v. Smith, 22 Ohio St. 227; 10 Am. R. 729; Baglor v. Baltimore &c. R. Co. 9 W. Va. 270; Kentucky &c. R. Co. v. Lebus, 14 Bush. (Ky.) 518; Little Rock &c. Railway v. Holland, 40 Ark. 336; Omaha &c. R. Co. v. Wright, 47 Neb. 886; 66 N. W. 842. In Arkansas it seems to have been held, in a recent case, that the engineer is under no duty to look out for stock upon the right of way. Memphis &c. R. Co. v. Kerr, 52 Ark. 162; 12 S. W. 329; 5 L. R. A. 429; 20 Am. St. 159, and note; 40 Am. & Eng. R. Cas. 171. See, also, Locke v. First Division &c. R. Co. 15 Minn. 350. But see Prescott &c. R. Co. v. Brown, 74 Ark. 606; 86 S. W. 809; St. Louis &c. R. Co. v. Kimberlain (Ark.); 88 S. W. 599. In Russell v. Maine Cent. R. Co. 100 Me. 406; 61 Atl. 899, and Davis v. Boston &c. R. Co. 70 N. H. 519; 49 Atl. 108, it is held that no such duty to look out for trespassing animals exists, and that the company only owes the negative duty not to wantonly injure them. To the same effect, see, also, Borneman v. Chicago &c. R. Co. (S. Dak.); 104 N. W. 208; Stacey v. Railroad Co. 42 Minn. 158; 43 N. W. 905. Some of the decisions to the contrary are influenced largely by local statutes.

[244] Missouri &c. R. Co. v. Gedney, 44 Kan. 329; 24 Pac. 464; 21 Am. St. 286; 45 Am. & Eng. R. Cas. 492; Stading v. Chicago &c. R. Co. (Neb.) 111 N. W. 460; Carlton v. Wilmington &c. R. Co. 104 N. Car. 365; 10 S. E. 516; 40 Am. & Eng. R. Cas. 178; Wilson v. Norfolk &c. R. Co. 90 N. Car. 69; Davis v. Southern R. Co. 68 S. Car. 446; 47 S. E. 723; Gulf &c. R. Co. v. Johnson, 54 Fed. 474; Washington v. Baltimore &c. R. Co. 17 W. Va. 190. In Missouri &c. R. Co. v. Wilson, 28 Kan. 637, it was said: "If the employes of the railroad company could, by the use of ordinary prudence, see, or, seeing the stock on the road, could, without danger, stop the train and avoid striking the animal, they were required to do so, because the idea is not tolerable that an injury may be inflicted, which, by ordinary care and diligence, may be avoided."

[245] Little Rock &c. R. Co. v. Finley, 37 Ark. 562; Missouri &c. R. Co. v. Reynolds, 31 Kan. 132; 1 Pac. 150; 13 Am. & Eng. R. Cas. 510; Kendig v. Chicago &c. R. Co. 79 Mo. 207; Memphis &c. R. Co. v. Sanders, 43 Ark. 225; Denver &c. R. Co. v. Henderson, 10 Colo. 1; 13 Pac. 910; Snowden v. Norfolk &c. R. Co. 95 N. Car. 93; Wilson v. Norfolk &c. R. Co. 90 N. Car. 69;

duty of the company to use care to equip its locomotives with such headlights as would render a lookout effective.[246] The engineer and fireman on the train, however, are not bound to keep a constant lookout.[247] There are intervals of time when their attention must be directed to the management of the machinery of the locomotive and when it is impossible for short periods of time for them to watch the track. Where such is the case they are neither expected nor required to keep such lookout.[248] Thus where the fireman was engaged in stoking his engine and the engineer in making necessary repairs it was held that the company was not liable for failure to

Missouri &c. R. Co. v. Gedney, 44 Kan. 329; 24 Pac. 464; 21 Am. St. 286. We do not assent to the doctrine that there is a general duty to keep a lookout.

[246] Alabama &c. R. Co. v. Jones, 71 Ala. 487. But it has been held in Tennessee that if a headlight is obscured by rain the company is not liable. Louisville &c. R. Co. v. Melton, 2 Lea (Tenn.) 262; In a recent Alabama case, the rule there is stated as follows: "It is negligence for a railroad to operate a locomotive and train of cars at night at so great a rate of speed that it is impossible to stop the train within the distance that the locomotive headlight illuminates the track." Western R. &c. Co. v. Stone (Ala.); 39 So. 723; Western R. &c. Co. v. Mitchell (Ala.); 39 So. 427; Anniston Elec. &c. Co. v. Hewitt, 139 Ala. 442; 36 So. 39; 107 Am. St. 42. See, also, Jonesboro &c. R. Co. v. Guest (Ark.); 99 S. W. 71. It is also held, in the first of the last two cases cited, that the testimony of the engineer that he did not have time to make any effort to prevent the killing was a mere conclusion, and properly excluded. The opinion also holds that testimony as to the equipment was properly excluded where the negligence charged was only in the operation, and lays down a rule as to the measure of damages where cattle are killed. See, also, as to evidence in such cases, Hoge v. Southern R. Co. (Ala.); 39 So. 425.

[247] Mobile &c. R. Co. v. Caldwell, 83 Ala. 196; 3 So. 445; Western R. Co. v. Lazarus, 88 Ala. 453; 6 So. 877; Cincinnati &c. R. Co. v. Burgess, 27 Ky. L. 252; 84 S. W. 760.

[248] East Tennessee &c. R. Co. v. Bayliss, 75 Ala. 466; 22 Am. & Eng. R. Cas. 596. In this case the court, in speaking of an instruction, said: "It does not, and was not intended to mean, that the engineer should keep his eye steadily on the track before him, to the neglect of his other equally imperative duties. The movements of the eye are quick and rapid. The engineer, while attending to the other wants of his train, must be constantly on the lookout for obstructions; and he meets this requirement when he bestows on the service that steady, regular care and watchfulness which his other duties allow a very careful and prudent person to give it." See, also, Mobile &c. R. Co. v. Holiday, 79 Miss. 294; 30 So. 820.

keep a lookout during such interval.[249] In determining whether the employes were exercising ordinary care to discover animals on or near the track it has been held proper to take into consideration whether or not the track was fenced at the particular point,[250] and also, whether it was light or dark.[251] The question whether the employes exercised due care in looking out for animals on or near the track is generally for the jury.[252] In cases of this kind it seems that the right to recover is predicated on the negligence of the company in failing to discover the animal in time to avoid injuries, and in such cases if it appear that the injury was caused by the failure to keep a proper lookout, and that there was such a duty, the company may be liable although care may have been exercised by the employes after the actual discovery of the animal.[253]

§ 1206. Signals.—In nearly all, if not quite all, of the states statutes are in force requiring railway companies at certain distances from crossings to sound the whistle of the locomotive and to ring the bell.[254] The obvious purpose of such signals is to give notice of the approach of trains. Such signals, it seems, are not required alone for the benefit of persons about to cross the track but are also required to warn and frighten animals away from the track.[255] Where animals

[249] See Howard v. Louisville &c. R. Co. 67 Miss. 247; 7 So. 216; 19 Am. St. 302; Carlton v. Wilmington &c. R. Co. 104 N. Car. 365; 10 N. E. 516; Owens v. Hannibal &c. R. Co. 58 Mo. 386.

[250] Cincinnati &c. R. Co. v. Smith, 22 Ohio St. 227; 10 Am. R. 729.

[251] St. Louis &c. R. Co. v. Vincent, 36 Ark. 451. See International &c. R. Co. v. Hall, 12 Tex. Civ. App. 11; 33 S. W. 127.

[252] Kent v. New Orleans &c. R. Co. 67 Miss. 608; 7 So. 341; Kansas City &c. R. Co. v. Watson, 91 Ala. 483; 8 So. 793; East Tennessee &c. R. Co. v. Bayliss, 74 Ala. 150; Hoge v. Southern R. Co. (Ala.); 39 So. 425. But compare the decision in this case (Southern R. Co. v. Hoge, 141 Ala. 351; 37 So. 439) on former appeal.

[253] East Tennessee &c. R. Co. v. Watson, 90 Ala. 41; 7 So. 813.

[254] Southern &c. R. Co. v. Schmidt, 44 Kan. 374; 24 Pac. 496; 45 Am. & Eng. R. Cas. 489; St. Louis &c. R. Co. v. Hendricks, 53 Ark. 201; 13 S. W. 699. Where a car which was standing on a down-grade side-track had been blocked, and in some unknown way the blocks were removed, and the car ran down and killed a cow, it was held that the statute as to signals did not apply. Montgomery &c. R. Co. v. Perryman, 91 Ala. 413; 8 So. 699.

[255] Alabama &c. R. Co. v. McAlpine, 71 Ala. 545; Braxton v. Hannibal &c. R. Co. 77 Mo. 455; East

are injured on the track of a railway company proof of the omission to give statutory signals may be evidence of negligence. The failure to give such signals is not actionable negligence per se,[256] but there are authorities which hold that proof of an injury to the animal and proof of a failure to give statutory signals make a prima facie case for the plaintiff.[257] The weight of authority is to the effect that a plaintiff who is seeking a recovery for animals injured on a railway track must not only show the omission of signals but must show that such omission was the cause of the injury.[258] It has

Tennessee &c. R. Co. v. Scales, 2 Lea (Tenn.) 688; St. Louis &c. R. Co. v. Hendricks, 53 Ark. 201; 13 S. W. 699; 20 Am. St. 167; Western &c. R. Co. v. Jones, 65 Ga. 631; Palmer v. St. Paul &c. R. Co. 38 Minn. 415; 38 N. W. 100; Young v. Illinois Cent. R. Co. (Miss.); 40 So. 870; Howenstein v. Pacific R. Co. 55 Mo. 33; Nashville &c. R. Co. v. Thomas, 5 Heisk. (Tenn.) 262; Memphis &c. R. Co. v. Smith, 9 Heisk. (Tenn.) 860; Hohl v. Chicago &c. R. Co. 61 Minn. 321; 63 N. W. 742; 52 Am. St. 598. See Neely v. Charlotte &c. R. Co. 33 S. Car. 136; 11 S. E. 636; Fink v. Evans, 95 Tenn. 413; 32 S. W. 307.

[256] Jackson v. Chicago &c. R. Co. 36 Iowa, 451; Michigan &c. R. Co. v. Fisher, 27 Ind. 96. But see Texas &c. R. Co. v. Crutcher (Tex. Civ. App.); 82 S. W. 341.

[257] Halferty v. Wabash &c. R. Co. 82 Mo. 90; Great Western &c. R. Co. v. Geddis, 33 Ill. 304; Atchison &c. R. Co. v. Morgan, 31 Kan. 77; 1 Pac. 298; 13 Am. & Eng. R. Cas. 499; Little Rock &c. R. Co. v. Trotter, 37 Ark. 593; Turner v. Kansas City &c. R. Co. 78 Mo. 578; Stoneman v. Atlantic &c. R. Co. 58 Mo. 503; Central &c. R. Co. v. Phillippi, 20 Kan. 9; St. Louis &c. R. Co. v. Hagan, 42 Ark. 122. Where it is probable that signals will frighten animals away from or off the track it is negligence to omit them. Pennsylvania Co. v. Krick, 47 Ind. 368; Lapine v. New Orleans &c. R. Co. 20 La. Ann. 158; Owens v. Hannibal &c. R. Co. 58 Mo. 386; Indianapolis &c. R. Co. v. Peyton, 76 Ill. 340; Gates v. Burlington &c. R. Co. 39 Iowa, 45; Washington v. Baltimore &c. R. Co. 17 W. Va. 190; Bemis v. Connecticut &c. R. Co. 42 Vt. 375; 1 Am. R. 339.

[258] Southern &c. R. Co. v. Schmidt, 44 Kan. 374; 24 Pac. 496; 45 Am. & Eng. R. Cas. 489; Quincy &c. R. Co. v. Wellhoener, 72 Ill. 60; Memphis &c. R. Co. v. Bibb, 37 Ala. 699; Hawker v. Baltimore &c. R. Co. 15 W. Va. 628; 36 Am. R. 825, and note; Holman v. Chicago &c. R. Co. 62 Mo. 562; Stoneman v. Atlantic &c. R. Co. 58 Mo. 503; Rockford &c. R. Co. v. Linn, 67 Ill. 109; Holman v. Chicago &c. R. Co. 62 Mo. 562; Braxton v. Hannibal &c. R. Co. 77 Mo. 455; Alexander v. Hannibal &c. R. Co. 76 Mo. 494; Chicago &c. R. Co. v. Huggins, 4 Ind. Ter. 194; 69 S. W. 845, 847 (quoting text); Mankey v. Chicago &c. R. Co. 14 S. Dak. 468; 85 N. W. 1013. "If the injury would not have occurred but for such violation of the law, then the company would

been held even where signals are not required by statute to be the duty of the company to make them whenever animals are on or near the track and such signals would be effective in frightening the animals away.[259] The company is bound to use ordinary care to prevent injuries to animals and where ordinary care requires the use of signals the company may be guilty of negligence in omitting them although they are not required by statute.[260] If the negligence of the owner of the animals contributed to their injury the company is not liable, unless by reason of some statutory provision, although the signals were not given.[261] If an owner sees his animals on a railway track at a point where they will likely be injured he must make some effort to protect them. He cannot stand by and rely solely upon the railway company giving signals to frighten the animals off the track.[262]

§ 1207. Actual collision with animals—Injuries caused by fright. —There is a great deal of conflict and confusion among the decided cases as to whether or not there must be an actual collision between

be liable; otherwise it would not." Western &c. R. Co. v. Main, 64 Ga. 649.

[259] Indianapolis &c. R. Co. v. Hamilton, 44 Ind. 76; Missouri &c. R. Co. v. Wilson, 28 Kan. 637; 11 Am. & Eng. R. Cas. 447; Alabama &c. R. Co. v. Powers, 73 Ala. 244; Toledo &c. R. Co. v. Fergusson, 42 Ill. 449; Gates v. Burlington &c. R. Co. 39 Iowa, 45; Bemis v. Connecticut &c. R. Co. 42 Vt. 375; 1 Am. R. 339; Owens v. Hannibal &c. R. Co. 58 Mo. 386. "The engineer, if he saw the ox in dangerous proximity to the track, and under circumstances indicating danger of its getting on the track, should have taken steps promptly to frighten him away." South &c. R. Co. v. Jones, 56 Ala. 507.

[260] In Eddy v. Evans, 58 Fed. 151, it was said: "It was the duty of the engineer to keep a careful lookout for stock on the track, and, when it was discovered, to use all reasonable means to avoid injuring it. . . . The engineer testifies he applied the air-brake, but he did not blow the whistle, and he gives no reason or excuse for not doing so. It was the duty of the engineer to sound the whistle, as well as to apply the brake; and the jury might well infer that, if the proper alarm signals had been sounded when the horses were first discovered, or ought to have been discovered, the horse farthest from the engine could and would have got off the track."

[261] Ohio &c. R. Co. v. Eaves, 42 Ill. 288; Owens v. Hannibal &c. R. Co. 58 Mo. 386.

[262] Milburn v. Kansas City &c. R. Co. 86 Mo. 104; 29 Am. & Eng. R. Cas. 244.

a railway train and the animal injured before liability is imposed upon the company operating the train. It is almost impossible to reconcile this conflict, and to attempt to lay down a general rule applicable to all cases would be unsafe. The reason for this difference between the cases which hold that there must be an actual collision and those which hold that an actual collision is not necessary to impose liability is to be found in the different statutes on which the liability rests. The liability in such cases depends upon the language of, or construction placed upon, the particular statute. If it is clear from the language of the statute that it was the intention of the legislature in enacting the statute that the company should be liable only for animals injured by actual collision with the train then it must be shown that actual collision took place. This rule is adopted in many of the states [263] But if the statute cannot be so construed as to make the company liable only for injuries to animals caused by actual collision the company will be liable for all injuries to animals caused by negligent operation of the train,[264] or by a failure to perform the duty imposed upon the company to maintain fences and cattle-guards.[265]

[263] Peru &c. R. Co. v. Hasket, 10 Ind. 409; 71 Am. Dec. 335; Ohio &c. R. Co. v. Cole, 41 Ind. 331; Lafferty v. Hannibal &c. R. Co. 44 Mo. 291; Schertz v. Indianapolis &c. R. Co. 107 Ill. 577; 15 Am. & Eng. R. Cas. 523; Louisville &c. R. Co. v. Smith, 58 Ind. 575; Baltimore &c. R. Co. v. Thomas, 60 Ind. 107; Croy v. Louisville &c. R. Co. 97 Ind. 126; Knight v. New York &c. R. Co. 99 N. Y. 25; 1 N. E. 108; Holder v. Chicago &c. R. Co. 11 Lea (Tenn.) 176; Seibert v. Missouri &c. R. Co. 72 Mo. 565; Railroad v. Sadler, 91 Tenn. 508; 19 S. W. 618; 30 Am. St. 896; Pennsylvania R. Co. v. Dunlap, 112 Ind. 93; 13 N. E. 403; Louisville &c. R. Co. v. Thomas, 106 Ind. 10; 5 N. E. 198; Geiser v. St. Louis &c. R. Co. 1 Mo. App. 672; Logan v. St. Louis &c. R. Co. 111 Mo. App. 674; 86 S. W. 565. But compare Perkins v. St. Louis &c. R. Co. 103 Mo. 52; 15 S. W. 320; 11 L. R. A. 426, and note. Proof that blood and hair were found on the cow-catcher of the locomotive coming from the direction where the animal was injured is admissible as tending to show that there had been an actual collision. International &c. R. Co. v. Hughes, 81 Tex. 184; 16 S. W. 875.

[264] Meeker v. Northern Pacific R. Co. 21 Ore. 513; 28 Pac. 639; 4 L. R. A. 841, and note; 28 Am. St. 758; 49 Am. & Eng. R. Cas. 518; Young v. St. Louis &c. R. Co. 44 Iowa, 172.

[265] Atchison &c. R. Co. v. Jones, 20 Kan. 527; Young v. St. Louis &c. R. Co. 44 Iowa, 172. If the injury is caused by the failure to perform some statutory duty it has been held that the company is liable, although there is no actual collision. Lafferty v. Hannibal &c. R. Co. 44

Thus where animals come upon the track because of the failure of the company to fence, and in attempting to escape from a train run into a bridge and culvert and are injured, the company has been held liable.[266] The decisions holding the company liable in such cases seem to us to be founded upon good reason and logic. While it is true the train may not touch the animal, still the negligence of the company in failing to construct proper fences to keep the animal off the track is the negligence on which the recovery is based and without which the injury would not have been inflicted.[267] The company has also been held liable for frightening animals upon the track because it was unfenced and thus causing them to run into wire fences along the side of the right of way and injure themselves.[268] Companies have also been held liable for injuries to animals caused by their becoming frightened at signals unnecessarily, maliciously and recklessly given by employes in charge of the train.[269] But where the animals are on the right of way through no neglect of the company and are injured because of fright or otherwise the company is not liable unless the injuries were willfully inflicted.[270]

§ 1208. Liability of lessees, mortgagees and receivers.—It often happens that railways are operated by lessees, mortgagees, trustees, receivers or the like and not by the owner, and it also often happens that the owner and a lessee operate the same railway. Where a lessee is operating a line of railway the same duty ordinarily rest upon the company in regard to maintaining fences and cattle-guards, and the

Mo. 291; Ohio &c. R. Co. v. Cole, 41 Ind. 331; Moshier v. Utica &c. R. Co. 8 Barb. (N. Y.) 427. See, also, Van Slyke v. Chicago &c. R. Co. 80 Ia. 620; 45 N. W. 396; Fremont &c. R. Co. v. Pounder, 36 Neb. 247; 5 N. W. 509; Chicago &c. R. Co. v. Cox, 51 Neb. 479; 71 N. W. 37; Nelson v. Chicago &c. R. Co. 30 Minn. 74.

[266] Kraus v. Burlington &c. R. Co. 55 Iowa, 338; 7 N. W. 598; Young v. St. Louis &c. R. Co. 44 Iowa, 172.

[267] See Liston v. Central Iowa &c. R. Co. 70 Iowa, 714; 29 N. W. 445; 26 Am. & Eng. R. Cas. 593, where an animal, on being frightened by a train, leaps over a cattle-guard and runs along the track until it falls through a bridge, injuring itself.

[268] Missouri Pacific R. Co. v. Eckel, 49 Kan. 794; 31 Pac. 693; Missouri &c. Railway Co. v. Gill, 49 Kan. 441; 30 Pac. 414; 56 Am. & Eng. R. Cas. 182.

[269] Cobb v. Columbia &c. R. Co. 37 S. Car. 194; 15 S. E. 878.

[270] Richmond &c. R. Co. v. Buice, 88 Ga. 180; 14 S. E. 205; Burlington &c. R. Co. v. Shoemaker, 18 Neb. 369; 25 N. W. 365; Foster v. St. Louis &c. R. Co. 90 Mo. 116; 2 S. W. 138; East Tennessee &c. R. Co. v. Watters, 77 Ga. 69.

same liability attaches to the lessee for injury to animals by its trains, that is imposed upon or attaches to a company operating a road of which it is the owner.[271] In some jurisdictions the rule prevails that either the lessee or the owner may be sued for an injury to an animal caused by a moving train upon an unfenced track.[272] Where the company owning a line had not yet completed the line, although it was operating it, and it allowed a contractor who was employed in completing the line to run his construction trains over the track it was held that the company was liable for injuries to animals caused by construction trains.[273] And it has also been held that a suit may

[271] Pittsburgh &c. R. Co. v. Bolner, 57 Ind. 572; Pittsburgh &c. R. Co. v. Currant, 61 Ind. 38; Downing v. Chicago &c. R. Co. 43 Iowa, 96; Pittsburgh &c. R. Co. v. Hannon, 60 Ind. 417; Whitney v. Atlantic &c. R. Co. 44 Me. 362; 69 Am. Dec. 102; Illinois Central R. Co. v. Kanouse 39 Ill. 272; 89 Am. Dec. 307; Missouri &c. R. Co. v. Ricketts, 46 Kan. 617; 26 Pac. 50; 45 Am. & Eng. R. Cas. 485; Tracy v. Troy &c. R. Co. 38 N. Y. 433; 98 Am. Dec. 54; Clary v. Midland &c. R. Co. 37 Iowa, 344; Jeffersonville &c. R. Co. v. Downey, 61 Ind. 287; Stewart v. Chicago &c. R. Co. 27 Iowa, 282; Bean v. Atlantic &c. R. Co. 63 Me. 293; Cincinnati &c. R. Co. v. Bunnell, 61 Ind. 183; Clement v. Canfield, 28 Vt. 302; Cook v. Milwaukee &c. R. Co. 36 Wis. 45; Gould v. Bangor &c. R. Co. 82 Me. 122; 19 Atl. 84. "It is always the duty of a railroad company operating a railroad to see that proper cattle-guards exist wherever its railroad enters and leaves improved or fenced land, whether such company owns the railroad, or simply operating it under a lease." Missouri Pacific R. Co. v. Morrow, 32 Kan. 217; 4 Pac. 87; 19 Am. & Eng. R. Cas. 630.

[272] Ditchett v. Spuyten-Duyvil &c. R. Co. 67 N. Y. 425; Eaton v. Oregon &c. R. Co. 19 Ore. 391; 26 Pac. 415; 43 Am. & Eng. R. Cas. 57; Hindman v. Oregon &c. R. Co. 17 Ore. 619; 22 Pac. 116; 38 Am. & Eng. R. Cas. 310; St. Louis &c. R. Co. v. Curl, 28 Kan. 622; 11 Am. & Eng. R. Cas. 458; Fontaine v. Southern Pacific R. Co. 54 Cal. 645. In Texas both lessor and lessee are liable. Missouri &c. R. Co. v. Dunham, 68 Tex. 231; 4 S. W. 472; 2 Am. St. 484; 31 Am. & Eng. R. Cas. 530; Gulf &c. R. Co. v. Morris, 67 Tex. 692; 4 S. W. 156. See, also, Davis v. Central R. Co. 75 Ga. 645; Cincinnati &c. R. Co. v. McDougall, 108 Ind. 179; 8 N. E. 571; Ohio &c. R. Co. v. Russell, 115 Ill. 52; 3 N. E. 561. The lessor is liable for injuries to animals because the road is not fenced on the ground that the lessee is agent of the lessor. Whitney v. Atlantic &c. R. Co. 44 Me. 362; 69 Am. Dec. 102; Bay City &c. R. Co. v. Austin, 21 Mich. 390; Wyman v. Penobscot &c. R. Co. 46 Me. 162. See, also, Bay City &c. R. Co. v. Austin, 21 Mich. 390; Dolan v. Newburgh &c. R. Co. 120 N. Y. 571; 24 N. E. 824.

[273] Wichita &c. R. Co. v. Gibbs, 47 Kan. 274; 27 Pac. 991.

be maintained against the contractor in such cases.[274] Where the property of a railway has gone into the hands of a receiver by whom the railroad is run and operated the company may still be liable for injuries to animals caused by the failure to discharge the statutory duty to fence notwithstanding the receiver's possession.[275] Suit may also be maintained against the receiver, and he is the proper person, ordinarily, against whom such a suit should be brought. Although the appointment of a receiver does not terminate the existence of the corporation, all the property of the corporation usually passes into his hands, and any suits affecting that property or a failure of the receiver to discharge his duty should properly be brought against the receiver.[276] So, a trustee engaged in running and operating a railroad is liable for injuries occasioned to animals while he is so operating the road.[277] Where a company has ceased to own the road, and it is owned, and controlled and operated by another corporation, the original owner is not liable for injuries to animals which are inflicted after the transfer of ownership.[278] And it is held under the Indiana statute making the railroad company lessee, assignee, receiver or other person operating or controlling the road liable, that such company is not liable for stock killed by a locomotive run and operated

[274] Gardner v. Smith, 7 Mich. 410; 74 Am. Dec. 722.

[275] Ohio &c. R. Co. v. Russell, 115 Ill. 52; 3 N. E. 561; 23 Am. & Eng. R. Cas. 149; Louisville &c. R. Co. v. Cauble, 46 Ind. 277; Ohio &c. R. Co. v. Fitch, 20 Ind. 498.

[276] Kansas Pacific R. Co. v. Wood, 24 Kan. 619. The test in cases of this kind to determine whether an action should be brought against the company or against the receiver is whether the injuries arose from negligence of the receiver in the performance of his duties or from the failure to perform a duty which the company might have performed notwithstandng the existence of the receivership. A company could fence its line without interfering with the receiver, but it could not run trains without interfering with him and rendering itself guilty of contempt of court. If the action arose from the failure to perform a duty which the company might have performed then the suit may be maintained against the company, but if it arose from a failure to perform some duty which only the receiver could perform, then the suit should be brought against the receiver. See Ohio &c. R. Co. v. Russell, 115 Ill. 52; 3 N. E. 561. See ante, § **581**. See, also. Indianapolis &c. R. Co. v. Ray, 51 Ind. 269; Farrell v. Union Trust Co. 77 Mo. 475; Brockert v. Central Ia. R. Co. 82 Ia. 369; 47 N. W. 1026.

[277] Farrell v. Union Trust Co. 77 Mo. 475.

[278] Western R. Co. v. Huss, 70 Ala. 565. See Lawson v. Illinois So. R. Co. (Mo. App.); 94 S. W. 807.

by a trespasser.[279] A partnership,[280] or an individual[281] operating a railway is bound to see that the track is properly fenced.

§ 1209. Contributory Negligence.—Where animals are injured by a railway company's trains, there can as a rule be no recovery if the owner of the animals was guilty of contributory negligence,[282] but this may depend largely upon the statute in force in the particular jurisdiction. What will amount to contributory negligence on the part of the owner will depend much on the particular circumstances of each case and it is usually a question to be determined by the jury.[283] Where the alleged negligence of a railway company on which a recovery is sought consists in the non-performance of some statutory duty in reference to the management of the train or in the alleged negligent management of a train independent of statutory regulations, the question of the owner's contributory negligence is ordinarily easily determined. Thus, where there is no question of failure to properly fence the track, and the alleged negligence consists wholly in the management of the train, the fact that the owner carelessly permitted his animals to stray in the immediate

[279] Cleveland &c. R. Co. v. Wasson, 33 Ind. App. 316; 66 N. E. 1020; 70 N. E. 821. See, also, Wabash &c. R. Co. v. Rooker, 90 Ind. 581. But compare, as to the question of pleading, Western R. &c. Co. v. Stone (Ala.); 39 So. 723.

[280] Kansas City &c. R. Co. v. Bolson, 36 Kan. 534; 14 Pac. 5.

[281] Liddle v. Keokuk &c. R. Co. 23 Iowa, 378.

[282] Leavenworth &c. R. Co. v. Forbes, 37 Kan. 445; 15 Pac. 595; 31 Am. & Eng. R. Cas. 522; Pittsburgh &c. R. Co. v. Methven, 21 Ohio St. 586; Toledo &c. R. Co. v. Head, 62 Ill. 233; Williams v. Northern Pacific R. Co. 3 Dak. 168; 11 Am. & Eng. R. Cas. 421; Ft. Worth &c. R. Co. v. Roberts (Tex. Civ. App.); 83 S. W. 250, 251 (citing text); Keeney v. Railway Co. 19 Oreg. 291; 24 Pac. 233; Norfolk &c. R. Co. v. Smith (Md.); 64 Atl. 317; McGill v. Minneapolis &c. R. Co. 113 Ia. 358; 85 N. W. 620.

[283] Veerhusen v. Chicago &c. R. Co. 53 Wis. 689; 11 N. W. 433; Cairo &c. R. Co. v. Woosley, 85 Ill. 370; Illinois Central R. Co. v. Gillis, 68 Ill. 317; Illinois Central R. Co. v. Middlesworth, 43 Ill. 64; Timins v. Chicago &c. R. Co. 72 Iowa, 94; 33 N. W. 379; Central R. Co. v. Hamilton, 71 Ga. 461; Evans v. St. Paul &c. R. Co. 30 Minn. 489; 16 N. W. 271; Schubert v. Minneapolis &c. R. Co. 27 Minn. 360; 7 N. W. 366; Curry v. Chicago &c. R. Co. 43 Wis. 665; Hammond v. Sioux City &c. R. Co. 49 Iowa, 450. See, also, Herrell v. Chicago &c. R. Co. 114 Wis. 605; 90 N. W. 1071; Kuehl v. Chicago &c. R. Co. 126 Ia. 638; 102 N. W. 512; Sarja v. Great Northern R. Co. (Minn.); 109 N. W. 600.

vicinity of a railway track has been held to be such negligence on his part as to preclude a recovery.[284] And where the owner in driving his animals along a public highway and over a railway track carelessly allows them to remain on the track when they could easily have been driven off and they are injured he cannot recover.[285] In some states, where the common law prevails and the owner is required to keep his animals up, allowing them to run at large will constitute such contributory negligence on his part as to exonerate a railway company from liability.[286] But

[284] Wabash &c. R. Co. v. Nice, 99 Ind. 152; 23 Am. & Eng. R. Cas. 169; Indianapolis &c. R. Co. v. Caudle, 60 Ind. 112; Jeffersonville &c. R. Co. v. Underhill, 48 Ind. 389; Schneekloth v. Chicago &c. R. Co. 108 Mich. 1; 65 N. W. 663.

[285] Niemann v. Michigan &c. R. Co. 80 Mich. 197; 44 N. W. 1049. See, also, West v. Northern Pac. R. Co. 13 N. Dak. 221; 100 N. W. 254. But it is held that "the mere fact of a horse being on the track of a railroad when injured cannot be considered an act of contributory negligence on the part of the owner, or, standing alone, as proof tending to show negligence, even though the animal was allowed to stray at large unattended, or was negligently cared for, so that it escaped." Norfolk &c. R. Co. v. Smith (Md.); 64 Atl. 317. But see Red River &c. R. Co. v. Dooley, 35 Tex. Civ. App. 364; 80 S. W. 566.

[286] Tonawanda &c. R. Co. v. Munger, 5 Denio (N. Y.) 255; 49 Am. Dec. 239, and note; Bowman v. Troy &c. R. Co. 37 Barb. (N. Y.) 516; Maynard v. Boston &c. R. Co. 115 Mass. 458; 15 Am. R. 119; Moses v. Southern Pacific R. Co. 18 Ore. 385; 23 Pac. 498; 8 L. R. A. 135, and note; 42 Am. & Eng. R. Cas. 555; Williams v. Michigan &c. R. Co. 2 Mich. 259; 55 Am. Dec. 59; Halloran v. New York &c. R. Co. 2 E. D. Smith (N. Y.), 257; Bennett v. Chicago &c. R. Co. 19 Wis. 145; Woolson v. Northern R. Co. 19 N. H. 267; Spinner v. New York &c. R. Co. 67 N. Y. 153; Indianapolis &c. R. Co. v. Harter, 38 Ind. 557; Stucke v. Milwaukee &c. R. Co. 9 Wis. 202; Louisville &c. R. Co. v. Ballard, 2 Metc. (Ky.) 177; Tower v. Providence &c. R. Co. 2 R. I. 404; Railroad Co. v. Skinner, 19 Pa. St. 298; 57 Am. Dec. 654; Pittsburgh &c. R. Co. v. Stuart, 71 Ind. 500; Baltimore &c. R. Co. v. Mulligan, 54 Md. 486; Johnson v. Chicago &c. R. Co. 29 Minn. 425; 13 N. W. 673; Robinson v. Flint &c. R. Co. 79 Mich. 323; 44 N. W. 779; 19 Am. St. 174; 45 Am. & Eng. R. Cas. 496; Chicago &c. R. Co. v. Goss, 17 Wis. 428; 84 Am. Dec. 755; Red River &c. R. Co. v. Dooley, 35 Tex. Civ. App. 364; 80 S. W. 566. In Hindanan v. Oregon &c. R. Co. 17 Ore. 614; 22 Pac. 116, it was said: "Knowingly allowing cattle to range upon the track, where they necessarily expose the lives and safety of the traveling public to constant danger, is, according to my notion, the highest degree of negligence upon the part of the owner, and should be regard-

where the common law is not in force it is not negligence to permit animals to run at large[287] and this is particularly so where there is a local law permitting cattle and other domestic animals to run at large.[288] Where it appears that the owner of animals had them in his fields around which were fences reasonably sufficient to restrain them he cannot be held guilty of contributory negligence if the animals escape and wander upon a railroad track where they are injured,[289] unless, perhaps, it be shown that the animals were breachy and the owner had knowledge of their breachiness.[290] Stock in charge of a herder who permits them to escape and wander upon a railway track where they are injured will be regarded as injured because of the negligence of the herder in suffering them to escape, and for their injuries the company is not liable.[291] Wilfully or recklessly exposing one's animals to danger will always constitute such contributory neg-

ed as contributing to the injury." But see Sarja v. Great Northern R. Co. (Minn.); 109 N. W. 600.

[287] Eddy v. Evans, 58 Fed. 151; Little Rock &c. R. Co. v. Finley, 37 Ark. 562; Searles v. Milwaukee &c. R. Co. 35 Iowa, 490; Blaine v. Chesapeake &c. R. Co. 9 W. Va. 252; Moses v. Southern Pacific R. Co. 18 Ore. 385; 23 Pac. 498; 8 L. R. A. 135, and note; 42 Am. & Eng. R. Cas. 555; Cleveland &c. R. Co. v. Elliott, 4 Ohio St. 474; Kerwhaker v. Cleveland &c. R. Co. 3 Ohio St. 172; Vicksburg &c. R. Co. v. Patton, 31 Miss. 156; 66 Am. Dec. 552; Trout v. Virginia &c. R. Co. 23 Gratt. (Va.) 619; South &c. R. Co. v. Williams, 65 Ala. 74; Kentucky &c. R. Co. v. Lebus, 14 Bush. (Ky.) 518; Gorman v. Pacific R. Co. 26 Mo. 441; 72 Am. Dec. 220; Isbell v. New York &c. R. Co. 27 Conn. 393; 71 Am. Dec. 78; Rockford &c. R. Co. v. Irish, 72 Ill. 404; McCoy v. California Pacific R. Co. 40 Cal. 532; 6 Am. R. 623; Bethea v. Raleigh &c. R. Co. 106 N. C. 279; 10 S. E. 1045; Proctor v. Wilmington &c. R. Co. 72 N. Car. 579; Orcutt v. Pacific Coast R. Co. 85 Cal. 291.

[288] But see Hanna v. Terre Haute &c. R. Co. 119 Ind. 316.

[289] Story v. Chicago &c. R. Co. 79 Iowa, 402; 44 N. W. 690; Pearson v. Milwaukee &c. R. Co. 45 Iowa, 497; Doran v. Chicago &c. R. Co. 73 Iowa, 115; 34 N. W. 619; Dennis v. Louisville &c. R. Co. 116 Ind. 42; 18 N. E. 179; 1 L. R. A. 448; and note; 35 Am. & Eng. R. Cas. 141; Railway Co. v. Howard, 40 Ohio St. 6; Toledo &c. R. Co. v. Milligan, 52 Ind. 505; Bulkley v. New York &c. R. Co. 27 Conn. 479; Spinner v. New York &c. R. Co. 67 N. Y. 153; Chicago &c. R. Co. v. Goss, 17 Wis. 428; 84 Am. Dec. 755.

[290] Dennis v. Louisville &c. R. Co. 116 Ind. 42; 18 N. E. 179; 1 L. R. A. 448, and note; 35 Am. & Eng. R. Cas. 141.

[291] Keeney v. Oregon R. &c. Co. 19 Ore. 291; 24 Pac. 233; 42 Am. & Eng. R. Cas. 619. See, also, Dickinson v. Wabash &c. R. Co. 103 Mo. App. 332; 77 S. W. 88.

ligence as to preclude a recovery if the animals are injured.[292] Thus, where an owner left open a gate between his fields and the railway track and the animals escaped from the fields and were injured on the railway tracks it was held there could be no recovery.[293] But where the alleged negligence of the railway company consists in its failure to erect and maintain proper fences there is some conflict in the authorities as to whether it is contributory negligence in an adjoining land-owner to turn his stock into a field near the railroad track when he knows that the fence between his field and the track is defective and not sufficient to turn stock. The weight of authority is, however, to the effect that it is not contributory negligence which will

[292] Jeffersonville &c. R. Co. v. Dunlap, 29 Ind. 426; Moser v. St. Paul &c. R. Co. 42 Minn. 480; 44 N. W. 530; Forbes v. Atlantic &c. R. Co. 76 N. Car. 454; Hopkins v. Kansas Pacific R. Co. 18 Kan. 462; Tarwater v. Hannibal &c. R. Co. 42 Mo. 193; Missouri Pacific R. Co. v. Roads, 33 Kan. 640; Rogers v. Newburyport &c. R. Co. 1 Allen (Mass.), 16; Corwin v. New York &c. R. Co. 13 N. Y. 42; Chicago &c. R. Co. v. Totten, 1 Kan. App. 558; 42 Pac. 269. Where the plaintiff had attached a block of wood to his cow and it appeared that the block of wood prevented her from getting off the track when a train which struck her was approaching it was held that the negligence of the owner contributed to the injury. Guess v. Railway Co. 30 S. Car. 163; 9 S. E. 163. If an owner stands by when his animals are in danger and makes no effort to save them his negligence will preclude a recovery against the railway company. Moody v. Minneapolis &c. R. Co. 77 Iowa, 29; 41 N. W. 477.

[293] Richardson v. Chicago &c. R. Co. 56 Wis. 347; 14 N. W. 176; Hook v. Worcester &c. R. Co. 58 N. H. 251; Manwell v. Burlington &c. R. Co. 80 Iowa, 652; 45 N. W. 568; 45 Am. & Eng. R. Cas. 501; Illinois &c. R. Co. v. McKee, 43 Ill. 119; Eames v. Boston &c. R. Co. 14 Allen (Mass.), 151; Indianapolis &c. R. Co. v. Shimer, 17 Ind. 295; Bay City &c. R. Co. v. Austin, 21 Mich. 390; Bond v. Evansville &c. R. Co. 100 Ind. 301. See, also, Missouri &c. R. Co. v. Bradshaw (Tex. Civ. App.); 83 S. W. 897; Dickinson v. Wabash &c. R. Co. 103 Mo. App. 332; 77 S. W. 88. But compare Atkinson v. Chicago &c. R. Co. 119 Wis. 176; 96 N. W. 529. So where the owner of animals opened the gate in a fence along a railroad right of way and was driving his animals along the track intending to take them off the right of way at a gate further along the track it was held that he was guilty of such contributory negligence as to prevent his recovering for an injury to his animals while they were being so driven. Davidson v. Central Iowa R. Co. 75 Iowa, 22; 39 N. W. 163; 35 Am. & Eng. R. Cas. 158.

defeat a recovery on the part of the owner to turn his stock into a field along one side of which the company has failed to properly fence,[294] although there are authorities which hold that it is contributory negligence.[295] Where the company utterly ignores its duty to fence or to properly repair its fences it seems to us that it is not just to an adjoining owner to hold him guilty of contributory negligence which will defeat a recovery if he turns his stock into fields adjoining the track If this were the rule it would virtually deprive the owner of a right to pasture his stock in fields adjoining the track or else compel him to erect the fences or constantly guard his animals.[296] The railway company is the party who has failed to discharge its positive statutory duty, and on it should fall the loss. But where a railway company has been diligent in the performance of its duty in erecting and maintaining fences and the fences are destroyed by accident or thrown down by storm or other casualty the company would have a reasonable time in which to make such repairs, and if

[294] Horner v. Williams, 100 N. Car. 230; 5 S. E. 734; Roberts v. Richmond &c. R. 88 N. Car. 560; Farmer v. Wilmington &c. R. Co. 88 N. Car. 564; Wilder v. Maine &c. R. Co. 65 Me. 332; 20 Am. R. 698; Shepard v. Buffalo &c. R. Co. 35 N. Y. 641; McCoy v. California &c. R. Co. 40 Cal. 532; 6 Am. R. 623; Pittsburg &c. R. Co. v. Smith, 38 Ohio St. 410; Evans v. St. Paul &c. R. Co. 30 Minn. 489; 16 N. W. 271; Cressley v. Northern R. 59 N. H. 564; 47 Am. R. 227; Donovan v. Hannibal &c. R. Co. 89 Mo. 147; 1 S. W. 232. Some cases hold that where the injury was due to the want of a fence the company is liable, although the owner was guilty of contributory negligence in permitting his animals to be abroad. In these cases the failure of the company to perform its statutory duty is regarded as the proximate cause of the injury. Welty v. Indianapolis &c. R. Co. 105 Ind. 55; 4 N. E. 410; Flint &c. R. Co. v. Lull, 28 Mich. 510; Cincinnati &c. R. Co. v. Hiltzhauer, 99 Ind. 486.

[295] Poler v. New York &c. R. Co. 16 N. Y. 476; Scowden v. Erie R. Co. 26 Pa. Super. Ct. 15; Martin v. Stewart, 73 Wis. 553; 41 N. W. 538; McCarme v. Chicago &c. R. Co. 96 Wis. 664; 71 N. W. 1054.

[296] "There is no negligence in pasturing his cattle upon his own premises, although he is aware of the defective condition of the fence which it is the duty of the company to maintain between it and the railroad track. He can not be deprived of the ordinary and proper use of his property by the failure of the railroad company to perform its duty." 2 Thom. Neg. (2nd ed.) 2019. See, also, Donovan v. Hannibal &c. R. Co. 89 Mo. 147; 1 S. W. 232; 26 Am. & Eng. R. Cas. 588; Missouri &c. R. Co. v. Dunnaway (Tex. Civ. App.); 95 S. W. 760.

an owner with knowledge that the fence was down should turn his cattle into the adjoining fields before a reasonable time in which to make repairs had elapsed and they are injured he should be held guilty of contributory negligence.[297] But it has been held that if repairs are not made within a reasonable time the owner may turn his animals into his fields.[298] It has also been held that although a plaintiff be guilty of such contributory negligence as would under ordinary circumstances defeat a recovery, yet, if the accident happened because the employes in charge of the train failed to exercise reasonable care to prevent the injury after the animals were discovered on the track, the contributory negligence of the plaintiff will be no defense to the action.[299]

§ 1210. Animals abandoned by their owner.—Where an owner abandons his animals he cannot recover if they are injured. If his action in abandoning the animals was such as to constitute a full relinquishment of all claim to them he no doubt would be unable to recover for them on the ground that the animals were of no value or that he had no property in them. Such cases are of rare occurrence and few have found their way into the reports. But there are cases where an owner, not intending to part with the property in his animals, abandons them in the immediate vicinity of or on a

[297] Martin v. Stewart, 73 Wis. 553; 41 N. W. 538; 38 Am. & Eng. R. Cas. 316; Jones v. Sheboygan &c. R. Co. 42 Wis. 306; Richardson v. Chicago &c. R. Co. 56 Wis. 347; 14 N. W. 176; Carey v. Chicago &c. R. Co. 61 Wis. 71; 20 N. W. 618; 20 Am. & Eng. R. Cas. 469; Spinner v. New York &c. R. Co. 67 N. Y. 153; Indianapolis &c. R. Co. v. Wright, 13 Ind. 213.

[298] Sika v. Chicago &c. R. Co. 21 Wis. 370.

[299] Wooster v. Chicago &c. R. Co. 74 Iowa, 593; 38 N. W. 425; 35 Am. & Eng. R. Cas. 152; Farmer v. Wilmington &c. R. Co. 88 N. Car. 564; Chicago &c. R. Co. v. Engle, 84 Ill. 397; Cincinnati &c. R. Co. v. Smith, 22 Ohio St. 227; 10 Am. R. 729; Kuhn v. Chicago &c. R. Co. 42 Iowa, 420; Coyle v. Baltimore &c. R. Co. 11 W. Va. 94; Georgia &c. R. Co. v. Neely, 56 Ga. 540; Mississippi &c. R. Co. v. Miller, 40 Miss. 45; Hannibal &c. R. Co. v. Kenney, 41 Mo. 271. See, also, New Albany &c. R. Co. v. Maiden, 12 Ind. 10; Isbell v. New York &c. R. Co. 27 Conn. 393; 71 Am. Dec. 78; Barnard v. Chicago &c. R. Co. (Ia.); 110 N. W. 439 (recovery allowed notwithstanding contributory negligence where the railroad operatives of the train knew or ought to have known that the cattle were on the track, and negligently failed to slacken speed or stop the train).

railway track where danger is imminent.[300] In such cases it is held that an owner cannot recover for injuries to the animals even though they were killed because the company had failed to perform its statutory duty to fence. The act of the owner in such a case amounts to positive wilfulness, but under such circumstances his contributory negligence in leaving the animals in a place of danger would, in some jurisdictions, defeat a recovery even if there was present no element of wilfulness.[301]

§ 1211. Animals attracted to railroad tracks.—It sometimes happens that animals which are injured on the tracks of a railway company are attracted there by some kind of food, such as hay, salt, grain or the like, which is being shipped over the company's road. Since these injuries usually take place at depot or station grounds where the company is excused from fencing, it follows that if a recovery can be had at all, it must be based on other negligence than that

[300] In the case of Welty v. Indianapolis &c. R. Co. 105 Ind. 55; 24 Am. & Eng. R. Cas. 371, it was said: "An owner who abandons his animal can not recover, although it entered upon the track of a railroad, and was killed at a place where the company failed to perform its statutory duty by fencing its track. Knight v. Toledo &c. R. Co. 24 Ind. 402; Jeffersonville &c. R. Co. v. Dunlap, 29 Ind. 426; Corwin v. New York &c. R. Co. 13 N. Y. 42, see opinion, Denio, J., p. 54. Sound principle supports this rule. If an owner were permitted to voluntarily put his domestic animals in a situation where it was almost certain that they would be killed by passing trains, and yet, in the event that they were killed, recover from the railroad company, it would open the way to great frauds, since it would enable the owner to recover for property voluntarily exposed to destruction; but this would not be the only evil result, for a further evil consequence would be that the temptation to get rid of animals not needful or useful, at the expense of the railroad company, would endanger the safety of those who travel upon our railroads. Public policy requires that a man who voluntarily puts his property in a place where it is certain that it will be destroyed, shall not receive assistance from the courts. A man who willingly abandons his property to destruction, or purposely abandons it to a known danger, has no right, either in law or morals, to invoke the assistance of the courts of justice to secure pay for it." See, also, Ft. Wayne &c. R. Co. v. Woodward, 112 Ind. 118; 13 N. E. 260; Brady v. Rensselaer &c R. Co. 1 Hun (N. Y.), 378; Moody v. Minneapolis &c. R. Co. 77 Ia. 29; 41 N. W. 477; Heller v. Abbot, 79 Wis. 409; 48 N. W. 598, 599.

[301] Ante, § **1209**.

in failing to fence. Negligence in failing to fence does not and cannot ordinarily exist in such a case. Where the company merely permits an article to be loaded on its cars and does not allow the loaded cars to stand for an unreasonable time after they are loaded, it will not be liable for injuries to animals which are attracted to the track by the article loaded in the cars. Thus, where it appeared that the injured animal had been attracted by hay loaded in a car, and that the car had not stood an unreasonable time, but had been moved on the same day on which the loading was completed, it was held that there was no liability.[302] But if the car had been allowed to stand for an unreasonable length of time the company, it was said, would have been liable.[303] Where the animal is attracted by an article which has been scattered over and about the track during the process of loading or unloading and is allowed to remain there, the company may sometimes be liable. Thus, where salt, in being unloaded, was scattered over the track and allowed to remain there, the company was held liable for injuries to an animal which had been attracted to the place by the salt.[304] And the company was held liable under similar circumstances where cotton-seed had been allowed to accumulate on the track.[305] But where the animals were attracted to the track by salt in a shed kept by a store-keeper who also acted as station agent, it was held that the company was not liable, it appearing that the keeping of the salt was not in any way connected with the duties of the station agent as an employe of the company.[306]

§ 1212. **Ownership of animals.**—A necessary part of a plaintiff's case in an action against a railway company for damages on account

[302] Schooling v. St. Louis &c. R. Co. 75 Mo. 518; 13 Am. & Eng. R. Cas. 536.

[303] Schooling v. St. Louis &c. R. Co. 75 Mo. 518; 13 Am. & Eng. R. Cas. 536.

[304] Crafton v. Hannibal &c. R. Co. 55 Mo. 580. But the company is not liable for injuries to an animal which was attracted to the tracks by salt placed about switches for the purpose of freeing them from snow and ice. Louisville &c. R. Co. v. Phillips (Miss.); 12 So. 825; Kirk v. Norfolk &c. R. Co. 41 W. Va. 722; 24 S. E. 639; 32 L. R. A. 416; 56 Am. St. 899.

[305] Little Rock &c. R. Co. v. Dick, 52 Ark. 402; 20 Am. St. 190; 42 Am. & Eng. R. Cas. 591. See, also, Kansas City &c. R. Co. v. Kirksey, 48 Ark. 366; 3 S. W. 190; Page v. North Carolina R. Co. 71 N. Car. 222.

[306] Burger v. St. Louis &c. R. Co. 123 Mo. 679; 27 S. W. 313; 59 Am. & Eng. R. Cas. 637.

of injuries to animals is proof of ownership by the plaintiff. The plaintiff must show that he is the owner of the animal or has such a property interest in it as to entitle him to maintain an action for its injury or death.[307] Thus, where the plaintiff testified in an action against a railway company for the death of a mule, that he had purchased the mule and had possession of it at the time of the accident, that he had not paid for it but did pay for it after the injury, it was held that he had such an interest as to entitle him to recover its full value.[308] But where a suit was brought by the husband to recover for injuries to an animal which had been obtained in exchange for a similar animal belonging to his wife, the husband having contributed a sum of money himself in addition to the animal in order to consummate the exchange, it was held that he had no such property interest as to entitle him to maintain the action.[309] It has been held that a suit for an injury to an animal cannot be brought by one person for the use of another. Such a suit is an action ex delicto and must be brought by the party for whose benefit the recovery is sought.[310] Proof of the possession of stock killed or injured is prima facie evidence of ownership [311]

§ 1213. **Presumption of negligence.**—We have heretofore seen that statutes attempting to impose an absolute liability upon railway companies for injuries to stock where there is no negligence or failure to fence or the like have uniformly been held unconstitutional. But in many of the states there are in force statutes which make proof of the existence of certain facts sufficient to constitute a prima facie case of liability in favor of the plaintiff. These statutes have been held valid.[312] They, however, are not statutes which affect the liability

[307] Welsh v. Chicago &c. R. Co. 53 Iowa, 632; 6 N. W. 13; Turner v. St. Louis &c. R. Co. 76 Mo. 261. Ownership must be alleged. South Georgia R. Co. v. Ryals, 123 Ga. 330; 51 S. E. 428.

[308] Railway Co. v. Taylor 57 Ark. 136; 20 S. W. 1083.

[309] Central R. &c. Co. v. Bryant, 89 Ga. 457; 15 S. E. 537. For a somewhat similar case where this question was held to be for the jury, see Davis v. Seaboard Air Line R. Co. 134 N. Car. 300; 46 S. E. 515.

[310] Kansas City &c. R. Co. v. Cantrell, 70 Miss. 329; 12 So. 344.

[311] Toledo &c. R. Co. v. Stevens, 63 Ind. 337. See, also, as to evidence of ownership, Southern R. Co. v. Pogue (Ala.); 40 So. 565.

[312] In Savannah &c. R. Co. v. Geiger, 21 Fla. 669; 58 Am. R. 697, and note; 29 Am. & Eng. R. Cas. 274,

of the company but only the mode of procedure.[313] Proof of the existence of the facts specified in the statute raises a presumption of negligence against the railway company and this makes a prima facie case in favor of the plaintiff, which, if not rebutted or overcome by the defendant, is sufficient to warrant a recovery against it. Thus, statutes are in force which make mere proof of the killing of or injury to an animal by the cars or locomotives of a railway company sufficient to raise a presumption of negligence against it.[314] As soon as this

it was said: "It is within the power of the legislature to provide that proof of the killing or of damage to live stock by railroad engines or trains shall be prima facie evidence of negligence on the part of the company or person operating them, as has been wisely done in some states, in view of the fact that the company always has witnessed the killing or injury." See, also, Atchison &c. R. Co. v. Matthews, 174 U. S. 96; 19 Sup. Ct. 609; Becksted v. Montana &c. R. Co. 19 Mont. 147; 47 Pac. 795; Tredway v. Sioux City &c. R. Co. 43 Iowa, 527; 14 Am. R. 475. But compare Jolliffe v. Brown, 14 Wash. 155; 44 Pac. 149; 53 Am. St. 868; Dickey v. Northern Pac. R. Co. 19 Wash. 350; 53 Pac. 347.

[313] "The effect of the statute is merely to change the order of proof." Huber v. Chicago &c. R. Co. 6 Dak. 392; 43 N. W. 819; 40 Am. & Eng. R. Cas. 188.

[314] Mobile &c. R. Co. v. Williams, 53 Ala. 595; Pippen v. Wilmington &c. R. Co. 75 N. Car. 54; Georgia &c. R. Co. v. Monroe, 49 Ga. 373; East Tennessee &c. R. Co. v. Bayliss, 74 Ala. 150; Western Maryland &c. R. Co. v. Carter, 59 Md. 306; St. Louis &c. R. Co. v. Vincent, 36 Ark. 451; Volkman v. Chicago &c. R. Co. 5 Dak. 69; 37 N. W. 222; 35 Am. & Eng. R. Cas. 204; Huber v. Chicago &c. R. Co. 6 Dak. 392; 43 N. W. 819; 40 Am. & Eng. R. Cas. 188; Kentucky Central R. Co. v. Talbot, 78 Ky. 621; 7 Am. & Eng. R. Cas. 585; Grundy v. Louisville &c. R. Co. 8 Ky. L. 689; 2 S. W. 899; Mobile &c. R. Co. v. Morrow (Ky.); 97 S. W. 389; Spaulding v. Chicago &c. R. Co. 33 Wis. 582; Jones v. Bond 40 Fed. 281; Georgia &c. R. Co. v. Hughes, 87 Ala. 610; 6 So. 413; South &c. R. Co. v. Williams, 65 Ala. 74; Randall v. Richmond &c. R. Co. 104 N. Car. 410; 10 S. E. 691; Kansas City &c. R. Co. v. Doggett, 67 Miss. 250; 7 So. 278; Jacksonville &c. R. Co. v. Wellman, 26 Fla. 344; 7 So. 845; State v. Divine, 98 N. Car. 778; 4 S. E. 477; 31 Am. & Eng. R. Cas. 574; Little Rock &c. R. Co. v. Payne, 33 Ark. 816; 34 Am. R. 55; Kansas City &c. R. Co. v. Wayt (Ark.); 97 S. W. 656; Kansas City &c. R. Co. v. Cush. (Ark.) 96 S. W. 1062; Brentner v. Chicago &c. R. Co. 68 Iowa, 530; 23 N. W. 245; 27 N. W. 605; Small v. Chicago &c. R. Co. 50 Iowa, 338; Wilson v. Norfolk &c. R. Co. 90 N. Car. 69; Keilbach v. Chicago &c. R. Co. 11 S. Dak. 468; 78 N. W. 951. "It being shown that the animal, while on the railroad track, was killed by a train of the defendant,

presumption arises the plaintiff has made out a prima facie case and will recover unless the defendant introduces evidence to show that it exercised due care and was not guilty of negligence.[315] This is true even though there be a local act in force requiring animals to

the burden was on the defendant to acquit himself of the charge of negligence made by the complaint; and the rulings of the court to this effect were free from error." Louisville &c. R. Co. v. Kelsey, 89 Ala. 287; 7 So. 648; 42 Am. & Eng. R. Cas. 584. It has been held that the presumption of negligence does not arise where the animal injured is a dog. Wilson v. Wilmington &c. R. Co. 10 Rich. L. (S. Car.) 52. But it does where the animals injured were oxen hitched to a cart. Randall v. Richmond &c. R. Co. 104 N. Car. 410; 10 S. E. 691; contra, Annapolis &c. R. Co. v. Pumphrey, 72 Md. 82; 19 Atl. 8; 42 Am. & Eng. R. Cas. 599. It is also held that there is no presumption that an animal will leave the track in time to avoid injury. Dennis v. Louisville &c. R. Co. 116 Ind. 42; 18 N. E. 179; 1 L. R. A. 448; Chicago &c. R. Co. v. Ramsey (Ind. App.); 79 N. E. 1065, 1066.

[315] Wilson v. Norfolk &c. R. Co. 90 N. Car. 69; Little Rock &c. R. Co. v. Jones, 41 Ark. 157; Jones v. Bond, 40 Fed. 281; 40 Am. & Eng. R. Cas. 191; Louisville &c. R. Co. v. Kelsey, 89 Ala. 287; 7 So. 648; 42 Am. & Eng. R. Cas. 584; Louisville &c. R. Co. v. Smith, 67 Miss. 15; 7 So. 212; Little Rock &c. R. Co. v. Henson, 39 Ark. 413; St. Louis &c. R. Co. v. Hagan, 42 Ark. 122. In Volkman v. Chicago &c. R. Co. 5 Dak. 69; 37 N. W. 731; 35 Am. & Eng. R. Cas. 204, the court, in discussing a statute, which made the proof of killing or injuring sufficient to raise a presumption of negligence, said: "As this section is in derogation of the rule at common law and the general rule of practice prescribed by our code of civil procedure, it behooves us to consider the effect, scope and object of this provision, in order to properly construe it. It seems to us that this section was enacted for the purpose of overcoming the difficulty, generally supposed to exist, with plaintiffs in this kind of actions, in making proof of facts which are only known as a rule to the servants and agents of the defendant. Hence, when the railway placed their servants and employes, in whose breasts these facts are presumed to rest, on the witness stand, and purge their consciences by, testifying, under oath, touching all the facts and circumstances within their knowledge, concerning the killing or injury, the reason for the statute ceases. To hold otherwise would work great injustice and oppression, and would be to prescribe a different rule for the adjudication of rights of persons and property engaged in the railway business from that which obtains in reference to other persons and property engaged in the railway business from that which obtains in reference to other persons, whose rights of property are in no wise more sacred."

be fenced in.[316] As a rule no presumption of negligence arises from proof of the killing or injuring an animal by the locomotives of a railway company unless there be a statute in force declaring that such proof shall make a prima facie case against the defendant or raise the presumption that it was guilty of negligence in killing or injuring the animal.[317] In a few jurisdictions, however, such proof seems to raise a presumption of negligence although there exists no statute on the subject,[318] but even then the rule is that where the company shows by the uncontradicted testimony of its employes that the accident was unavoidable,[319] or that due care was used in the operation of the train,[320] the presumption of negligence is overcome. And it is held that there must be evidence to show that the injury was caused by the train or locomotive in order to raise the presumption.[321]

§ 1214. Burden of proof—Evidence.—In actions for damages against railway companies on account of injuries to animals the burden of establishing negligence on the part of the defendant rests upon

[316] Roberts v. Richmond &c. R. Co. 88 N. Car. 560; 20 Am. & Eng. R. Cas. 473.

[317] Eddy v. Lafayette, 49 Fed. 798; Volkman v. Railway Co. 5 Dak. 69; 37 N. W. 731; Burlington &c. R. Co. v. Wendt, 12 Neb. 76; 10 N. W. 456; Eaton v. Oregon &c. Navigation Co. 19 Ore. 391; 24 Pac. 415; Savannah &c. R. Co. v. Geiger, 21 Fla. 669; Walsh v. Virginia &c. R. Co. 8 Nev. 110; Railway Co. v. Heiskell, 38 Ohio St. 666; 13 Am. & Eng. R. Cas. 555; Denver &c. R. Co. v. Henderson, 10 Colo. 1; 13 Pac. 910; Milburn v. Kansas City &c. R. Co. 86 Mo. 104; Kansas City &c. R. Co. v. Bolson, 36 Kan. 534; 14 Pac. 5; Atchison &c. R. Co. v. Betts, 10 Colo. 431; 15 Pac. 821; Railroad Co. v. McMillan, 37 Ohio St. 554; Gulf &c. R. Co. v. Washington, 49 Fed. 347.

[318] Smith v. Eastern &c. R. Co. 35 N. H. 356; McCoy v. California &c. R. Co. 40 Cal. 532; 6 Am. R. 623; Murray v. South Carolina &c. R. Co. 10 Rich. L. (S. Car.) 227; 70 Am. Dec. 219; White v. Concord R. 30 N. H. 188; Galpin v. Chicago &c. R. Co. 19 Wis. 604; Roof v. Railroad Co. 4 S. Car. 61. See, also, Cincinnati &c. R. Co. v. Burgess, 27 Ky. L. 252; 84 S. W. 760.

[319] Alabama &c. R. Co. v. Roebuck, 76 Ala. 277; Railway Co. v. Shoecraft, 53 Ark. 96; 13 S. W. 422; Central of Ga. R. Co. v. Dich, 121 Ga. 65; 48 S. E. 683; St. Louis &c. R. Co. v. Cline, 69 Ark. 659; 65 S. W. 427.

[320] Little Rock &c. R. Co. v. Payne, 33 Ark. 816; 34 Am. R. 55; Mobile &c. R. Co. v. Williams, 53 Ala. 595; Central of Ga. R. Co. v. Bagley, 121 Ga. 781; 49 S. E. 780, 781. See, also, Durham v. Wilmington &c. R. Co. 82 N. Car. 352; Lane v. Kansas City &c. Ry. Co. (Ark); 95 S. W. 460.

[321] St. Louis &c. R. Co. v. Hagan, 42 Ark. 122.

the plaintiff,[322] except in those cases where mere proof of killing by the company raises a presumption of negligence.[323] Even in those cases the burden of proving negligence may appropriately be said to rest on the plaintiff, for on him rests the burden of showing the existence of the necessary facts to raise the presumption of negligence.[324] If those facts are not shown, the plaintiff has failed to raise a presumption of negligence and has not made out a prima facie case. Where a recovery is sought on the ground that the company failed to fence, the burden is upon the plaintiff to show that the animals came upon the track at a point where it was not securely fenced,[325] but if the defense is interposed that the company was excused from fencing at that point the burden rests upon the company to establish

[322] Doggett v. Richmond &c. R. Co. 81 N. Car. 459; Atchison &c. R. Co. v. Betts 10 Colo. 431; 15 Pac. 821; Savannah &c. R. Co. v. Geiger, 21 Fla. 669; 58 Am. R. 697, and note; Fort Worth &c. R. Co. v. Tomlinson (Tex. App.); 16 S. W. 866; Cleveland &c. R. Co. v. Crawford, 24 Ohio St. 631; 15 Am. R. 633; Burlington &c. R. Co. v. Wendt, 12 Neb. 76; 10 N. W. 456; McKissock v. St. Louis &c. R. Co. 73 Mo. 456; Lyndsay v. Connecticut &c. R. Co. 27 Vt. 643; Locke v. First Div. St. Paul &c. R. Co. 15 Minn. 350; Grand Rapids &c. R. Co. v. Judson, 34 Mich. 506; Peoria &c. R. Co. v. Barton, 80 Ill. 72; Lawrence v. Milwaukee &c. R. Co. 42 Wis. 322; Bethje v. Houston &c. R. Co. 26 Tex. 604; Indianapolis &c. R. Co. v. Caudle, 60 Ind. 112; New Orleans &c. R. Co. v. Enochs, 42 Miss. 603; Rockford &c. R. Co. v. Connell, 67 Ill. 216; Schneir v. Chicago &c. R. Co. 40 Iowa, 337; Waldron v. Portland &c. R. Co. 35 Me. 422; Walsh v. Virginia &c. R. Co. 8 Nev. 110; Maynard v. Norfolk &c. R. Co. 40 W. Va. 331; 21 S. E. 733; Hoge v. Ohio River &c. R. Co. 35 W. Va. 562; 14 S. E. 152; Johnson v. Baltimore &c. R. Co. 25 W. Va. 570. It is error to require the company to show absence of negligence. McGhee v. Gaines, 98 Ky. 50; 32 S. W. 602. And mere proof that an animal was killed on the track has been held insufficient to show negligence. Atchison &c. R. Co. v. Adcock (Colo.); 88 Pac. 180; Chicago &c. R. Co. v. Huggins, 4 Ind. Ter. 194; 69 S. W. 845; Missouri &c. R. Co. v. Webb (Ind. Ter.); 97 S. W. 1010.

[323] Ante, § 1213.

[324] See St. Louis &c. R. Co. v. Hagan, 42 Ark. 122; Southern R. Co. v. Forsythe, 23 Ky. L. 942; 64 S. W. 506.

[325] Evansville &c. R. Co. v. Mosier, 101 Ind. 597; 22 Am. & Eng. R. Cas. 569; Morrison v. New York &c. R. Co. 32 Barb. (N. Y.) 568; Lawrence v. Milwaukee &c. R. Co. 42 Wis. 322; Rockford &c. R. Co. v. Lynch, 67 Ill. 149; Small v. Chicago &c. R. Co. 50 Iowa, 338; Lantz v. St. Louis &c. R. Co. 54 Mo. 228; Cecil v. Pacific R. Co. 47 Mo. 246.

that defense.[326] Where it appears that the animals were injured on the track near a point where there was no fence or a defective fence the jury may infer that the animals came on the track at such point.[327] If the action is based upon the negligence of the company in failing to fulfill its statutory duty to fence, or in failing to perform some other duty imposed by statute and it appears that the company was negligent in that respect, the plaintiff is not bound to show that he was free from contributory negligence. But if the action is not based on the alleged failure of the company to discharge some statutory duty imposed upon it, freedom from contributory negligence is, in some jurisdictions, a necessary part of a plaintiff's case and the burden rests upon him to establish it.[328] In actions for injuries to animals proof of the injury and the negligence of the company may be established by either direct or circumstantial evidence. That direct evidence is admissible there can be no question and it is almost equally well settled that circumstantial evidence of the injury or negligence in inflicting it is admissible. A great many cases of this kind arise in such a way that it is impossible to get direct evidence and in such cases circumstantial evidence must necessarily be admissible or a substantial failure of justice would result. Thus, where it is necessary to prove a collision between the defendant's trains and the animal, it is not necessary that the plaintiff should produce actual eye witnesses to the collision.[329] The collision may be proved by circum-

[326] Terre Haute &c. R. Co. v. Penn, 90 Ind. 284; Louisville &c. R. Co. v. Kious, 82 Ind. 357; Indianapolis &c. R. Co. v. Lindley, 75 Ind. 426; Cox v. Atchison &c. R. Co. 128 Mo. 362; 31 S. W. 3. See, also, Central R. &c. Co. v. Lee, 96 Ala. 444; 11 So. 424; Dailey v. Chicago &c. R. Co. 121 Ia. 254; 96 N. W. 778.

[327] McCoy v. California &c. R. Co. 40 Cal. 532; 6 Am. R. 623; Bellefontaine &c. R. Co. v. Suman, 29 Ind. 40; Small v. Chicago &c. R. Co. 50 Iowa, 338; Toledo &c. R. Co. v. Pence, 68 Ill. 524; St. Louis &c. R. Co. v. Casner, 72 Ill. 384; Fickle v. St. Louis &c. R. Co. 54 Mo. 219; Walther v. Pacific R. Co. 55 Mo. 271; Bennett v. Chicago &c. R. Co. 19 Wis. 145. Proof that the fence was generally insecure and defective has been held sufficient to sustain a verdict in favor of a plaintiff without proof that the particular point where the animals entered was defective. Louisville &c. R. Co. v. Spain, 61 Ind. 460.

[328] Jeffersonville &c. R. Co. v. Huber, 42 Ind. 173; Indianapolis &c. R. Co. v. Caudle, 60 Ind. 112.

[329] Indianapolis &c. R. Co. v. Thomas, 84 Ind. 194. "It is not necessary in such a case, to show, by direct evidence, that the stock was struck by the company's train;

stantial evidence,[330] as where the animal is found mutilated and dead near the track with blood and hair on one of the rails,[331] or where blood is found on the track and traced to an adjoining field where the animal lay injured.[332] Proof that an animal was seen near the track and afterward found on or near the track in a bruised and mutilated condition may be sufficient to establish the fact of a collision.[333] But the verdict must not be based on mere conjecture and there are many cases in which somewhat similar evidence, without more, has been held insufficient.[334] When a recovery is claimed because of the alleged negligence of the company in running its trains at a rate of speed in excess of that prescribed by a municipal ordinance, the ordinance limiting the speed and also the ordinance prohibiting stock from running at large are admissible in evidence on the question of negligence and contributory negligence.[335] Neither, however, even if vio-

it is sufficient if there are circumstances from which that fact may be fairly and justly inferred." Whitewater R. Co. v. Bridgett, 94 Ind. 216.

[330] South &c. R. Co. v. Small, 70 Ala. 499; Keltenbaugh v. St. Louis &c. R. Co. 34 Mo. App. 147; St. Louis &c. R. Co. v. Casner, 72 Ill. 384; Indianapolis &c. R. Co. v. Thomas, 84 Ind. 194; Mayfield v. St. Louis &c. R. Co. 91 Mo. 296; 3 S. W. 201; Vaughan v. Kansas City &c. R. Co. 34 Mo. App. 141.

[331] Blewett v. Wyandotte &c. R. Co. 72 Mo. 583.

[332] Mayfield v. St. Louis &c. R. Co. 91 Mo. 296; 3 S. W. 201; Louisville &c. R. Co. v. Montgomery, 17 Ky. L. 807; 32 S. W. 738.

[333] New Brunswick &c. R. Co. v. Armstrong, 23 N. B. 193; Union Pac. R. Co. v. Harris, 28 Kan. 206; Jackson v. St. Louis &c. R. Co. 36 Mo. App. 170; Boing v. Raleigh &c. R. Co. 87 N. Car. 360; Morrow v. Hannibal &c. R. Co. 29 Mo. App. 432. For other cases in which circumstantial evidence was held sufficient to establish certain essential elements of the plaintiff's case, see Hobbs v. St. Louis &c. R. Co. 113 Mo. App. 126; 87 S. W. 525, and authorities cited; Brown v. Missouri &c. R. Co. 104 Mo. App. 691; 78 S. W. 273; Chicago &c. R. Co. v. Brown, 33 Ind. App. 603; 71 N. E. 908; Herrell v. Chicago &c. R. Co. 114 Wis. 605; 90 N. W. 1071.

[334] Shaw v. St. Louis &c. R. Co. 110 Mo. App. 561; 85 S. W. 611; Logan v. St. Louis &c. R. Co. 111 Mo. App. 674; 86 S. W. 565; Beaudin v. Oregon &c. R. Co. 31 Mont. 238; 78 Pac. 303; Union Pac. R. v. Bullis, 6 Colo. App. 64; 39 Pac. 897. See, also, Kansas City &c. R. Co. v. Lewis (Ark.); 97 S. W. 56; Alabama &c. R. Co. v. Boyles (Miss.); 37 So. 498; Kansas City &c. R. Co. v. Walker, 71 Ark. 643; 71 S. W. 660; Southern R. Co. v. Forsythe, 23 Ky. L. 942; 64 S. W. 506; Atchison &c. R. Co. v. Adcock (Colo.); 88 Pac. 180.

[335] Chicago &c. R. Co. v. Richardson, 28 Neb. 118; 44 N. W. 103; 42 Am. & Eng. R. Cas. 592; Union Pac.

lated, is conclusive proof of negligence or contributory negligence.[336] Mere proof of an unlawful rate of speed is not sufficient to justify a finding against the defendant. Such proof may be prima facie evidence of negligence, but, in addition, there must be some showing that such unlawful speed was the cause of the accident.[337]

§ 1215. Pleading and practice.—The general rules of pleading and practice apply to actions for damages on account of injuries to animals by railway companies. The plaintiff must allege and prove all the material facts necessary to constitute a cause of action in his favor.[338] What must be alleged in the declaration or complaint of course varies according to the nature of the alleged negligence on which the action is based and also according to the provisions of the statute in force in the jurisdiction in which the action is brought. In several states it is necessary to allege and prove that the animal was injured in the county in which the action was commenced.[339] It is not always necessary, however, to prove in express terms that the point where the injury occurred is in the county where the action is brought. Courts are bound to take judicial notice of the limits of the county in which they sit and also of the prominent and general geographical features of the county, and where it appears that an animal was killed at a certain town or at a certain distance from a town, or between two towns, the proof will be sufficient if the court knows that such town is in the county or that the distance from the town or other well known point falls within the limits of the county.[340]

R. Co. v. Rasmussen, 25 Neb. 810; 41 N. W. 778; 13 Am. St. 527.

[336] Chicago &c. R. Co. v. Richardson, 28 Neb. 118; 44 N. W. 103; 42 Am. & Eng. R. Cas. 592.

[337] Toledo &c. R. Co. v. Deacon, 63 Ill. 91; Chicago &c. R. Co. v. Engle, 58 Ill. 381. See, also, San Antonio &c. R. Co. v. Clark, 26 Tex. Civ. App. 280; 62 S. W. 546.

[338] See McGhee v. Gaines, 98 Ky. 182; 32 S. W. 602.

[339] Kansas City &c. R. Co. v. Burge, 40 Kan. 734; 19 Pac. 791; 40 Am. & Eng. R. Cas. 181; Ellis v. Missouri Pac. R. Co. 83 Mo. 372; Mitchell v. Missouri Pac. R. Co. 82 Mo. 106; Backenstoe v. Wabash &c. R. Co. 86 Mo. 492. See, also, Beaudin v. Oregon &c. R. Co. 31 Mont. 238; 78 Pac. 303; Little Rock &c. R. Co. v. Jamison, 70 Ark. 387; 68 S. W. 153; Southern R. Co. v. Brock, 115 Ga. 721; 42 S. E. 65.

[340] Indianapolis &c. R. Co. v. Case, 15 Ind. 42; Louisville &c. R. Co. v. Hixon, 101 Ind. 337; Indianapolis &c. R. Co. v. Moore, 16 Ind. 43; Indianapolis &c. R. Co. v. Stephens, 28 Ind. 429; Terre Haute &c. R. Co. v. Pierce, 95 Ind. 496; 19 Am. & Eng. R. Cas. 581. See,

It has been held that a complaint need not be more specific as to the place where the animal was killed than to name the county.[341] Where there is a material variance between the allegations and the proof the plaintiff cannot recover. Thus where the plaintiff sued for a wilful and intentional injury he is not entitled to recover upon proof that the engineer of the train which struck the animals negligently failed to discover the animals or to stop the train after their discovery.[342] An immaterial variance, or slight variance between the allegations and the proof will not ordinarily be fatal to a plaintiff's case.[343] Amending a pleading so as to make it include a demand for damages for loss by fire in addition to a claim for injuries to stock has been held sufficient to constitute a misjoinder of causes of action and should not be allowed.[344] Under the codes of some of the states it is held that an action for damages on account of injuries to animals by a railway train may be assigned and suit maintained by the assignee.[345] In an action for injury to animals where there is no conflict in the evidence and it is to the effect that the company was not guilty of any actionable negligence, the court may direct a verdict for the defendant.[346] But where there is any material conflict in the evidence, the case should go to the jury.[347] Questions as to pleading and practice in cases involving injuries to animals are so different in the different states and so largely depend on local statutes

also, Chicago &c. R. Co. v. Brown, 33 Ind. App. 603; 71 N. E. 908.

[341] Jacksonville &c. R. Co. v. Wellman, 26 Fla. 344; 7 So. 845. That is, as against a demurrer.

[342] Indiana &c. R. Co. v. Overton, 117 Ind. 253; 20 N. E. 147. See, also, Clement v. Pere Marquette R. Co. 138 Mich. 57; 100 N. W. 999. An averment that it was at or near a certain place in a certain county is sufficient, and the name of the employe in charge of the locomotive need not be stated. Western R. Co. v. Stone (Ala.); 39 So. 723. See, also, Western R. &c. v. Mitchell (Ala.); 41 So. 427.

[343] See St. Louis &c. R. Co. v. Pickens (Tex.); 14 S. W. 1071; St. Louis &c. R. Co. v. Evans, 78 Tex. 369; 14 S. W. 798. See, also, Chicago &c. R. Co. v. Brown, 33 Ind. App. 603; 71 N. E. 908; Central of Ga. R. Co. v. Edmondson, 135 Ala. 336; 33 So. 480; Kinyon v. Chicago &c. R. Co. 118 Ia. 349; 96 Am. St. 382; 92 N. W. 40; Southern R. Co. v. Pogue (Ala.); 40 So. 565.

[344] Union Pac. R. Co. v. Sternberg, 13 Colo. 141; 21 Pac. 1021.

[345] Snyder v. Wabash &c. R. Co. 86 Mo. 613; 29 Am. & Eng. R. Cas. 237; Louisville &c. R. Co. v. Goodbar, 88 Ind. 213.

[346] Anderson v. Birmingham &c. R. Co. 109 Ala. 128; 19 So. 519. See, also, Chicago &c. R. Co. v. Huggins, 4 Ind. Ter. 194; 69 S. W. 845.

[347] Baird v. Georgia &c. R. Co. 19 So. 661.

that it is impossible to here discuss those questions in detail. In these cases one cannot safely rely on any general work on the subject but must consult the decisions of the jurisdiction in which the action is pending.

§ 1216. Notice and demand for damages.—In some jurisdictions it is provided by statute that an owner whose animals are injured by the trains of a railway company shall, within a specified time after the injury, serve notice upon the railway company of the injury and claim therein such damages as may have been sustained. The object of these notices is to apprise the company of the injury and the claim for damages so as to give it an opportunity to settle the claim without suit. The railway company after the service of such notice is given a certain specified time to pay the claim, and if it fails to pay the claim within such time and suit is afterward brought and the plaintiff is adjudged entitled to recover, some penalty, such as the recovery of double damages or the like may be assessed against the company. Such notices and claims for damages are ordinarily required to be verified. The object of a verification is to avoid extravagant and excessive claims.[348] The affidavit of the loss or damage may be made by any one who is acquainted with the facts,[349] and the affidavit, claim and notice may be embodied in a single writing.[350] The affidavit and notice must be served on some agent of the company.[351] The service may be made by any one,[352] and proof of service may be made by affidavit[353] or by the official return of an officer if the notice was served by an officer.[354] In Iowa a copy of the affidavit or notice may be served

[348] Mendell v. Chicago &c. R. Co. 20 Iowa, 9.

[349] Henderson v. St. Louis &c. R. Co. 36 Iowa, 387.

[350] Mendell v. Chicago &c. R. Co. 20 Iowa, 9.

[351] Welsh v. Chicago &c. R. Co. 53 Iowa, 632; 6 N. W. 13; Brandt v. Chicago &c. R. Co. 26 Iowa, 114; Alabama &c. R. Co. v. Roebuck, 76 Ala. 277; St. Louis &c. R. Co. v. Hale (Ark.); 100 S. W. 1148 (on station agent sufficient). Where the statute required that the notice be served on a "station or ticket agent," proof of service on "the agent" of the company is not sufficient. Chicago &c. R. Co. v. Totten, 1 Kan. App. 558; 42 Pac. 269. See Alabama &c. R. Co. v. Killian, 69 Ala. 277.

[352] Mundhenk v. Central Iowa &c. R. Co. 57 Iowa, 718; 11 N. W. 656.

[353] Macon &c. R. Co. v. Baber, 42 Ga. 300; Brandt v. Chicago &c. R. Co. 26 Iowa, 114.

[354] Liston v. Central Iowa &c. R. Co. 70 Iowa, 714; 29 N. W. 445.

on the company,[355] and the proof of service may be made by correct copies without requiring the company to produce the originals.[356] Care must be taken to see that a proper amount is inserted in the affidavit and claim, for where double damages are allowed the recovery will be limited to double the amount stated in the affidavit.[357] Where a bill is made out in writing stating an account in favor of the plaintiff, giving the value of the animal and the date and place of the accident and is delivered to the company within thirty days of the accident it is held to be a sufficient demand.[358] Where notice and demand is necessary to complete a cause of action such notice and demand must be alleged and proved in order to complete plaintiff's cause of action.[359] A notice that attorney's fees will be claimed is not required to be served on the company; the existence of the statute providing that attorney's fees may be recovered is sufficient notice to the company.[360]

§ 1217. Appraisement of damages.—Statutes have been enacted and are in force in some of the states providing for an appraisement of the damages done to an animal before suit is brought. Although such a statute is in force it seems that the appraisement is not a necessary prerequisite to the right of a plaintiff to maintain the action.[361] The object in having appraisement made is to procure

[355] Mendell v. Chicago &c. R. Co. 20 Iowa, 9; Van Slyke v. Chicago &c. R. Co. 80 Iowa, 620; 45 N. W. 396.

[356] Smith v. Kansas City &c. R. Co. 58 Iowa, 622; 12 N. W. 619; Brentner v. Chicago &c. R. Co. 58 Iowa, 625; 12 N. W. 615.

[357] Manwell v. Burlington &c. R. Co. 80 Iowa, 662; 45 N. W. 568; 45 Am. & Eng. R. Cas. 501.

[358] Fort Scott &c. R. Co. v. Holman, 45 Kan. 167; 25 Pac. 585.

[359] Missouri &c. R. Co. v. Morrow, 36 Kan. 495; 13 Pac. 789; 31 Am. & Eng. R. Cas. 520; Keyser v. Kansas City &c. R. Co. 56 Iowa, 440; 9 N. W. 338. In Kansas &c. R. Co. v. Ball, 19 Kan. 535, it was said: "The statute is a stringent one, and imposes new burdens upon railroad corporations; and he who would avail himself if its benefits ought to bring himself clearly within its terms. See, also, Chicago &c. R. Co. v. Totten, 1 Kan. App. 558; 42 Pac. 269.

[360] Peoria &c. R. Co. v. Duggan, 109 Ill. 537; 50 Am. R. 619; 20 Am. & Eng. R. Cas. 489.

[361] Volkman v. Chicago &c. R. Co. 5 Dak. 69; 37 N. W. 731; 35 Am. & Eng. R. Cas. 204. But see Atchison &c. R. Co. v. Lujan, 6 Colo. 338, where it was held that the failure of an owner to have his stock appraised before bringing suit was proper subject-matter for a plea in abatement. It was also held that such a defense would be waived unless presented at the earliest opportunity.

evidence of the value of the animals or the extent of the injury sustained by them. Such an appraisement is not, however, conclusive of the amount of damage done and a statute which attempts to make such an appraisement conclusive is unconstitutional and void as being in conflict with the constitution of the United States because it denies the right of trial by jury.[362] But an act which makes the valuation fixed by the appraiser only prima facie evidence of the value of the stock killed may be constitutional since the report is open to contradiction.[363]

§ 1218. Measure of damages.—Where an animal is killed by a railway company and the company is liable the measure of damages is usually the value of the animal at the time it was killed.[364] The same rule applies where the animal is so badly injured that it has to be killed.[365] The value may be shown by proving what the ani-

[362] Graves v. Northern &c. R. Co. 5 Mont. 556; 6 Pac. 16; 51 Am. R. 81; 19 Am. & Eng. R. Cas. 436; Oregon &c. R. Co. v. Smalley, 1 Wash. 206; 23 Pac. 1008; 22 Am. St. 143; 42 Am. & Eng. R. Cas. 550; Oregon &c. R. Co. v. Dacres, 1 Wash. 195; 23 Pac. 415.

[363] Illinois &c. R. Co. v. Crider, 91 Tenn. 489; 19 S. W. 618; 56 Am. & Eng. R. Cas. 157. See Maberry v. Missouri Pac. R. Co. 83 Mo. 664.

[364] Jacksonville &c. R. Co. v. Wellman, 26 Fla. 344; 7 So. 845; Burlington v. Newport News &c. R. Co. 32 W. Va. 436; 9 S. E. 876; Harris v. Panama &c. R. Co. 58 N. Y. 660; Toledo &c. R. Co. v. Arnold, 43 Ill. 418; Madison &c. R. Co. v. Herod, 10 Ind. 2; Toledo &c. R. Co. v. Johnston, 74 Ill. 83; Indianapolis &c. R. Co. v. Mustard, 34 Ind. 50; Lapine v. New Orleans &c. R. Co. 20 La. Ann. 158; Cincinnati &c. R. Co. v. Jones, 111 Ind. 259; 12 N. E. 113; Houston &c. R. Co. v. Muldrow, 54 Tex. 233; Alabama &c. R. Co. v. McAlpine, 75 Ala. 113; Jeffersonville &c. R. Co. v. Tull, 37 Ind. 341; Galveston &c. R. Co. v. Turner, 1 Tex. App. Civ. Cas. 344; Texas &c. R. Co. v. Lanham, 1 Tex. App. Civ. Cas. 99; Chicago &c. R. Co. v. Barnes, 116 Ind. 126; 18 N. E. 459; Central Branch R. Co. v. Nichols, 24 Kan. 242. It is proper to ask a plaintiff who testifies as to the value of the animal injured, what the animal cost him. Railway Co. v. Sageley, 56 Ark. 549; 20 S. W. 413. The value must be proven or there can be no recovery. St. Louis &c. R. Co. v. Pickens, 3 Tex. App. Civ. Cas. 471; 14 S. W. 1071. What an animal was worth in another state from that in which it was injured is not competent unless it be shown that there was no local market at the place of the injury. Jones v. Railway Co. 53 Ark. 27; 13 S. W. 416; 22 Am. St. 175. See next page as to deducting value of carcass where animal is killed.

[365] Gulf &c. R. Co. v. Keith, 74 Tex. 287; 11 S. W. 1117; Page v. Sumpter, 53 Wis. 652; 11 N. W. 60.

mal was worth on the market,[366] and it is competent for persons who are engaged in the stock business and are familiar with the value of animals to give their opinion as to the value of the animal for whose death a recovery is sought.[367] It is competent to prove the quality or breed of an animal as tending to show its value.[368] A judgment which is for a greater amount than the market value will be regarded as excessive and may be set aside.[369] A plaintiff should be given his choice between a remittitur or a new trial where excessive damages are awarded.[370] Where the animal killed has a value after its death, such as the value of a cow for beef or for her hide, and the owner keeps such animal or disposes of it the measure of damages is the market value less the value of the carcass of the animal.[371] Where the stock is only injured the measure of damages is the difference between the market value of the same at the time of the infliction of the injury and its value after the injury.[372] An

[366] Offers of compromise made by a plaintiff are not admissible to prove value. Georgia &c. R. Co. v. Smith, 85 Ga. 530; 11 S. E. 859.

[367] Parker v. Lake Shore &c. R. Co. 93 Mich. 607; 53 N. W. 834; Texas &c. R. Co. v. Virginia &c. R. Co. (Tex.); 7 S. W. 341; 35 Am. & Eng. R. Cas. 201; Atchison &c. R. Co. v. Gabbert, 34 Kan. 132; 8 Pac. 218.

[368] Richmond &c. R. Co. v. Chandler (Miss.); 13 So. 267; Parker v. Lake Shore &c. R. Co. 93 Mich. 607; 53 N. W. 834; East Tennessee &c. R. Co. v. Watson, 90 Ala. 41; 7 So. 813; Central Branch &c. R. Co. v. Nichols, 24 Kan. 242.

[369] Jacksonville &c. R. Co. v. Garrison, 30 Fla. 431; Horton v. St. Louis &c. R. Co. 83 Mo. 541; St. Louis &c. R. Co. v. Pickens, 3 Tex. App. Civ. Cas. 471; 14 S. W. 1071.

[370] St. Louis &c. R. Co. v. Hagan, 42 Ark. 122; Indiana &c. R. Co. v. Dooling, 42 Ill. App. 63; Georgia &c. R. Co. v. Crawley, 87 Ga. 191; 13 S. E. 508. See Chicago &c. R. Co. v. Jarrett, 59 Miss. 470.

[371] Roberts v. Richmond &c. R. Co. 88 N. Car. 560; 20 Am. & Eng. R. Cas. 473; Illinois &c. R. Co. v. Finnigan, 21 Ill. 646; Case v. St. Louis &c. R. Co. 75 Mo. 668; 13 Am. & Eng. R. Cas. 564; Jackson v. St. Louis &c. R. Co. 74 Mo. 526; Boing v. Raleigh &c. R. Co. 91 N. Car. 199; Godwin v. Wilmington &c. R. Co. 104 N. Car. 146; 10 S. E. 136; Memphis &c. R. Co. v. Hembree, 84 Ala. 182; 4 So. 392; Georgia &c. R. Co. v. Fullerton, 79 Ala. 298. The net profits only should be deducted. The owner should be paid for his time and trouble in caring for and disposing of the carcass. Dean v. Chicago &c. R. Co. 43 Wis. 305. And see, as to cost of transporting carcass, Western R. &c. v. Stone (Ala.); 39 So. 723.

[372] Fritts v. New York &c. R. Co. 62 Conn. 503; 26 Atl. 347; Atlantic &c. R. Co. v. Hudson, 62 Ga. 679; Keyes v. Minneapolis &c. R. Co. 36 Minn. 290; 30 N. W. 888.

owner may also recover as a part of the damages such sum as he may properly have expended in caring for and curing the injured animal,[373] including the value of his own services rendered. The owner is also entitled, in a proper case, to recover as a part of the damages the value of the services of the animal during the time of the injury and before the cure is effected.[374] If it appears that the injuries were wilfully or wantonly inflicted exemplary damages may sometimes be awarded in addition to the actual damages.[375] And in some jurisdiction by complying with certain statutory provisions the plaintiff may recover attorney's fees[376] or double damages.[377] The expenses incurred by the plaintiff because of the "litigious litigation" carried on by the defendant may be recovered, it seems in Georgia.[378] If the carcass of a dead animal is abandoned by the owner when he could have secured a profit from it and such profit is lost the loss must fall on the owner.[379] It is his duty to use

[373] Manwell v. Burlington &c. R. Co. 80 Iowa, 662; 45 N. W. 568; 45 Am. & Eng. R. Cas. 501; Central &c. R. Co. v. Warren, 84 Ga. 329; 10 S. E. 918; International &c. R. Co. v. Cocke, 64 Tex. 151; 23 Am. & Eng. R. Cas. 226; Gillett v. Western R. Co. 8 Allen (Mass.) 560; Keyes v. Minneapolis &c. R. Co. 36 Minn. 290; 30 N. W. 888; Finch v. Central &c. R. Co. 42 Iowa, 304; Gulf &c. R. Co. v. Keith, 74 Tex. 287; 11 S. W. 1117. But in no case can the whole damages be allowed to exceed the value of the horse. Gillett v. Western &c. R. Co. 8 Allen (Mass.) 560; Keyes v. Minneapolis &c. R. Co. 36 Minn. 290; 30 N. W. 888. The jury is to determine whether the expenditures were reasonable and made in good faith. Ellis v. Hilton, 78 Mich. 150; 43 N. W. 1048; 18 Am. St. 438; 6 L. R. A. 454.

[374] Streett v. Laumier, 34 Mo. 469; Missouri &c. R. Co. v. Hannibal &c. R. Co. 79 Mo. 478; Atlanta &c. R. Co. v. Hudson, 62 Ga. 679.

[375] Vicksburg &c. R. Co. v. Patton, 31 Miss. 156; 66 Am. Dec. 552. In Cobb v. Columbia &c. R. Co. 37 S. Car. 194; 15 S. E. 878, it was held that actual damages could not be awarded in an action for exemplary damages. Exemplary damages cannot be assessed where the animals were killed or injured through ordinary negligence. Toledo &c. R. Co. v. Arnold, 43 Ill. 418; Chicago &c. R. Co. v. Jarrett, 59 Miss. 470.

[376] Post, § 1220.

[377] Post, § 1219.

[378] Selma &c. R. Co. v. Fleming, 48 Ga. 514. Such a recovery depends, however, on special statutory enactments.

[379] Harrison v. Missouri Pac. R. Co. 88 Mo. 625; Illinois &c. R. Co. v. Finnigan, 21 Ill. 646. "The cow, as the plaintiff testified, was worth from eighteen to twenty dollars as beef, and was still his property. If she could have been sold for that sum, or was worth it to the owner, he should have made reasonable use or disposition of the cow as

every reasonable effort to render the loss as small as possible and where he negligently fails to avail himself of the value of a dead animal or fails to use reasonable effort to properly care for and cure an injured animal he must so far bear the loss.[380] Under some of the statutes interest may be included in estimating the amount of damages, the interest being calculated on the amount of the recovery from the date of the accident to the date of the judgment.[381] Interest, however, wherever allowed must be calculated only on the amount of the actual damages; it will not be allowed on the attorney's fees, on exemplary damages, nor in cases where double damages are allowed.[382]

§ 1219. Double damages.—In many jurisdictions in this country

would have proportionately diminished the damages." Roberts v. Richmond &c. R. Co. 88 N. Car. 560.

[380] Memphis &c. R. Co. v. Hembree, 84 Ala. 182; 4 So. 392; Georgia &c. R. Co. v. Fullerton, 79 Ala. 298. The owner has a reasonable time in which to dispose of a dead animal. Toledo &c. R. Co. v. Parker, 49 Ill. 385.

[381] Woodland v. Union Pac. R. Co. 27 Utah, 543; 26 Pac. 298; Houston &c. R. Co. v. Muldrow, 54 Tex. 233; Alabama &c. R. Co. v. McAlpine, 75 Ala. 113; St. Louis &c. R. Co. v. Biggs, 50 Ark. 169; 6 S. W. 724; Varco v. Chicago &c. R. Co. 30 Minn. 18; 13 N. W. 921; 11 Am. & Eng. R. Cas. 419; Lackin v. Delaware &c. R. Co. 22 Hun (N. Y.) 309; Baltimore &c. R. Co. v. Schultz, 43 Ohio St. 270; 54 Am. R. 805; 1 N. E. 324. Interest, however, will not be allowed unless the statute under which the action is brought is broad enough to cover interest. Many of the authorities hold that an action for injuries to animals is a pure case of tort, and interest should not be allowed. See Atchison &c. R. Co. v. Gabbert, 34 Kan. 132; 8 Pac. 218; Houston &c. R. Co. v. Muldrow, 50 Tex. 233; Meyer v. Atlantic &c. R. Co. 64 Mo. 542; De Steiger v. Hannibal &c. R. Co. 73 Mo. 33. Compare Mote v. Chicago &c. R. Co. 27 Iowa, 22; Dean v. Chicago &c. R. Co. 43 Wis. 305. See, also, the following cases which hold that interest cannot be allowed: Toledo &c. R. Co. v. Johnston, 74 Ill. 83; Brentner v. Chicago &c. R. Co. 68 Iowa, 530; 23 N. W. 245; 19 Am. & Eng. R. Cas. 448; Atchison &c. R. Co. v. Gabbert, 34 Kan. 132; 8 Pac. 218. While the jury may not allow interest eo nomine, they may consider the length of time elapsing since the accident and the length of time the plaintiff has been kept out of his money, and increase the damages on that account. Western &c. R. Co. v. McCauley, 68 Ga. 818.

[382] Brentner v. Chicago &c. R. Co. 68 Iowa, 530; 23 N. W. 245; 27 N. W. 605; 19 Am. & Eng. R. Cas. 448; Wade v. Missouri Pac. R. Co. 78 Mo. 362.

statutes are in force which permit a plaintiff, under certain conditions prescribed by the statute, to recover double damages in an action against a railway company for damages to stock.[383] Certain conditions in the nature of conditions precedent to the right to recover double damages are usually imposed on a plaintiff. These conditions must be complied with before a recovery of double damages can be adjudged. Thus, by the terms of some of the statutes, the plaintiff must serve notice upon the defendant of his loss and claim before bringing suit and his failure to do so will prevent his securing a recovery of double damages.[384] In Arkansas the company is required to post up at certain places lists of animals killed or injured, and on failure so to do, double damages may be awarded.[385] Statutes providing for double damages are generally held constitutional,[386] and are applicable even though the road is in the hands of and being

[383] Henderson v. Wabash &c. R. Co. 81 Mo. 605. See ante, § **1183**. Where, after notice of the loss and claim for damages, the defendant had sent a due bill to the plaintiff and the due bill was not paid within the time fixed by the statute, it was held that the acceptance of the due bill fixed the amount of damages, and double damages could not be allowed. Shaw v. Chicago &c. R. Co. 82 Iowa, 199; 47 N. W. 1004.

[384] Manwell v. Burlington &c. R. Co. 80 Iowa, 662; 45 N. W. 568; 45 Am. & Eng. R. Cas. 501; Van Slyke v. Chicago &c. R. Co. 80 Iowa, 620; 45 N. W. 396. An assignee of a claim for injuries to stock may recover double damages upon making the same showing as would entitle the original owner to double damages. Everett v. Central Iowa R. Co. 73 Iowa, 442; 35 N. W. 609.

[385] Memphis &c. R. Co. v. Carlley, 39 Ark. 246. See, also, Jones v. Americus &c. R. Co. 80 Ga. 803; 7 S. E. 117; St. Louis &c. R. Co. v. Wright, 57 Ark. 327; 21 S. W. 476; Little Rock &c. R. Co. v. Payne, 33 Ark. 816. Evidence that the company failed to post such notice is inadmissible unless the plaintiff makes a claim for double damages in his declaration. St. Louis &c. R. Co. v. Kimmons, 61 Ark. 200; 32 S. W. 505. See, however, Jolliffe v. Brown, 14 Wash. 155; 44 Pac. 149; 53 Am. St. 868, where a statute somewhat similar to the Arkansas statute was held unconstitutional.

[386] Hines v. Missouri Pac. R. Co. 86 Mo. 629; Missouri Pac. R. Co. v. Terry, 115 U. S. 523; 6 Sup. Ct. 114; Missouri Pac. Co. v. Humes, 115 U. S. 512; 6 Sup. Ct. 110; Barnett v. Atlantic R. Co. 68 Mo. 56; 30 Am. R. 773; Spealman v. Missouri Pac. R. Co. 71 Mo. 434; Humes v. Missouri Pac. R. Co. 82 Mo. 221; 52 Am. R. 369, and note; Phillips v. Missouri Pac. R. Co. 86 Mo. 540; Goodridge v. Union Pac. R. Co. 35 Fed. 35; Memphis &c. R Co. v. Horsfall, 36 Ark. 651; Mackie v. Central R. Co. 54 Iowa, 540; 6 N. W. 723. See, also, ante, § **1183**. But see ante, § **669**.

operated by a receiver.[387] Double damages are imposed upon railway companies in the nature of a penalty, because the companies fail or refuse to settle meritorious claims to which their attention has been called.[388] Where a plaintiff has a meritorious claim and he gives the company full and fair notice of his claim, and the company has opportunity to adjust the claim but fails to do so, it is but just that it should be made to suffer an additional penalty for compelling the plaintiff to resort to a court to collect his claim. The amount involved in such cases is usually small, and in many cases the expense of prosecuting a suit will be greater than the amount of actual damages which might be recovered, so that unless some penalty was imposed upon the company in favor of a plaintiff, meritorious rights would often go unredressed. Double damages are imposed in the nature of a penalty and it is held to be no objection to the validity of the law that they are given to the plaintiff. Not only the actual damages are doubled where such a recovery is adjudged, but it is held that the plaintiff is also entitled to recover double the amount of the expense to which he has been put in caring for and curing an injured animal.[389] In arriving at a judgment for double damages the usual practice, it seems, is to permit a jury to fix the amount of actual damages in their verdict, and the court to double this

[387] Central Trust Co. v. Wabash &c. R. Co. 26 Fed. 12.

[388] Manz v. St. Louis &c. R. Co. 2 West R. 472. In some of the cases it is intimated that double damages are allowed in the nature of compensation to the owner rather than as a penalty against the company. Koons v. Chicago &c. R. Co. 23 Iowa, 493.

[389] See Young v. Kansas City &c. R. Co. 52 Mo. App. 530; Johnson v. Chicago &c. R. Co. 29 Minn. 425; 13 N. W. 673. In Manwell v. Burlington &c. R. Co. 80 Iowa, 662; 45 N. W. 568, it was said: "But the damages caused to the stock are physical, and the owner is entitled to recover double the financial damages which result therefrom. In this case, the plaintiff expended time and money in proper efforts to heal the injured animals. The evidence tends to show that, without attention, one of them would have died, and the other would have become worthless. Under the theory of the instruction, single damages only are recoverable for the time and money so spent; yet they were as much the direct result of the alleged wrong of defendant as was the depreciation in the value of the horses, and the reason for allowing double damages applies as strongly to them as to the loss in value. The same rule would apply to all damages which resulted directly from the injuries in question."

amount in rendering the judgment,[390] although in some states the jury may include double damages in their verdict.[391] Where a plaintiff is required to serve notice on the defendant of his claim, and send a verified statement of the claim with such notice, in a subsequent suit the plaintiff will not be permitted to recover more than double the amount claimed in such notice and affidavit.[392]

§ 1220. Attorney's fees.—Statutes permitting an attorney's fee to be added to the actual damages in suits against railway companies for injuries to stock are in force in many of the states. There is some conflict in the decisions as to whether a statute providing for the allowance of an attorney's fee in such cases is constitutional. The weight of modern authority is to the effect that such statutes are constitutional,[393] but there are a few cases which hold them unconstitutional.[394] It is usually provided in these statutes

[390] Hollyman v. Hannibal &c. R. Co. 58 Mo. 480; Wood v. St. Louis &c. R. Co. 58 Mo. 109.

[391] See Memphis &c. R. Co. v. Carliey, 39 Ark. 246.

[392] Manwell v. Burlington &c. R. Co. 80 Iowa, 662; 45 N. W. 568; 45 Am. & Eng. R. Cas. 501.

[393] Gulf &c. R. Co. v. Ellis, 87 Tex. 19; 26 S. W. 985; 61 Am. & Eng. R. Cas. 357; Jacksonville &c. R. Co. v. Prior, 34 Fla. 271; .15 So. 760; Peoria &c. R. Co. v. Duggan, 109 Ill. 537; 50 Am. R. 619; Perkins v. St. Louis &c. R. Co. 103 Mo. 52; 15 S. W. 320; 11 L. R. A. 426, and note; Kansas Pac. R. Co. v. Mower, 16 Kan. 573; Missouri &c. R. Co. v. Shirley, 20 Kan. 660; Missouri &c. R. Co. v. Abney, 30 Kan. 41; 1 Pac. 385; 13 Am. & Eng. R. Cas. 650; Gulf &c. R. Co. v. Ellis (Tex.); 18 S. W. 723; 49 Am. & Eng. R. Cas. 509; Johnson v. Chicago &c. R. Co. 29 Minn. 425; 13 N. W. 673; Atchison &c. R. Co. v. Harper, 19 Kan. 529; Missouri Pac. R. Co. v. Humes, 115 U. S. 512; 6 Sup. Ct. 110; 22 Am. & Eng. R. Cas. 557; Central Pacific &c. R. Co. v. Nichols, 24 Kan. 242; Kansas City &c. R. Co. v. Burge, 40 Kan. 734; 19 Pac. 791; Terre Haute &c. R. Co. v. Salmon, 161 Ind. 131; 67 N. E. 918; citing text.

[394] St. Louis &c. R. Co. v. Williams, 49 Ark. 492; 5 S. W. 883; Wilder v. Chicago &c. R. Co. 70 Mich. 382; 38 N. W. 11. The Michigan case cited holds that such legislation is class legislation and void. In the case of Gulf &c. R. Co. v. Ellis, 87 Tex. 19; 26 S. W. 985; 61 Am. & Eng. Cas. 357; C. C. Appeal, 165 U. S. 150; 17 Sup. Ct. 225, the opposite view was also taken, but there was no statute requiring railroad companies to fence. See, also, Lafferty v. Chicago &c. R. Co. 71 Mich. 35; 38 N. W. 660; Schut v. Chicago &c. R. Co. 70 Mich. 433; 38 N. W. 291; Rinear v. Grand Rapids &c. R. Co. 70 Mich. 620; 38 N. W. 599; South &c. R. Co. v. Morris, 65 Ala. 193; Denver &c. R. Co. v. Outcalt, 2 Colo. App.

that as a prerequisite to the right to recover an attorney's fee the plaintiff must serve notice of his loss on the railway company and give them an opportunity to settle the claim without suit.[395] In such cases it held to be but just that the validity of a statute allowing an attorney's fee to the plaintiff should be upheld. The railway company by its refusal to settle the claim of which it has been notified virtually compels a plaintiff to resort to the courts and to incur a liability for attorney's fees and it is only fair that such fee or a reasonable fee should be paid by the company.[396] A statute providing for the allowance of an attorney's fee is held to be not unconstitutional as being class legislation.[397] Legislation of this kind is intended to compel railway companies to properly fence their tracks and is held to be a valid exercise of the police power of the state.[398]

395; 31 Pac. 177; Rio Grande &c. R. Co. v. Vaughn, 3 Colo. App. 465; Jolliffe v. Brown, 14 Wash. 155; 44 Pac. 149.

[395] Illinois Central R. Co. v. Crider, 91 Tenn. 489; 19 S. W. 618; 56 Am. & Eng. R. Cas. 157.

[396] In Illinois Central R. Co. v. Crider, 91 Tenn. 489; 19 S. W. 618, it was said: "This additional penalty is not imposed except upon the contingency that the company shall refuse settlement upon the basis of the prima facie valuation, and upon the further condition that the owner of the live stock killed or injured shall establish both the liability of the company and that the appraised value was not excessive. What the state may impose as a penalty without condition it may impose subject to condition. The measure of the damages for failure to fence, as well as the disposition of any recovery in excess of actual compensation was wholly within the legislative discretion. The additional or increase of damages, in case the company unsuccessfully contests its liability for the full amount of the appraisement, is to be measured by the reasonable expense thrown upon the plaintiff in what is there established to have been unnecessary litigation."

[397] Gulf &c. R. Co. v. Ellis, 87 Tex. 19; 26 S. W. 985; 61 Am. & Eng. R. Cas. 158; Illinois Central R. Co. v. Crider, 91 Tenn. 489; 19 S. W. 618; 56 Am. & Eng. R. Cas. 157.

[398] Perkins v. St. Louis &c. R. Co. 103 Mo. 52; 15 S. W. 320; 11 L. R. A. 426, and note. In Illinois Central R. Co. v. Crider, 91 Tenn. 489; 19 S. W. 618, it was said: "It is argued that this is the imposition of a burden upon one class of litigants in favor of another, and violates the constitutional rule which requires equality of right, privilege and exemption. These objections overlook the fact that this legislation is intended to compel railroad companies to fence in their tracks; and that the liability imposed is a consequence of failure of the offending company to adopt so necessary a means toward the protection of the property of others, and as a precaution against

§ 1220a. Expense of preventing further injuries as element of damages.—In an action for damages caused by the negligence of a railroad company to keep cattle-guards in repair, it has been held that the land-owner has the right to include in his claim for damages the value of his services, and that of his family, in driving out and herding stock to prevent further and additional damages. These expenses are regarded as the natural and direct consequence of the negligence of the railroad company.[399] On this question the supreme court of Iowa has said: "There was no error in an instruction given to the effect that a plaintiff might recover as damages, a reasonable compensation for time and labor necessarily expended in trying to save his crop from destruction. If he in the exercise of ordinary efforts to prevent the destruction of his crops because of defendant's fault, expended money or labor, he should be compensated therefor. This is one of the natural and ordinary consequences of the neglect of the appellant to comply with the statutory requirement to put in the cattle-guard, and if plaintiff is not allowed to recover for this, the law fails to compensate him fully for the injury inflicted, while it required at his hands the performance of this duty."[400]

§ 1220b. Statutory duty of railroad company to advertise or report fact of killing.—Some of the states have enacted statutes making it obligatory upon railroad companies to post or advertise the fact

accidents resulting from the presence of animals on the road, thus endangering the safety of those controlling, and then using, so dangerous a mode of conveyance. If the state may, in the exercise of its police power, compel all railroad companies to fence in their tracks, it may enforce such policy by making the offending company liable to all who sustain injury by neglecting such precaution. . . . The view here taken of this act, its objects and scope, excludes the assumption that the statute is one merely imposing a burden upon one class of litigants not borne by all others. The subject of the legislation being within the police power of the state, it is not objectionable that additional or increased damages are imposed upon such terms and subject to such contingencies as the public interest shall demand." This and the preceding section are cited in Chicago &c. R. Co. v. Irons (Ind. App.); 78 N. E. 207.

[399] St. Louis &c. R. Co. v. Sharp, 27 Kan. 134; St. Louis &c. R. Co. v. Ritz, 33 Kan. 408; 6 Pac. 533; Missouri &c. R. Co. v. Ricketts, 45 Kan. 617; 26 Pac. 50.

[400] Smith v. Chicago &c. R. Co 38 Ia. 518.

of killing stock, and these statutes subject railroad companies to penalties or render them liable in double damages for a failure to comply with this provision. In Arkansas—a state having a statute of this character—it has been held that the company was liable for double damages, although the owner had actual notice of the killing of his stock. This decision, which is certainly unusual since the whole purpose of the advertisement seems to have been accomplished, is grounded by the court on the fact that the statute does not specially except from its provisions the case of the owner who has actual notice of the killing of his stock.[401] It is held, under the Georgia statute rendering railroad companies liable in double damages for the failure of overseers or track menders to report the killing of stock, that the penalty should be recovered in separate proceedings before a justice of the peace. The action is not subject to consolidation.[402]

§ 1220c. Release of damages.—A land-owner's release of "all damages and rights of damages, actions and causes of action, which I might sustain or be entitled to by reason of anything connected with, or consequent upon, the location or construction of said work, or the repairing thereof when finally established or completed," has been held to relate solely to damages resulting from the location, construction, or repair of the road and not to refer to damages for the injury or destruction of cattle by the running of cars along the railroad.[403]

[401] Memphis &c. R. Co. v. Carlley, 39 Ark. 246.

[402] Jones v. Americus &c. R. Co. 80 Ga. 803; 7 S. E. 117.

[403] Cleveland &c. R. Co. v. Crossley, 36 Ind. 370.

CHAPTER LI.

FIRES SET BY RAILWAY COMPANIES.

§ **1221. Common-law liability.**—The rule of the ancient common law governing the use of fire was very strict, going so far as to make the person setting out fires absolutely liable to a third

person, whose property was injured thereby.[1] This strict rule of the common law seems to have been enforced in England up to 1860, but in that year its harshness was modified, and the rule laid down in a railway fire case, in an opinion by Chief Justice Cockburn, that a railway company which has been authorized by legislative authority to operate a railway and incidently to use fire in its locomotives, is not liable for damages caused by such fire unless the company has been guilty of negligence.[2] The strict and ancient rule of the common law has never been in force in this country, and the true rule of liability, independent of statutory enactments, is, that where the railway company is operating its railway by virtue of legislative authority and uses reasonable precaution in the selection and operation of its locomotives, it is not liable for fires resulting therefrom unless it be guilty of some act of negligence.[3] Negligence is the gist of the action, and unless negligence

[1] The rule was thus stated in an ancient book of the common law: "If my fire, by misfortune, burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods, and also my neighbor's house, he shall have his action on the case against me. So if the fire is caused by a servant or guest, or any person who entered the house with my consent; but otherwise if it is caused by a stranger who entered the house against my will." Rolle Abr. Action on the Case, B. title, Fire; Turberville v. Stampe, 1 Ld. Raym. 264; Pantam v. Isham, 1 Salk. 19. See, also, St. Louis &c. R. Co. v. Matthews, 165 U. S. 1; 17 Sup. Ct. 243, reviewing English authorities, and giving history of the law and statutes upon the subject in this country.

[2] Vaughan v. Taff Vale R. Co. 5 H. & N. 679. In that case it was said: "Although it may be true that if a person keep an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal or using the instrument; yet, when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence: that, if damage results from the use of such thing, independently of negligence, the party using it is not responsible."

[3] Mississippi Home Ins. Co. v. Louisville &c. R. Co. 70 Miss. 119; 12 So. 156; Atchison &c. R. Co. v. Riggs, 31 Kan. 622; 3 Pac. 305; 15 Am. & Eng. R. Cas. 531; Kansas &c. R. Co. v. Butts, 7 Kan. 308; Piggot v. Eastern &c. R. Co. 54 Eng. Com. Law, 228; McCready v. South &c. R. Co. 2 Strob. 356;

be shown there can be no recovery.[4] The distinction must be borne

Brown v. Atlanta &c. R. Co. 19 S. Car. 39; 15 Am. & Eng. R. Cas. 479; McHugh v. Chicago &c. R. Co. 41 Wis. 75; Woodson v. Milwaukee &c. R. Co. 21 Minn. 60; Illinois &c. R. Co. v. Mills, 42 Ill. 407; Frankford &c. R. Co. v. Philadelphia &c. Co. 54 Pa. St. 345; 93 Am. Dec. 708; Huyett v. Philadelphia &c. R. Co. 23 Pa. St. 373; Burroughs v. Housatonic &c. R. Co. 15 Conn. 124; 38 Am. Dec. 64, and note; Leavenworth &c. R. Co. v. Cook, 18 Kan. 261; Morris &c. R. Co. v. State, 36 N. J. L. 553; Jackson v. Chicago &c. R. Co. 31 Iowa, 176; 7 Am. R. 120; Indianapolis &c. R. Co. v. Paramore, 31 Ind. 143; Sheldon v. Hudson River R. Co. 14 N. Y. 218; 67 Am. Dec. 155; Flynn v. San Francisco &c. R. Co. 40 Cal. 14; 6 Am. R. 595, and note; White v. Chicago &c. R. Co. 1 S. Dak. 326; 47 N. W. 146; 9 L. R. A. 824, and note; Chapman v. Atlantic &c. R. Co. 37 Me. 92; Louisville &c. R. Co. v. Richardson, 66 Ind. 43; 32 Am. R. 94, and note; Toledo &c. R. Co. v. Larmon, 67 Ill. 68; Kentucky &c. R. Co. v. Barrow, 89 Ky. 638; 20 S. W. 165; Inman v. Elberton &c. R. Co. 90 Ga. 663; 16 S. E. 958; 35 Am. St. 232; Webb v. Rome &c. R. Co. 49 N. Y. 420; 10 Am. R. 389; Henderson v. Philadelphia &c. R. Co. 144 Pa. St. 461; 22 Atl. 851; 16 L. R. A. 299; 27 Am. St. R. 652; Philadelphia &c. R. Co. v. Hendrickson, 80 Pa. St. 182; 21 Am. R. 97; Meyer v. Vicksburg &c. R. Co. 41 La. Ann. 639; 6 So. 218; 17 Am. St. R. 408; Louisville &c. R. Co. v. Reese, 85 Ala. 497; 5 So. 283; 7 Am. St. R. 66; Gandy v. Chicago &c. R. Co. 30 Iowa, 420; 6 Am. R. 682; McCaig v. Erie Ry. Co. 8 Hun (N. Y.) 599; Bernard v. Richmond &c. R. Co. 85 Va. 792; 17 Am. St. 103; Norfolk &c. R. Co. v. Ferguson, 79 Va. 241; Sheeler v. Chesapeake &c. R. Co. 81 Va. 188; 59 Am. R. 654; Savannah &c. R. Co. v. Pelzer Co. 60 Fed. 39; Edrington v. Louisville &c. R. Co. 41 La. Ann. 96. In the case of Atchison &c. R. Co. v. Riggs, 31 Kan. 622, it was said: "As frequently decided in this court, railroad companies are not insurers against fire, but are liable only for negligence; and if they are guilty of no negligence then no action can be maintained against them for any accidental fire caused by the escape of fire from their engines." Mr. Bishop, in his work on Non-Contract Law, § 1027, in speaking of the liability of a railway company for fires set by its locomotives, said: "Whatever be the danger of ignition from locomotives, the charter of a railroad justifies the use of them, and frees the road from liability to individuals necessarily, or of pure accident, subjected to loss or injury therefrom."

[4] Henderson v. Philadelphia &c. R. Co. 144 Pa. St. 461; 16 L. R. A. 299; 27 Am. St. 652; Bernard v. Richmond &c. R. Co. 85 Va. 792; 8 S. E. 785; 17 Am. St. 103. "But for some reason, perhaps because the common law in reference to the liability for damages caused by accidental fires was not considered applicable to our condition as a new country, the uniform current of decisions in America has been, in the absence of statute, to the effect that negligence or misconduct is the gist of the liability of railroad

in mind between those cases in which liability exists independent of negligence as a result of statutory enactments and those in which the burden of proof is upon the defendant to disprove negligence. In those cases in which the burden of proof is upon the defendant the establishment of negligence is as essential to a right to recover as it is in cases where the burden is upon the plaintiff, and the mere fact that the burden of proof is changed must not in any way be regarded as rendering the establishment of negligence less necessary.[5] The mere fact that a locomotive emits more sparks when ascending a grade does not in itself amount to negligence on the part of the company.[6] But the company may be held guilty of negligence in unnecessarily running a heavy freight train up grade at twice the schedule rate of speed, when it is unusually dry and there is a liability to cause fire.[7] Where two fires, one of which was negligently set by the company, the other not, commingle and destroy property the company is liable.[8] What particular acts or omissions will amount to negligence on the part of the company will more fully appear in the sections following.

§ 1222. Statutory liability.—In a great many of the states the common law liability of railway companies for damages on account

companies for injuries caused by fire escaping from their engines; though the authorities are in hopeless conflict as to which party must assume the burden of proof in such cases." Union &c. R. Co. v. De Busk, 12 Colo. 294; 20 Pac. 752; 13 Am. St. 221; 3 L. R. A. 350. As to presumption of negligence where fire is set by locomotive, see McCullen v. Chicago &c. R. Co. 101 Fed. 66; 41 C. C. A. 365, and note; 49 L. R. A. 642; Piggott v. Eastern Counties R. Co. 3 C. B. 229; 54 Eng. Com. L. 228.

[5] See Union &c. R. Co. v. De Busk, 12 Colo. 294; 20 Pac. 752; 13 Am. St. 221; 3 L. R. A. 350.

[6] Frier v. President &c. Co. 86 Hun 464; 33 N. Y. S. 886.

[7] Norfolk &c. R. Co. v. Fritts, 103 Va. 687; 49 S. E. 971; 68 L. R. A. 864; 106 Am. St. 911.

[8] McClellan v. St. Paul &c. R. Co. 58 Minn. 104; 59 N. W. 978. The court said: "If two fires have been set, the origin of one or both of which can be traced to the negligence of a party or parties, either or both of these parties can be held responsible for resulting damages in case the fires mingle. All the legal consequences of being joint wrong-doers must follow, one being that each is liable to the full extent of the damages growing out of the wrongful acts; or, as it is sometimes said, where the injury is the result of two concurring causes, one party is not exempt from full liability, although another party is equally culpable."

of fires set by them has been changed by statute. Some of these statutes do not change the liability imposed by the common law but change only the manner of enforcing the liability, such as casting the burden of proof upon the defendant to show that the fire was not negligently started, or making proof of fire prima facie evidence of negligence.[9] But in addition to changing the common law method of enforcing the remedy there are a number of states which have statutes imposing an absolute liability upon railway companies for fires set by sparks from their locomotives.[10] And it has been held that a fire caused by burning grass and weeds off the right of way is within the scope of a statute making a railway company liable for fires set out in the operation of its road.[11] A statute imposing an absolute liability upon a railway company for fires set out in the operation of its road applies to the destruction of personal property as well as to the destruction of or injury to real estate.[12]

§ 1223. Constitutionality of statutes imposing liability.—Statutes imposing absolute liability for damages, on account of fires set out by railway locomotives have been attacked in many of the states where they are in force on the ground that they are unconstitutional, but in all the decisions, where the question has directly arisen, so far as we have been able to discover, they have been held constitu-

[9] The statutes to which we have just referred will be discussed in the section on burden of proof. See § 1242, post.

[10] Union &c. R. Co. v. De Busk, 12 Colo. 294; 20 Pac. 752; 3 L. R. A. 350; 13 Am. St. 221; Rodemacher v. Milwaukee &c. R. Co. 41 Iowa, 297; 20 Am. St. 592; Denver &c. R. Co. v. Henderson, 10 Colo. 1; 13 Pac. 910; Ross v. Boston &c. R. Co. 6 Allen (Mass.) 87; Thorpe v. Rutland &c. R. Co. 27 Vt. 140; 62 Am. Dec. 625; Pratt v. Atlantic &c. R. Co. 42 Me. 579; Perley v. Eastern &c. R. Co. 98 Mass. 414; 96 Am. Dec. 645, and note. See authorities cited in next section infra.

[11] Pratt v. Atlantic &c. R. Co. 42 Me. 579; Hooksett v. Concord &c. R. Co. 38 N. H. 242; Missouri Pacific Co. v. Cady, 44 Kan. 633; Hart v. Western &c. R. Co. 13 Met. (Mass.) 99; 46 Am. Dec. 719, and note.

[12] Bassett v. Conn. River &c. R. Co. 145 Mass. 129; 13 N. E. 370; 1 Am. St. 443, and note; Thatcher v. Maine Central R. Co. 85 Me. 502; 27 Atl. 519; Bean v. Atlantic &c. R. Co. 63 Me. 293; Cleveland v. Grand Trunk &c. R. Co. 42 Vt. 449; Hooksett v. Concord &c. R. Co. 38 N. H. 244; Stearns v. Atlantic &c. R. Co. 46 Me. 95. But see Clark v. Kansas City &c. R. Co. 129 Fed. 341.

tional.[13] In Iowa such a statute was attacked on the ground that it violated the obligations of a contract, the statute having been passed after the railway company was chartered, but the court held that the railroad company took its charter subject to such changes as might be made in the laws.[14] In many cases the reasoning is that, although, it would seem to be a harsh rule to impose an absolute

[13] See St. Louis &c. R. Co. v. Matthews, 165 U. S. 1; 17 Sup. Ct. 243, and authorities cited in subsequent notes to this section. Undoubtedly the weight of authority is that such statutes are constitutional, but, on principle, there is some, although not perhaps sufficient, reason for doubting the soundness of the accepted doctrine. As we have elsewhere said, the legislature, in authorizing the construction and operation of a railroad, authorizes the use of fire, and if there is a proper performance of the authorized act it is difficult to perceive how the proper performance of that act can be arbitrarily declared unlawful. Ante, § 1222, note. It is by no means easy to reconcile the doctrine of the cases which uphold the validity of such statutes with the long established principles affirmed in such cases as Clark v. Foot, 8 Johns. (N. Y.) 421; Patridge v. Scott, 3 Mees & W. 220; Acton v. Blundell, 12 Mees. & W. 324; Chadwick v. Tower, 6 Bing. (N. Cas.) 1; Radcliff's Ex. v. Brooklyn, 4 N. Y. 195; 53 Am. Dec. 357, and note; Governor &c. of Cast &c. Manufacturers v. Meredith, 4 Term. R. 794; Macy v. Indianapolis, 17 Ind. 267; Vaughan v. Taff Vale &c. R. Co. 5 Hurl. & N. 678. It may also be said that if a railroad company may be made absolutely liable for loss caused by fire, so may all corporations and all individuals that use fire, and certainly the common law of America forbids any such conclusion, for it is only for negligence in using fire that there is a liability. 2 Thomp. Neg. (2d ed.) § 2230; Bishop Non-Contract Law, § 833; 2 Sherman & R. Negligence (4th ed.) § 665; Wharton Negligence, § 865 It is going pretty far to hold that if injury results from a fire, although attributable to pure accident, the corporation or person who uses the fire is liable. There is certainly some reason in the dissent of McIver, C. J., in McCandless v. Richmond &c. R. Co. 38 S. Car. 103; 18 L. R. A. 440; 61 Am. & Eng. R. Cas. 524. Chief Justice McIver makes the distinction, which we have elsewhere noted, between the power to regulate the public duties of a corporation and the power to abridge its private rights. But as far as the decisions of the state courts can settle a question this question is settled against the view taken in the dissenting opinion to which we have just referred, although the reasoning in many cases supports that view. New Orleans &c. R. Co. v. Bourgeois, 66 Miss. 3; 5 So. 629; 14 Am. St. 534; Oregon &c. R. Co. v. Smalley, 1 Wash. 206; 22 Am. St. 143; San Mateo v. Southern Pacific R. Co. 13 Fed. 722; Zeigler v. South &c. R. Co. 58 Ala. 594.

[14] Rodemacher v. Milwaukee &c. R. Co. 41 Iowa, 297; 20 Am. R. 592. See, also, Lyman v. Boston

liability upon a railway company for damages on account of fires set out by its locomotives when the company was guilty of no negligence whatever and was engaged in a lawful business duly authorized by the laws of the land yet it would be much harsher to compel a property-owner along the line of the road to suffer loss of his property by reason of a dangerous agency set in motion by a third person when such property-owner was entirely free from fault. The constitutionality of statutes imposing absolute liability has been upheld in several cases on the ground that where loss must fall upon one of two innocent persons that person causing the loss should bear the burden of it.[15] In Colorado it was held that such a statute was

&c. Corp. 4 Cush. (Mass.) 288; Matthews v. St. Louis &c. R. Co. 121 Mo. 298; 24 S. W. 591; 25 L. R. A. 161.

[15] In Rodemacher v. Milwaukee &c. R. Co. 41 Iowa, 297; 20 Am. R. 592, it was said: "The statute simply recognizes the doctrine that the use of a locomotive engine is the employment of a dangerous force; that sometimes, notwithstanding the exercise of the highest care and diligence, it will emit sparks and cause destructive conflagrations; that when this occurs, loss must fall upon one of two innocent parties; that heretofore that loss has been borne by the owner of the property injured; hereafter it shall be borne by the owner of the property causing the injury." To the same effect are the following cases: Matthews v. St. Louis &c. R. Co. 121 Mo. 298; 24 S. W. 591; 25 L. R. A. 161, affirmed in 165 U. S. 1; 17 Sup. Ct. 243. In Campbell v. Missouri &c. R. Co. 121 Mo. 340; 25 S. W. 936; 25 L. R. A. 175; 42 Am. St. 530, the constitutionality of the Missouri statute was upheld, the court saying, inter alia: "It is unquestioned that the utmost diligence and care cannot prevent the escape of fire from locomotive engines. We have, then, this condition of things. The corporation is given the right, by the statute, to run its engine by steam power, necessitating the use of fire. Fire necessarily escapes, and is scattered along the route. The citizen owns property along the line of the road, which is exposed to fire from those engines, regardless of the care and vigilance he may exercise. Both parties are faultless, but, nevertheless, the property of the owner is consumed by fire from an engine. The property-owner has the right to own the property, and to claim protection under the law, equal at least to the right of the corporation to use fire on its engines. The loss must necessarily fall upon one or the other of these parties; which one of them shall suffer the loss, the one through whose agency the damage was caused, though in the lawful use of its own property, or the one equally innocent of wrong, and who had no agency in causing the damage? Tested by the rule of natural right and equity, there could be but one answer to the inquiry. This answer is formulated into the maxim that

but a reenactment of the ancient common law and did not violate any provisions of their constitution.[16] The first state to enact such a statute was Massachusetts, which passed it in the year 1840. That statute has been declared constitutional by the Supreme Court of Massachusetts in a number of cases,[17] and in the many states in which the same or substantially the same, statute has been enacted, it has also been held constitutional.[18] In many of the states where

every one should so use his own property as not to injure that of his neighbor."

[16] Union Pacific R. Co. v. De Busk, 12 Colo. 294; 20 Pac. 752; 13 Am. St. 221; 3 L. R. A. 350. In that case it was said: "Undoubtedly the enforcement of such acts will stimulate railroad companies to the greatest diligence to prevent fires from the operation of their roads. . . . A hundred years ago, when a man's house burned without any negligence on his part—a case of pure accident—and the fire caused the burning of his neighbor's house, it was deemed a harsh law that required him to make good his neighbor's loss as well as to bear his own; and so resort was had to act of parliament to remedy the supposed hardship. 14 Geo. III, chap. 78. The adoption of the statute in this and other states making railroad companies liable for damages by fire caused by the operation of their locomotive engines is but the re-enactment pro tanto of the ancient common law for the better protection of property exposed to such unusual dangers." Denver &c. R. Co. v. De Graff, 2 Colo. App. 42; 29 Pac. 664; Union Pac. R. Co. v. Arthur, 2 Colo. App. 159; 29 Pac. 1031; Union Pacific R. Co. v. Tracy, 19 Colo. 331; 37 Pac. 537; Rowell v. Railroad, 57 N. H. 132; 24 Am. R. 59.

[17] Ross v. Boston &c. R. Co. 6 Allen (Mass.) 87; Pierce v. Worcester &c. R. Co. 105 Mass. 199; Hart v. Western &c. R. Co. 13 Met. (Mass.) 99; 46 Am. Dec. 719, and note; Trask v. Hartford &c. R. Co. 16 Gray (Miss.), 71; Bassett v. Connecticut &c. R. Co. 145 Mass. 129; 1 Am. St. 443, and note; Sufford v. Boston &c. R. Co. 103 Mass. 583; Ingersoll v. Stockbridge &c. R. Co. 8 Allen (Mass.) 438; Perley v. Eastern &c. R. Co. 98 Mass. 414; 96 Am. Dec. 645, and note.

[18] Pratt v. Atlantic &c. R. Co. 42 Me. 579; Denver &c. R. Co. v. Henderson, 10 Colo. 1; 13 Pac. 910; Thorpe v. Rutland &c. R. Co. 27 Vt. 140; 62 Am. Dec. 625; Chapman v. Atlantic &c. R. Co. 37 Me. 92; Hooksett v. Concord Railroad, 38 N. H. 242; Brady v. Des Moines &c. R. Co. 57 Iowa, 393; Gissell v. Housatonic &c. R. Co. 54 Conn. 447; 9 Atl. 137; 1 Am. St. 138; McCandless v. Richmond &c. R. Co. 38 S. Car. 103; 18 L. R. A. 440; Thompson v. Richmond &c. R. Co. 24 S. Car. 366; Hunter v. Columbia &c. R. Co. 41 S. Car. 86; 19 S. E. 197; Lipfield v. Charlotte &c. R. Co. 41 S. Car. 285; 19 S. E. 497; Martin v. New York &c. R. Co. 62 Conn. 331; Rowell v. Railroad Co. 57 N. H. 132; 24 Am. R. 59; Lowney v. New Brunswick &c. R. Co. 78 Me. 479; Regan v. New York &c. R.

these statutes are in force, provision is made whereby a railroad company has an insurable interest in property along its line which is likely to be burned and for which it would have to pay in case of destruction by fire.[19] A statute imposing absolute liability, however, will not be so construed as to confine the liability of the company to such property as it may obtain insurance upon.[20] Such statutes as those considered in this section have also been held constitutional by the Supreme Court of the United States, and the question may now be regarded as finally settled.[21]

§ 1224. Equipment—Spark arresters—Ash-pans—Fuel.—The operation of the modern railway necessarily requires the use of steam power and that power is furnished by means of locomotives in which steam is generated. In the generation of steam it is necessary to use fire, and it is from the use of this fire that nearly all the losses occasioned by railway fires result. In the construction of locomotives it is almost impossible, or at least it has been so up to the present time, to entirely prevent the escape of fire.[22] Hundreds of

Co. 60 Conn. 124; 25 Am. St. 306; Bean v. Atlantic &c. R. Co. 63 Me. 293; Thatcher v. Maine Central R. Co. 85 Me. 502; Smith v. Boston &c. R. Co. 63 N. H. 25; Adams v. St. Louis &c. R. Co. (Mo.); 28 S. W. 496.

[19] Grissell v. Housatonic &c. R. Co. 54 Conn. 447; 9 Atl. 137; 1 Am. St. 138; 32 Am. & Eng. R. Cas. 349; Simmonds v. New York &c. R. Co. 52 Conn. 264; 52 Am. R. 587; Rowell v. Railroad, 57 N. H. 132; 24 Am. R. 59; Perley v. Eastern &c. R. Co. 98 Mass. 414; 96 Am. Dec. 645; Laird v. Railroad, 62 N. H. 254; 13 Am. St. 564; Thatcher v. Maine &c. R. Co. 85 Me. 502; 27 Atl. 519.

[20] Campbell v. Missouri &c. R. Co. 121 Mo. 340; 25 S. W. 936; 25 L. R. A. 175; 42 Am. St. 530, and note; Adams v. St. Louis &c. R. Co. (Mo.); 28 S. W. 496.

[21] St. Louis &c. R. Co. v. Mathews, 165 U. S. 1; 17 Sup. Ct. 243. See, also, Jones v. Brim, 165 U. S. 180; 17 Sup. Ct. 282, 283; Grand Trunk R. Co. v. Richardson, 91 U. S. 456, 472.

[22] There are some authorities which indicate that with the present scientific appliances it is possible to altogether prevent the escape of sparks. If this were true then suffering the escape of sparks could seldom be otherwise than negligent, and liability would be practically absolute. We do not believe that the doctrine indicated by such authorities is warranted by the history of railway fire cases and mechanical appliances to prevent escape of sparks. See Longabaugh v. Virginia &c. R. Co. 9 Nev. 271; Small v. Chicago &c. Co. 50 Iowa, 338; 6 Cent. L. J. 310; Case v. Northern &c. R. Co. 59 Barb. 644; Toledo &c. R. Co. v. Parks, 163 Ind. 592; 72 N. E. 592; St. Louis &c. R. Co. v. Dawson, 77 Ark. 434;

different devices and appliances have been invented and used but none has yet been invented which will completely render the use of fire harmless. In the selection and use of machinery and appliances to prevent the escape of fire, the duty resting upon railway companies is very clearly defined. In those states where there are statutes imposing an absolute liability on account of fires the use of a particular kind of appliance would seem to be immaterial,[23] but in those states in which no such statutes are in force, it is the duty of railway companies to adopt and use on their locomotives approved appliances in general use to prevent the escape of sparks and fire, and an omission to perform such duty generally constitutes negligence.[24]

92 S. W. 27, 28; Menominee &c. Co. v. Milwaukee &c. R. Co. 91 Wis. 447; 65 N. W. 176, supporting the text.

[23] The statute fixes the liability independent of the kind of devices and appliances used. However, the use of the best appliances will prevent fires, and lessen the number of cases of absolute liability, and it is the policy of companies to make use of such appliances as far as possible.

[24] Watt v. Nevada &c. R. Co. 23 Nev. 154; 44 Pac. 423; Gulf &c. R. Co. v. Reagan (Tex.); 32 S. W. 846; Hoff v. West Jersey &c. R. Co. 45 N. J. L. 201; 13 Am. & Eng. R. Cas. 476; Jacksonville &c. R. Co. v. Peninsular &c. Co. 27 Fla. 1; 9 So. 661; 17 L. R. A. 33, and note; Metzgar v. Chicago &c. R. Co. 76 Iowa, 387; 41 N. W. 49; 14 Am. St. 224; Spaulding v. Chicago &c. R. Co. 30 Wis. 110; 11 Am. R. 550; Meyer v. Vicksburg &c. R. Co. 41 La. Ann. 639; 6 So. 218; Burroughs v. Housatonic &c. R. Co. 15 Conn. 124; 38 Am. Dec. 64; Texas &c. Co. v. Levi, 59 Tex. 674; Pittsburgh &c. R. Co. v. Nelson, 51 Ind. 150; Longabaugh v. Virginia City &c. R. Co. 9 Nev. 271; Indianapolis &c. R. Co. v. Clem, 51 Ind. 591; Gulf &c. R. Co. v. Benson, 69 Tex. 407; Henderson v. Philadelphia &c. R. Co. 144 Pa. St. 461; 22 Atl. 851; 16 L. R. A. 299; Diamond v. Northern &c. R. Co. 6 Mont. 580; 13 Pac. 367; 29 Am. & Eng. R. Cas. 117; St. Louis &c. R. Co. v. Gilham, 39 Ill. 455; Burlington &c. R. Co. v. Westover, 4 Neb. 268; Eddy v. Lafayette, 49 Fed. 807; Missouri &c. R. Co. v. Bartlett, 81 Tex. 42; 16 S. W. 638; Anderson v. Cape Fear &c. Co. 64 N. Car. 399; Toledo &c. R. Co. v. Pindar, 53 Ill. 447; Jackson v. Chicago &c. R. Co. 31 Iowa, 176; Brighthope v. Rogers, 76 Va. 443; 8 Am. & Eng. R. Cas. 710; Fitch v. Pacific &c. R. Co. 45 Mo. 322; Erie &c. R. Co. v. Decker, 78 Pa. St. 293; Smith v. Old Colony &c. R. Co. 10 R. I. 22; Kenney v. Hannibal &c. R. Co. 63 Mo. 99; Indiana &c. R. Co. v. Paramore, 31 Ind. 143; Bass v. Chicago &c. R. Co. 28 Ill. 9; Toledo &c. R. Co. v. Corn, 71 Ill. 493; Pittsburgh &c. R. Co. v. Noel, 77 Ind. 110; Rost v. Missouri &c. R. Co. 76 Tex. 168; 12 S. W. 1131; Snyder v. Pittsburgh &c. R. Co. 11 W. Va. 14; Hannaker v. St. Paul &c. R. Co. 5 Dak. 1; 37 N. W.

But in such cases if it appear that the company had in use on the locomotive which set the fire appliances and machinery then in general use for the prevention of the escape of the sparks and coals of fire, and it is not shown to have been negligent in other particulars, there is no liability.[25] A railway company is not bound to adopt any

717; White v. Chicago &c. R. Co. 1 S. Dak. 326; 47 N. W. 146; 9 L. R. A. 824, and note; 45 Am. & Eng. R. Cas. 565. See Paris &c. R. Co. v. Nesbitt, 11 Tex. Civ. App. 608; 33 S. W. 280; Illinois Cent. R. Co. v. Bailey, 222 Ill. 480; 78 N. E. 833, 836.

[25] Union Pac. R. Co. v. Motzner, (Kan.); 43 Pac. 785; New York &c. R. Co. v. Baltz, 141 Ind. 661; 36 N. E. 414; 38 N. E. 402; Toledo &c. R. Co. v. Parks, 163 Ind. 592; 72 N. E. 592; Brown v. Atlanta &c. R. Co. 19 S. Car. 39; 13 Am. & Eng. R. Cas. 479; Inman v. Elberton &c. R. Co. 90 Ga. 663; 16 S. E. 958; 35 Am. St. 232; Missouri &c. R. Co. v. Platzer, 73 Tex. 117; 11 S. W. 160; 15 Am. St. 771; Chicago &c. R. Co. v. Smith, 11 Bradw. (Ill. App.) 348; Bevier v. Delaware &c. R. Co. 13 Hun (N. Y.) 254; Vaughan v. Taff Vale &c. R. Co. 5 H. & N. 679; Greenfield v. Chicago &c. R. Co. 83 Iowa, 270; 49 N. W. 95; Burlington &c. R. Co. v. Westover, 4 Neb. 268; Frace v. New York &c. R. Co. 143 N. Y. 182; 38 N. E. 102; St. Louis &c. R. Co. v. Lindley (Tex. Civ. App.); 29 S. W. 1101. See, also, Hagan v. Railroad Co. 86 Mich. 615; 49 N. W. 509; Lesser Cot. Co. v. St. Louis &c. R. Co. 114 Fed. 133; Atlantic Coast Line R. Co. v. Watkins, 104 Va. 154; 51 S. E. 172; St. Louis &c. R. Co. v. Coombs, 76 Ark. 132; 88 S. W. 595; Anderson v. Oregon R. Co. 45 Oreg. 211; 77 Pac. 119; Missouri &c. Ry. Co. v. Hopkins (Tex. Civ. App.); 80 S. W. 414; Bottoms v. Seaboard Air Line R. Co. 136 N. Car. 472; 49 S. E. 348. In a case in Pennsylvania it was held that where a railway company had used every precaution in the selection and use of the best appliances for the prevention of fires, it would not be liable, though it fire "every rod of country through which it run." Philadelphia &c. R. Co. v. Schultz, 93 Pa. St. 341. In the case of Texas &c. R. Co. v. Levi, 59 Tex. 674; 13 Am. & Eng. R. Cas. 464, it was said: "The evidence tends to show that, by the use of the most improved spark-arresters, it is impracticable to prevent entirely the escape of sparks from locomotives, unless the draught is so closed by the spark-arrester as to prevent the generation of steam. If such be the case, a railway company is authorized to operate its engines with such protection against injury to others by fire as can be given by the use of a high degree of care in the selection and use of such appliances as are approved by prudent and skillful persons, generally engaged in such business, and are found to be best adapted to prevent the escape of fire by which others may be injured, even though as thus operated there may be danger of injury to others from fire escaping from locomotives. The business being authorized by law, no liability can be incurred from its exer-

particular kind of appliances or machinery for the prevention of fires, and it cannot be held guilty of negligence for failing to adopt a different kind or pattern of appliances than that which it has adopted,[26] if it has exercised reasonable care in the selection and the latter is approved and in general use. This seems to us to be the true rule, for if the company has taken every precaution and secured approved machinery in general use, it has done all that lies in its power to do, consistent with the operation of its road, and there ought, on principle, to be no liability for a purely accidental fire.[27] Even where

cise, unless there be a want of care in its prosecution, even though it be attended with some risk of injury to others."

[26] The rule is thus stated in the case of Menominee &c. Co. v. Milwaukee &c. R. Co. 91 Wis. 447; 65 N. W. 176: "Considerable evidence was directed at the trial to the relative merits of short-front engines, as the one in question, and extension-front engines, in respect to their ability to prevent the escape of sparks and cinders. The evidence does not tend to show any decided superiority of one over the other, but that both kinds were of approved construction, and in very general use, with others; and the court ruled that, unless it was a well-established fact that a certain plan or device was superior to all others, no company could be held negligent in not using that device, although the court or jury might be convinced that it was the best device, and that it could not be found that the defendant was guilty of negligence in using a short instead of an extension-front engine. As applied to the evidence the ruling was clearly correct. Frace v. New York &c. R. Co. 143 N. Y. 182; 38 N. E. 102; Flinn v. New York R. Co. 142 N. Y. 11; 36 N. E. 1046."

[27] Louisville &c. R. Co. v. Reese, 85 Ala. 497; 7 Am. St. 66. In the course of the opinion in the case just cited the court said: "Railroad companies, being authorized to employ the powerful and dangerous agency of steam, are required by law to use due and reasonable care to prevent injury to the property of others; as has often been said, a high degree of care. Reasonable care, however, does not require the adoption of every new invention or contrivance which science may or can suggest, as to the utility of which men equally skilled may differ. They fulfill the measure of their duty in this respect by adopting such appliances and contrivances as are in practical use by well-regulated railroad companies, and which have been proved by experience to be adapted to the purpose. When they have discharged this duty they are not liable for accidental injuries caused by the escape of fire from their engines." See, Jennings v. Penna. Co. 93 Pa. St. 337; St. Louis &c. Ry. Co. v. Dawson 77 Ark. 434; 92 S. W. 27, 28; St. Louis &c. Ry. Co. v. Thompson &c. Co. (Ark.); 94 S. W. 707. In the recent case of St. Louis &c. R. Co. v. Hoover (Kan.); 43 Pac. 854, the court said: "A railway company in the

such machinery and appliances as are in general use are adopted, however, it is still incumbent upon the company to use care to see that they are kept in proper repair and working order and if it is negligent in that respect and loss occurs on account thereof the company will be liable.[28] Some of the authorities hold that it is the duty of the company to make regular and careful inspections of its locomotives to see that the spark arresters and ash-pans are in proper repair.[29] In the selection and adoption of appliances and machinery railway companies are only bound to use care to select such as have stood practical tests and are in general use. They are not required to adopt every new invention even though it has the highest scientific approval,[30] nor are they bound at once to discard all their machinery and appliances and adopt new and better ones which are coming into general use.[31] And it has been held in a recent case that it is not

operation of its railway, with locomotive engines, propelled by steam, generated by fire, and drawing its trains over its road in the usual and ordinary manner, is not liable for damages done by the mere unavoidable accidental escape of fire from the engine."

[28] Johnson v. Chicago &c. R. Co. 77 Iowa, 666; 42 N. W. 512; Chicago &c. R. Co. v. Quaintance, 58 Ill. 389; Toledo &c. R. Co. v. Larmon, 67 Ill. 68; Pittsburgh &c. R. Co. v. Campbell, 86 Ill. 443. See § 1225, infra.

[29] See Menominee &c. Co. v. Milwaukee &c. R. Co. 91 Wis. 447; 65 N. W. 176; Cleveland &c. R. Co. v. Hayes (Ind.), 79 N. E. 448. As to evidence on this subject, see Woodward v. Chicago &c. R. Co. 145 Fed. 577.

[30] Flinn v. New York &c. R. Co. 142 N. Y. 11; 36 N. E. 1046; Hoff v. West Jersey &c. R. Co. 45 N. J. L. 201; Steinweg v. Erie R. Co. 43 N. Y. 123; 3 Am. R. 673; Frankford &c. R. Co. v. Philadelphia &c. R. Co. 54 Pa. St. 345; 93 Am. Dec. 708; Jefferis v. Philadelphia &c. R Co. 3 Houst. (Del.) 447; Louisville &c. R. Co. v. Reese, 85 Ala. 497; 7 Am. St. 66; Hagan v. Chicago &c. R. Co. 86 Mich. 615; Lackawanna &c. R. Co. v. Doak, 52 Pa. St. 379; 91 Am. Dec. 166; Crist v. Erie &c. R. Co. 58 N. Y. 638; Cleveland &c. R. Co. v. Hayes (Ind.) 79 N. E. 448.

[31] Flinn v. New York &c. R. Co. 142 N. Y. 11; 36 N. E. 1046. In that case it was said: "A railroad company is not bound to at once introduce every new appliance which is claimed to make its engines safer or more useful. It must have time for trial and experiment. It can not arrest all of its engines at once to make changes, but must have the time requisite, taking into consideration expense, convenience, the operation of its road, and all the problems connected with such a change." See, also, St. Louis &c. Ry. Co. v. Dawson, 77 Ark. 434; 92 S. W. 27, 28 (citing text); Rosen v. Railroad Co. 83 Fed. 300; St. Louis &c. Ry. Co. v. Thompson-Halley Co. (Ark.); 94 S. W. 707. In Vallaster v. Atlantic City

a question for a jury to determine whether or not a railway company was guilty of negligence in adopting a particular kind of spark arrester on its locomotives.[32] Railway companies are not bound to use any particular kind of fuel in their locomotives or to select a kind which is least likely to emit sparks or scatter fire,[33] but it has been held that a company was guilty of negligence in using wood for fuel in a locomotive constructed for burning coal.[34]

§ 1225. Management of engines.—In the preceding section we discussed the duty of railway companies in regard to the adoption of machinery and appliances for the prevention of the escape of fires from locomotives. Here we propose to discuss the management of such locomotives after proper appliances have been adopted. While it is true that a railway company may generally escape liability in those states where an absolute liability is not imposed by statute, by showing that it had equipped its locomotives with the appliances and

R. Co. 72 N. J. L. 334; 62 Atl. 993, it is held that the company is not liable merely because the kind of spark arrester used on the locomotive in question might not be so good as a different kind used on some of its other locomotives where, after the exercise of due care and skill it had adopted both and believed both to be equally good.

[32] Frace v. New York &c. R. Co. 143 N. Y. 182; 38 N. E. 102. Where the statute prescribes the kind, it is held that there is no negligence in using that kind. West Jersey R. Co. v. Abbott, 60 N. J. L. 150; 37 Atl. 1104.

[33] Collins v. New York &c. R. Co. 5 Hun (N. Y.), 499; New Brunswick &c. R. Co. v. Robinson, 11 Sup. Ct. of Can. 689; 29 Am. & Eng. R. Cas. 132; Lackawanna &c. R. Co. v. Doak, 52 Pa. St. 379; 91 Am. Dec. 166; Baltimore &c. R. Co. v. Woodruff, 4 Md. 242; 59 Am. Dec. 72. "While any ordinary fuel may be used in a locomotive engine for the generation of steam, the exercise of this right is subject to the restriction that the latest improvement in its management in general use shall be applied to it." Henderson v. Philadelphia &c. R. Co. 144 Pa. St. 461; 22 Atl. 851; 16 L. R. A. 299; 27 Am. St. 652; 48 Am. & Eng. R. Cas. 16. See Glanz v. Chicago &c. Ry. Co. 119 Ia. 611; 93 N. W. 575.

[34] Chicago &c. R. Co. v. Quaintance, 58 Ill. 389; Chicago &c. R. Co v. Ostrander, 116 Ind. 266; 15 N. E. 227; 38 Am. & Eng. R. Cas. 346; St. Joseph &c. R. Co. v. Chase, 11 Kan. 47. In an action against a railway company for damages on account of fire alleged to have been negligently set by the company's locomotives it is improper to permit a witness to state as an inference that he knew that wood must have been used in the engines. Ireland v. Cincinnati &c. R. Co. 79 Mich. 163; 44 N. W. 426.

contrivances in general use, that rule is to be taken with some qualification, for there are cases in which the companies will be liable notwithstanding the use of proper machinery and where no question is made as to the kind of machinery used. In addition to exercising care and precaution in selecting and keeping in repair the machinery and appliances the company must not be guilty of negligence in operating that machinery, for if it so negligently operates machinery that fires result, it will be liable. Such liability has been declared and enforced in a number of cases. Thus it has been held to be negligence to use a greater amount of steam than was reasonably necessary, so as to cause an unusually large number of sparks to be emitted[35] in attempting to draw too heavy a load up a grade with a single engine, so that as a consequence a heavy shower of sparks was emitted;[36] to overload a locomotive;[37] or to run at an unlawful speed;[38] in running with the dampers of the fire box open so that coals of fire may escape;[39] to switch off a burning car from a train and leave it in such a position that plaintiff's property was fired and destroyed;[40] and in burning wood in a coal burning engine.[41] But it has been held not to be negligence to run a train up a grade without breaking into sections contrary to the usual custom, where it appears that the engine was properly and carefully managed and operated.[42] And a company is not bound to shut off the steam and

[35] Great Western &c. R. Co. v. Haworth, 39 Ill. 346.

[36] North Shore &c. R. Co. v. McWillie, 17 Can. Sup. Ct. 511.

[37] Toledo &c. R. Co. v. Pindar, 53 Ill. 447; 5 Am. R. 57.

[38] Martin v. Western &c. R. Co. 23 Wis. 437; 99 Am. Dec. 189. See, also, Norfolk &c. R. Co. v. Fritts, 103 Va. 687; 49 S. E. 971; 68 L. R. A. 864; 106 Am. St. 911. It must appear, however, that the unlawful speed was the proximate cause of the injury. Bennett v. Missouri &c. R. Co. (Texas), 32 S. W. 834; Clisby v. Mobile &c. R. Co. 78 Miss. 937; 29 So. 913.

[39] Cantlon v. Eastern &c. R. Co. 45 Minn. 481; 48 N. W. 22.

[40] St. Louis &c. R. Co. v. Hecht, 38 Ark. 357; 9 Am. & Eng. R. Cas. 222.

[41] See next section, supra. Among other decisions supporting the general rule as to liability where there is negligence in the management of the engine, see Norfolk &c. R. Co. v. Perrow, 101 Va. 345; 43 S. E. 614; Toledo &c. R. Co. v. Fenstermaker, 163 Ind. 534; 72 N. E. 561; Glanz v. Chicago &c. R. Co. 119 Ia. 611; 93 N. W. 575; Lake Erie &c. R. Co. v. McFall, 165 Ind. 574; 76 N. E. 400; Norris v. Baltimore &c. R. Co. 109 Fed. 591; Illinois &c. R. Co. v. Bailey 222 Ill. 480; 78 N. E. 833.

[42] Abbott v. Gore, 74 Wis. 509; 43 N. W. 365; 40 Am. & Eng. R. Cas. 244.

allow a locomotive to roll slowly by buildings which may be set on fire.[43] And it is not negligence per se to run an ordinary freight train at the rate of forty miles an hour.[44] Nor is it negligence to put on steam when the locomotive is standing near the plaintiff's property. Putting an unusual large amount of coal in the fire-box of a locomotive is not negligence.[45] The question as to whether or not a company was guilty of negligence in managing and operating its locomotives is, as a rule, but not always, a question of fact to be determined by a jury.[46]

§ 1226. Duty as to right of way—Combustible material.—As it is impossible to entirely prevent the escape of sparks and coals of fire from railway locomotives, and as the sparks and coals that do escape usually fall on the right of way, it is held that it is the duty of a railway company to keep its track and right of way free from dry grass, weeds and other combustible material which are liable to be ignited by sparks and coals of fire and thus communicate fire to the premises of others, and if it fails to discharge this duty and permits the fire to escape to adjoining premises, it may be found guilty of negligence.[47] The removal of dry and combustible material being quite as effectual in preventing fires as the adoption of improved machinery and appliances it would seem that companies should be held equally responsible for a negligent failure to perform one of these duties as the other.[48] In some cases it is held that per-

[43] Mississippi &c. Co. v. Louisville &c. R. Co. 70 Miss. 119; 12 So. 156; 54 Am. & Eng. R. Cas. 512.

[44] Hagen v. Chicago &c. R. Co. 86 Mich. 615; 49 Am. & Eng. R. Cas. 670; Michigan &c. R. Co. v. Anderson, 20 Mich. 244.

[45] McGibbon v. Northern Pacific R. Co. 11 Ont. Rep. 307; 25 Am. & Eng. R. Cas. 486.

[46] Philadelphia &c. R. Co. v. Yerger, 73 Pa. St. 121. For evidence held insufficient to sustain a verdict for the plaintiff, see Cyle v. Denver &c. R. Co. (Colo.) 86 Pac. 1010.

[47] Toledo &c. R. Co. v. Wand, 48 Ind. 476; Atlantic Coast Line R. Co. v. Watkins, 104 Va. 154; 51 S. E. 172; North Fork Lumber Co. v. Southern R. Co. (N. Car.); 55 S. E. 781.

[48] Black v. Aberdeen &c. R. Co. 115 N. Car. 667; 20 S. E. 713; 20 S. E. 909; Kellogg v. Chicago &c. R. Co. 26 Wis. 223; 7 Am. R. 69; Jones v. Michigan &c. R. Co. 59 Mich. 437; 25 Am. & Eng. R. Cas. 482; Smith v. London &c. R. Co. L. R. 5 C. P. 98; Indiana &c. R. Co. v. Overman, 110 Ind. 538; 10 N. E. 575; 29 Am. & Eng. R. Cas. 161; Gibbon v. Wisconsin &c. R. Co. 66 Wis. 161; 28

mitting an accumulation of dry and combustible material to remain on the track is negligence per se,[49] but the decided weight of authority

N. W. 170; Delaware &c. R. Co. v. Salmon, 39 N. J. L. 299; 23 Am. R. 214; Henry v. Southern &c. R. Co. 50 Cal. 176; Kesee v. Chicago &c. R. Co. 30 Iowa, 78; 6 Am. R. 643; Troxler v. Richmond &c. R. Co. 74 N. Car. 377; Brighthope &c. R. Co. v. Rogers, 76 Va. 443; 8 Am. & Eng. R. Cas. 710; Longabaugh v. Virginia City &c. R. Co. 9 Nev. 271; Chicago &c. R. Co. v. Goyette, 133 Ill. 21; Moore v. Chicago &c. R. Co. 78 Wis. 120; 47 N. W. 273; Martin v. New York &c. R. Co. 62 Hun (N. Y.), 181; Gram v. Northern Pacific R. Co. 1 N. Dak. 252; 46 N. W. 972; Cleveland &c. R. Co. v. Crawford, 24 Ohio St. 631; 15 Am. R. 633; Atchison &c. R. Co. v. Stanford, 12 Kan. 354; Flannigan v. Canadian Pacific R. Co. 17 Ont. R. 6; 38 Am. & Eng. R. Cas. 362; Steele v. Pacific &c. R. Co. 74 Cal. 323; 15 Pac. 851; 32 Am. & Eng. R. Cas. 333; West v. Chicago &c. R. Co. 77 Iowa, 654; 35 N. W. 479; 32 Am. & Eng. R. Cas. 339; Bowen v. St. Paul &c. R. Co. 36 Minn. 522; 32 Am. & Eng. R. Cas. 370; O'Neill v. New York &c. Co. 115 N. Y. 579; 29 N. E. 217; 5 L. R. A. 591, and note; 40 Am. & Eng. R. Cas. 240; Webb v. Rome &c. R. Co. 49 N. Y. 420; 10 Am. R. 389; Abbott v. Gore, 74 Wis. 509; 43 N. W. 365; 40 Am. & Eng. R. Cas. 244; Rost v. Missouri &c. R. Co. 76 Tex. 168; 12 S. W. 1131; Terre Haute &c. R. Co. v. Walsh, 11 Ind. App. 13; 38 N. E. 534; Texas &c. R. Co. v. Gains, (Tex. Civ. App.); 26 S. W. 433; Gulf &c. R. Co. v. Rowland, (Tex. Civ. App.); 23 S. W. 421; St. Johns &c. R. Co. v. Ransom, 33 Fla. 406; 14 So. 892; Gulf &c. R. Co. v. Reagan (Tex. Civ. App.); 32 S. W. 846; Watt v. Nevada &c. R. Co. 23 Nev. 154; 44 Pac. 423. The fact that a railway runs through a prairie country where only wild grass grows on the right of way and the lands adjacent thereto does not excuse the company from clearing its right of way of inflammable material Sibilrud v. Minneapolis &c. R. Co. 29 Minn. 58; 7 Am. & Eng. R. Cas. 99.

[49] Diamond v. Northern Pacific R. Co. 6 Mont. 580; 29 Am. & Eng. R. Cas. 117. In the case of Richmond &c. R. Co. v. Medley, 75 Va. 499; 40 Am. R. 734; 7 Am. & Eng. R. Cas. 493, the court said: "A railway company may be supplied with the best engines and most improved apparatus for preventing the emission of sparks, operated by the most skillful engineers. It may do all that science and skill can suggest in the management of its locomotives, and still it may be guilty of gross negligence in allowing the accumulation of dangerous combustible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors. Conceding that a railroad company is relieved of all responsibility for fires unavoidably caused by its locomotives, it does not follow it is exempt from liability for such as are the result of its negligence or mismanagement. The removal of inflammable matter from the line of the railroad track is quite as much a

is that it is a circumstance only from which negligence may be found.[50] The latter rule is, we think, the true one. In a number of the states statutes are in force requiring railway companies to clear their right of way of combustible material at certain stated periods.[51] A mere failure to comply with such a statute would seem to be negligence in itself.[52] In cases where fires start in combustible material permitted to accumulate on the track and right of way, the question of negligence in setting the fire is immaterial as affecting the liability, for the right to recover is based on negligence in permitting the dry and combustible materials to accumulate and the fire to escape and the establishment of negligence in that respect is sufficient to justify a recovery.[53] And evidence as to the kind of a

means of preventing fires to adjoining lands as the employment of the most approved and best constructed machinery. Many of the authorities hold that to allow the accumulation of such matter is per se negligence, which will render the company responsible if loss ensues. Others hold, and perhaps with better reason, that it is a question for the jury to determine upon all the circumstances of the case."

[50] Eddy v. Lafayette, 49 Fed. 807; Louisville &c. R. Co. v. Stevens, 87 Ind. 198; Burlington &c. R. Co. v. Westover, 4 Neb. 268; St. Louis &c. R. Co. v. Richardson, 47 Kan. 517; 28 Pac. 183; Cantlon v. Eastern &c. R. Co. 45 Minn. 481; Gulf &c. R. Co. v. Benson, 69 Tex. 407; 5 S. W. 822; 5 Am. St. 74; 32 Am & Eng. R. Cas. 330; Union &c. R. Co. v. Gilland, 4 Wyo. 953; 34 Pac. 953. In the case of San Antonio &c. R. Co. v. Long, 4 Tex. Civ. App. 497; 23 S. W. 499, it was held that it was not negligence, as matter of law, to permit weeds and grass to grow on a railroad right of way. See, also, Gram v. Northern Pac. R. Co. 1 N. Dak. 252; 46 N. W. 972; Bass v. Chicago &c. R. Co. 28 Ill. 9; 81 Am. Dec. 254; Taylor v. Pennsylvania &c. R. Co. 174 Pa. St. 171; 34 Atl. 457.

[51] Diamond v. Northern Pacific R. Co. 6 Mont. 580; 13 Pac. 367; 29 Am. & Eng. R. Cas. 117; Spencer v. Montana &c. R. Co. 11 Mont. 164; 27 Pac. 681; Lake Erie &c. R. Co. v. Middlecoff, 150 Ill. 27; 37 N. E. 660; Union &c. R. Co. v. Gilland, 4 Wyo. 953; 34 Pac. 953.

[52] Diamond v. Northern Pacific R. Co. 6 Mont. 580; 13 Pac. 367; 29 Am. & Eng. R. Cas. 117. Compare Chicago &c. R. Co. v. Goyette, 133 Ill. 21; 24 N. E. 549; 43 Am. & Eng. R. Cas. 36; Texas &c. R. Co. v. Medaris, 64 Tex. 92.

[53] Indiana &c. R. Co. v. Overman, 110 Ind. 538; 10 N. E. 575; 29 Am. & Eng. R. Cas. 161; Pittsburgh &c. R. Co. v. Hixon, 79 Ind. 111; Brinkman v. Bender, 92 Ind. 234; Wabash &c. R. Co. v. Johnson, 96 Ind. 40; Louisville &c. R. Co. v. Nitsche, 126 Ind. 229; 26 N. E. 51; 9 L. R. A. 750, and note; 22 Am. St. 582; Terre Haute &c. R. Co. v. Walsh, 11 Ind. App. 13; 38 N. E. 534. See, also, Williams v. Atlantic Coast Line R. Co. 140 N. Car. 623; 53 S. E. 448; Richmond &c. R. Co.

spark arrester or ash pans in use would seem to be incompetent where the action is based on negligence in permitting an accumulation of dry and combustible material,[54] but such evidence may be competent where the question is whether the locomotive caused the fire. The company is liable if it negligently permits combustibles to accumulate and the fire to escape no matter how perfect its spark arresters may be,[55] and ordinarily it is its duty in clearing off the right of way to do so for the entire width.[56] It has been held that it is not sufficient for a company to cut grass or weeds on its right of way, and that they must be removed or destroyed.[57] Whether or not a company is guilty of negligence in suffering combustible material to accumulate on its right of way is usually a question of fact for the jury.[58]

§ 1227. Fires set to burn off right of way.—It frequently becomes necessary for a railway company, in order to effectively remove rubbish and inflammable material from its right of way, to resort to the use of fire. In such cases where the fire is set by voluntary act of the company, for a lawful purpose, there can ordinarily be no negligence in starting the fire. But after such a fire has once been started it is incumbent upon the company to guard the fire and see that it does not escape and do damage to others and if the company negligently allows such a fire to escape and the property of third persons is destroyed it will be liable to such persons for

v. Medley, 75 Va. 499; 40 Am. R. 734; New York &c. R. Co. v. Thomas, 92 Va. 606; 24 S. E. 264.

[54] Indiana &c. R. Co. v. Overman, 110 Ind. 538; 10 N. E. 575.

[55] Galveston &c. R. Co. v. Polk, (Tex.); 28 S. W. 353. See, also, Missouri Pacific R. Co. v. Platzer, 73 Tex. 117; 11 S. W. 160; 15 Am. St. 771; Watt v. Nevada Cent. R. Co. 23 Nev. 154; 62 Am. St. 772, and note.

[56] Blue v. Aberdeen &c. R. Co. 117 N. Car. 644; 23 S. E. 275.

[57] Smith v. London &c. R. Co. L. R. 5 C. P. 98.

[58] Rockford &c. R. Co. v. Rogers, 62 Ill. 346; Gibbons v. Wisconsin &c. R. Co. 58 Wis. 335; Bass v. Chicago &c. R. Co. 28 Ill. 9; 81 Am. Dec. 254, and note; Texas &c. R. Co. v. Medaris, 64 Tex. 92; Illinois &c. R. Co. v. Frazier, 47 Ill. 505; White v. Missouri Pacific R. Co. 31 Kan. 280; 1 Pac. 611; Jones v. Michigan &c. R. Co. 59 Mich. 437; Perry v. Southern Pac. R. Co. 50 Cal. 578; Van Ostrand v. Wallkill &c. R. Co. 19 N. Y. S. 621; Wines v. Rio Grande &c. R. Co. 9 Utah, 228; 33 Pac. 1042; Richmond &c. R. Co. v. Medley, 75 Va. 499; 40 Am. R. 734.

damages.[59] The action is predicated on negligence in setting the fire or permitting it to escape, not in permitting combustibles to accumulate.[60] And there may be cases, owing to the dangerous nature of the places and surroundings where such a fire is set out, in which the action of the company will be regarded as a direct and positive wrong.[61] Evidence is admissible, as tending to show negligence in setting a fire at an improper time, that the plaintiff cautioned defendant's section foreman at the time he set the fires and objected to his setting them because everything was dry and likely to be destroyed.[62] Cases in which fires have been set to consume inflammable material and rubbish stand on a different

[59] Indiana &c. R. Co. v. Overman, 110 Ind. 538; 10 N. E. 575; 29 Am. & Eng. R. Cas. 161; B. E. Brister Co. v. Illinois Cent. R. Co. 84 Miss. 33; 36 So. 142.

[60] Gulf &c. R. Co. v. Cusenberry, 86 Tex. 525; 26 S. W. 43.

[61] Gordon v. Grand Rapids &c. R. Co. 103 Mich. 379; 61 N. W. 549; Cole v. Lake Shore &c. R. Co. 105 Mich. 549; 63 N. W. 647; Louisville &c. R. Co. v. Nitsche, 126 Ind. 229; 26 N. E. 51; 9 L. R. A. 750, and note; 22 Am. St. 582; 45 Am. & Eng. R. Cas. 532. In the last case the company, in a very dry time, started a fire on a bed of peat over which its right of way extended for the purpose of clearing off rubbish and combustible material. The fire caught in the peat and spread to and destroyed the property of adjacent owners. The court, in discussing the liability of the company for starting a fire under such circumstances, said: "An essential and ruling element of this case is this: It was a tortious act to set out the fire which caused the plaintiff's injury. It was something more than culpable negligence to start a fire on a bed of turf or peat, in a season of great drought, when for weeks no rain had fallen, and the ground was parched and dry. The act of the defendant in setting out a fire at such a place and under such conditions was a positive wrong, for the law forbids that one person should put the property of another in jeopardy by such an act. In degree only is there difference between such a case as this and one in which a person kindles a fire near a train of gunpowder, leading to a magazine filled with explosive substances. In essence the case is the same as that of one who builds a fire upon materials that will ignite and continue burning in a place where all surrounding materials are of the same combustible character. . . . A railroad company has a right to remove combustible material from its right of way, and, ordinarily, it may not be negligence to employ fire for that purpose; but, where the conditions are such as to put in great peril adjacent property, fire can not be rightfully used for such a purpose." See, also, Grant v. Omaha &c. R. Co. 91 Mo. App. 312; 68 S. W. 91.

[62] Gordon v. Grand Rapids &c. R. Co. 103 Mich. 379; 61 N. W. 549.

basis from those which are started because of defective apparatus and appliances, negligent operation or the presence of combustible material on the right of way. In those cases the ground of liability is usually the failure of the company to perform some antecedent duty imposed upon it to prevent the starting of fires, while in the cases mentioned here the recovery is based upon the failure of the company to properly guard a fire lawfully started.[63] Thus it has been held that a company is not liable under a statute imposing absolute liability on account of railway fires for damages caused by a fire lawfully started to burn off a right of way.[64] And where a fire set out to destroy rubbish escapes through pure accident the company is not liable.[65] The burden is on the plaintiff to show negligence and of this the fire itself may be no proof.[66] But where a fire was negligently set on the right of way and escaped and did damage, the company is liable although its employes did all in their power to check its spread.[67] Where a fire which has been set on

[63] In Williams v. Atlantic Coast Line R. Co. 140 N. Car. 623; 53 S. E. 448, 449, it is said: "(1) If fire escapes from an engine in proper condition, having a proper spark arrester, and operated in a careful way by a skillful and competent engineer, and the fire catches off the right of way, the defendant is not liable, for there is no negligence. (2) If fire escapes from an engine in proper condition, with a proper spark arrester, and operated in a careful way by a skillful and competent engineer but the fire catches on the right of way, which is in a foul and negligent condition, and thence spreads to the plaintiff's premises, the defendant is liable. Moore v. Wilmington R. Co. 124 N. C. 341; 32 S. E. 710; Phillips v. Durham &c. R. Co. 138 N. C. 12; 50 S. E. 462. (3) If fire escapes from a defective engine, or defective spark arrester, or from a good engine not operated in a careful way, or not by a skillful engineer, and the fire catches off the right of way, the defendant is liable. In the first case there would be, as above stated, no negligence. In the second case the foul right of way would be negligence, and in the third the defective engine or spark arrester, or the negligent operation of a good engine, would be negligence."

[64] Atchison &c. R. Co. v. Dennis, 38 Kan. 424; 17 Pac. 153; 32 Am. & Eng. R. Cas. 318.

[65] Atchison &c. R. Co. v. Dennis, 38 Kan. 424; 17 Pac. 153; 32 Am. & Eng. R. Cas. 318. See, also, Lake Erie &c. R. Co. v. Naron, 18 Ind. App. 193; 47 N. E. 691.

[66] Mattoon v. Fremont &c. R. Co. 6 S. Dak. 301; 60 N. W. 69.

[67] Chicago &c. R. Co. v. Ludding-ton, 10 Ind. App. 636; 38 N. E. 342. See, also, Mobile &c. R. Co. v. Stinson, 74 Miss. 453; 21 So. 14, 522; Austin v. Chicago &c. R. Co. 93 Wis. 496; 67 N. W. 1129.

the right of way by the employes of the company escapes therefrom and destroys the property of a third person it has been held that the railway company will not be liable unless the act of the employes in setting the fire was within the scope of their duties as such employes.[68]

§ 1228. Extra precautions—Dry seasons—Wind—Exposed property.—It is a well settled principle of law that care in doing any particular act must be exercised in proportion to the danger attending the act. Where the doing of any particular act is attended with unusual hazards unusual care must be exercised, but where the performance of the act is attended with only ordinary hazards less care is required.[69] These principles have frequently been applied in railway fire cases for the circumstances under which fires are likely to occur and do occur are so varied that different measures of care must necessarily be employed. In proportion as the hazards increase there should be a corresponding increase in the care exercised. Thus it has been held that it is the duty of a railway company in an unusually dry season, where all inflammable material is like tinder and liable to be set on fire from the smallest spark, to exercise greater precaution and care than in wet or damp seasons.[70] So, where the wind is blowing directly from an engine

[68] Where the employes built a fire on the right of way for the purpose of warming their dinners and the fire escaped the company was not liable. Morier v. St. Paul &c. R. Co. 31 Minn. 351; 47 Am. R. 793. But compare St. Louis &c. R. Co. v. Ford, 65 Ark. 96; 45 S. W. 55.

[69] Frankford &c. R. Co. v. Philadelphia &c. R. Co. 54 Pa. St. 345; 93 Am. Dec. 708; Chicago &c. R. Co. v. Quaintance, 58 Ill. 389; Smith v. Old Colony &c. R. Co. 10 R. I. 22; Pierce v. Worcester &c. R. Co. 105 Mass. 199; Salmon v. Delaware &c. R. Co. 38 N. J. L. 5; 20 Am. R. 356; Jones v. Festiniog &c. R. Co. L. R. 3 Q. B. 733. See, also, Gracy v. Atlantic Coast R. Co. (Fla.) 42 So. 903, 909 (citing text.)

[70] Chicago &c. R. Co. v. Smith, 6 Ind. App. 262; 33 N. E. 244; Marvin v. Chicago &c. R. Co. 79 Wis. 140; 44 S. W. 1123; 11 L. R. A. 506, and note; 45 Am. & Eng. R. Cas. 540; Louisville &c. R. Co. v. Fort, 112 Tenn. 432; 80 S. W. 429; Pittsburgh &c. R. Co. v. Noel, 77 Ind. 110; 7 Am. & Eng. R. Cas. 524. In the last case cited the court said: "If a locomotive were running under a fall of drenching rain, it would hardly be deemed negligent if trackmen were not employed to extinguish emitted sparks or coals, however large and numerous; but if, on the contrary, every thing was dry, and combustible material was accumulated upon or along the track, extra precautions would be

toward wooden buildings or combustible materials greater precautions may be required,[71] and when a train is running through a densely populated country or village where there are a great number of buildings exposed to the hazards of fire greater precaution must generally be exercised than is necessary when running through the country where there are no buildings.[72] Unusual precautions are not required, such as the purchase and use of tarpaulins or other similar means to protect against fires.[73]

§ 1229. Fires started on right of way.—A different rule of liability prevails in reference to fires started on the right of way from that which prevails where fires are started off the right of way. Where a fire is started on the right of way, whether negligently or otherwise, no right of action can, ordinarily accrue to any one so long as that fire does not escape and do damage to the property of others. Since no liability can arise unless the fire escapes from the right of way it necessarily follows that a right

required, which it would be negligence to omit; and the fact that the company used machinery properly constructed and kept in repair with a view to prevent the spread of fire, and the engines were operated with care and skill to the same end would not, in the case supposed in the instruction, necessarily constitute the proper precaution and care, unless, indeed, as demonstrated by experience, the machinery was so far perfect as that further safe-guards or watchfulness were unnecessary. . . . Due care is a relative term, to be measured according to the circumstances of each case, and extra dangers call for extra precautions." See, also, Norfolk &c. R. Co. v. Fritts, 103 Va. 687; 49 S. E. 971; 68 L. R. A. 864, 866; 106 Am. St. 911, 914 (quoting text).

[71] Kellogg v. Milwaukee &c. R. Co. 5 Dill. (U. S.) 537; Fed. Cases No. 7664, 1 Cent. L. Jr. 278; 94 U. S. 469; Fero v. Buffalo &c. R. Co. 22 N. Y. 209; 78 Am. Dec. 178, and note; Johnson v. Chicago &c. R. Co. 31 Minn. 57; 16 N. W. 488; 13 Am. & Eng. R. Cas. 460.

[72] Fero v. Buffalo &c. R. Co. 22 N. Y. 209; 78 Am. Dec. 178, and note; Kendrick v. Towle, 60 Mich. 363; 1 Am. St. 526; 25 Am. & Eng. R. Cas. 473. See, also, generally as to circumstances to be considered, Riley v. Chicago &c. R. Co. 71 Mich. 425; 74 N. W. 171; Jones v. Michigan Cent. R. Co. 59 Mich. 437; 26 N. W. 622; 25 Am. & Eng. R. Cas. 482; Longabaugh v. Virginia City &c. R. Co. 9 Nev. 271; Louisville &c. R. Co. v. Fort, 112 Tenn. 432; 80 S. W. 429; Continental Ins. Co. v. Chicago &c. Ry. Co. 97 Minn. 467; 107 N. W. 548, 554 (citing text to effect that care must be in proportion to danger).

[73] Tribette v. Illinois Central R. Co. 71 Miss. 212; 13 So. 899.

of recovery must be founded on the negligence in suffering the fire to escape.[74] And a company may be found negligent in suffering a fire to escape whether it stands by and allows fire to escape without making any effort to check it or whether it negligently allows the conditions to become and remain such as that any fire which may be ignited may readily escape, for, as we have heretofore said, a company may be guilty of negligence in allowing combustibles to accumulate by means of which the spread of fires is easily caused.[75] In cases of fires started on the right of way there is some conflict in the authorities as to whether it is material whether or not the fire was negligently started. Some of the authorities seem to hold that it must be shown that the fire was negligently started, but we do not regard these authorities as stating the correct rule. The correct rule, and that held and declared by the weight of authority, is that if the company negligently suffers the fire to escape it is liable independently of how the fire was started, whether negligently or otherwise. And under this rule it is immaterial what kind of locomotives and appliances were used or the manner in which they were operated.[76]

§ 1230. Fires started off the right of way.—Where fires are started off the right of way a recovery is based on some wrong of the company in failing to adopt and use proper machinery and appliances or in unskillfully and negligently managing the same.

[74] Mattoon v. Fremont &c. R. Co. 6 S. Dak. 301; 60 N. W. 69; Pittsburgh &c. R. Co. v. Hixon, 110 Ind. 225; 11 N. E. 285; Indianapolis &c. R. Co. v. Paramore, 31 Ind. 143; Pittsburgh &c. R. Co. v. Hixon, 79 Ind. 111; Pittsburgh &c. R. Co. v. Jones, 86 Ind. 496; 44 Am. R. 334, and note; Louisville &c. R. Co. v. Ehlert, 87 Ind. 339; Brinkman v. Bender, 92 Ind. 234; Indiana &c. R. Co. v. McBroom, 91 Ind. 111; Indiana &c. R. Co. v. Adamson, 90 Ind. 60. Mere proof that the fire started on the right of way is not sufficient to render the company liable. Taylor v. Pennsylvania &c. R. Co. 174 Pa. St. 171; 34 Atl. 457. "The railroad corporation is bound at all hazards to prevent the fire from spreading, and is liable inevitably unless there is contributory negligence on the part of the land-owner." Simmonds v. New York &c. R. Co. 52 Conn. 264; 52 Am. R. 587; 23 Am. & Eng. R. Cas. 369.

[75] Ante, § 1226.

[76] International &c. R. Co. v. McIver (Tex. Civ. App.); 40 S. W. 438 (citing text); McMahon v. Hetchhetchy &c. Ry. Co. 2 Cal. App. 400; 84 Pac. 350. See, also, Ball v. Grand Trunk R. Co. 16 U. C. C. P. 252.

The gist of the action is negligence in some one of the respects which we have just mentioned. In these cases the condition of the right of way is immaterial for it is in no way connected with the fire. It is well to bear in mind the different theories on which a recovery is based dependent upon the point where the fire started, for, as we shall hereafter show, different pleadings are required and different proof must be made.[77]

§ 1231. Remote fires.—By remote fires is meant those fires which do not catch directly from sparks from an engine or from a fire spreading from the right of way to the property of an owner, but those fires which are originally set by the company and after spreading to the land of one owner spread from his land to the land of others. It is somewhat difficult to give an accurate definition of a remote fire, but for the purposes of this discussion we shall consider remote fires to be those fires which are communicated to the lands of second and subsequent owners after having passed over the lands of the first owner to whose lands they were directly communicated by the railway company. This is hardly a just distinction, for where a fire starts and continues to burn, it is one fire, no matter how long it burns or how far it extends, and it can only be said to be remote because it extends over the lands of owners remote from the point where the fire started. The material question in the case of remote fires is whether or not the injury was proximately caused by the negligence of the company.[78] If the company was guilty of negligence in the first instance in starting the fire and it burns in one continuous fire without the intervention of any independent agency and destroys the property of a land-owner, no matter how remote or how great a number of various land-owner's lands the fire may have been passed over before reaching the particular land-owner's property, the company will be liable for the resulting damages.[79] This doctrine is founded on the theory

[77] Infra, §§ 1240, 1241. This section is quoted and applied in Lake Erie &c. R. Co. v. McFall, 165 Ind. 574; 76 N. E. 400, 401, 402, 403.

[78] Milwaukee &c. R. Co. v. Kellogg, 94 U. S. 469; Clemens v. Hannibal &c. R. Co. 53 Mo. 366; 14 Am. R. 460.

[79] Louisville &c. R. Co. v. Nitsche, 126 Ind. 229; 9 L. R. A. 750, and note; 22 Am. St. 582; Milwaukee &c. R. Co. v. Kellogg, 94 U. S. 469; Webb v. Rome &c. R. Co. 49 N. Y. 420; 10 Am. R. 389; Pollett v. Long, 56 N. Y. 200; O'Neill v. New York &c. R. Co. 115 N. Y. 579; 22 N. E. 217; 5 L. R. A. 591, and note; 40 Am. & Eng. R. Cas. 240;

that he who sets a dangerous agency in motion must be responsible for all the damages which proximately result from his act. It is as old as the famous "squib case," and has been enforced in the courts of this country time and time again.[80] If, however, some independent cause intervenes, so as to break the line of causation between the defendant's original act and the property destroyed, there is no liability.[81] Where a heavy wind arose after the starting

Burlington &c. R. Co. v. Westover, 4 Neb. 268; Butcher v. Vaca &c. R. Co. 67 Cal. 518; 23 Am. & Eng. R. Cas. 356; Annapolis &c. R. Co. v. Gantt, 39 Md. 115; Atchison &c. R. Co. v. Stanford, 12 Kan. 354; 15 Am. R. 362; Poeppers v. Missouri &c. R. Co. 67 Mo. 715; 29 Am. R. 518; Atchison &c. R. Co. v. Bales, 16 Kan. 252; Toledo &c. R. Co. v. Maxfield, 72 Ill. 95; Pennsylvania &c. R. Co. v. Hope, 80 Pa. St. 373; 21 Am. R. 100; Troxler v. Richmond &c. R. Co. 74 N. Car. 377; Hoyt v. Jeffers, 30 Mich. 181; Kuhn v. Jewett, 32 N. J. Eq. 647; Baltimore &c. R. Co. v. Shipley, 39 Md. 251; Smith v. London &c. R. Co. L. R. 5 C. P. 98; St. Joseph &c. R. Co. v. Chase, 11 Kan. 47; Doggett v. Richmond &c. R. Co. 78 N. Car. 305; Fent v. Toledo &c. R. Co. 59 Ill. 349; 14 Am. R. 13; Perley v. Eastern &c. R. Co. 98 Mass. 414; 96 Am. Dec. 645, and note; Delaware &c. R. Co. v. Salmon, 39 N. J. L. 299; 23 Am. R. 214; Hooksett v. Concord &c. R. Co. 38 N. H. 242; Louisville &c. R. Co. v. Krinning, 87 Ind. 351; Chicago &c. R. Co. v. Pennell, 110 Ill. 435; Chicago &c. R. Co. v. McBride, 54 Kan. 172; 37 Pac. 978; Yankton Fire Ins. Co. v. Freemont &c. R. Co. 7 S. Dak. 428; 64 N. W. 514. In the case of Kellogg v. Chicago &c. R. Co. 26 Wis. 223; 7 Am. R. 69, the court said; "It would be strange, indeed, if the liability of a party for the negligent destruction of property by fire were to depend upon the fact whether he set fire at once to the property or whether he set fire to some other combustible material at some distance from it, but communicating with it and which it was apparent at the time would inevitably lead to its destruction." See, also St. Louis &c. R. Co. v. League, 71 Kans. 79; 80 Pac. 46; Phillips v. Durham &c. R. Co. 138 N. Car. 12; 50 S. E. 462; St. Louis &c. R. Co. v. Gentry (Tex. Civ. App.); 80 S. W. 844.

[80] Louisville &c. R. Co. v. Nitsche, 126 Ind. 229; 26 N. E. 51; 9 L. R. A. 750, and note; 22 Am. St. 582; Billman v. Indianapolis &c. R. Co. 76 Ind. 166; 40 Am. R. 250; Lake Shore &c. R. Co. v. Rosenzweig, 113 Pa. St. 519; 6 Atl. 545; Terre Haute &c. R. Co. v. Buck, 96 Ind. 346; 49 Am. R. 168; Denver &c. R. Co. v. Harris, 122 U. S. 597; 7 Sup. Ct. 1286; Louisville &c. R. Co. v. Falvey, 104 Ind. 409; Louisville &c. R. Co. v. Snyder, 117 Ind. 435; 3 L. R. A. 434; 10 Am. St. 60, and note; Ohio &c. R. Co. v. Hecht, 115 Ind. 443.

[81] Doggett v. Richmond &c. R. Co. 78 N. Car. 305; Brown v. Atlanta &c. R. Co. 19 S. Car. 39. See, also, Stone v. Boston &c. R. Co. 171 Mass. 536; 51 N. E. 1; 41 L. R. A. 794. Where fire was communicated

of a fire and wafted a brand of fire across an intervening ridge of land and set fire to and destroyed the plaintiff's property, it was held that such wind was an independent intervening cause and there could be no recovery.[82] But, ordinarily, the wind cannot be regarded as an independent intervening cause, for it is a natural cause reasonably to be expected, and a defendant who wrongfully sets out a fire should be charged with knowledge that such a natural cause is likely to intervene and be held responsible for damages done thereby.[83] It matters not how far a fire may spread, for, if the line of causation remains unbroken the defendant will be liable.[84] The time intervening between the starting of the fire and the destruction of the property sued for is immaterial so long as the line of causation is unbroken.[85] Whether a fire, however remote,

to the property of A and from that of A to that of B, it was held that the negligence of A in leaving combustible material on his premises which caused the spread of the fire was not an independent cause. Johnson v. Chicago &c. R. Co. 31 Minn. 57; 13 Am. & Eng. R. Cas. 460; St. Louis &c. Ry. Co. v. Gentry (Tex. Civ. App.); 80 S. W. 844. But compare Hoffman v. King, 160 N. Y. 618; 55 N. E. 401; 73 Am. St. 715; 46 L. R. A. 672; Palmer v. Missouri Pac. R. Co. 76 Mo. 217. See, also, Wiley v. West Jersey R. Co. 44 N. J. L. 247; Beckham v. Seaboard &c. R. Co. (Ga.) 56 S. E. 638.

[82] Marvin v. Chicago &c. R. Co. 79 Wis. 140; 47 N. W. 1123; 11 L. R. A. 506, and note; 45 Am. & Eng. R. Cas. 540. See, also, Toledo &c. R. Co. v. Muthersbaugh, 71 Ill. 572; Kansas Pac. R. Co. v. Butts, 7 Kans. 308; Pennsylvania R. Co. v. Whitlock, 99 Ind. 16. (See Louisville &c. R. Co. v. Nitsche, 126 Ind. 229; 26 N. E. 51; 9 L. R. A. 750, and note; 22 Am. St. 582, where this case is limited).

[83] Tyler v. Ricamore, 87 Va. 466; 12 S. E. 799; Poeppers v. Missouri &c. R. Co. 67 Mo. 715; 29 Am. R. 518; Safford v. Boston &c. R. Co. 103 Mass. 583; Kenney v. Hannibal &c. R. Co. 70 Mo. 252; Hightower v. Missouri &c. R. Co. 67 Mo. 726; Northern Pacific R. Co. v. Lewis, 51 Fed. 658; Chicago &c. R. Co. v Lesh, 158 Ind. 423; 63 N. E. 794; Smith v. London &c. R. Co. L. R. 5 C. P. 98; 6 C. P. 14; Manhattan &c. R. Co. v. Keeler, 32 Kans. 163; 4 Pac. 143.

[84] Poeppers v. Missouri &c. R. Co. 67 Mo. 715; 29 Am. R. 518 (a fire spreading eight miles); Smith v. London &c. R. Co. L. R. 5 C. P. 98 (200 yards); Perley v. Eastern &c. R. Co. 98 Mass. 414; 96 Am. Dec. 645, and note; Safford v. Boston &c. R. Co. 103 Mass. 583; Burlington &c. R. Co. v. Westover, 4 Neb. 268 (one-half mile); Atchison &c. R. Co. v. Stanford, 12 Kan. 354; 15 Am. R. 362; Atchison &c. R. Co. v. Bales, 16 Kan. 252 (three or four miles); Hightower v. Missouri &c. R. Co. 67 Mo. 726; Chicago &c. R. Co. v. McBride, 54 Kan. 172; 37 Pac. 978 (ten miles).

[85] Louisville &c. R. Co. v. Nitsche,

occurs as a proximate result of the defendant's original wrong is usually a question to be determined by the jury.[86] And where there was an agreement between the land-owner to whose lands fire had been communicated and the railway company setting out the fire to let the fire burn and consume rubbish on the land-owner's property and the fire was afterwards communicated to a bed of peat under a third owner's land and damage was done, it was held that the company was liable to such third owner and that it was proper for the jury to determine whether or not the original fire was the proximate cause of the injury.[87]

§ 1232. **Duty to extinguish fires.**—Where it is possible for a company to easily extinguish a fire negligently started it would be to the best interests of the company to do so, for it could thus lessen the amount of damages for which it would be liable. Most of the authorities, however, in defining the duty of a company to extinguish a fire do not make any distinction between fires negligently started and those not negligently started. Some of the authorities hold that where there was no negligence in starting a fire no duty rests upon the employes of the company as servants of the company to extinguish the fire, and that the company is not liable for a failure to extinguish such a fire.[88] But the weight of

126 Ind. 229; 26 N. E. 51; 9 L. R. A. 750, and note; 22 Am. St. 582; Missouri &c. R. Co. v. Cullers, 81 Tex. 382; 13 L. R. A. 542.

[86] Henry v. Southern Pacific R. Co. 50 Cal. 176; Clemens v. Hannibal &c. R. Co. 53 Mo. 366; 14 Am. R. 460; Louisville &c. R. Co. v. Krinning, 87 Ind. 351; Pennsylvania &c. R. Co. v. Hope, 80 Pa. St. 373; 21 Am. R. 100; Lehigh &c. R. Co. v. McKeen, 90 Pa. St. 122; 35 Am. R. 644, and note; Perry v. Southern Pacific R. Co. 50 Cal. 578; Atchison &c. R. Co. v. Bales, 16 Kan. 252; Gram v. Northern &c. R. Co. 1 N. Dak. 252; 46 N. W. 972; Kellogg v. Milwaukee &c. R. Co. 5 Dill. (U. S.) 537; Perry v. Southern Pacific R. Co. 50 Cal. 578; Frace v. New York &c. R. Co. 143 N. Y. 182; 38 N. E. 102. And where a fire was supposed to be extinguished but afterward broke out and destroyed property it was held to be a question for the jury as to whether the original fire was the proximate cause of the second fire. Green Ridge &c. R. Co. v. Brinkman, 64 Md. 52; 20 Atl. 1024; 54 Am. R. 755.

[87] Simmonds v. New York &c. R. Co. 52 Conn. 264; 52 Am. R. 587; 23 Am. & Eng. R. Cas. 369.

[88] Kenney v. Hannibal &c. R. Co. 70 Mo. 252. The court in this case held that the only duty resting on the servants of the company was

authority seems rather opposed to the doctrine just stated and it is held that where a fire has been set by the sparks from locomotives of the company and the company's servants discover the fire in time to extinguish it and to prevent it from doing damages to others and negligently fail to do so, the company will be liable.[89] Where a fire is discovered by the employes operating a train the duty of such employes to the passengers would seem to be superior to their duty to stop and extinguish the fire and thus delay the train, but where a fire is discovered by trackmen walking or traveling along the track they should use care to extinguish it. There

the mere social duty one citizen owes to another to prevent the destruction of his property if reasonably within his power. The court, in the course of its opinion, said: "We hold that the company is not liable because its servants neglected to extinguish the fire when they discovered it on the track. It was their duty, as citizens, to prevent the spread of the fire, and by their conduct on the occasion, as testified to by one of their number, they manifested a cruel and brutal indisposition to the destruction of a neighbor's property, but it was not in the line of their employment, and was no more their duty to extinguish the fire than that of any other person who saw it. If not liable for the origin of the fire, he, (the master), can not be held so on account of the neglect of the social duty by persons in his employment, in a business not connected with the origin of the fire, or imposing any duty to extinguish it in addition to that which every citizen owes to society." See, also, Baltimore &c. R. Co. v. Shipley, 39 Md. 251. Train crew need not stop and leave train to extinguish the fire. Galveston &c. Ry. Co. v. Chiltein, 31 Tex. Civ. App. 40; 71 S. W. 294; Mississippi &c. Ins. Co. v. Louisville &c. R. Co. 70 Miss. 119; 12 So. 156. But compare Rolke v. Chicago &c. R. Co. 26 Wis. 537.

[89] Missouri &c. R. Co. v. Platzer, 73 Tex. 117; 11 S. W. 160; 15 Am. St. 771, and note; 38 Am. & Eng. R. Cas. 366; Erd v. Chicago &c. R. Co. 41 Wis. 65; Rolke v. Chicago &c. R. Co. 26 Wis. 537; Bass v. Chicago &c. R. Co. 28 Ill. 1; Eighme v. Rome &c. R. Co. 10 N. Y. S. 600; Kenney v. Hannibal &c. R. Co. 63 Mo. 99; Moore v. Chicago &c. R. Co. 78 Wis. 120; 47 N. W. 273. "Without entering into any discussion as to the degree of care a railway company should use to extinguish a fire caused by the escape of fire from its engine, we feel constrained to hold that the duty does exist, however careful such companies may be to prevent the escape of fire from their engines, and that the failure to exercise such care as the circumstances of a given case would indicate to a prudent man was proper will give a cause of action for an injury resulting." Missouri &c. R. Co. v. Platzer, 73 Tex. 117; 11 S. W. 160; 15 Am. St. 771, and note.

is no obligation resting upon a company to employ men to patrol its track to extinguish fires which may be started by passing trains.[90]

§ 1233. Ownership of property burned.—The question of the ownership of property destroyed by a railway fire is very material in an action brought to recover its value. The general rule is that a plaintiff must show a general or special property right in himself or there can be no recovery.[91] Where a plaintiff is the absolute owner of the property there can ordinarily be no question as to his right to maintain the action, and where his right to the property is of a special or qualified nature, proof of that right is generally sufficient to entitle him to recover, at least to the extent of his interest in the property.[92] Where a person entered upon lands of a third person under a parol license from one who claimed to be the agent of the owner, and cut and put up hay which was afterwards destroyed by a railway company, it was held that such person had a right of action against the company where there was evidence tending to show that the owner ratified the act of his alleged agent, although there was no proof that such agent had authority to act for the land-owner.[93] And where buildings are erected on the land of another with a right of removal such buildings are personal property and the owner may maintain an action for their destruction by fire.[94] A lessee is entitled to recover for buildings burned, where, by the terms of his lease, he is bound to replace the buildings if they are destroyed,[95] and the railway company cannot question the

[90] Baltimore &c. R. Co. v. Shipley, 38 Md. 251; Indianapolis &c. R. Co. v. Paramore, 31 Ind. 143.

[91] St. Louis &c. R. Co. v. Hecht, 38 Ark. 357; 9 Am. & Eng. R. Cas. 222; Reed v. Chicago &c. R. Co. 71 Wis. 399; 37 N. W. 225; 32 Am. & Eng. R. Cas. 320; McNarra v. Chicago &c. Railway Co. 41 Wis. 69.

[92] Possession has been held to be prima facie proof of title. Spurlock v. Port Townsend &c. R. Co. 13 Wash. 29; 42 Pa. 520.

[93] Bullis v. Chicago &c. R. Co. 76 Iowa, 680; 39 N. W. 245. See Northern &c. R. Co. v. Lewis, 51 Fed. 658. Where a plaintiff owned grass which was burned, under a verbal lease from the owner of the land, the defendant can not set up the invalidity of such lease. International &c. R. Co. v. Searight, 8 Tex. Civ. App. 593; 28 S. W. 39.

[94] Laird v. Connecticut &c. R. Co. 62 N. H. 254; 13 Am. St. 564; 43 Am. & Eng. R. Cas. 63.

[95] Anthony v. New York &c. R. Co. 162 Mass. 60; 37 N. E. 780. And for nursery stock planted with an understanding that it may be removed. Adams v. St. Louis &c. R. Co.

lessee's title merely because he failed to have his lease recorded as required by statute.[96] Where it was shown that a widow had resided for eighteen years with her husband and for four years after his death on the land where the property was destroyed, and that the possession had been undisturbed during all of that time and that she claimed the property as a homestead, it was held that she was entitled to maintain an action for her benefit for the destruction by a railway fire of grass, rails and logs on the land.[97] It has also been held that where a plaintiff is in possession of lands under claim of title, he can recover for hay destroyed without proving title to the land.[98] If the property destroyed is covered by an insurance policy, with a right of subrogation to the rights of the insured against a wrong-doer in favor of the insurance company on payment of the policy, it is held that the owner may bring an action for his benefit and that of the insurance company,[99] or that the insurance company may maintain an action itself on being subrogated,[100] or that both may maintain a joint action.[101]

§ 1234. Effect of insurance on property burned.—In a great many cases where property is destroyed by fires set out by railway companies the owner carries insurance policies and is thus enabled

(Mo.); 28 S. W. 496; 29 S. W. 836.

[96] Anthony v. New York &c. R. Co. 162 Mass. 60; 37 N. E. 780.

[97] International &c. R. Co. v. Timmermann, 61 Tex. 660.

[98] McClellan v. St. Paul &c. R. Co. 58 Minn. 104; 59 N. W. 978. Adverse possession of real estate for the statutory period is sufficient title to enable a holder to maintain an action for injury thereto by a railway fire. Busby v. Florida &c. R. Co. 45 S. Car. 312; 23 S. E. 50.

[99] Regan v. New York &c. R. Co. 60 Conn. 124; 22 Atl. 503; 25 Am. St. 306; Hart v. Western &c. R. Co. 13 Met. 99; 46 Am. Dec. 719; Swarthout v. Chicago &c. R. Co. 49 Wis. 625; 6 N. W. 314.

[100] Phenix Ins. Co. v. Pennsylvania R. Co. 134 Ind. 215; 33 N. E. 970; 20 L. R. A. 405; Connecticut &c. R. Co. v. Erie &c. Co. 73 N. Y. 399; 29 Am. R. 171; Hart v. Western &c. R. Co. 13 Met. (Mass.) 99; 46 Am. Dec. 719, and note; Peoria Ins. Co. v. Frost, 37 Ill. 333; Connecticut &c. R. Co. v. New York &c. R. Co. 25 Conn. 265; 65 Am. Dec. 571; Rockingham &c. Co. v. Bosher, 39 Me. 253; 63 Am. Dec. 618.

[101] Home &c. Co. v. Oregon &c. R. Co. 20 Ore. 569; 26 Pac. 857; 23 Am. St. R. 151; Swarthout v. Chicago &c. R. Co. 49 Wis. 625. See, also, Lake Erie &c. R. Co. v. Falk, 62 Ohio St. 297; 56 N. E. 1020.

to collect the amount of his damage from the insurance company independent of any right of action or recovery against the railway company. In cases of this kind, where the owner has received the amount of his loss from the insurance company, it would seem at first blush that he ought not to be allowed to recover again for the same loss from the railway company, and railway companies in a number of cases have set up this defense. But as the right of action against the railway is based on a wrong done by the company, it is held that it is liable for that wrong, and the mere fact that the owner has collected insurance money from an insurance company will not excuse the railway company, and is a matter in which it has no concern.[102] And the railway company is not entitled to a reduction of damages against it to an amount equal to the amount which the plaintiff has recovered from an insurance company.[103] Where an insurance company has been compelled to pay for property which has been tortiously destroyed by a railroad company, it is usually subrogated to the rights which the owner has against such wrong doer, and may thus make good its loss.[104]

[102] Hagen v. Chicago &c. R. Co. 86 Mich. 615; 49 Am. & Eng. R. Cas. 670; Peter v. Chicago &c. R. Co. 121 Mich. 324; 80 N. W. 295; 46 L. R. A. 224; 80 Am. St. 500; Cunningham v. Evansville &c. R Co. 102 Ind. 478; 52 Am. R. 683; 23 Am. & Eng. R. Cas. 347; Carpenter v. Eastern &c. R. Co. 71 N. Y. 574; Weber v. Morris &c. R. Co. 35 N. J. L. 409; 10 Am. R. 253; Rockingham &c. Co. v. Bosher, 39 Me. 253; 63 Am. Dec. 618; Connecticut &c. R. Co. v. New York &c. R. Co. 25 Conn. 265; 65 Am. Dec. 571; Missouri &c. Ry. Co. v. Jordan (Tex. Civ. App.); 82 S. W. 791 (evidence as to whether insured inadmissible); Ohio &c. R. Co. v. Dickerson, 59 Ind. 317. But a Maine statute limits the recovery to the difference between the amount of the loss and the amount of insurance. Leavitt v. Canadian Pac. R. Co. 90 Me. 153; 37 Atl. 886; 38 L. R. A. 152. So in Massachusetts, Lyons v. Boston &c. R. Co. 181 Mass. 551; 64 N. E. 404, the railroad company was liable only under the statute, however, in the cases cited, and there was no actual negligence on its part to cause a common law liability. See Dyer v. Maine Cent. R. Co. 99 Me. 195; 58 Atl. 994; 67 L. R. A. 416.

[103] Regan v. New York &c. R. Co. 60 Conn. 124; 22 Atl. 503; 25 Am. St. 306

[104] Rockingham &c. Co. v. Bosher, 39 Me. 253; 63 Am. Dec. 618; First &c. Society v. Goodrich Transportation Co. 7 Fed. 257; Aetna &c. Co. v. Hannibal &c. R. Co. 3 Dill. (U. S.) 1; St. Louis &c. R. Co. v. Fire Association, 55 Ark. 163; 18 S. W. 43. Where there is a subrogation, however, the insurance company can take no greater rights against the

In this way the owner is prevented from securing to himself a double recovery, the insurance company may recover money which it was compelled to pay through the wrong of the railway company, and the railway company is made to answer for the consequences of its negligence. Where there has been a subrogation the suit may be brought by the owner for himself and as trustee for the insurance company, by the insurance company, or by both.[105] Under a code which provides that a suit shall be brought by "the real party in interest," it has been held that an insurance company which has paid a loss and been subrogated to the rights of the insured against a wrong-doer causing the loss, may maintain suit in its own name.[106] And it seems that where an insurance com-

wrong-doer than were possessed by the party to whose rights it is subrogated. Thus, where the insured erected property on a railway company's ground and executed a contract that the railway company should not be liable for fires unless negligently set, although there was a statute in force in the state where the property was situated and where the contract was made, imposing absolute liability for fires independent of negligence, and the property was afterward burned and an insurance company paid the loss, taking a subrogation to the rights of the insured against the wrong-doer, it was held that the insurance company was bound by the stipulation of the insured that the company should be liable only in case of negligence. Savannah &c. R. Co. v. Pelzer &c. Co. 60 Fed. 39. The doctrine is thus stated in the case of Phenix Ins. Co. v. Penn. R. Co. 134 Ind. 215; 33 N. E. 970; 20 L. R. A. 405: "Where property is injured or destroyed by the negligent act or omission of one, under such circumstances as that the owner of the property may maintain an action for such injury or destruction, it seems to be well settled, both upon principle and authority, that if such property is insured, such insurer, if compelled by reason of the policy to make good the loss to the owner, may be subrogated to the rights of the owner, and recover from the wrong-doer a sufficient sum to reimburse him for such outlay, provided the damages are sufficient to equal the sum paid." See where insurance company has paid owner and the railroad thereafter knowingly pays him, Connecticut &c. Ins. Co. v. Erie R. Co. 73 N. Y. 399; 29 Am. R. 171, but compare Cunningham v. Evansville &c. R Co. 102 Ind. 478; 52 Am. R. 683.

[105] Ante, § 1233. But it is held in Allen v. Chicago &c. R. Co. 94 Wis. 93; 68 N. W. 873, that the owner can not maintain the suit after the insurer has paid him as the insurer is subrogated to his rights and is the real party in interest. But compare Lake Erie &c. R. Co. v. Falk, 62 Ohio St. 297; 56 N. E. 1020.

[106] Connecticut &c. Ins. Co. v. Erie &c. R. Co. 73 N. Y. 399; 29 Am. R. 171. See Phenix Ins. Co. v. Penn. R. Co. 134 Ind. 215; 33 N. E. 970; 20 L. R. A. 405; Home &c.

pany has paid the insured the amount of the policy and the insured brings a suit against the railway company and recovers, the amount of the recovery will be held in trust for the benefit of the insurance company to the extent of the amount it paid the insured.[107] If a railroad company, with knowledge that an insurance company has paid the owner of property destroyed the amount of his loss, settles with such owner and takes a release in full from him, it has been held that the insurance company may nevertheless maintain an action against it in the name of the insured, without his consent, to compel it to repay the amount paid under the policy, and the release of the insured to the railway company is no defense to such an action.[108] The insurance company, on account of its contract, being compelled to pay the money because the property was destroyed by the act of a wrong-doer, can not, it is held, by any act of the insured be deprived of its right to a reimbursement. As we have heretofore said, in those states where the statutes are in force imposing an absolute liability upon railway companies for fires set out by them, provision is usually made by which a railway company has an insurable interest in property along its line and may thus protect itself by securing policies on property which is exposed to hazards and likely to be destroyed.[109] But such a provision in such a statute is held to apply only to cases in which the company is liable under the statute and not to cases in which the liability of the company is caused by its own negligence.[110]

§ 1235. Property on right of way.—It frequently happens that property of third persons located on the railway right of way is destroyed by fire communicated by locomotives of the company using the right of way. In cases of this kind the railway company is some-

Co. v. Oregon &c. R. Co. 20 Ore. 569; 26 Pac. 857; 23 Am. St. 151. Even where the objection might be made that there is a defect of parties plaintiff because the insured was not joined the objection will be waived after the insurance company has denied that plaintiff has any claim against it. Chicago &c. R. Co. v. German Ins. Co. (Kan.); 42 Pac. 594.

[107] Home &c. Co. v. Oregon &c. R. Co. 20 Ore. 569; 26 Pac. 857; 23 Am. St. 151.

[108] Monmouth &c. Ins. Co. v. Hutchinson &c. R. Co. 21 N. J. Eq. 108.

[109] Ante, § 1223.

[110] Dyer v. Maine Cent. R. Co. 99 Me. 195; 58 Atl. 994; 67 L. R. A. 416.

times liable and sometimes not. The test of liability is generally whether or not the property situated on the right of way was rightfully there. If the owner of the property is a mere trespasser and placed his property on the right of way without the consent of the railway company he cannot recover for its negligent destruction by fire. Thus, where a person intruded upon the right of way of a railway company and without the consent of the company erected a building which was afterwards destroyed by fire it was held that there could be no recovery.[111] But where a company expressly licenses third persons to erect buildings within the limits of its right of way it will be liable if it negligently destroys such buildings by fire,[112] unless it has contracted with the persons erecting such buildings that it shall not be liable if the buildings are destroyed by fire.[113] And where property is placed on the right of way of a railway company by agreement, either express or implied, and such property is negligently destroyed by fire, the company will be liable.[114] The complaint

[111] Philadelphia &c. R. Co. v. Yeiser, 8 Pa. St. 366.

[112] Ingersoll v. Stockbridge &c. R. Co. 8 Allen (Mass.), 438; Grand Trunk &c. Co. v. Richardson, 91 U. S. 454; Sherman v. Maine Central &c. R. Co. 86 Me. 422; 30 Atl. 69.

[113] Griswold v. Illinois Central R. Co. 90 Iowa, 265; 57 N. W. 843; 9 Am. R. & Corp. R. (Lewis) 697. Where there is a statute in force making a company liable for fires set by its engines independent of negligence, the company may contract with a party who places buildings on its land that it shall be liable only for fires negligently set, and such contract will be upheld notwithstanding the statute. Savannah &c. R. Co. v. Pelzer &c. Co. 60 Fed. 39. Where a railway company by contract permits buildings to be erected upon its right of way it is not against public policy to provide in such contract that the company shall not be liable if the property on its right of way is destroyed by fire. Such a contract does not relieve the company of liability for failure to perform any duty resting upon it, for no duty rests upon a company to allow buildings to be erected upon its right of way unless that duty be imposed by contract. Hartford Fire Ins. Co. v. Chicago &c. R. Co. 70 Fed. 201; 30 L. R. A. 193.

[114] Pittsburgh &c. R. Co. v. Nelson, 51 Ind. 150; Indianapolis &c. R. Co. v. Paramore, 31 Ind. 143; Pennsylvania &c. R. Co. v. Gallentine, 77 Ind. 322; 7 Am. & Eng. R. Cas. 517; Pittsburgh &c. R. Co. v. Noel, 77 Ind. 110; Texas &c. R. Co. v. Ross (Tex. Civ. App.); 27 S. W. 728. A case in Pennsylvania seems to declare a contrary doctrine. In that case, Post v. Buffalo &c. R. Co. 108 Pa. St. 585, a railway company built a side-track near one of its stations to facilitate the shipment of freight. A lumberman who was in the habit of using this side-track placed a large quan-

in an action to recover damages for property burned on the right of way, must show that the property was rightfully there.[115]

§ 1236. Contracts limiting liability.—As a general rule contracts which seek to confer upon a person immunity from the consequences of his negligent acts to be performed in the future are held void as being contrary to public policy. But there is some conflict among the authorities and decisions may be found which support a contrary doctrine. Contracts by which railway companies attempt to excuse themselves from liability on account of negligence in the carriage of freight are almost, if not quite universally held void. And in the case of the carriage of gratuitous passengers a provision in the pass on which the person rides that there shall be no liability on account of negligence of the company has been held void although there are cases maintaining a different rule. So far as we have been able to discover there are few cases in the books involving the validity of a contract exempting a railway from liability for negligently firing and burning property. We think that, ordinarily, a contract exempting the company from liability for negligently burning property not on the right of way or premises of the company would be held void.[116] But where property is placed on a railway right of way by virtue of a contract in which the owner releases the rail-

tity of lumber near it, partly on the right of way and partly on ground hired for the purpose, in order that the lumber would be ready for shipment as required and as cars were furnished by the railway company, and also for storing and seasoning the lumber. The lumber caught fire in an extremely dry season from sparks from a locomotive running on the road, and was destroyed. In a suit by the owner against the company for damages, a non-suit was entered in the court below, and on appeal it was held that, conceding the loss to have been caused by the negligence of the railway company, the plaintiff having placed his lumber in a dangerous place with full knowledge of the danger, was guilty of contributory negligence, and the nonsuit was properly entered. See, also, Missouri &c. R. Co. v. Bartlett, 69 Tex. 79; 6 S. W. 549. But these cases are both distinguished, and in part disapproved, in Cincinnati &c. R. Co. v. South Fork Coal Co. 139 Fed. 528, which approves the rule stated in the text and applies it where lumber was placed on the right of way with the consent of the company.

[115] Pennsylvania R. Co. v. Gallentine, 77 Ind. 322; 7 Am. & Eng. R. Cas. 517. But see Southern R. Co. v. Wilson, 138 Ala. 510; 35 So. 561.

[116] Griswold v. Illinois Cent. R. Co. 90 Iowa, 265; 57 N. W. 843; 9 Am. R. & Corp. R. (Lewis) 697.

road company from any and all liability on account of fire, and the property is afterwards destroyed by fire negligently set by the railway company the contract is not void and the company cannot be held liable.[117] In such a case, as placing the property upon the

[117] Griswold v. Illinois Cent. R. Co. 90 Iowa, 265; 57 N. W. 843; 9 Am. R. & Corp. R. (Lewis) 697. In this case the plaintiff, by contract, erected on the railway company's right of way the buildings which were destroyed by fire. In the contract was a clause in which the plaintiff as lessee agreed "to protect and save harmless said lessor from all liability for damage by fire, which, in the operation of the lessor's railroad, or from cars or engines lawfully on its tracks, may accidentally or negligently be communicated to any property or structure on said described premises." The property having been burned by the negligence of the railway company, suit was brought to recover its value. The court, in disposing of the objection that the contract was against public policy, and in upholding its validity, said: "The defendant owed no duty to the public to exercise care with respect to its own buildings situate on its right of way, and incurred no liability for their negligent burning, unless the fire spread beyond its own premises. The operation of a railway increases the danger from fire to the property of the people situated on their own premises, where they have the right to have it, and hence, the provision of section 1289, making the corporation operating the railway absolutely liable for all damages by fire that is negligently set out or caused by the operation of the railway. As to such property the railway company owes to the public the duty of care, and the public has an interest in the performance of that duty. Therefore, a contract that exempts from that duty to the public would be injurious to the public interests, and against public policy. The plaintiff Griswold's buildings were not on his own premises, nor where he had a right to have them, independent of the defendant; they were upon the right of way, where they could only be by its permission. In granting the permission, and in placing the buildings there, both parties knew of the increased hazard of the location from fire communicated either through accident or negligence in the operation of the road. . . . The plaintiff had an insurable interest, and could, as he did, protect himself, in part, at least, against loss by either accident or negligence. The defendant had no insurable interest, and could only protect itself from the hazard by refusing consent, or by contracting for indemnity, as it did. . . It seems to us now quite clear that as these buildings could only be placed upon the defendant's right of way by its consent, and were so placed upon the premises, and on the conditions expressed in the lease, the public had no interest therein, under said section 1289, or otherwise, that would be injured by giving effect to the agreement in question. Much as the public may have been interested in the

right of way is an inconvenience to the company and increases the danger of fire and as the contract in no way relieves the company from any public duty, it is not against public policy, and is therefore binding upon the parties.[118] Where, however a railway company leased its property and there was a provision in the lease that the company would not be liable to the lessee for property of his destroyed by fire, it was held that the company was liable to an employe of the lessee who had property which was stored on the leased premises destroyed by fire through the negligence of the railway company.[119]

convenience of such a place of business, it had no interest as to who should carry the hazard incident to that property being located as it was. The fact that the defendant acquired this right of way, in the exercise of the right of eminent domain, did not preclude it from granting or withholding permission to the plaintiff to build thereon, nor the parties from contracting as to which should bear the hazard incident to the location." See, also, Savannah &c. Co. v. Pelzer &c. Co. 60 Fed. 39. To the same effect are Hartford Fire Ins. Co. v. Chicago &c. R. Co. 70 Fed. 201; 30 L. R. A. 193, and Stephens v. Southern Pac. Co. 109 Cal. 86; 41 Pac. 783.

[118] Janes Quirk Milling Co. v. Minneapolis &c. R. Co. (Minn.); 107 N. W. 742, 744, cited text and the following authorities: Griswold v. Illinois Cent. R. Co. 90 Iowa, 265; 57 N. W. 843; 24 L. R. A. 647; Stephens v. Southern Pac. R. Co. 109 Cal. 86; 41 Pac. 783; 29 L. R. A. 751; 50 Am. St. Rep. 17; King v. Southern Pac. R. Co. 109 Cal. 96; 41 Pac. 786; 29 L. R. A. 755; Kansas City &c. R. Co. v. Blaker, 68 Kan. 244; 75 Pac. 71; 64 L. R. A. 81; 1 Am. & Eng. Ann. Cas. 883; Greenwich Ins. Co. v. Louisville &c. R. Co. 23 Ky. L. 2014; 66 S. W. 411; 67 S. W. 16; 56 L. R. A. 477; 99 Am. St. 313; Wabash R. Co. v. Ordelheide, 172 Mo. 436; 72 S. W. 684; Hartford Fire Ins. Co. v. Chicago &c. R. Co. 70 Fed. 201; 17 C. C. A. 62; 30 L. R. A. 193; same case on appeal, 175 U. S. 91; 20 Sup. Ct. 33; 44 L. Ed. 84; Baltimore &c. R. Co. v. Voigt, 176 U. S. 498; 20 Sup. Ct. 385; 44 L. Ed. 560; Osgood v. Central Vermont R. Co. 77 Vt. 334; 60 Atl. 137; 70 L. R. A. 930; Richmond v. New York &c. R. Co. 26 R. I. 225; 58 Atl. 767; Woodward v. Ft. Worth &c. R. Co. 35 Tex. Civ. App. 14; 79 S. W. 896; Mann. v. Pere Marquette R. Co. 135 Mich. 210; 97 N. W. 721; Quimby v. Boston &c. R. Co. 150 Mass. 365; 23 N. E. 205; 5 L. R. A. 846; Russell v. Pittsburg &c. R. Co. 157 Ind. 305; 61 N. E. 678; 55 L. R. A. 253; 87 Am. St. 214; Texas &c. R. Co. v. Watson, 190 U. S. 287, 293; 23 Sup. Ct. 681; 47 L. Ed. 1057. See, also, Blitch v. Central of Ga. R. Co. 122 Ga. 711; 50 S. E. 945; Mansfield &c. Ins. Co. v. Cleveland &c. R. Co. 74 Ohio St. 30; 77 N. E. 269.

[119] King v. Southern Pac. R. Co. 109 Cal. 96; 41 Pac. 786; 29 L. R. A. 755. See, also, J. C. Woolridge & Son v. Ft. Worth &c. R. Co. (Tex. Civ. App.); 86 S. W. 942; Texas &c. R. Co. v. Watson, 190 U. S. 287; 23 Sup. Ct. 681, to the

§ 1237. Liability where road is operated under lease.—Some of the cases hold that where a railway company leases its line and the same is operated by a lessee the lessor is liable for all the torts of the lessee unless there be a special statutory enactment making the lessee liable and exempting the lessor from liability.[120] But, in most of such cases, the lessee may also be held responsible for any injuries caused by its wrong.[121] Where fires are set by a railway company operating a line of railway under a lease from the company owning the line the lessee is liable for such loss and it cannot set up as a defense that the road is owned by its lessor,[122] or that the lease is invalid. And, according to some of the authorities, unless there be special statutory enactments exempting the lessor from liability and placing it upon the lessee alone, it seems that the lessor is also liable.[123] So, where a company permits another company to run trains

effect that such a provision is not binding upon one who has no knowledge of it and is not in privity with the lessee.

[120] Thomas v. Railroad Co. 101 U. S. 71; Railroad Co. v. Brown, 17 Wall. (U. S.) 445; New York &c. R. Co. v. Winans, 17 How. (U. S.) 30; Ohio &c. R. Co. v. Dunbar, 20 Ill. 623; 71 Am. Dec. 291, and note; Clary v. Iowa &c. R. Co. 37 Iowa, 344; McCluer v. Manchester &c. R. Co. 13 Gray (Mass.) 124; 74 Am. Dec. 624; Pittsburgh &c. R. Co. v. Campbell, 86 Ill. 443; Wasmer v. Delaware &c. R. Co. 80 N. Y. 212; 36 Am. R. 608. But see ante, §§ 467, 471.

[121] Jacksonville &c. R. Co. v. Peninsular &c. Co. 27 Fla. 1; 9 So. 661; 17 L. R. A. 33; Pierce Railroads, 224; Texas &c. R. Co. v. Ross, 7 Tex. Civ. App. 653; 27 S. W. 728.

[122] Cantlon v. Eastern &c. R. Co. 45 Minn. 481; 48 N. W. 22; Slossen v. Burlington &c. R. Co. 60 Iowa, 215; 14 N. W. 244; 7 Am. & Eng. R. Cas. 509; 11 Am. & Eng. R Cas. 67; Jacksonville &c. R. Co. v. Peninsular &c. Co. 27 Fla. 1; 9 So. 661; 17 L. R. A. 33. In the last case cited the court said: "If one railroad company operates a railroad under a lease from another, it is responsible for its negligence to persons injured thereby; and the invalidity in law of the lease is no defense to the lessee company against liability to persons suffering by its negligence. If its possession or operation of the road is, in law, unauthorized, it is no less the author of the injuries its want of care may proximately inflict upon them; and it cannot use one wrong as an excuse for or bar to liability for another which it could not have inflicted but for the first."

[123] Balsley v. St. Louis &c R. Co. 119 Ill. 68; 8 N. E. 859; 59 Am. R. 784; 25 Am. & Eng. R. Cas. 497; Bean v. Atlantic &c. R. Co. 63 Me. 293; Stearns v. Atlantic &c. R. Co. 46 Me. 95. See, also, Davis v. Providence &c. R. Co. 121 Mass. 134 But it seems to us that where, as is generally true in such cases, the

over its tracks, knowing that such company's engines are equipped with defective spark arresters, it has been held that it will be liable for fires set by the engines of that company.[124] Where a railway company does not own the ground but has a mere license to maintain its tracks over certain premises, it is its duty to keep such track free from combustible material, and if it negligently fails to do so and the property of third persons is destroyed because of its negligence, it will be liable.[125]

§ 1238. Contributory negligence of owner.—The decisions as to

injury is caused in the operation of the road, over which the lessor has no control, there is some reason for holding that the lessee alone should be held liable. Where a statute was in force making a railway company liable for fires communicated by "its locomotive engines" it was held that such lessor company cannot be held liable where the fires were communicated by the engines of its lessee. Lipfeld v. Charlotte &c. R. Co. 41 S. Car. 285; 19 S. E. 497; Hunter v. Columbia &c. R. Co. 41 S. Car. 86; 19 S. E. 197. But see Pittsburg &c. R. Co. v. Campbell, 86 Ill. 445; Ingersoll v. Stockbridge &c. R. Co. 8 Allen (Mass.), 438. See ante, § 467, et seq.

[124] Delaware &c. R. Co. v. Salmon, 39 N. J. L. 299; 23 Am. R. 214; Pierce v. Concord &c. R. Co. 51 N. H. 590; Jefferson v. Chicago &c. Ry. Co. 117 Wis. 549; 94 N. W. 289 (citing § 477, ante).

[125] Kurz &c. Co. v. Milwaukee &c. R. Co. 84 Wis. 171; 53 N. W. 850; 56 Am. & Eng. R. Cas. 94. In the course of the opinion the court said: "In this case, however, it is insisted that because the railway company had only a naked license to lay its track, and had no interest in the land, it had no control over the premises covered by its rails and ties, and owed no duty to any one to remove combustible material. We have been referred to no case which lays down this principle, and, if there be any, we shall decline to follow it. In our opinion, the duty of the defendant company to take reasonable care of the track to prevent the starting of fires is not lifted from its shoulders by the fact that it did not own the right of way, but was simply a licensee. It built this track, and was using it for its own gain in the freights and tolls which it expected and was entitled to charge the ice companies. The track was rightfully laid. The company had a right to operate it and collect freights so long, at least, as its license was unrevoked. It would be strange to hold that the railroad company possessed all the substantial rights in the way of using the track and collecting its freights, which it would have if it owned the right of way, with none of the duties or liabilities which ordinarily result from such use. . . . With the right which it enjoyed and was exercising for its own gain and profit goes hand in hand a correlative duty to use reasonable care to keep its tracks clear from inflammable material."

the effect of the contributory negligence of a property-owner whose property is destroyed by fire negligently set by a railway company on his right to recover are not altogether harmonious. While this lack of harmony is due, in a great measure, to statutory enactments, still, different rules are laid down and enforced independent of any statutes whatever. Where there are statutes in force imposing an absolute liability upon a railway company for fires set by its locomotives, the question of the owner's contributory negligence is immaterial and has no effect on his right to recover.[126] We do not believe, however, that such a strict rule, even where there is an absolute statutory liability, is entirely just. There may be cases, where, after the property is set on fire by the railway company the owner could by slight effort save the property from destruction, and in such cases, it seems to us that it would be unjust to compel a railway company to pay an owner damages notwithstanding an absolute statutory liability.[127] And where the liability of the defendant rests upon the common law contributory negligence is usually a defense.[128]

[126] Laird v. Connecticut &c. R. Co. 62 N. H. 254; 13 Am. St. 564; 43 Am. & Eng. R. Cas. 63; West v. Chicago &c. R. Co. 77 Iowa, 654; 35 N. W. 479; 42 N. W. 512; 38 Am. & Eng. R. Cas. 340; Peter v. Chicago &c. R. Co. 121 Mich. 324; 80 N. W. 295; 46 L. R. A. 224, 225, 226; 80 Am. St. 500 (citing text). See, also, Matthews v. Missouri Pac. R. Co. 142 Mo. 645; 44 S. W. 802.

[127] In the case of Union &c. R. Co. v. Williams, 3 Colo. App. 526; 34 Pac. 731, it was said: "Of course, if a party should knowingly or purposely place his property in a situation where sparks from a passing engine would be likely to ignite and burn it, he could not recover in case of its destruction; but such an act would scarcely come within the definition of contributory negligence. It would be a fraud from which its author would not be permitted to derive an advantage. Nothing of this kind is, however, claimed here. The appellant introduced no evidence. The testimony for appellee discloses no negligence on his part, and as the liability of the appellant is fixed by the statute, irrespective of any negligence of its own, and as any negligence of the owner of the property is not to be considered, unless it comes within the doctrine announced in Denver &c. R. Co. v. Morton, 3 Colo. App. 155; 32 Pac. 345, where it was shown that the owner, being present, suffered his property to remain in dangerous proximity to a fire in actual progress, without any effort to remove or protect it." See, also, the majority and dissenting opinions in Peter v. Chicago &c. R. Co. 121 Mich. 324; 80 N. W. 295; 80 Am. St. 500; 46 L. R. A. 224, 226, 228.

[128] See case last above cited; also, Murphy v. Chicago &c. R. Co. 45 Wis. 222; 30 Am. R. 721; Ross v.

Where there is a statute changing the burden of proof the defense of contributory negligence on the part of the owner is not defeated.[129] The acts on the part of the property-owner which determine whether or not he is guilty of contributory negligence naturally divide themselves into two classes; first, those things which he does or omits to do antecedent to the setting of the fire, and, second, those things which he does or omits to do after the setting of the fire. In reference to the first class the measure of duty resting upon the property owner is very slight. Where a person owns lands adjoining the right of way of a railway company, he has a right to presume that the railway company will not be guilty of negligence and he is not bound to remove dry and combustible material from his land in anticipation of probable negligence on the part of the company.[130] He has a

Boston &c. R. Co. 6 Allen (Mass.) 87; Tilley v. St. Louis &c. R. Co. 49 Ark. 535; 6 S. W. 8. A few of the statutes also provide that it shall be considered.

[129] Ford v. Chicago &c. R. Co. 91 Iowa, 179; 59 N. W. 5; 24 L. R. A. 657.

[130] St. Louis &c. R. Co. v. Stevens, 3 Kan. App. 176; 43 Pac. 434; Lindsay v. Winona &c. R. Co. 29 Minn. 411; 13 N. W. 191; 43 Am. St. 228; 7 Am. & Eng. R. Cas. 488; Fitch v. Pacific R. Co. 45 Mo. 322; Fort Scott &c. R. Co. v. Tubbs, 47 Kan. 630; 28 Pac. 612; 49 Am. & Eng. R. Cas. 685; Chicago &c. R. Co. v. Kern, 9 Ind. App. 505; 36 N. E. 381; Pittsburgh &c. R. Co. v. Jones, 86 Ind. 496; 44 Am. R. 334, and note; Delaware &c. R. Co. v. Salmon, 39 N. J. L. 299; 23 Am. R. 214; Union Pacific R. Co. v. Arthur, 2 Colo. App. 159; 29 Pac. 1031; Mississippi &c. R. Co. v. Louisville &c. R. Co. 70 Miss. 119; 12 So. 156; 54 Am. & Eng. R. Cas. 512; Richmond &c. R. Co. v. Medley, 75 Va. 499; 40 Am. R. 734; Vaughan v. Taff Vale R. Co. 3 H. & N. 747; Kellogg v. Chicago &c. R. Co. 26 Wis. 223; 7 Am. R. 69; Flynn v. San Francisco &c. R. Co. 40 Cal. 14; 6 Am. R. 595, and note; Erd v. Chicago &c. R. Co. 41 Wis. 65; Snyder v. Pittsburgh &c. R. Co. 11 W. Va. 14. See, also, Cleveland &c. R. Co. v. Tate, 104 Ill. App. 615. In Philadelphia &c. R. Co. v. Hendrickson, 80 Pa. St. 182; 21 Am. R. 97, it was said: "The conclusion from the case is very clear that a plaintiff is not responsible for the mere condition of his premises lying along a railroad, but in order to be held for contributory negligence, must have done some act or omitted some duty which is the proximate cause of his injury, concurring with the negligence of the company. Farmers may cultivate, use, and possess their farms and improvements in the manner customary among farmers, and are not bound to use unusual means to guard against the negligence of the railroad company; indeed, are not bound to expect that the company will be guilty of negligence." An adjoining property-owner is under no obligation to provide himself with apparatus to extinguish such

right to use his property in the ordinary and usual way, and so long as he does so he will not be deemed guilty of contributory negligence.[131] And a property-owner is under no obligation to keep guard over his property or to watch for fires which may be set out by a railway company.[132] As a property-owner has the right to use his property in the ordinary and usual way, he is not guilty of negligence in erecting buildings on his own land near a railway right of way,[133]

fires as may be set by the negligence of a railway company. McLaren v. Canada &c. R. Co. 32 U. C. C. P. 324.

[131] Philadelphia &c. R. Co. v. Schultz, 93 Pa. St. 341; 2 Am. & Eng. R. Cas. 271; Kalbfleisch v. Long Island &c. R. Co. 102 N. Y. 520; 7 N. E. 557; 55 Am. R. 832; 29 Am. & Eng. R. Cas. 179; Toledo &c. R. Co. v. Maxfield, 72 Ill. 95; Caswell v. Chicago &c. R. Co. 42 Wis. 193; Rowell v. Railroad Co. 57 N. H. 132; Burke v. Louisville &c. R. Co. 7 Heisk. (Tenn.) 451. See, also, Boston &c. Co. v. Bangor &c. R. Co. 93 Me. 52; 44 Atl. 138; 47 L. R. A. 82; 19 Am. R. 618. "It is very well settled that it is not contributory negligence for the occupant of land adjoining a railroad to leave it in its natural state; and a farmer using his premises in the ordinary and customary manner is not guilty of contributory negligence for failing to resort to special or extraordinary precautions to prevent the destruction of his property from fire happening through the negligence of a railroad company." Gulf &c. R. Co. v. Johnson, 54 Fed. 474.

[132] Jacksonville &c. R. Co. v. Peninsular &c. Co. 27 Fla. 1; 9 So. 661; 17 L. R. A. 33; 49 Am. & Eng. R. Cas. 603. In that case it was said: "That the plaintiff was not bound to keep guard against the negligence of the defendant, but has the right to enjoy his property in the ordinary manner, and that, while he is charged with the duty of saving his property from destruction, if it can be saved, he is under no obligation to stand guard over it, continuously watching it, to protect it from the negligence of the defendant, is a proposition of law too clearly correct to admit of any controversy, and nothing in the authorities cited by the appellant question it; and the same is true of the charge that the fact that the plaintiff's property was exposed to the reach of sparks of a locomotive engine is no defense to an action of this kind, and the plaintiff has the right to construct his buildings on any part of his property, and to enjoy the same without rendering himself liable to the negligence of the defendant." See, also, Indiana Clay Co. v. Baltimore &c. R. Co. 31 Ind. App. 258; 67 N. E. 704.

[133] Burke v. Louisville &c. R. Co. 7 Heisk. (Tenn.) 451; 19 Am. R. 618; Toledo &c. R. Co. v. Maxfield, 72 Ill. 95; Grand Trunk &c. R. Co. v. Richardson, 91 U. S. 454; Cincinnati &c. R. Co. v. Barker, 94 Ky. 71; 21 S. W. 347. It is not negligence per se to build a wooden building near a railway track. Briant v. Detroit &c. R. Co. 104 Mich. 307; 62 N. W. 365. See, also, Stacy

nor, ordinarily, in stacking his grain or hay near the right of way of a railroad company.[134] So, where buildings are erected near the right of way the owner is not necessarily guilty of contributory negligence in permitting such buildings to remain in the condition caused by the natural deterioration and the usual effect of the elements on them, such as allowing a roof to become old and dry,[135] or a barn to become old and decayed.[136] Where hay or grain is stacked by an owner on his land near a railway right of way, he is ordinarily under no obligation to place out fire breaks and is not to be deemed guilty of contributory negligence in failing to do so,[137] but where it is the usual and ordinary custom among farmers to place fire breaks around their stacks of hay and grain to guard against fires, as they do in prairie or open countries, it may be negligence in an owner to fail to put out fire breaks,[138] and it is, at least, a question which should be submitted to the jury.[139] So, where a person places a build-

v. Milwaukee &c. R. Co. 85 Wis. 225; 54 N. W. 779; Fero v. Buffalo &c. R. Co. 22 N. Y. 209; 78 Am. Dec. 178.

[134] St. Joseph &c. R. Co. v. Chase, 11 Kan. 47; Cook v. Champlain &c. Co. 1 Denio (N. Y.) 91 Patton v. St. Louis &c. R. Co. 87 Mo. 117; 56 Am. R. 446; 23 Am. & Eng. R. Cas. 364; Reed v. Missouri Pacific R. Co. 50 Mo. App. 504

[135] Philadelphia &c. R. Co. v. Hendrickson, 80 Pa. St. 182; 21 Am. R. 97.

[136] Jefferis v. Philadelphia &c. R. Co. 3 Houst. (Del.) 447.

[137] Gulf &c. R. Co. v. Johnson, 54 Fed. 474; Hoffman v. Chicago &c. R. Co. 40 Minn. 60; 41 N. W. 301; Louisville &c. R. Co. v. Hart, 119 Ind. 273; 21 N. E. 753; 4 L. R. A. 549; Burlington &c. R. Co. v. Westover, 4 Neb. 268.

[138] Keese v. Chicago &c. R. Co. 30 Iowa, 78; 6 Am. R. 643. In this case it was said: "While the owner of land has the right to stack his grain or hay on his premises adjoining to a railway, and thereby only takes the risk of accident by fire not occasioned by the company's negligence; yet, if he is guilty of negligence himself, in not ploughing around the stacks, or in omitting to do such acts as would have protected his property and prevented the loss, then it would be a case of contributory negligence." See West v. Chicago &c. R. Co. 77 Iowa, 654; 35 N. W. 479; 42 N. W. 512; 32 Am. & Eng. R. Cas. 339.

[139] Kellogg v. Chicago &c. R. Co. 26 Wis. 223; 7 Am. R. 69; Kansas &c. R. Co. v. Brady, 17 Kan. 380; Karsen v. Milwaukee &c. R. Co. 29 Minn. 12; 11 N. W. 122; Gram v. Northern Pacific R. Co. 1 N. Dak. 252; 46 N. W. 972; 45 Am. & Eng. R. Cas. 544; Karsen v. Milwaukee &c. R. Co. 29 Minn. 12; 11 N. W. 122; Ross v. Boston &c. R. Co. 6 Allen (Mass.) 87; Ohio &c. R. Co. v. Shanefelt, 47 Ill. 497; 95 Am. Dec. 504; Erie &c. R. Co. v. Dicker. 78 Pa. St. 293; Brown v. Hannibal &c. R. Co. 37 Mo. 298; Missouri &c.

ing or other property in a position exposing it to hazards from railway fires he is bound to take notice of the unusual and increased risk and to exercise a higher degree of care than if the property were placed in an unexposed position.[140] Thus, where a plaintiff owning a stable which stood two feet from the right of way of the defendant had permitted a large accumulation of straw and inflammable material to collect in a hot and dry season so that when it was set on fire the stable was also destroyed, it was held that the question of his contributory negligence was properly submitted to the jury.[141] And where the owner of the property allowed shavings and hay to accumulate near his building and fire caught in the shavings and hay and destroyed the building, it was held that the question of contributory negligence was one of fact for the jury.[142] Carelessly allowing the windows or doors of buildings near the track, in which are stored inflammable and dry materials, to remain open, thus exposing the buildings and their contents to sparks has been held to constitute contributory negligence,[143] although there are some cases which hold that such acts do not amount to negligence on the part of a property-owner.[144] Placing property along the line of a railway right of way for the purpose of shipment, with consent of the company, either express or implied, does not of itself constitute contributory negligence.[145]

R. Co. v. Kincaid, 29 Kan. 654; 11 Am. & Eng. R. Cas. 83.

[140] Kansas City &c. R. Co. v. Owen, 25 Kan. 419; Chicago &c. R. Co. v. Pennell, 94 Ill. 448; Briant v. Detroit &c. R. Co. 104 Mich. 307; 62 N. W. 365. See, also, Louisville &c. R. Co. v. Sullivan &c. Co. 138 Ala. 379; 35 So. 327. He cannot intentionally have it set afire and recover damages from the company. Bowen v. Boston &c. R. Co. 179 Mass. 524; 61 N. E. 141.

[141] Collins v. New York &c. R Co. 5 Hun 499; Omaha Fair Association v. Missouri Pacific R. Co. 42 Neb. 105; 60 N. W. 330. So where he left the barn door open, knowing of the fire on the right of way. Brown v. Oregon &c. Co. 41 Wash. 688; 84 Pac. 400.

[142] Murphy v. Chicago &c. R. Co. 45 Wis. 222; 30 Am. R. 721; Coates v. Missouri &c. R. Co. 61 Mo. 38.

[143] Great Western &c. R. Co. v. Haworth, 39 Ill. 346; Brown v. Oregon &c. Co. 41 Wash. 688; 84 Pac. 400; St. Louis &c. R. Co. v. Crabb (Tex. Civ. App.); 80 S. W. 408 (question for jury).

[144] Fero v. Buffalo &c. R. Co. 22 N. Y. 209; 78 Am. Dec. 178, and note.

[145] Pittsburgh &c. R. Co. v. Noel, 77 Ind. 110; Pittsburgh &c. R. Co. v. Nelson, 51 Ind. 150; Gulf &c. R. Co. v. McLean, 74 Tex. 646. Compare Missouri &c. R. Co. v. Bartlett, 69 Tex. 79; 32 Am. & Eng. R. Cas. 343.

Even if it be conceded that in no case is a plaintiff bound to take any steps or precautions in anticipation of a fire set by a railway company, yet after a fire is once started and discovered by him the duty resting upon a plaintiff to try to save his property is an imperative one, and if he fails to make reasonable effort to discharge that duty he must bear the loss. He cannot stand by and see his property destroyed, when by a reasonable effort on his part the property could be saved, and then place the loss on another. That there can be no recovery in such cases has been declared again and again.[146] It has been held that if the fire was originally set by the wrong of a railway company and part of the property was destroyed before the contributory negligence of the owner intervened, he may recover for the damage done up to the time when his negligence intervened, but not for that part of the property afterwards destroyed.[147] But where a fire was started by the negligence of a railway company, it was held erroneous to instruct the jury that a plaintiff could not recover if he made no attempt to extinguish the fire, entirely ignoring the question of the plaintiff's ability to cope with the fire.[148] Where a property-

[146] Illinois &c. R. Co. v. McClelland, 42 Ill. 355; Collins v. New York &c. R. Co. 5 Hun (N. Y.) 499; Murphy v. Chicago &c. R. Co. 45 Wis. 222; 30 Am. R. 721; Haverly v. State Line &c. R. Co. 135 Pa. St. 50; 19 Atl. 1013; 20 Am. St. 848; Denver &c. R. Co. v. Morton, 3 Colo. App. 155; 32 Pac. 345; St. Louis &c. R. Co. v. Hecht, 38 Ark 357; Eaton v. Oregon &c. R. Co. 19 Ore. 391; 20 Pac. 415; Toledo &c. R. Co. v. Pindar, 53 Ill. 447; 5 Am. R. 57; Chicago &c. R. Co. v. Pennell, 94 Ill. 448; Tilley v. St. Louis &c. R. Co. 49 Ark. 535; 6 S. W. 8; Illinois &c. R. Co. v. McKay, 69 Miss. 139; 12 So. 447; Coates v. Missouri &c. R. Co. 61 Mo. 38; Post v. Buffalo &c. R. Co. 108 Pa. St. 585; Doggett v. Richmond &c. R. Co. 78 N. Car. 305; McNarra v. Chicago &c. R. Co. 41 Wis. 69. See, also, Louisville &c. R. Co. v. Sullivan &c. Co. 138 Ala. 379; 35 So. 327. The owner is bound to make only ordinary and reasonable efforts to extinguish a fire; extraordinary means or efforts are not required. Bevier v. Delaware &c. R. Co. 13 Hun (N. Y.) 254.

[147] Stebbins v. Central Vermont &c. R. Co. 54 Vt. 464; 41 Am. R. 855.

[148] Tilley v. St. Louis &c. R. Co. 49 Ark. 535; 6 S. W. 8. Where sparks from a railway set fire to plaintiff's awning, and she became frightened and ran away without making any attempt to extinguish the fire and the house was destroyed, it was held that she was not guilty of contributory negligence, it not appearing that she could have extinguished the fire even if she had not run away. Sugarman v. Manhattan &c. R. Co. 16 N. Y. S. 533. See, also, St. Louis &c. R. Co. v. League, 71 Kans. 79; 80 Pac. 46; Clark v. Kansas City

owner licensed the use of an engine on his premises and acquiesced in the use of such engine long after he became aware of its defective condition in the matter of its spark arresting apparatus it was held that he was guilty of such negligence as to preclude a recovery for damages on account of his property being destroyed by fire set by such engine.[149] If such a property-owner makes reasonable complaint he will not be held guilty of negligence.[150] The question as to whether a property-owner has been guilty of contributory negligence in suffering his property to be destroyed by fire is usually one to be submitted to the jury under all the circumstances of the case.[151]

§ 1239. Measure of damages for property destroyed by fire.—In determining the measure of damages which a person whose property is negligently burned by a railway company is entitled to recover, the difficult question is not so much the measure of that damage as the method of arriving at the proper measure. Stated abstractly the rule is that an owner is entitled to recover just compensation for the property destroyed, or, in other words, such an amount as will restore him to the same property status as he occupied before his property was burned.[152] How to arrive at such compensation is the question to be determined, and the method adopted for determining such compensation will depend on the nature of the prop-

&c. R. Co. 129 Fed. 341; Franey v. Illinois Cent. R. Co. 104 Ill. App. 499.

[149] Marquette &c. R. Co. v. Spear, 44 Mich. 169; 6 N. W. 202; 38 Am. R. 242.

[150] Kendrick v. Towle, 60 Mich. 363; 27 N. W. 567; 1 Am. St. 526.

[151] Haverly v. State Line &c. R. Co. 135 Pa. St. 50; 19 Atl. 1013; 20 Am. St. 848; 43 Am. & Eng. R. Cas. 31; Mills v. Chicago &c. R. Co. 76 Wis. 422; Gibbons v. Wisconsin &c. R. Co. 66 Wis. 161; 28 N. W. 170; 25 Am. & Eng. R. Cas. 479; Coates v. Missouri &c. R. Co. 61 Mo. 38; Great Western &c. R. Co. v. Haworth, 39 Ill. 346; Macon &c. R. Co. v. McConnell, 27 Ga. 481; Missouri &c. R. Co. v. Cornell, 30 Kan. 35; 1 Pac. 312; 11 Am. & Eng. R. Cas. 56; Illinois Central R. Co. v. Nunn, 51 Ill. 78; St. Louis &c. R. Co. v. Crabb (Tex. Civ. App.); 80 S. W. 408.

[152] Jacksonville &c. R. Co. v. Peninsular &c. R. Co. 27 Fla. 1; 9 So. 661; 17 L. R. A. 33; 49 Am. & Eng. R. Cas. 603, 644. See, also, Pacific Express Co. v. Lasker &c. 81 Tex. 81; 16 S. W. 792. Where timber land was burned over it is proper to consider in estimating the damages and the increased cost of cutting the timber owing to timber blown down because the roots of the trees had been burned away. Gordon v. Grand Rapids &c. R. Co. 103 Mich. 379; 61 N. W. 540.

erty destroyed, its location and other attendant cirumstances. There are two kinds of property which may be destroyed or injured, personal and real, and where real property is destroyed or injured the property may be such a part of the real estate as to have a separate and independent value of itself,[153] or it may be such that its value can only be determined by taking into consideration the entire value of the real estate of which it forms a part. Where the thing destroyed is personal property or such a part of realty that it has a value separate and apart from the soil on which it stands or with which it is connected the rule for determining the measure of damages is generally the same. In such cases if the property is totally destroyed the measure of damages is its market value at the time and place of its destruction;[154] and if only partially destroyed the measure

[153] "For the purpose of actions for injuries through negligence, many things which are attached to the realty, and a part of it, such as fruit trees, houses, timber, etc., are considered separate and distinct from it because they have a value which is distinct from the value of the land. Therefore, where buildings, trees, crops, etc., are destroyed or injured, the proper measure of damages is not the difference in the value of the land before and after injury, but of the buildings, trees, etc., themselves; and where buildings are destroyed by fire, the proper measure of damages is the value of the buildings when destroyed." 2 Thompson Neg. 1262. See, also, Thomp. Neg. (2d ed.) § 7228 et seq. See, also, Atchison &c. R. Co. v. Huitt, 1 Kan. App. 781; 41 Pac. 1049; Mathews v. Missouri &c. R. Co. 142 Mo. 645; 44 S. W. 802; Cooley v. Kansas City &c. R. Co. 149 Mo. 487; 51 S. W. 101.

[154] Donald v. St. Louis &c. R. Co. 44 Iowa, 157; Burke v. Louisville &c. R. Co. 7 Heisk. (Tenn.) 451; 19 Am. R. 618; Parrott v. Housatonic &c. R. Co. 47 Conn. 575; Chapman v. Chicago &c. R. Co. 26 Wis. 295; 7 Am. R. 81; Delaware &c. R. Co. v. Salmon, 39 N. J. L. 299; 23 Am. R. 214; White v. Chicago &c. R. Co. 1 S. Dak. 326; 47 N. W. 146; 9 L. R. A. 824, and note; 45 Am. & Eng. R. Cas. 565; Ward v. Carson River &c. Co. 13 Nev. 44; Galveston &c. R. Co. v. Horne, 69 Tex. 643; 35 Am. & Eng. R. Cas. 238; Galveston &c. R. Co. v. Rheiner, (Tex. Civ. App.); 25 S. W. 441 and 971; Gulf &c. R. Co. v. Reagan (Tex. Civ. App.); 32 S. W. 846. This is the true rule as to fruit trees whose value can be determined independently of the realty on which they are grown where the owner sues for the value of the trees. Whitback v. New York &c. Co. 36 Barb. (N. Y.) 644; Norfolk &c. R. Co. v. Bohannan, 85 Va. 293; 7 S. E. 236. See, also, Galveston &c. R. Co. v. Warnecke, (Tex. Civ. App.); 95 S. W. 600, and cases there cited; Bailey v. Chicago &c. R. Co. 3 S. Dak. 531; 54 N. W. 596; 19 L. R. A. 653, and note; Kansas City &c. R. Co. v. Rogers, 48 Neb. 653; 67 N. W. 602; Missouri Pac. R. Co. v. Tipton, 61 Neb. 49;

of damages is the difference between the market value and its value after the injury.[155] The cost of replacing the property is not the correct measure of damages for its destruction.[156] Where property of the kind destroyed has a market value at the time and place of the destruction the measure of damages is very easily determined for mere proof of the market value is all that is required. But it often happens that the kind of property destroyed has no market value and it would be impossible to prove a market value. In such cases instead of taking the market value as a standard for determining the measure of damages the real and ordinary value is taken,[157] and to enable a jury to determine such real or ordinary

84 N. W. 416; Ducktown &c. Co. v. Barnes (Tenn.); 60 S. W. 593; Atchison &c. R. Co. v. Geiser, 68 Kans. 281; 75 Pac. 68; Kansas City &c. R. Co. v. Perry, 65 Kans. 792; 70 Pac. 876. Testimony as to their value may show the difference in the value of the land before and after the fire. Dent v. South Bound R. Co. 61 S. Car. 329; 39 S. E. 527; and this view may, perhaps, reconcile many of the cases, although another distinguishing feature would seem to be the form of action; that is, whether it is for injury to the trees, or the like, alone, or for injury to the realty. But ordinarily fruit trees have not a value separate and apart from the real estate on which they stand. Dwight v. Elmira &c. Co. 132 N. Y. 199; 30 N. E. 398; 15 L. R. A. 612, and note; 28 Am. St. 563. Where forest or matured trees are injured the measure of damages is the difference in value before and after the fire. Atkinson v. Atlantic &c Co. 63 Mo. 367. As standing timber. Union Pac. R. Co. v. Murphy (Neb.); 107 N. W. 757. In Clarke v. New York &c. R. Co. 26 R. I. 59; 58 Atl. 245, the plaintiff was held entitled to damages to the soil and standing timber, although he had given a license to another to remove it.

[155] Atkinson v. Atlantic &c. R. Co. 63 Mo. 367; Bevier v. Delaware &c. R. Co. 13 Hun (N. Y.) 254; Texas &c. R. Co. v. Levi, 59 Tex. 674; 13 Am. & Eng. R. Cas. 464.

[156] Pacific &c. R. Co. v. Lasker Real Estate Ass'n, 81 Tex. 81; 16 S. W. 792; Pacific &c. R. Co. v. Smith, (Tex); 16 S. W. 998; Burke v. Louisville &c. R. Co. 7 Heisk. (Tenn.) 451; 19 Am. R. 618; Watt v. Nevada &c. R. Co. 23 Nev. 154; 44 Pac. 423; 62 Am. St. 772, and note; Jacksonville &c. R. Co. v. Peninsular &c. R. Co. 27 Fla. 1; 9 So. 661; 16 L. R. A. 631, and note. But see Wiggins v. St. Louis &c. R. Co. 119 Mo. App. 492; 95 S. W. 311; Vermilya v. Chicago &c. R. Co. 66 Ia. 606; 55 Am. R. 279.

[157] Fremont &c. R. Co. v. Crum, 30 Neb. 70; 46 N. W. 217; International &c. R. Co. v. Searight, 8 Tex. Civ. App. 593; 28 S. W. 39. See, also. Texas &c. Ry. Co. v. Prude (Tex. Civ. App.); 86 S. W. 1046; McMahon v. Dubuque, 107 Ia. 62; 77 N. W. 517; Pittsburg &c R. Co. v. Indiana &c. Co. 154 Ind. 322; 56 N. E. 766; Highland v.

value and to arrive at a fair valuation, all facts connected with such property, such as its cost, the uses to which it has been put, its age, its condition, location and the like are admissible.[158] The opinions of witnesses acquainted with the standard value of such property are also competent.[159] So where buildings are destroyed and they have a separate and independent value apart from the soil on which they stand, but no market value, it has been held proper to admit evidence of the cost of their construction as an element in determining the measure of damages.[160] Where the property destroyed or injured is so closely connected with the real estate on which it stands or to which it is attached, that it has no value separate and independent of the real estate, or the injury is

Houston &c. R. Co. (Tex. Civ. App.); 65 S. W. 649.

[158] Atchison &c. R. Co. v. Stanford, 12 Kan. 354; 15 Am. R. 362; Pittsburgh &c. R. Co. v. Hixon, 110 Ind. 225; 11 N. E. 285. See, also, Toledo &c. R. Co. v. Fenstermaker, 163 Ind. 534; 72 N. E. 561; Castner v. Chicago &c. R. Co. 126 Ia. 581; 102 N. W. 499; Wiggins v. St. Louis &c. Ry. Co. 119 Mo. App. 492; 95 S. W. 311; Jacksonville &c. R. Co. v. Peninsular Land &c. Co. 27 Fla. 1; 9 So. 661; 17 L. R. A. 33; Wall v. Platt, 169 Mass. 398; 48 N. E. 270; Denver &c. R. Co. v. Frame, 6 Colo. 382. Where the property was so badly damaged by the fire as to have no market value at the place where the injury occurred, it is proper to take into account, in estimating the measure of damages, the cost of preparing it for a market and shipping it thereto. Texas &c. R. Co. v. Levi, 59 Tex. 675; 13 Am. & Eng. R. Cas. 464. As affecting the measure of damages for the destruction it is competent to show the age of the meadow, and to prove, also, that as the meadow became older the quantity and quality of the hay increased. Terre Haute &c. R. Co. v. Walsh, 11 Ind. App. 13; 38 N. E. 534. Evidence is also admissible in an action for injuries to grass lands that they were burned over the two years previous. Gulf &c. R. Co. v. Saddler, 8 Tex. C. App. 300; 27 S. W. 904. Where land is injured by fire evidence is admissible to show the capacity of the land to produce crops before and after the fire. Chicago &c. R. Co. v. Burden, 14 Ind. App. 572; 43 N. E. 155.

[159] Pennsylvania &c. R. Co. v. Bunnell, 81 Pa. St. 414; Lafayette &c. R. Co. v. Winslow, 66 Ill. 219; Matthews v. Missouri Pac. Ry. Co. 142 Mo. 645; 44 S. W. 802; Fremont &c. R. Co. v. Marley, 25 Neb. 138; 13 Am. St. 482; Stertz v. Stewart, 74 Wis. 160. But their opinion as to the amount of damage, which is the ultimate question to be decided by the jury, is inadmissible in many jurisdictions. Wiggins v. St. Louis &c. Ry. Co. 119 Mo. App. 492; 95 S. W. 311.

[160] Cleland v. Thornton, 43 Cal. 437; Jacksonville &c. R. Co. v. Peninsular &c. Co. 27 Fla. 1; 9 So. 661; 17 L. R. A. 33, and note.

to the soil itself, the measure of damages is the difference in value between the real estate before the injury and after it.[161] The

[161] Fort Worth &c. R. Co. v. Wallace, 74 Tex. 581; 40 Am. & Eng. R. Cas. 248; Galveston &c. R. Co. v. Horne, 69 Tex. 643; 35 Am. & Eng. R. Cas. 238; Fort Worth &c. R. Co. v. Hogsett, 67 Tex. 685; 9 S. W. 440; Missouri &c. R. Co. v. Ayers, (Tex.); 8 S. W. 538; Hayes v. Chicago &c. R. Co. 45 Minn. 17; 47 N. W. 260; Carner v. Chicago &c. R. Co. 43 Minn. 375; Baltimore &c. R. Co. v. Countryman, 16 Ind. App. 139; 44 N. E. 265; Kansas &c. Ry. Co. v. Hoover, (Kans. App.); 43 Pac. 854; Easterbrook v. Erie R. Co. 51 Barb. (N. Y.) 94; Missouri &c. R. Co. v. Fulmore (Tex.); 29 S. W. 688; Missouri &c. R. Co. v. Goode, 7 Tex. Civ. App. 245; 26 S. W. 441; Louisville &c. R. Co. v. Spencer, 149 Ill. 97; 36 N. E. 91; Rowe v. Chicago &c. Ry. Co. 102 Ia. 286; 71 N. W. 409, 411 (quoting text); Bradley v. Iowa Cent. R. Co. 111 Ia. 562; 82 N. W. 996; Atchison &c. R. Co. v. Arthurs, 63 Kan. 404; 65 Pac. 651. Where plaintiff's cranberry marsh was destroyed by fire it was held that he had a right, as affecting the measure of damages, to introduce evidence showing the natural advantages of the marsh as to the accumulation of water from adjoining lands, thereby making the marsh more valuable and productive. Moore v. Chicago &c. R. Co. 78 Wis. 120; 47 N. W. 273. In Dwight v. Elmira &c. R. Co. 132 N. Y. 199; 30 N. E. 398; 15 L. R. A. 612, and note; 28 Am. St. 563, the court said: "It is apparent from the authorities already cited, as well as those following, that in cases of injury to real estate the courts recognize two elements of damage: (1) The value of the tree or other thing taken after separation from the free-hold, if it have any; (2) the damage to the realty, if any, occasioned by the removal. Ensley v. Mayor, 2 Baxt. 144; Striegel v. Moore, 55 Iowa, 88; 7 N. W. 413; Longfellow v. Quimby, 33 Me. 457; Foote v. Merrill, 54 N. H. 490; 20 Am. St. 151. . . . In this case the plaintiff was not satisfied with a recovery based on the value of the trees destroyed, after separation from the realty, of which they formed a part, as indeed he should not have been, as such value was little or nothing, so he sought to obtain the loss occasioned to the land by reason of the destruction of an orchard of fruit-bearing trees, which added largely to its productive value. This was his right, but the measure of damages in such a case is, as we have observed, the difference in value of the land before and after the injury; and as this rule was not followed, but rejected, on the trial, and a method of proving damages adopted not recognized nor permitted by the courts, the judgment should be reversed." In Vermilya v. Chicago &c. Co. 66 Iowa, 606; 24 N. W. 234; 55 Am. R. 279; 23 Am. & Eng. R. Cas. 108, where a meadow was destroyed by the negligent setting out of fire by a railway company, it was held that the measure of damages was the cost of restoring the meadow. See St Louis &c. R. Co. v. Jones, 59 Ark. 105; 26 S. W. 595. And where plaintiff's fencing was

authorities, however, are not entirely harmonious, especially when it comes to the application of the general rule, and much may depend upon the circumstances of the particular case, and there are cases in which the rental value of the land or cost of replacing the property, or its actual value, or the like has been held to properly measure the damages.[162] While there are some authorities which deny

injured and destroyed it was held that he was entitled to recover the cost of restoring to as good a condition as before the fire. Central &c. R. Co. v. Murray, 93 Ga. 256; 20 S. E. 129. See, also, as to damages to fence, Wiggins v. St. Louis &c. R. Co. 119 Mo. App. 492; 95 S. W. 311. In the case of Ward v. Chicago &c. R. Co. 21 Minn. 449; 63 N. W. 1104, the court said: "An action to recover damages for a partial loss or a complete destruction of growing crops, whether annual or perennial, is practically an action to recover for an injury to real property. In principle such an action cannot be distinguished from one brought to recover for an injury to growing trees, nor is the measure of damages at all different, although stated differently. The proof in an action to recover for trees destroyed is all directed to an ascertainment of the difference in the market value of the real property immediately before the injury and immediately after its infliction, this difference being the measure of damages. The proof in a case to recover for injuries to a growing crop is, or should be, confined to estimating the value of the crop when destroyed; such being the measure of damages. . . . The measure of damages in this case must be ascertained by inquiring into the difference in the market value of the real property immediately before the injury and its value immediately after its infliction, and in ascertaining this difference evidence that another crop of some character and value may be grown on the land the same growing period, of the average yield of like crops, of the average market price, the ordinary expense of harvesting and marketing such crops, the condition of that particular crop before the injury, and any other fact existing at the time of the loss tending to show how and to what extent the injury decreased and diminished the value of the farm, may be considered."

[162] See, generally, Black v. Minneapolis &c. R. Co. 122 Ia. 32; 96 N. W. 984; Kansas City &c. R. Co. v. Pirtle, 67 Ark. 617; 55 S. W. 940; Cooley v. Kansas City &c. R. Co. 149 Mo. 487; 51 S. W. 101; Krejci v. Chicago &c. R. Co. 117 Ia. 344; 90 N. W. 708; Jamieson v. New York &c. R. Co. 162 N. Y. 630; 57 N. E. 1113, affirming 42 N. Y. S. 915. Rental value and cost of residing held the proper measure where injury not permanent. St. Louis &c. R. Co. v. Jones, 59 Ark. 112; 26 S. W. 595; Ft. Scott &c. R. Co. v. Tubbs, 47 Kans. 630. "Stumpage" held the proper measure where timber is destroyed, in Gorden v. Grand Rapids &c. R. Co. 103 Mich. 379; 61 N. W. 549.

the right of an owner to interest on the amount of his recovery,[163] the general rule is that interest may be allowed on the amount of damage done from the date of the injury to the date of the recovery.[164] Where after a fire had been negligently set by a railway company the owner could have saved part of the property from destruction but failed to do so, the defendant may prove the value of the property so negligently failed to be saved by the owner.[165] In some states there are statutory enactments which allow a plaintiff to recover, in addition to his actual damages, attorney's fees.[166]

§ 1240. Pleading—Parties.—A suit brought to recover damages on account of property destroyed by fire should be brought, as a general rule, by the owner of that property.[167] But where prop-

[163] Atkinson v. Atlantic &c. R. Co. 63 Mo. 367; De Steiger v. Hannibal &c. R. Co. 73 Mo. 33; 7 Am. & Eng. R. Cas. 492.

[164] Galveston &c. R. Co. v. Horne, 69 Tex. 643; 9 S. W. 440; 35 Am. & Eng. R. Cas. 238; Gulf &c. R. Co. v. Sheperd, (Tex. Civ. App.); 76 S. W. 800; Parrott v. Housatonic &c. R. Co. 47 Conn. 575; Chapman v. Chicago &c. R. Co. 26 Wis. 295; 7 Am. R. 81; Wilson v. Atlanta &c. R. Co. 16 S. Car. 587; Norfolk &c. R. Co. v. Bohannan, 85 Va. 293; 7 S. E. 236; Texas &c. R. Co. v. Levi, 59 Tex. 674; Texas &c. R. Co. v. Tankersley, 63 Tex. 57; Union Pac. R. Co. v. Ray, 46 Neb. 750; 65 N. W. 773. See, also, Black v. Minneapolis &c. R. Co. 122 Ia. 32; 96 N. W. 984. It has been sometimes said that interest is not to be allowed on unliquidated demands. There are actions, such, for instance, as assault and battery or slander, to which the rule is applicable. But where the demand is for property that has a market value susceptible of easy proof there is no propriety in such a rule. A loss of property having a definite money value is practically the same as the loss of so much money; the loss of the use of the property is practically the same as the loss of the use (or interest) of so much money. We think, therefore, a just indemnity to the plaintiff required the addition to the value of the goods, at the time of their destruction, of the interest from that time to the date of the judgment." Regan v. New York &c. R. Co. 60 Conn. 124; 22 Atl. 503; 25 Am. St. 306; 49 Am. & Eng. R. Cas. 590. But it is said that this should be left to the discretion of the jury. 6 Thomp. Neg. (2d ed.) § 7261, and cases there cited.

[165] St. Louis &c. R. Co. v. Hecht, 38 Ark. 357; 9 Am. & Eng. R. Cas. 222.

[166] § 1246, infra.

[167] See Fort Worth &c. R. Co. v. Wallace, 74 Tex. 581; 12 S. W. 227; 40 Am. & Eng. R. Cas. 248. Buildings situated on the land of another, with the right of removal, are personal property, and the owner is the proper person to sue for their destruction. Laird v. Con-

erty which has been destroyed was insured and the insurance company has paid the insurance and been subrogated to the rights, if any, of the insured against a wrong-doer causing the loss, it has been held that suit may be brought in either the name of the insured, the insurer, or both.[168] And where the injury was caused by a company operating the line under a lease the action may, according to some of the authorities, be brought against either lessee or lessor unless there is a statute expressly exempting the lessor from liability.[169]

§ 1241. Pleading—Sufficiency of complaint.—What will be sufficient to constitute a good complaint against a railway company for negligently burning property depends on what it is necessary to show to constitute a good cause of action. And as the facts which a plaintiff is bound to show vary in different jurisdictions it necessarily follows that there will be a corresponding difference in the pleadings. Ownership of the property destroyed must generally be averred in an action to recover its loss.[170] Where there are statutes in force imposing an absolute liability it need not be alleged that the fire was negligently set out,[171] but where no such statute exists and

necticut &c. R. Co. 62 N. H. 254; 13 Am. St. 564; 43 Am. & Eng. R. Cas. 63. See, generally, as to parties: International &c. R. Co v. Timmermann, 61 Tex. 660; Gulf &c. R. Co. v. Smith, 3 Tex. Civ. App. 483; 23 S. W. 89; Cleveland v. Grand Trunk R. Co. 42 Vt. 449; Ohio &c. R. Co. v. Trapp, 4 Ind. App. 69; 30 N. E. 812; Gulf &c. R. Co. v. Johnson, 54 Fed. 474; Bullis v. Chicago &c. R. Co. 76 Ia. 680; 39 N. W. 245; Eddy v. Lafayette, 49 Fed. 807; Logan v. Wabash Western R. Co. 43 Mo. App. 71.

[168] Ante, § 1234. See, also, Jacobs v. New York Cent. &c. R. Co. 107 App. Div. (N. Y.) 134; 94 N. Y. S. 954.

[169] Ante, § 1237.

[170] St. Louis &c. R. Co. v. Hecht, 38 Ark. 357; 9 Am. & Eng. R. Cas. 222. Where it appears that land damaged by fire was owned by plaintiff and his children, and it is not shown how many children there are or the extent of plaintiff's injury, a non-suit is proper. Comer v. Newman, 95 Ga. 434; 22 S. E. 634. As to what is sufficient title and proof thereof, see, generally, Ohio &c. R. Co. v. Trapp, 4 Ind. App. 69; 30 N. E. 812; Rood v. New York &c. R. Co. 18 Barb. (N. Y.) 80; Ridell v. New York Cent. &c. R. Co. 73 N. Y. 618; Reed v. Chicago &c. R. Co. 71 Wis. 399; 37 N. W. 225; Johnson v. Chicago &c. R. Co. 77 Ia. 666; 42 N. W. 512; Metzgar v. Chicago &c. R. Co. 76 Ia. 387; 41 N. W. 49; 14 Am. St. 224; McClellan v. St. Paul &c. R. Co. 58 Minn. 104; 59 N. W. 978; Pacific Exp. Co. v. Dunn, 81 Tex. 85; 16 S. W. 792; Spurlock v. Port Townsend &c. R. Co. 13 Wash. 29; 42 Pac. 520.

[171] Campbell v. Missouri &c. R. Co.

a recovery can only be had on proof of negligence of the company, facts constituting negligence must be alleged and the particular kind of negligence on which the recovery is based should be shown.[172] Thus, where the action is based on the use of defective appliances negligence in that respect must be shown and where the action is based on negligence in suffering a fire to escape from the right of way it must be alleged that the fire was negligently suffered to escape.[173] Where property which had been placed on the right of way of a railway company was destroyed by fire it was held in an action to recover its value that a complaint which did not allege that the property was rightfully on the right of way was not sufficient to withstand a demurrer.[174] Where a complaint contained no allegation as to the unskillfulness of the engineer or fireman but charged the company with negligence in permitting the engine to be out of "repair and carelessly and negligently used," it was held that the allegation was not sufficient to justify a charge submitting to the jury the question of skillfulness of the engineer and fireman.[175] Where a complaint is based on the negligence of the company in setting fire directly from an engine the complaint should describe, as definitely as possible, the locomotive set-

121 Mo. 340; 25 S. W. 936; 25 L. R. A. 175; 42 Am. St. 530, and note; Martin v. New York &c. R. Co. 62 Conn. 331; 25 Atl. 239.

[172] Where a statute provided that no formal pleadings should be required in a justice's court, but only a "statement of the facts constituting the cause of action upon which the suit is founded," a statement in a suit for damages caused by a railway fire which did not allege that the fire was negligently set was held sufficient on objection raised after verdict. Polhans v. Atchison &c. R. Co. 115 Mo. 535; 22 S. W. 478. For complaint held sufficiently certain, see Pittsburg &c. R. Co. v. Wise, 36 Ind. App. 59; 74 N. E. 1107.

[173] Lake Erie &c. R. Co. v. Miller, 9 Ind. App. 192; 36 N. E. 428; Louisville &c. R. Co. v. Roberts, 13 Ind. App. 692; 42 N. E. 247; Pittsburgh &c. R. Co. v. Hixon, 79 Ind. 111; Louisville &c. R. Co. v. Ehlert, 87 Ind. 339; Louisville &c. R. Co. v. Palmer, 13 Ind. App. 161; 39 N. E. 881; Indiana &c. R. Co. v. Adamson, 114 Ind. 282; 15 N. E. 5; 34 Am. & Eng. R. Cas. 127; Lake Erie &c. R. Co. v. Miller, 9 Ind. App. 192; 36 N. E. 428; Chicago &c. R. Co. v. Burden, 14 Ind. App. 647; 43 N. E. 155. For complaint held sufficient, see Pittsburg &c. R. Co. v. Wise, 36 Ind. App. 59; 74 N. E. 1107.

[174] Pennsylvania R. Co. v. Gallentine, 77 Ind. 322; 7 Am. & Eng. R. Cas. 517; Pittsburgh &c. R. Co. v. Noel, 77 Ind. 110; 7 Am. & Eng. R. Cas. 524.

[175] Babcock v. Chicago &c. R. Co. 72 Iowa, 197; 33 N. W. 628. Com-

ting the fire so that the defendant may have an opportunity to identify the engine and examine into its condition at the time of the fire as well as the conduct of its agents and servants at that time.[176] As a general rule the complaint must allege the particular negligence which it is intended to prove for an allegation of negligence in one particular is not sufficient to admit evidence of negligence in another particular.[177] Thus, where it was alleged that a company was guilty of negligence in operating its locomotives evidence tending to show negligence in permitting combustibles to accumulate is inadmissible.[178] But in many jurisdictions negligence may be charged somewhat generally, at least unless the defendant asks to have the complaint made more specific. And where it was alleged that an engine was operated with a defective flue, proof that it had no flue at all was held not to be a fatal variance.[179] A complaint which alleged that the railway company "negligently allowed its engine to scatter fire" has been held broad enough to admit evidence as to the condition of the engine and the manner of its operation.[180] The pleader should allege facts to charge the defendant with knowledge that the result charged might be reasonably expected to follow directly and naturally from the burning.[180a]

§ 1242. Burden of proof—Presumption of negligence.—Where a fire is caused by inflammable material on the right of way or by fire spreading from the right of way the authorities are pretty well agreed that the burden of proving negligence rests upon the plaintiff. In such cases it is but just that the burden should rest upon the plaintiff for the means of proof are as equally available

pare Bullis v. Chicago &c. R. Co. 76 Iowa, 680; 39 N. W. 245.

[176] Koontz v. Oregon &c. R. Co. 20 Ore. 3; 23 Pac. 820; 43 Am. & Eng. R. Cas. 11; Missouri Pacific R. Co. v. Merrill, 40 Kan. 404.

[177] Miller v. Chicago &c. R. Co. 76 Iowa, 318; 41 N. W. 28. See, also, St. Louis &c. Ry. Co. v. Moss, (Tex. Civ. App.); 84 S. W. 281.

[178] Carter v. Kansas City &c. R. Co. 65 Iowa, 287; 21 N. W. 607; Miller v. Chicago &c. R. Co. 66 Iowa, 364; 23 N. W. 756.

[179] Denver &c. R. Co. v. Conway, 8 Colo. 1; 5 Pac. 142; 54 Am. R. 537.

[180] Weber v. Winona &c. R. Co. 63 Minn. 66; 65 N. W. 93. See, also, Alabama Great Southern R. Co. v. Sanders (Ala.); 40 So. 402; Norwich Ins. Co. v. Oregon R. Co. 46 Oreg. 123; 78 Pac. 1025. But compare Lake Erie &c. R. Co. v. Ford (Ind.); 78 N. E. 969.

[180a] Atlantic Coast Line R. Co. v. Benedict Pineapple Co. (Fla.); 42 So. 529.

to the plaintiff as to the defendant. The gist of such action in such cases is negligence in suffering the fire to escape and the burden in showing negligence in that respect rests upon the plaintiff. But where a fire is set directly by sparks from a locomotive and the action is predicated on negligence of the company in using a locomotive with defective apparatus or equipments or in negligently and unskillfully managing a locomotive, the authorities are in direct conflict as to who has the burden of proof. The plaintiff must, of course, assume the burden of proving that there was a fire and that it was set by a locomotive.[181] But after it has been shown that there was a fire and that it was set by a locomotive before there can be a recovery, in the absence of absolute statutory liability, it still remains to be shown that the company was guilty of some act of negligence. Here the authorities are in decided conflict. There are a great many authorities which maintain and enforce the rule that when it has once been proved that a fire was set by a locomotive a presumption of negligence[182]

[181] Inman v. Elberton &c. R. Co. 90 Ga. 663; 16 S. E. 958; 35 Am. St. 232; Union &c. R. Co. v. Keller, 36 Neb. 189; 54 N. W. 420; Niskern v. Chicago &c. R. Co. 22 Fed. 811.

[182] Kimball v. Borden, 95 Va. 203; 28 S. E. 207, 208 (citing text); St. Louis &c. Ry. Co. v. Coombs, 76 Ark. 132; 88 S. W. 595, 596 (citing text); Edwards v. Campbell (Tex. Civ. App.); 33 S. W. 761; Reed v. Missouri &c. R. Co. 50 Mo. App. 504; Rose v. Chicago &c. R. Co. 72 Iowa, 625; 34 N. W. 450; Louisville &c. R. Co. v. Reese, 85 Ala. 497; 5 So. 283; 7 Am. St. R. 66; Karsen v. Milwaukee &c. R. Co. 29 Minn. 12; 11 N. W. 122; Coates v. Missouri &c. R. Co. 61 Mo. 38; Case v. Northern Central &c. R. Co. 59 Barb. (N. Y.) 644; Burroughs v. Housatonic &c. R. Co. 15 Conn. 124; 38 Am. Dec. 64; Burlington &c. R. Co. v. Westover, 4 Neb. 268; Illinois Central R. Co. v. Mills, 42 Ill. 407; Burke v. Louisville &c. R. Co. 7 Heisk. (Tenn.) 451; 19 Am. R. 618; Spaulding v. Chicago &c. R. Co. 30 Wis. 110; 11 Am. R. 550; Cronk v. Chicago &c. R. Co 3 S. Dak. 93; 52 N. W. 720; 54 Am. & Eng. R. Cas. 525; East Tennessee &c. R. Co. v. Hesters, 90 Ga. 11; 15 S. E. 828; Smith v. Northern &c. R. Co. 3 N. Dak. 17; 53 N. W. 173; Fitch v. Pacific &c. R. Co. 45 Mo. 322; Tilley v. St. Louis &c. R. Co. 49 Ark. 535; 6 S. W. 8; 32 Am. & Eng. R. Cas. 324; Jones v. Michigan &c. R. Co. 59 Mich. 437; 26 N. W. 662; Greenridge &c. R. Co. v. Brinkman, 64 Md. 52; 20 Atl. 1024; 54 Am. R. 755; Johnson v. Chicago &c. R. Co. 31 Minn. 57; Wise v. Joplin &c. R. Co. 85 Mo. 178; Brown v. Atlanta &c. R. Co. 19 S. Car. 39; Longabaugh v. Virginia City &c. R. Co. 9 Nev. 271; Gulf &c. R. Co. v. Benson, 69 Tex. 407; 5 S. W. 822; 5 Am. St. 74; International &c. R. Co. v. Timmermann, 61 Tex. 660; International

at once arises and the burden is on the defendant to overcome that presumption before it can escape liability. In some states this

&c. R. Co. v. Hogsett, 67 Tex. 685; Ellis v. Portsmouth &c. R. Co. 2 Ired. (N. Car.) L. 138; Cleveland v. Grand Trunk &c. R. Co. 42 Vt. 449; Eddy v. Lafayette 49 Fed. 807; Kinney v. Hannibal &c. R. Co. 70 Mo. 243; Woodson v. Milwaukee &c. R. Co. 21 Minn. 60; Johnson v. Northern &c. R. Co. 1 N. Dak. 354; 48 N. W. R. 227; 45 Am. & Eng. R. Cas. 554; Piggot v. Eastern &c. R. Co. 3 C. B. 229; Gibson v. South Eastern &c. R. Co. 1 F. & F. 23; Aldridge v. Great Western &c. R. Co. 15 C. B. (N. S.) 582; Smith v. London &c. R. Co. L. R. 6 C. P. 14; Moxley v. Canada &c. R. Co. 14 Ont. App. 309; 32 Am. & Eng. R. Cas. 304; Seska v. Chicago &c. R. Co. 77 Iowa, 137; 41 N. W. 596; Anderson v. Cape Fear &c. Co. 64 N. Car. 399; Koontz v. Oregon &c. R. Co. 20 Ore. 3; 23 Pac. 820; 43 Am. & Eng. R. Cas. 11; Anderson v. Wasatch &c. R. Co. 2 Utah 518; Columbia &c. R. Co. v. Farrington, 1 Wash. 202; 23 Pac. R. 413; Galveston &c. R. Co. v. Dolores &c. R. Co. (Tex. Civ. App.); 26 S. W. 79. See, also, Louisville &c. R. Co. v. Marbury Lumber Co. 132 Ala. 520; 32 So. 745; 90 Am. St. 917, and note; Piggott v. Eastern Counties R. Co. 3 C. B. 229; 54 Eng. Com. L. 228; McCullen v. Chicago &c. R. Co. 101 Fed. 66; 49 L. R. A. 642. "But there are cases where negligence will be presumed from proof of the accident and the injury, and fires caused by steam engines seem to come within this class. This is a presumption arising from necessity, and that justice may not be defeated. Fire escapes from an engine and destroys property. The owner only knows that his property is gone, and that the fire causing its destruction came from the engine. He might not know, or be able to prove, from what particular engine on the line of a railroad the fire escaped, or who at the time was in charge of it, or whether it was properly constructed, and so not be able to prove negligence, when, in fact, it did exist. All this proof is in possession of the railroad company, and it has the power of rebutting the charge of negligence, if none, in fact existed." Diamond v. Northern &c. R. Co. 6 Mont. 580; 13 Pac. 367; 29 Am. & Eng. R. Cas. 117. In the case of Galveston &c. R. Co. v. Horne, 69 Tex. 643; 9 S. W. 440; 35 Am. & Eng. R. Cas. 238, the court said: "There is a conflict in the decisions of England and America, as to whether the escape of sparks from a passing engine is prima facie evidence of negligence on the part of the company running the engine. . . . The employes know the condition of the engine, and of the appliances used to prevent the escape of fire, and they should be informed as to whether these were sufficient for that purpose. The injured party would not, as a general thing, be possessed of any such information, and he could not ordinarily obtain it. To require him to make the proof would in most instances be a denial of justice, and would allow the party doing the wrong to escape by concealing the facts which brought it about. Hence, the courts have adopted the

rule prevails as a result of statutory enactment.[183] But in a great many states, it is held that no presumption of negligence arises from a mere setting of a fire, and that something further must be shown by the plaintiff before he can recover.[184] Those authorities which hold that the burden of proof should rest upon the plaintiff justify the rule on the ground that the company, being engaged in a lawful business, should not be made to respond in damages without being shown to have been guilty of negligence.[185]

salutary rule of presuming the existence of negligence against the party who has the means of disproving it, and fails to make use of them."

[183] East Tennessee &c. R. Co. v. Hesters, 90 Ga. 11; 15 S. E. 828; Garrett v. Chicago &c. R. Co. 36 Iowa, 121; Babcock v. Chicago &c. R. Co. 62 Iowa, 593; 11 Am. & Eng. R. Cas. 64; 13 Am. & Eng. R. Cas. 477; Chicago &c. R. Co. v. Pennell, 110 Ill. 435; Small v. Chicago &c. R. Co. 50 Iowa, 338; Baltimore &c. R. Co. v. Dorsey, 37 Md. 19; McLavish v. Great Northern Ry. Co. 8 N. Dak. 333; 79 N. W. 443, 446; Smith v. Northern &c. R. Co. 3 N. Dak. 17; 53 N. W. 173; Karsen v. Milwaukee R. Co. 29 Minn. 12, 14; 11 N. W. 122; Daly v. Chicago &c. R. Co. 43 Minn. 319; 45 N. W. 611; Cleveland v. Grand Trunk &c. R. Co. 42 Vt. 449; Chicago &c. R. Co. v. Clampit, 63 Ill. 95; Annapolis &c. R. Co. v. Gantt, 39 Md. 115; Missouri &c. R. Co. v. Merrill, 40 Kan. 404; Atchison &c. R. Co. v. Gibson, 42 Kan. 34; Louisville &c. R. Co. v. Natchez &c. Co. 67 Miss. 399. Under statutes such as those in Minnesota and North and South Dakota, it is said that the sole office of such a presumption is to change the burden of proof, that it then becomes functus officio and can not be used, after evidence of the facts has been adduced, to raise an issue for a jury which the evidence itself does not present. Woodward v. Chicago &c. R. Co. 145 Fed. 577, 580.

[184] Philadelphia &c. R. Co. v. Yerger, 73 Pa. St. 121; Indianapolis &c. R. Co. v. Paramore, 31 Ind. 143; Ruffner v. Cincinnati &c. R. Co. 34 Ohio St. 96; Lowney v. New Brunswick &c. R. Co. 78 Me. 479; 7 Atl. 381; Henry v. Southern &c. R. Co. 50 Cal. 176; Pittsburgh &c. R. Co. v. Noel, 77 Ind. 110; Jefferis v. Philadelphia &c. R. Co. 3 Houst. (Del.) 447; Burroughs v. Housatonic &c. R. Co. 15 Conn. 124; 38 Am. Dec. 64, and note; Pittsburgh &c. R. Co. v. Hixon, 110 Ind. 225; 11 N. E. 285; 32 Am. & Eng. R. Cas. 150; Chicago &c. R. Co. v. Ostrander, 116 Ind. 259; 15 N. E. 227; Meyer v. Vicksburg &c. R. Co. 41 La. Ann. 639; 6 So. 218; 17 Am. St. 408; Henderson v. Philadelphia &c. R. Co. 144 Pa. St. 461; 22 Atl. 851; 16 L. R. A. 299; 27 Am. St. 652; Bernard v. Richmond &c. R. Co. 85 Va. 792; 8 S. E. 785; 17 Am. St. 103; Cincinnati &c. R. Co. v. South Fork Coal Co. 139 Fed. 528, 537; Garrett v. Southern Ry. Co. 101 Fed. 102; 49 L. R. A. 645; Meyer v. Vicksburg &c. R. Co. 41 La. Ann. 639; 6 So. 218; 17 Am. St. 208.

[185] The most cogent reasons given

Those authorities which hold that the burden of disproving negligence should rest upon the defendant proceed upon the theory that the mere fact that a fire is set out indicates negligence and that the evidence necessary to show negligence is peculiarly within the reach of the defendant and often not available to the plaintiff, and that no hardship is imposed upon the defendant in requiring it to produce that evidence.[186] The tendency of modern judicial decision and authority is, probably, in favor of casting the burden of disproving negligence on the company, but, as experience has demonstrated that it is almost, if not quite, impossible to operate an engine without the emission of sparks and as negligence may be proved by circumstantial evidence equally accessible to the plaintiff we are inclined to think that, upon principle, this should not constitute an exception to the general rule that the burden is upon the plaintiff.[187]

for the support of this rule are, that a railroad company which is authorized by law to operate its trains by steam is not an insurer against accidents by fire, and is not liable for injuries caused by the use of fire in generating steam, if the right is exercised in a lawful manner and with reasonable care and skill; and the owner of adjacent property assumes all risks incident to a lawful and proper use of the road; that negligence is the gist of the liability, without proof of which an action can not be maintained, and by the general rule in actions founded on negligence, the plaintiff must aver it, and the burden of proof rests upon him, and in no case does the mere fact of injury prove negligence." Louisville &c. R. Co. v. Reese, 85 Ala. 497; 5 So. 283; 7 Am. St. 66.

[186] The reason of the rule is thus stated in the case of Spaulding v. Chicago &c. R. Co. 30 Wis. 110; 11 Am. R. 550. "The reasons given for requiring the companies to show that this duty has been performed on their path are, that agents and employes of the road know, or are at least bound to know, that the engine is properly equipped to prevent fire from escaping, and that they know whether any mechanical contrivances were employed for that purpose, and if so, what was their character; whilst, on the other hand, persons not connected with the road, and who only see trains passing at a high rate of speed, have no such means of information, and the same is inaccessible to and can not be obtained by them, without great trouble and expense." See, also, Cincinnati &c. R. Co. v. Falconer (Ky.); 97 S. W. 727; Louisville &c. R. Co. v. Reese, 85 Ala. 497; 5 So. 283; 7 Am. St. 66.

[187] See Cincinnati &c. R. Co. v. South Fork Coal Co. 139 Fed. 528, 537. In other cases it is held that, while it devolves upon the company to rebut the prima facie case, the burden does not shift so as to require the company to do so by a

§ 1243. Proof that company set out fire.—While in a great number of cases the plaintiff is not required to prove that the defendant was guilty of negligence in setting out a fire it is always incumbent on the plaintiff, where his property is directly set on fire, to show that the fire was set by a locomotive of the defendant.[188] As there are few, if any, cases where persons see the fire directly communicated, proof of communication must necessarily be more or less circumstantial.[189] But, even though circumstantial evidence is sufficient to establish liability, where the evidence is such that it is a mere conjecture as to whether or not the company set the fire it is proper to nonsuit the plaintiff.[190] Where, however, it is shown that there was no probable cause for the fire except the railway locomotives it may be sufficient to fasten it upon the com-

preponderance of the evidence. St. Louis &c. R. Co. v. Hooser (Tex. Civ. App.); 97 S. W. 708; Toledo &c. R. Co. v. Star Flouring Mills, 146 Fed. 953.

[188] Union &c. R. Co. v. Keller, 36 Neb. 189; 54 N. W. 420; Sheldon v. Hudson River &c. R. Co. 14 N. Y. 218; 67 Am. Dec. 155; Inman v. Elberton &c. R. Co. 90 Ga. 663; 16 S. E. 958; 35 Am. St. 232; Fitch v. Pacific &c. R. Co. 45 Mo. 322; Burke v. Louisville &c. R. Co. 7 Heisk. (Tenn.) 451; 19 Am. R. 618; Indianapolis &c. R. Co. v. Paramore, 31 Ind. 143; Niskern v. Chicago &c. R. Co. 22 Fed. 811; White v. New York &c. R. Co. 85 N. Y. S. 497, affirmed in 181 N. Y. 577; 74 N. E. 1126.

[189] Louisville &c. R. Co. v. McCorkle, 12 Ind. App. 691; 40 N. E. 26; Sheldon v. Hudson River &c. R. Co. 14 N. Y. 218; 67 Am. Dec. 155; Union &c. R. Co. v. DeBusk, 12 Colo. 294; 20 Pac. 752; 13 Am. St. 221; 3 L. R. A. 350; Union Pacific R. Co. v. Keller, 36 Neb. 189; 54 N. W. 420. "The origin of fires is often proved by circumstances. It is not necessary to prove it by direct or positive evidence. No witness may have testified that the fire was started by an engine operated by appellant, and yet the evidence may have fully justified the inference that it was so started." Ohio &c. R. Co. v. Trapp, 4 Ind. App. 69; 30 N. E. 812. See, also, St. Louis &c. R. Co. v. Coombs, 76 Ark. 132; 88 S. W. 595; E. Swindell & Co. v. Alabama &c. R. Co. 123 Ga. 311; 51 S. E. 386; Brooks v. Missouri Pac. R. Co. 98 Mo. App. 166; 71 S. W. 1083; Marande v. Texas &c. R. Co. 184 U. S. 173; 193; 22 Sup. Ct. 340; Monte Ne R. Co. v. Phillips (Ark.); 96 S. W. 1060; Minard v. West Jersey &c. R. Co. (N. J.); 64 Atl. 1054.

[190] Megow v. Chicago &c. R. Co. 86 Wis. 466; 56 N. W. 1099. See, also, Pfeffer v. Missouri Pac. R. Co. 98 Mo. App. 291; 71 S. W. 1073; Denver &c. R. Co. v. De Graff, 2 Colo. App. 42; 29 Pac. 664; Lake Erie &c. R. Co. v. Gossard, 14 Ind. App. 244; 42 N. E. 818; Minneapolis &c. Co. v. Great Northern &c. R. Co. 83 Minn. 370; 86 N. W. 451.

pany.[191] It is not necessary that the plaintiff should produce evidence to exclude every other possible cause of the fire.[192] The plaintiff is not always required to show that any particular engine set out the fire, and evidence that other engines of the company, similar in general construction to that supposed to have set out the fire, set out fire about the time of the injury has often been held admissible.[193] As tending to show that the fire was set by the defendant, it has also been held competent to prove that at various times before the fire occurred the engines of the company set out fires along its line in the vicinity.[194] Proof that fires were set

[191] Baltimore &c. R. Co. v. Shipley, 39 Md. 251; Field v. New York &c. R. Co. 32 N. Y. 339; Johnson v. Chicago &c. R. Co. 77 Iowa, 666; 42 N. W. 512; Karsen v. Milwaukee &c. R. Co. 29 Minn. 12; 11 N. W. 122; 7 Am. & Eng. R. Cas. 501; Smith v. London &c. R. Co. L. R. 6 C. P. 14. Where it was shown that a fire sprang up just after a train passed, that there was no other fire on the premises before and no other apparent cause for the fire, it was held that the evidence was sufficient to warrant a finding that it was set by the passing train. Union &c. R. Co. v. DeBusk, 12 Colo. 294; 20 Pac. 752; 3 L. R. A. 350; 13 Am. St. 221; 38 Am. & Eng. R. Cas. 321. See Union &c. R. Co. v. Jones, 9 Colo. 379. See, also, St. Louis &c. R. Co. v. Dawson, 77 Ark. 434; 92 S. W. 27; St. Louis &c. R. Co. v. Coombs, 76 Ark. 132; 88 S. W. 595, 596 (citing text).

[192] Crist v. Erie R. Co. 58 N. Y. 638.

[193] Chicago &c. R. Co. v. Gilbert, 52 Fed. 711; Gulf &c. R. Co. v. Johnson, 54 Fed. 474; Koontz v. Oregon &c. R. Co. 20 Ore. 3; 23 Pac. 820; 43 Am. & Eng. R. Cas. 11; Crocker v. McGregor, 76 Me. 282; 46 Am. R. 611, and note; Henderson v. Philadelphia &c. R. Co. 144 Pa. St. 461; 22 Atl. 851; 16 L. R. A. 299; 27 Am. St. 652; 48 Am. & Eng. R. Cas. 16; Annapolis &c. R. Co. v. Gantt, 39 Md. 115; Stertz v. Stewart, 74 Wis. 160; 42 N. W. 214; Chicago &c. R. Co. v. Gilbert, 52 Fed. 711; Smith v. Boston &c. R. Co. 63 N. H. 25; Thatcher v. Maine &c. R. Co. 85 Me. 502; Campbell v. Missouri Pacific R. Co. 121 Mo. 340; 25 L. R. A. 175; 42 Am. St. 530, and note; Hoskison v. Central Vermont R. Co. 66 Vt. 618; 30 Atl. 24; Chicago &c. R. Co. v. Zimmerman, 12 Ind. App. 504; 40 N. E. 703; Northern Pacific R. Co. v. Lewis, 51 Fed. 658; Loring v. Worcester &c. R. Co. 131 Mass. 469. See, also, McMahon v. Hetchhetchy R. Co. 2 Cal. App. 400; 84 Pac. 350. Where plaintiff's building which was destroyed was 125 feet from the railway track it was proper for the plaintiff to show, as tending to rebut the presumption that defendant's engines did not set the fire, that property in a direct line, but farther away had been set on fire. Hoskison v. Central Vermont R. Co. 66 Vt. 618; 30 Atl. 24.

[194] Grand Trunk &c. R. Co. v.

along the line of the railway is not admissible unless it is shown that they were set by the railway company.[195] But it has been held competent to show that coals of fire had previously been dropped or been found on the track at or near the place where the injury occurred.[196] Where the plaintiff seeks to confine the setting of the fire to a single engine, proof that the same engine set other fires is admissible.[197] But proof that other engines set out fires at different times has been held inadmissible.[198] Evidence is not admis-

Richardson, 91 U. S. 454; Henderson v. Philadelphia &c. R. Co. 144 Pa. St. 461; 16 L. R. A. 299; 27 Am. St. 652; 48 Am. & Eng. R. Cas. 16; Field v. New York &c. R. Co. 32 N. Y. 339; Webb v. Rome &c. R. Co. 49 N. Y. 420; 10 Am. R. 389; Koontz v. Oregon &c. R. Co. 20 Ore. 3; 23 Pac. 820; 43 Am. & Eng. R. Cas. 11; Steele v. Pacific Coast R. Co. 74 Cal. 323; 32 Am. & Eng. R. Cas. 333. Some of the authorities holding such evidence admissible seem to us to go to the extreme. Where the particular engine which set the fire is known and designated, proof that it set other fires is admissible, but not proof that other engines set out fires. Ireland v. Cincinnati &c. R. Co. 79 Mich. 163. See, also, Shelly v. Philadelphia &c. Ry. Co. 211 Pa. St. 160, 165; 60 Atl. 581, 582.

[195] St. Louis &c. R. Co. v. Jones, 59 Ark. 105; 26 S. W. 595. Where evidence is admissible of other fires it must appear that the fires were not very remote from the fire causing the damage. If the fires are remote in time it must appear that the machinery and appliances remained in the same condition of repair or the evidence will not be admitted. Collins v. New York &c. R. Co. 109 N. Y. 243; 32 Am. & Eng. R. Cas. 366. "Reasonable latitude must, of course, be allowed. The purpose of such proofs would be defeated if they were confined to the exact or precise time of the occurrence." Henderson v. Philadelphia &c. R. Co. 144 Pa. St. 461; 22 Atl. 851; 16 L. R. A. 299; 27 Am. St. 652.

[196] Longabaugh v. Virginia City &c. R. Co. 9 Nev. 271; Smith v. Old Colony &c. R. Co. 10 R. I. 22; St. Joseph &c. R. Co. v. Chase, 11 Kan. 47. See, also, Gorham &c. Co. v. New York &c. R. Co. 27 R. I. 35; 60 Atl. 638.

[197] Patton v. St. Louis &c. R. Co. 87 Mo. 117; 56 Am. R. 446; 23 Am. & Eng. R. Cas. 364; Atchison &c. R. Co. v. Bales, 16 Kan. 252; Louisville &c. R. Co. v. McCorkle, 12 Ind. App. 691; 40 N. E. 26; Lake Erie &c. R. Co. v. Middlecoff, 150 Ill. 27; 37 N. E. 660; Hendricks v. Southern R. Co. 123 Ga. 342; 51 S. E. 415. See, also, A. F. Johnson & Son v. Atlantic Coast Line R. Co. 140 N. Car. 581; 53 S. E. 362.

[198] St. Louis &c. R. Co. v. Jones, 59 Ark. 105; 26 S. W. 595. See, also, McFarland v. Gulf &c. Ry. Co. (Tex. Civ. App.); 88 S. W. 450; Shelly v. Philadelphia &c. R. Co. 211 Pa. St. 160, 165; 60 Atl. 581, 582; and authorities cited in notes to next following section.

sible to show that the railway company settled with other persons for loss caused by the same fire.[199]

§ 1243a. Evidence of emission of sparks or setting of fires by the same or other engines.—It is difficult to reconcile all the decisions upon the subject of evidence of the emission of sparks or the setting of fires on other occasions, as appears from the preceding section, but the question is discussed, and the authorities are reviewed, and what seems to be the true doctrine, is stated by us in another work[200] as follows: "If but one of the defendant's engines passed the place about the time of the fire, and it is known, or if it is otherwise identified as the one which must have caused the fire, if any did, evidence is admissible, within reasonable limits, to show that the same engine has, on other occasions and under similar conditions emitted burning sparks which have been carried to a great distance [201] and set other fires along the line.[202] But in such a case, that is, where the only engine that could have caused the fire is identified, testimony that other engines at other times and places set fires or

[199] The rule is thus stated in Louisville &c. R. Co. v. Roberts, 13 Ind. App. 692; 42 N. E. 247: "On the trial the court, over appellant's objection, permitted the appellee to prove that appellant had paid other land-owners for loss sustained by them caused by the same fire. The evidence was introduced as tending to prove that appellant recognized its liability for the losses occasioned by the fire in question. This was error. The fact that appellant had paid such losses of others was not admissible in evidence as tending to prove that appellant was liable to appellee."

[200] Elliott Ev. § 188.

[201] Taylor v. Louisville &c. R. Co. 19 Ky. L. 717; 41 S. W. 551; Ross v. Boston &c. R. Co. 6 Allen (Mass.), 87; Baltimore &c. R. Co. v. Tripp, 175 Ill. 251; 51 N. E. 833; Hinds v. Barton, 25 N. Y. 544.

[202] Chicago &c. R. Co. v. Kreig, 22 Ind. App. 393; 53 N. E. 1033; Louisville &c. R. Co. v. McCorkle, 12 Ind. App. 691; 40 N. E. 26; Henry v. Southern Pac. R. Co. 50 Cal. 176; Lake Erie &c. R. Co. v. Middlecoff, 150 Ill. 27; 37 N. E. 660; Patton v. St. Louis &c. R. Co. 87 Mo. 117; 56 Am. R. 446; Slossen v. Burlington &c. R. Co. 60 Ia. 215; Green Ridge R. Co. v. Brinkman, 64 Md. 52; 20 Atl. 1024; 54 Am. R. 755; Atchison &c. R. Co. v. Bales, 16 Kans. 252. In most of these authorities there appears to have been no evidence of similarity of conditions. But see Collins v. New York &c. R. Co. 109 N. Y. 243; 16 N. E. 50; Wheeler v. New York &c. R. Co. 67 Hun (N. Y.), 639; Menominee &c. Co. v. Milwaukee &c. R. Co. 91 Wis. 447; 65 N. W. 176; Hoyt v. Jeffers, 30 Mich. 181.

threw igniting sparks is, on principle, irrelevant and inadmissible unless, at least, evidence is introduced showing that they were in the same condition as the engine in question, or similarly constructed and operated, and there are well-considered authorities to this effect,[203] although this distinction is not always drawn, and there are other authorities that seem to countenance such evidence in any event.[204] We think, however, that very few of them actually so decide, and the leading case[205] upon which most of them are based does not do so, for in that case the engine that caused the fire was not identified. In a Missouri case it is said that where the question is simply as to whether an engine of the defendant caused the fire,

[203] Lesser Cotton Co. v. St. Louis &c. R. Co. 114 Fed. 133; Baltimore &c. R. Co. v. Woodruff, 4 Md. 242; 59 Am. Dec. 72; Gibbons v. Wisconsin &c. R. Co. 58 Wis. 335, 339; 17 N. W. 132; Allard v. Chicago &c. R. Co. 73 Wis. 165; 40 N. W. 685; Henderson v. Philadelphia &c. R. Co. 144 Pa. St. 461; 22 Atl. 851; 27 Am. St. 652; 16 L. R. A. 299; Crissey &c. Co. v. Denver &c. R. Co. 17 Col. App. 275; 68 Pac. 670; First Nat. Bank v. Lake Erie &c. R. Co. 174 Ill. 36; 50 N. E. 1023; San Antonio &c. R. Co. v. Home &c. Ins. Co. 70 S. W. 999; Smith v. Hannibal &c. R. Co. 37 Mo. 287; Coale v. Hannibal &c. R. Co. 60 Mo. 227, 233; Ireland v. Cincinnati &c. R. Co. 79 Mich. 163; 44 N. W. 426. See, also, Boyce v. Cheshire R. Co. 42 N. H. 97; Haseltine v. Concord R. Co. 64 N. H. 545; 15 Atl. 143; Hubbard v. Androscoggin &c. R. Co. 39 Me. 506; Robinson v. Fitchburg &c. R. Co. 7 Gray (Mass.), 92; Phelps & Co. v. Conant & Co. 30 Vt. 277; Hoskison v. Central Vt. R. Co. 66 Vt. 618; 30 Atl. 24; Malton v. Nesbit, 1 Car. & P. 70. The Maryland case has been considered as virtually overruled in more recent cases of Annapolis &c. R. Co. v. Gantt, 39 Md. 115, and Green R. Co. v. Brinkman, 64 Md. 52; 20 Atl. 1024; 54 Am. R. 755, and one of the Missouri cases is expressly overruled in Hoover v. Missouri &c. R. C. (Mo.); 16 S. W. 480, but the distinction between an identified and an unidentified engine is not noticed in the latter case, and we think the Maryland cases do not overrule the earlier decision.

[204] Atchison &c. R. Co. v. Stanford, 12 Kan. 354; 15 Am. R. 362; Hoover v. Missouri &c. R. Co. (Mo).; 16 S. W. 480; Sheldon v. Hudson River R. Co. 14 N. Y 218; 67 Am. Dec. 155; Koontz v. Oregon &c. Co. 20 Ore. 3; 23 Pac. 820 (reasons for the rule); Northern Pacific R. Co. v. Lewis, 51 Fed. 658; Thatcher v. Maine &c. R. Co. 85 Me. 502; 27 Atl. 519; Ross v. Boston &c. R. Co. 6 Allen (Mass.), 87 (in rebuttal); Evansville &c. R. Co. v. Keith, 8 Ind. App. 57; 35 N. E. 296; Louisville &c. R. Co. v. Lange, 13 Ind. App. 337; 41 N. E. 609 (but see Chicago &c. R. Co. v. Gilmore, 22 Ind. App. 466; 53 N. E. 1078).

[205] Grand Trunk R. Co. v. Richardson, 91 U. S. 454.

evidence of other fires along the lines from other engines of the defendant within a reasonable time is admissible, but if the engine is identified and the only question is as to negligence, such evidence is not admissible.[206] If the particular engine cannot be identified, evidence is admissible that other engines of the defendant similarly constructed and operated set fires or threw igniting sparks equally far at other times, within a reasonable period, and at other places in the vicinity along the line, and the great weight of authority appears to be to the effect that such evidence is admissible without proof on the part of the plaintiff that the engines were similarly constructed and operated and without confining it to the exact time or day of the fire in question.[207] But some of these cases, in permitting negligence to be shown in this way go to the extreme, and hold that evidence of other fires months before or after the fire in question ought not to be received, at least without some evidence of similar conditions.[208] Where negligence is charged in permitting combus-

[206] Campbell v. Missouri &c. R. Co. 121 Mo. 340; 25 S. W. 936; 25 L. R. A. 175; 42 Am. St. 530, and note. See, also, Chicago &c. R. Co. v. Gilbert, 52 Fed. 711; 3 C. C. A. 264; Louisville &c. R. Co. v. Miller, 109 Ala. 500; 19 So. 989; Smith v. Old Colony &c. R. Co. 10 R. I. 22; St. Louis &c. R. Co. v. Jones, 59 Ark. 105, 111; 26 S. W. 595; Piggott v. Eastern &c. R. Co. 3 C. B. 229, 241; 54 E. C. L. 241. Where the only engine which would have caused the fire is identified, and its spark arrester shown to be without holes, punched in at the time of the fire, evidence to show a habit of the defendant's engineers to punch holes in spark arresters of their engines is not admissible. Lesser Cotton Co. v. St. Louis &c. R. Co. 114 Fed. 133.

[207] Hoskison v. Central Vt. R. Co. 66 Vt. 618; 30 Atl. 24; Cleveland v. Grand Trunk R. Co. 42 Vt. 449; Van Steuben v. Central R. Co. 178 Pa. St. 367; 35 Atl. 992; 34 L. R. A. 577; Thatcher v. Maine &c. R. Co. 85 Me. 502; 27 Atl. 519; Grand Trunk R. Co. v. Richardson, 91 U. S. 454; Chicago &c. R. Co. v. Gilmore, 22 Ind. App. 466; 53 N. E. 1078; Jacksonville &c. R. Co. v. Peninsular &c. Co. 27 Fla. 1, 157; 9 So. 661; 17 L. R. A. 33; Loring v. Worcester &c. R. Co. 131 Mass. 469; Inman v. Elberton &c. R. Co. 90 Ga. 663; 16 S. E. 958; 35 Am. St. 232; Koontz v. Oregon &c. Co. 20 Ore. 3; 23 Pac. 820; Webb v. Rome &c. R. Co. 49 N. Y. 420; 10 Am. R. 389, and note; Longabaugh v. Virginia &c. R. Co. 9 Nev. 271; Matthews v. Missouri &c. R. Co. 142 Mo. 645; 44 S. W. 802; Burke v. Louisville &c. R. Co. 7 Heisk. (Tenn.) 451; 19 Am. R. 618; Alabama &c. R. Co. v. Johnson, 128 Ala. 283; 29 So. 771.

[208] Henderson v. Philadelphia &c. R. Co. 144 Pa. St. 461; 22 Atl. 851; 16 L. R. A. 299; 27 Am. St. 652; Collins v. New York &c. R. Co. 109 N. Y. 243; Dillingham v. Whitaker

tible material upon the right of way and permitting fires to spread therefrom, evidence of other fires set to such material about the same place some time before is admissible."[209] But where the negligence charged is in the negligent operation of the engine by using too much steam it has been held that the connection between the use of too much steam and the escape of sparks must be shown, and that mere evidence of other fires set by the locomotive is insufficient to do it.[210]

§ 1244. Proof that company negligently set out fire.—In jurisdictions in which a presumption of negligence arises on proof that the fire was set by the locomotives of the defendant much less evidence may be required on the part of the plaintiff than in those cases where no such presumption arises. Of course, before the plaintiff can secure the benefit of such a presumption he must show that the company set the fire, and, when he has done this, it has been held that he has made out a prima facie case,[211] and may recover unless the defendant successfully overcomes the presumption of negligence against it. But, in those cases where no such presumption arises and the burden is on the plaintiff to show negligence as well as the setting of the fire, it necessarily follows that the plaintiff must produce more evidence than in the former class of cases. The evidence necessary to prove setting of the fires is the same in either case, for what would prove that the fire was set by the company

(Tex. Civ. App.); 25 S. W. 723; Babcock v. Chicago &c. R. Co. 62 Ia. 593; 13 N. W. 740; Menominee &c. Co. v. Milwaukee &c. R. Co. 91 Wis. 447; 65 N. W. 176; Davidson v. St. Paul &c. R. Co. 34 Minn. 51; 24 N. W. 324. But see Field v. New York &c. R. Co. 32 N. Y. 339.

[209] Pittsburgh &c. R. Co. v. Indiana &c. Co. 154 Ind. 322; 56 N. E. 766; Texas &c. R. Co. v. Rutherford, 28 Tex. Civ. App. 590; 68 S. W. 825; Abrams v. Seattle &c. R. Co. 27 Wash. 507; 68 Pac. 78. So held where the accumulations of combustibles and fires were at other places. Wabash R. Co. v. Miller, 158 Ind. 174; 61 N. E. 1005. But see Lake Erie &c. R. Co. v. Miller, 24 Ind. App. 662, 666; 57 N. E. 596.

[210] Louisville &c. R. Co. v. Vinyard (Ind. App.); 79 N. E. 384.

[211] Reed v. Missouri Pacific R. Co. 50 Mo. App. 504; St. Louis &c. R. Co. v. Strotz, 47 Ill. App. 342; Niskern v. Chicago &c. R. Co. 22 Fed. 811; St. Louis &c. Ry. Co. v. Coombs, 76 Ark. 132; 88 S. W. 595, 596. See, also, Toledo &c. R. Co. v. Valodin, 109 Ill. App. 132; Anderson v. Oregon R. Co. 45 Oreg. 211; 77 Pac. 119.

in one case would prove that the fire was set by the company in another similar case, although in one case the burden of proof of negligence may be on the plaintiff while in the other case the defendant may be presumptively negligent. And it often happens that negligence cannot be directly proved, but must be proved by circumstantial evidence. That such evidence is admissible is settled both by reason and authority.[212] Since the question of negligence is ordinarily one for the jury, and, as some juries might infer negligence from a state of facts from which other juries might fail to find negligence, it necessarily follows that there will be some conflict in the authorities as to what is sufficient evidence to show negligence. But, as to what tends to show, or, is competent as tending to show negligence, the authorities are pretty well agreed. Negligence may be inferred where property is set on fire by a locomotive which is shown to have been without a spark arrester. The absence of a spark arrester is prima facie evidence of negligence.[213] So, where fire is shown to have originated from a worn-out and defective spark arrester a prima facie case of negligence is made out.[214] And where an engine emits sparks of large and unusual size, it may be inferred that it is not provided with a proper spark arrester,[215] or where sparks are thrown to a great height or far from the track.[216] And proof that an engine frequently set fires has been held competent

[212] Atchison &c. R. Co. v. Bales, 16 Kan. 252; Philadelphia &c. R. Co. v. Schultz, 93 Pa. St. 341; Jacksonville &c. R. Co. v. Peninsula &c Co. 27 Fla. 1; 9 So. 661; 17 L. R. A. 47; Caswell v. Chicago &c. R. Co. 42 Wis. 193; McDoel v. Gill, 23 Ind. App. 630; 53 N. E. 956.

[213] Lackawanna &c. R. Co. v. Doak, 52 Pa. St. 379; 91 Am. Dec. 166.

[214] Louisville &c. R. Co. v. McCorkle, 12 Ind. App. 691; 40 N. E. 26, and cases cited; Ryan v. Gross, 68 Md. 377; 12 Atl. 115; 16 Atl. 302; 11 Cent. R. 502.

[215] Pennsylvania R. Co. v. Watson, 81½ Pa. St. 293; Philadelphia &c. R. Co. v. Schultz, 93 Pa. St. 341; Philadelphia &c. R. Co. v. Hendrickson, 80 Pa. St. 182; 21 Am. R. 97; Penn. R. Co. v. Lacey, 89 Pa. St. 458; Jackson v. Chicago &c. R. Co. 31 Iowa, 176; 7 Am. R. 120; Henry v. Southern &c. R. Co. 50 Cal. 176; Toledo &c. R. Co. v. Maxfield, 72 Ill. 95; Herring v. Wilmington &c. R. Co. 10 Ired. L. 402; 51 Am. Dec. 395; Toledo &c. R. Co. v. Kingman, 49 Ill. App. 43. Evidence of experts that such sparks could not be thrown from a properly constructed engine in proper repair is held admissible in Peck v. New York &c. R. Co. 165 N. Y. 347.

[216] Huyett v. Philadelphia &c. R. Co. 23 Pa. St. 373; Missouri &c. Co. v. Texas &c. R. Co. 41 Fed. 917; Chicago &c. R. Co. v. Ostrander,

as tending to show negligence on the part of the company.[217] It is also proper to show, as tending to prove negligence on the part of the company, that it ran its train at a great and unusual speed;[218] that wood was being used for fuel in a locomotive constructed for burning coal;[219] and that the engine emitted large quantities of sparks while standing near combustible material at a time when a

116 Ind. 259; 19 N. E. 110; Cincinnati &c. R. Co. v. Smock, 133 Ind. 411; 33 N. E. 108.

[217] Gandy v. Chicago &c. R. Co. 30 Iowa, 420; 56 Am. R. 682; Atchison &c. R. Co. v. Stanford, 12 Kan. 354; 15 Am. R. 362; Hull v. Sacramento &c. R. Co. 14 Cal. 387; 73 Am. Dec. 656; St. Joseph &c. R. Co. v. Chase, 11 Kan. 47; Jacksonville &c. R. Co. v. Peninsular &c. Co. 27 Fla. 1 and 157; 9 So. 661; 17 L. R. A. 33. "If engines in good repair and properly constructed do not ordinarily set out fires, defects in an engine, or negligence in running them, may be inferred from the frequent escape of fire therefrom. Circumstances of this kind may be considered by the jury." Slossen v. Burlington &c. R. Co. (Iowa); 10 N. W. 860; 7 Am. & Eng. R. Cas. 509. In Jacksonville &c. R. Co. v. Peninsular &c. Co. 27 Fla. 1 and 157; 17 L. R. A. 33, the court said: "The authorities hold that, where it is shown, as it is in this case, that the fatal fire had been set out from a designated engine, it is admissible to introduce evidence of other fires previously set out by the same engine, but not by any other engine of the defendant company. Ireland v. Cincinnati, &c. R. Co. 79 Mich. 163; Coale v. Hannibal &c. R. Co. 60 Mo. 227; Brighthope R. Co. v. Rogers, 76 Va. 443; Gibbons v. Wisconsin Valley R. Co. 58 Wis. 335; Slossen v. Burlington, C. R. & N. R. Co. 60 Iowa, 215; 14 N. W. 244; Lanning v. Chicago, B. & Q. R. Co. 68 Iowa, 502; 27 N. W. 478; Baltimore & S. R. Co. v. Woodruff, 4 Md. 242; 59 Am. Dec. 72. Former fires by the same engine are admissible as evidence tending to prove its defective condition or construction, or improper management, and those put out by other engines are excluded because they are matters collateral to the issue, and not evidence of the imperfect condition or bad management of the particular locomotive."

[218] Gandy v. Chicago &c. R. Co. 30 Iowa, 420; 6 Am. R. 682; Martin v. Western &c. R. Co. 23 Wis. 437; 99 Am. Dec. 189. See, also, Van Nostrand v. Railway Co. 79 Hun (N. Y.) 550; 29 N. Y. S. 625; Lake Erie &c. R. Co. v. Middlecoff, 150 Ill. 27; 37 N. E. 660; De Camp v. Omaha &c. Ry. Co. 62 Minn. 207; 64 N. W. 392. Evidence of unusual speed has been held not admissible, however, unless it be shown that such speed would make the danger from fires greater. Brusberg v. Milwaukee &c. R. Co. 50 Wis. 231; 6 N. W. 821.

[219] Chicago &c. R. Co. v. Ostrander, 116 Ind. 266; 38 Am. & Eng. R. Cas. 346; Chicago &c. R. Co. v. Quaintance, 58 Ill. 389; St. Joseph &c. R. Co. v. Chase, 11 Kan. 47.

strong wind was blowing.[220] Where the alleged negligence of the company consisted in permitting inflammable material to accumulate, proof of the accumulation and that it was discovered on fire shortly after the passage of a train has been held sufficient to support a verdict for the plaintiff.[221] Other decisions as to evidence sufficient to show negligence on the part of the company are reviewed in the opinion in the case cited below.[222] Where the only evidence to establish the defendant's responsibility was proof that it had settled

[220] Fero v. Buffalo &c. R. Co. 22 N. Y. 209; 78 Am. Dec. 178, and note.

[221] Terre Haute &c. R. Co. v. Walsh, 11 Ind. App. 13; 38 N. E. 534.

[222] Continental Ins. Co. v. Chicago &c. R. Co. 97 Minn. 467; 107 N. W. 548, 551, from which we quote as follows: "Negligence may be affirmatively proved by the emission of cinders unusual in quantity or size, or carried to an unusual height or distance. Anderson v. Railway Co. 45 Ore. 211; 77 Pac. 119, collecting cases at page 122; Jacksonville &c. R. Co. v. Peninsular Co. 27 Fla. 1; 9 South. 661; 17 L. R. A. 33; Bedell v. Long Island R. Co. 44 N. Y. 367; 4 Am. Rep. 688. Although such circumstantial evidence is not of the most satisfactory or conclusive character the jury should weigh it. Johnson v. Chicago R. Co. 31 Minn. 59; 16 N. W. 488; O'Neill v. New York R. Co. 115 N. Y. 583; 22 N. E. 217; 5 L. R. A. 591; Henry v. Southern Pac. R. Co. 50 Cal. 176; Great Western R. v. Haworth, 39 Ill. 346; Chicago &c. R. Co. v. Quaintance, 58 Ill. 389; Texas &c. R. Co. v. Insurance Co. (Tex. Civ. App.); 73 S. W. 1088; Glanz v. Chicago &c. R. Co. 119 Iowa, 611; 93 N. W. 575. In Huyett v. Philadelphia &c. R. Co. 23 Pa. 373, Lowry, J., said: "When we find fires started by a locomotive at distances from 80 to 150 feet from the road, how can we say that there is no evidence of negligence? That a fire was started at a distance of 60 feet (Chicago &c. R. Co. v. McCahill, 56 Ill. 29); of 63 feet (Louisville &c. R. Co. v. Malone, 109 Ala. 509; 20 So. 33); of 65 feet (L. E. &c. R. Co. v. Black, 54 Ill. App. 85), or of 100 feet (Illinois Cent. R. Co. v. McClellan, 42 Ill. 355), has been held to be substantive and independent evidence of defendant's negligence to be considered by the jury. And see Hull v. Sacramento &c. R. Co. 14 Cal. 388; 73 Am. Dec. 656; Anderson v. Oregon R. Co. 45 Oreg 211; 77 Pac. 122; Sibilrud v. Minneapolis &c. R. Co. 29 Minn. 58; 11 N. W. 146. On the other hand, in Smith v. Northern Pac. R. Co. 3 N. D. 17, 24; 53 N. W. 173, it is held that the mere fact that sparks set fire out at a distance of 118 feet from the track, in a heavy wind, is not affirmative evidence of negligence. That case has been severely criticised (2 Thomp. Neg. 796), and is not in harmony with the weight or the better reason of the authorities." See, also, Cincinnati &c. R. Co. v. South Fork Coal Co. 139 Fed. 528.

with another party for property destroyed by the same fire, it was held that no negligence was shown.[223]

§ 1245. Evidence to rebut presumption of negligence.—Where a presumption of negligence arises from mere proof of setting the fire the burden is upon the defendant to prove that it was guilty of no negligence before it can escape liability. As tending to rebut a presumption of negligence the defendant may show that its engines were equipped with approved apparatus for preventing the escape of sparks and that such apparatus was in good repair. But the mere use of good machinery is not always enough to relieve a defendant for it may be guilty of negligence in operating such machinery and there are authorities which hold, when this is also alleged, that the defendant must show in addition to the use of improved machinery that it was guilty of no negligence in operating the machinery.[224] And although it is shown that the machinery was properly operated it must also appear that the machinery was in good repair before the plaintiff's prima facie case will be overcome.[225]

[223] Missouri &c. R. Co. v. Fulmore (Tex.); 29 S. W. 688; Dillingham v. Whitaker (Tex.); 25 S. W. 723. Indeed, we think such evidence is inadmissible.

[224] Johnson v. Northern Pacific R. Co. 1 N. Dak. 354; 48 N. W. 227; 45 Am. & Eng. R. Cas. 554; Chicago &c. R. Co. v. Zimmerman, 12 Ind. App. 504; 40 S. E. 703; Texas &c. R. Co. v. Levine, 87 Tex. 437; 29 S. W. 466; St. Louis &c. R. Co. v. Lindley (Tex.); 29 S. W. 1101; Missouri &c. R. Co. v. Kelley (Tex.); 30 S. W. 488; Martin v. Texas &c. R. Co. 87 Tex. 117; 26 S. W. 1052. Much, however, may depend upon the theory of the complaint. The rule is thus stated in Gulf &c. Railway v. Benson, 69 Tex. 407; 5 S. W. 822; 5 Am. St. 74: "When property situate contiguous to the right of way of a railroad company is burned by sparks emitted from the company's locomotive engine passing over the road, which ignite the dry grass on the right of way, and injury results therefrom, in a suit for damages brought by the injured party, the burden of proof is on the railway company to show that there was no negligence. This burden of proof is, however, satisfied when the company shows by undisputed evidence that it was using at the time, and upon the very engine in question, the best and most approved mechanical appliances known and in use to prevent the escape of fire from its engine, and sparks from the smoke-stack, and that the same were in good repair and condition, and were operated by a skillful engineer in a careful manner." This statement of the law is adopted and followed in the case of Missouri &c. R. Co. v. Texas &c. R. Co. 41 Fed. 917.

[225] Texas &c. R. Co. v. Gaines, (Tex.); 26 S. W. 873. See, also,

If the defendant makes it appear that its locomotives were equipped with approved contrivances to prevent fires, that they were in good order, and that the engines were carefully and skilfully managed, it is held the plaintiff cannot recover unless he alleges and shows negligence in some other respect, notwithstanding the fires were set out by the company.[226] But the authorities are not harmonious upon the general subject. If the plaintiff does not attempt to charge the setting of the fire to any particular locomotive it has been held that the defendant may introduce evidence showing that all its engines were provided with the most approved appliances,[227] but where the fire is attributed to a particular engine evidence as to the

Southern R. Co. v. Puckett, 121 Ga. 322; 48 S. E. 968. But where the mismanagement of the engine which set the fire is the only negligence alleged, the defendant need not show that the engine was in good repair. Atchison &c. R. Co. v. Ayers, 56 Kan. 176; 42 Pac. 722.

[226] Menominee &c. R. Co. v. Milwaukee &c. R. Co. 91 Wis. 447; 65 N. W. 176; New York &c. R. Co. v. Baltz, 141 Ind. 661; 36 N. E. 414; Galveston &c. R. Co. v. Rheiner (Tex.); 25 S. W. 971; Missouri &c. R. Co. v. Stafford (Tex.); 31 S. W. 319 Savannah &c. R. Co. v. Pelzer &c. Co. 60 Fed. 39. The rule is thus stated in a recent case: "We recognize also the wisdom and sound policy of the act of the legislature in requiring a screen to be used, the best possible contrivance known to science, and in general use; that railroads should be held to strict diligence in the use of same, seeing that it is in good order, perfect condition, and without defect, and even leaving the burden of evidence on the railroad to show this care and diligence and sufficiency of the machine used in the place of the old one first noticed or prescribed by the legislature. And yet, when a railroad has brought itself clearly and conclusively within the line indicated, then it results that, under the law in Kentucky, they are not responsible if, by accident, fire does escape, and causes serious damage, even as claimed in this case. If any further obligation or responsibility is to be imposed on such company, it must be by legislative authority, and not by the courts. Whatever may be our sympathy for a sufferer by the loss of his property, if it was shown to have been destroyed by fire from a railroad engine (as we think this was not), we are unauthorized to adjudge his compensation out of the property of another, who is clearly within the requirements of the law." Louisville &c. R. Co. v. Mitchell, 17 Ky. L. 977; 29 S. W. 860. See, also, Spaulding v. Chicago &c. R. Co. 33 Wis. 582. Evidence that an engine could not be operated without small cinders escaping is admissible. German Ins. Co. v. Chicago &c. R. Co. 128 Ia. 386; 104 N. W. 361.

[227] Haley v. St. Louis &c. R. Co. 69 Mo. 614.

condition of other engines would seem to be incompetent. It is also competent for the defendant to show that its engines had been regularly and carefully inspected and found in good condition.[228]

§ 1245a. Evidence to rebut presumption—Conflicting authorities. —As intimated in the last preceding section the decisions are not harmonious upon the subject of what is necessary to rebut the prima facie case or presumption of negligence, especially when the presumption is created by statute. It is held in many cases in effect that it is for the jury to weigh the statutory presumption of negligence against the defendant's evidence in rebuttal.[229] But many

[228] Chicago &c. R. Co. v. Quaintance, 58 Ill. 389; Baltimore &c. R. Co. v. Shipley, 39 Md. 251; Cleveland v. Grand Trunk R. Co. 42 Vt. 449. In the recent case of Woodward v. Chicago &c. R. Co. 145 Fed. 577, it is also held that evidence of the condition of the devices upon a locomotive for arresting sparks and preventing the escape of fire at various times within a month preceding the setting of the fire in controversy is not too remote; that evidence that for years the railway company had required the firemen of its passenger trains, and that it had been their custom, to inspect the dampers, ash-pans and dump-grates of their locomotives before they started on their trips, to see that they were clean and in good order, and that the company had required both firemen and engineers to report what, if anything, was needed, is competent upon the issue of the negligence of the company; and that one who knows that, if an act had been done by him or by his department, it would have been recorded upon a book or paper which he had at the time, and which he identifies, may testify that he knows it was not done, from the absence from the record of any note of it, although he has no independent recollection and this fact does not refresh his memory, and the record and such testimony are competent evidence of the fact that the act was not performed.

[229] Greenfield v. Chicago &c. R. Co. 83 Iowa, 270; 49 N. W. 95; West Side &c. Co. v. Railway Co. (Iowa); 95 N. W. 193; Glanz v. Railway Co. 119 Iowa, 611; 93 N. W. 575; Hemmi v. Chicago &c. R. Co. 102 Iowa, 25; 70 N. W. 746; Great Northern R. Co. v. Coates, 115 Fed. 452; 53 C. C. A. 382; Atchison &c. R. Co. v. Bales, 16 Kan. 252; Atchison &c. R. Co. v. Geiser, 68 Kan. 281; 75 Pac. 68; St. Louis &c. R. Co. v. Funk, 85 Ill. 460; Chicago &c. R. Co. v. Quaintance, 58 Ill. 389; Sappington v. Missouri Pac. R. Co. 14 Mo. App. 86, 90; Palmer v. Railway Co. 76 Mo. 217; Huff v. Missouri &c. R. Co. 17 Mo. App. 356; Babcock v. Chicago &c. R. Co. 62 Iowa, 593; 13 N. W. 740; 17 N. W. 909; Id. 72 Iowa, 197; 28 N. W. 644; 38 N. W. 628; Hagan v. Chicago &c. R. Co. 86 Mich. 615; 49 N. W. 509; 2 Thomp. Neg. (2d. ed.) § 2288. In the recent case

other decisions are to the effect that proof that the engine was properly constructed, equipped, maintained and managed is as broad as the presumption of negligence and justifies the court in directing a verdict for the defendant.[230] The authorities upon both sides are reviewed in a Minnesota case, where the latter doctrine is approved, but it is said: "Such rebuttal proof must conform, as to character and extent, to the standard, by which in ordinary cases is measured the propriety of a holding by a trial court that a defendant, against whom a prima facie case of negligence has been made, is free from fault as a matter of law. The adequacy of such proof by a defendant must also be determined in view of any other facts appearing in the testimony in addition to those sufficient to give rise to the statutory presumption, which tend to show negligence. Unless the rebutting evidence as to both the facts and the inferences reasonably to be drawn from them is conclusive, the question is for the jury."[231]

of Great Northern R. Co. v. Coates, 115 Fed. 452 (followed in Atchison &c. R. Co. v. Geiser, 68 Kans. 281; 75 Pac. 68), a majority of the court took this view, but a strong dissenting opinion was filed, and the authorities and arguments upon both sides are well presented in that case. And in the still more recent case of Woodward v. Chicago &c. Ry. Co. 145 Fed. 577, the judge who wrote the dissenting opinion in the former case wrote the opinion of the whole court, holding that the presumption created by the Minnesota statute and similar statutes merely changed the burden of proof, and could not be used as evidence, and that the court might direct a verdict in a proper case.

[230] Daly v. Railway Co. 43 Minn. 319; 45 N. W. 611; Rosen v. Chicago &c. R. Co. 83 Fed. 300; 27 C. C. A. 534; Anderson v. Oregon &c. R. Co. 45 Ore. 211; 77 Pac. 119; Indiana &c. R. Co. v. Craig, 14 Ill. App. 407; Gulf &c. R. Co. v. Benson, 69 Tex. 407; 5 S. W. 822; 5 Am. St. 74; Missouri &c. Co. v. Stafford (Tex. Civ. App.); 31 S. W. 319; Menominee Co. v. Milwaukee &c. R. Co. 91 Wis. 447; 65 N. W. 176; Smith v. Northern Pac. R. Co. 3 N. D. 17, 23; 53 N. W. 173; Louisville &c. R. Co. v. Marbury Lumber Co. 125 Ala. 237; 50 L. R. A. 620; 28 So. 438; Alabama &c. R. Co. v. Taylor, 129 Ala. 238; 29 So. 673; Kurz &c. Ice Co. v. Milwaukee &c. R. Co. 84 Wis. 171; 53 N. W. 850; Johnson v. Northern Pacific R. Co. 1 N. D. 354; 48 N. W. 227. See, also, Louisville &c. R. Co. v. Marbury Lumber Co. 132 Ala. 520; 32 So. 745; 90 Am. St. 917; Olmsted v. Oregon &c. R. Co. 27 Utah, 515; 76 Pac. 557; Woodward v. Chicago &c. R. Co. 145 Fed. 577.

[231] Continental Ins. Co. v. Chicago &c. Ry. Co. 97 Minn. 467; 107 N. W. 548, 550. The court held the rebuttal evidence insufficient to justify the direction of a verdict for the defendant because the plaintiff had introduced affirmative evi-

§ 1245b. Instructions to juries.—In the later decisions the following holdings on the subject of instructions in this connection are found. It has been held that the rule against instructions on the weight of the evidence was not violated by an instruction, that if the jury believed the sparks escaped from one of the defendant's engines and set the fire and the plaintiff did not contribute thereto they should find for the plaintiff. The instruction was not open to the construction that it assumed that the setting of the fire by sparks established negligence.[232] Another court in the same jurisdiction has held this rule not violated by an instruction that if the fire was caused by sparks from the engine, such fact would prima facie establish negligence of the defendant.[233] But the court in the latter case held that the rule was violated by an instruction that the act of the railroad company in permitting the accumulation of dry and inflammable matter on its right of way, and in allowing it to remain there, was such negligence on the defendant's part as to make it liable for any damages occasioned thereby.[234] The rule against argumentative instructions was held violated by an instruction that the jury had no right to speculate as to how the fire arose, and that before they could find for the plaintiff, the evidence must satisfy them that the fire arose from a spark from the defendant's engine, and was communicated to the plaintiff's property in one of the methods alleged in the complaint, and that, if the evidence failed on both or either of these points, the verdict should be for the defendant.[235] An instruction that the word "originate" means that the fire must have originated in the grass or combustible matter on the defendant's right of way and must have originated therein by sparks from the defendant's engine, was held not open to criticism on the ground

dence of negligence in addition to the facts raising the statutory presumption, and the credibility of defendant's witnesses was for the jury, and consisted mainly of the testimony of experts, which was inconsistent in itself and based on too narrow an hypothesis. To the effect that where there was other affirmative evidence of negligence the question was for the jury, the court cited Preece v. Rio Grande &c. R. Co. 24 Utah, 493; 68 Pac. 413. Authorities as to the testimony of interested parties and experts not being conclusive in such cases are also cited.

[232] Texas &c. R. Co. v. Woldridge (Tex. Civ. App.); 63 S. W. 905.

[233] Gulf &c. R. Co. v. Jordan, 25 Tex. Civ. App. 82; 60 S. W. 784.

[234] Gulf &c. R. Co. v. Jordan, 25 Tex. Civ. App. 82; 60 S. W. 784.

[235] Louisville &c. R. Co. v. Sullivan Timber Co. 138 Ala. 379; 35 So. 327.

that it imposed on the plaintiff the duty of proving, by more than a preponderance of evidence, that the fire originated in combustible matter on the defendant railroad's right of way from sparks emitted from its engine, and was communicated to his land.[236] An instruction that defendant railroad company must keep its track and right of way free from combustible material liable to communicate fire to the premises of others, and if it failed to discharge this duty and permitted fire to escape to plaintiff's land whereby his stacks were destroyed, the defendant was liable, was held to require too high a degree of care.[237] Another instruction condemned as imposing too high a degree of care told the jury to find for defendant if it had exercised "all reasonable care and caution" to keep its spark arrester in repair.[238] An instruction imposing on the railroad company the duty of "the actual adoption of the most approved and best-known spark arresters and appliances" was held faulty in using the word "adoption" instead of the word "procuring."[239]

§ 1246. Attorney's fees.—In some states by statute the plaintiff is permitted to recover, in addition to the damage actually done, a reasonable fee for his attorney. Such a statute is in force in the state of Kansas.[240] But before a recovery of such a fee will be decreed the plaintiff must demand the same in his complaint or petition and then submit the question to the court or jury trying the case upon the merits.[241] Where an insurance company which had paid part of the owner's loss on account of fire alleged to have been negligently set by defendant was joined as a party plaintiff it was held proper to include an attorney's fee in the judgment where the only interest the insurance company had was the right of subrogation to the insured's interest in the judgment.[242]

[236] Jackson v. Missouri &c. R. Co. (Tex. Civ. App.); 78 S. W. 724.

[237] Ft. Worth &c. R. Co. v. Dial (Tex. Civ. App.); 85 S. W. 22.

[238] St. Louis Southwestern R. Co. v. Crabb (Tex. Civ. App.), 80 S. W. 408.

[239] Anderson v. Oregon R. Co. 45 Ore. 211; 77 Pac. 119.

[240] St. Louis &c. R. Co. v. Hoover (Kan.); 43 Pac. 854.

[241] Ft. Scott &c. R. Co. v. Tubbs, 47 Kan. 630; 28 Pac. 612; 49 Am. & Eng. R. Cas. 685; Fort Scott &c. R. Co. v. Karracker, 46 Kan. 511; 26 Pac. 1027; Missouri Pacific R. Co. v. Merrill, 40 Kan. 404.

[242] Atchison &c. R. Co. v. Huitt, 1 Kan. App. 781; 41 Pac. 1051.

§ 1247. Personal and other injuries caused by fires.—It sometimes happens that personal and other injuries, aside from the mere burning of property, are caused by fires set out by railway companies. In such cases where the injuries are a direct and proximate result of the railway company's negligence it will be liable to one who is free from contributory negligence for damages on account of such injuries. Thus, a railway company has been held liable for the death of a person caused by the explosion of a powder mill which had been ignited by sparks negligently permitted to escape from a locomotive.[243] And where a person was injured while acting with reasonable prudence in attempting to save from destruction the property of another in danger on account of fire negligently set out by a railway company, it was held that the company setting out the fire would be liable for the injuries such person had sustained.[244] Where loss of life is caused by a fire negligently set without any contributory negligence on the part of the person bringing an action or his intestate, the company setting the fire may be liable.[245] But where a person voluntarily exposes himself to danger and is injured by the fire there can be no recovery.[246] Where fences are destroyed by fires negligently set and as a proximate result of such destruction animals escape and are lost,[247] or crops are destroyed,[248] the company may be liable. In a recent case, where a residence was negligently destroyed by fire it was held that the damages might include such as accrued to the occupants by being compelled to flee at night insufficiently clothed, but not damages from sleeping on a neighbor's floor after the residence was destroyed.[249]

§ 1247a. Negligence of persons using fire about cars by per-

[243] Babcock v. Fitchburg R. Co. 19 N. Y. S. 774.

[244] Liming v. Illinois Central R. Co. 81 Iowa, 246; 47 N. W. 66; 45 Am. & Eng. R. Cas. 581. But see Logan v. Wabash R. Co. 96 Mo. App. 461; 70 S. W. 734.

[245] Rajnowski v. Detroit &c. R. Co. 74 Mich. 20; 41 N. W. 847; 78 Mich. 681; 44 N. W. 335.

[246] Pike v. Grand Trunk &c. R. Co. 39 Fed. 255; 38 Am. & Eng. R. Cas. 336; Seale v. Gulf &c. R. Co. 65 Tex. 274; 57 Am. R. 602.

[247] St. Louis &c. R. Co. v. McKinsey, 78 Tex. 298; 14 S. W. 645; 22 Am. St. 54. See, also, Highland v. Houston &c. R. Co. (Tex. Civ. App.); 65 S. W. 649.

[248] Miller v. St. Louis &c. R. Co. 90 Mo. 389; 2 S. W. 439; 29 Am. & Eng. R. Cas. 172 and 254.

[249] Serafina v. Galveston &c. R. Co. (Tex. Civ. App.); 42 S. W. 142.

mission of railroad company.—Under the broad principle that a railroad company can not, without legislative sanction, delegate its functions to other persons or corporations so as to escape liability for their negligent performance, it has been held that a railroad company charged with the duty to heat cars used for the transportation of perishable articles, which entrusted that duty to a shipper, was liable for loss to a neighboring building from a fire caused by the shipper's negligence.[250]

§ 1247b. Liability for fire set out on lands of railroad company let to other persons.—It is elementary that a person who lets the use of his premises to another person for a lawful purpose not inherently dangerous or noxious to his neighbors or their property, and reserves or exercises no supervision over the manner in which the business is conducted is not liable for damages arising from the mere negligent acts of the occupant. This rule has been applied to exonerate a railroad company from liability for fire where it permitted a city to use low lying ground not used by it for a public dumping ground and the railroad company retained no substantial control over the conduction of the work and gave no consent for the setting out of fire on the ground. It was held that neither the railroad company's ownership of the ground, nor the fact that on one occasion it had made suggestions as to the filling, and had twice assisted in subduing fire which had broken out in the dump, was sufficient to render the railroad company liable for damages for fire communicated from a fire originating in the dump.[251]

§ 1247c. Liability where a railroad is operated by purchaser at foreclosure sale, mortgage trustees in possession, receivers.—The purchasers of railroad property at a foreclosure sale are not liable for injuries from fire before the sale, unless a statute existing at the time of the purchase makes them liable, or unless such liability is imposed by the decree under which the sale is made.[252] But it has been held that the trustees for the bondholders in a railroad mortgage taking possession of the road on default in the payment of the principal or interest of such bonds and operating it for the benefit of the

[250] Rolfe v. Boston &c. R. Co. 69 N. H. 476; 45 Atl. 251.

[251] Denver &c. R. Co. v. Porter, 126 Fed. 288.

[252] Hammond v. Port Royal &c. R. Co. 15 S. Car. 10; Stratton v. European &c. R. Co. 74 Me. 422.

bondholders, are liable to the owners of property along the line injured by the negligent operation of the road, and this would, of course, include injuries from fire.[253] There is, however, authority holding them not liable, but this is based on a statute expressly limiting their liability as trustees to moneys received and their personable liability to malfeasance or fraud.[254] So, it has been held that an action for loss from fire may, with the permission of the court, be maintained against the receivers of the railroad company, although the cause of action accrued before the receivers were appointed.[255]

[253] Lockhart v. Little Rock &c. R. Co. 40 Fed. 631; Ballou v. Farnum, 91 Mass. 47.

[254] Stratton v. European &c. R. Co. 74 Me. 422.

[255] Grant v. Omaha &c. R. Co. 94 Mo. App. 312; 68 S. W. 91.

CHAPTER LII.

INJURIES TO TRESPASSERS, LICENSEES AND STRANGERS.

§ 1248. Who are licensees.—It is sometimes extremely difficult to distinguish a license from an invitation on the one hand and from mere sufferance or acquiescence on the other. License implies permission or authority, and is, therefore, more than mere sufferance, but it does not imply an invitation. Thus, one who occasionally uses a railroad track or the like, without objection, and by the mere sufferance or passive acquiescence of the company, is not a licensee unless he has either express or clearly implied permission or authority so to do.[1]

[1] Jeffersonville &c. R. Co. v. Goldsmith, 47 Ind. 43; Morrow v. Sweeney, 10 Ind. App. 626; 38 N. E. 187; Palmer v. Chicago &c. R. Co. 112 Ind. 250; 14 N. E. 70; Terre Haute &c. R. Co. v. Graham, 95 Ind. 286; 48 Am. R. 719; Brown v. Louisville &c. R. Co. 97 Ky. 228;

So, on the other hand, one may have permission to do a certain thing for his own sole benefit, and yet not be invited to do so. A license will be much more readily implied in some cases than in others. Thus, continuous use by many persons may give rise to the implication of a license where merely occasional use by one or few persons would not do so, and a license to cross a track may be implied where a license to use it longitudinally would not be implied. One who goes upon the premises of another, without permission, express or implied, although no objection is made, may nevertheless be a trespasser. If he has permission he will, as a general rule at least, be deemed to be a licensee, and if he is invited he is more than a licensee and a higher duty is due him.[2] One who goes upon the premises of a railroad company

30 S. W. 639; Louisville &c. R. Co. v. Redmon's, 28 Ky. L. 1293; 91 S. W. 722; Akers v. Chicago &c. R. Co. 58 Minn. 540; 60 N. W. 589; 60 Am. & Eng. R. Cas. 30; Egan v. Montana Cent. R. Co. 24 Mont. 569; 63 Pac. 831; Central R. Co. v. Brinson, 70 Ga. 207; 19 Am. & Eng. R. Cas. 42; Baltimore &c. R. Co. v. State, 62 Md. 479; 50 Am. R. 233; 19 Am. & Eng. R. Cas. 83; Carrington v. Louisville &c. R. Co. 88 Ala. 472; 6 So. 910; 41 Am. & Eng. R. Cas. 543; Blanchard v. Lake Shore &c. R. Co. 126 Ill. 416; 18 N. E. 799; 9 Am. St. 630; Finlayson v. Chicago &c. R. Co. 1 Dill. (U. S.) 579; Devoe v. New York &c. R. Co. 63 N. J. L. 276; 43 Atl. 899; Memphis &c. R. Co. v. Womack, 84 Ala. 149; 4 So. 618; Glass v. Memphis &c. R. Co. 94 Ala. 581; 10 So. 215; Anderson v. Chicago &c. R. Co. 87 Wis. 195; 58 N. W. 79; 23 L. R. A. 203; Philadelphia &c. R. Co. v. Hummell, 44 Pa. St. 375; 84 Am. Dec. 457; Bancroft v. Boston &c. R. Co. 97 Mass. 275; Parker v. Portland &c. R. Co. 69 Me. 173; 31 Am. R. 262. See, also, Illinois Cent. R. Co. v. Eicher, 202 Ill. 556; 67 N. E. 376; Bartlett v. Wabash R. Co. 220 Ill. 163; 77 N. E. 96; Cannon v. Cleveland &c. R. Co. 157 Ind. 682; 62 N. E. 8; Pittsburgh &c. R. Co. v. Simons (Ind. App.); 76 N. E. 883 (citing text, but holding invitation in the particular case); Huff v. Chesapeake &c. R. Co. 48 W. Va. 45; 35 S. E. 866; Le Duc v. New York Cent. &c. R. Co. 92 App. Div. (N. Y.) 107; 87 N. Y. S. 364; St. Louis &c. R. Co. v. Shiflet, 98 Tex. 326; 83 S. W. 677.

[2] In Colorado &c. R. Co. v. Sonne, 34 Colo. 206; 83 Pac. 383, it is held that "a railroad company owes to a person in its yards on lawful business the duty of having its premises in a reasonably safe condition, and to prevent injury to him from any unusual danger; but this obligation does not require it to make the place absolutely safe," and a person in a railroad yard on the invitation of the company is not relieved from the exercise of reasonable care to avoid injury to himself. See, also, Pittsburgh &c. R. Co. v. Seivers, 162 Ind. 234; 67 N. E. 680; 70 N. E. 133. But compare Santa Fe &c. R. Co. v. Ford, (Ariz.) 85 Pac. 1072. As to duty and liability of those invited

merely to speak to an employe and not upon any business with the company is a mere licensee.[3] The same has been held to be true of one who went to a mine to seek employment.[4] And city firemen and policemen are likewise held to be mere licensees, under ordinary circumstances, even when upon another's premises in the discharge of their duties.[5] One who comes upon the premises of a railroad company, in the usual course of business with it, for the purpose of loading and unloading, or delivering and receiving freight is not a mere licensee, but is entitled to the care due one who is invited to come upon the premises of another.[6] And this is true of an employe of

to a park, or the like, owned by the company, see Indianapolis St. R. Co. v. Dawson, 31 Ind. App. 605; 68 N. E. 909, and cases there cited.

[3] Woolwine v. Chesapeake &c. R. Co. 36 W. Va. 329; 15 S. E. 81; 32 Am. St. 859; Galveston Oil Co. v. Morton, 70 Tex. 400; 7 S. W. 756; Illinois Cent. R. Co. v. Willis' Adm'r, 29 Ky. L. 1187; 97 S. W. 21; Lachat v. Lutz, 94 Ky. 287; 22 S. W. 218; Faris v. Hoberg, 134 Ind. 269; 33 N. E. 1028; 39 Am. St. 261; Wright v. Rawson, 52 Iowa, 329; 3 N. W. 106; 35 Am. R. 275. In Patterson Ry. Ac. Law, 176, § 174, it is said that "licensees are persons who are neither passengers, servants, nor trespassers, and, not standing in any contractual relations to the railway, are permitted by the railway to come upon its premises for their own interests, convenience or gratification." Quoted in Woolwine v. Chesapeake &c. R. Co. 36 W. Va. 329; 15 S. E. 815; 16 L. R. A. 271; 32 Am. St. 859. See, also, Kentucky Cent. R. Co. v. Gastineau, 83 Ky. 119; Northwestern El. R. Co. v. O'Malley, 107 Ill. App. 599.

[4] Larmore v. Crown Point Iron Co. 101 N. Y. 391; 4 N. E. 752; 54 Am. R. 718. See, also, Peterson v. South &c. R. Co. (N. Car.) 55 S. E. 618.

[5] 2 Jaggard Torts, 891; Pennsylvania R. Co. v. Meyers, 136 Ind. 242; 36 N. E. 32; Woodruff v. Bowen, 136 Ind. 431; 34 N. E. 1113; 22 L. R. A. 198; Blatt v. McBarron, 161 Mass. 21; 36 N. E. 468; 42 Am. St. 385; Gibson v. Leonard, 143 Ill. 182; 32 N. E. 182; 36 Am. St. 376; Behler v. Daniels, 18 R. I. 563; 29 Atl. 6; 27 L. R. A. 512; 49 Am. St. 790. Compare Learoyd v. Godfrey, 138 Mass. 315; Creeden v. Boston &c. R. (Mass.) 79 N. E. 344; Parker v. Barnard, 135 Mass. 116; 46 Am. R. 450; Low v. Grand Trunk R. Co. 72 Me. 313; 39 Am. R. 331. A militiaman guarding the premises during the strike has been held to be there by invitation. O'Hara v. New York Cent. &c. R. Co. 92 Hun (N. Y.) 56; 36 N. Y. S. 567; 153 N. Y. 690; 48 N. E. 1106. Quarantine guard held not to be a trespasser in Louisville &c. R. Co. v. Goulding (Fla.) 42 So. 854.

[6] Toledo &c. R. Co. v. Hauck, 8 Ind. App. 367; 35 N. E. 573; St. Louis &c. R. Co. v. Ridge, 20 Ind. App. 547; 49 N. E. 828; Chadderdon v. Michigan Cent. R. Co. 100 Mich. 293; 58 N. W. 998; Newson v. New York &c. R. Co. 29 N. Y. 383; Con-

one railroad company who is engaged in delivering cars to another railroad company upon the latter's tracks, in the usual course of business between the two companies.[7] Thus, in a recent case an employe of one company operating its cars under a traffic contract on the track of another was held entitled to recover from the latter company for injury caused by its negligence in operating a switch and failing to keep it closed and locked.[8] But where a shipper and his employes take an empty car which they find upon a side-track and push it up to a chute and load it, all "without notice to, or the knowledge of the company," they are, "at best, mere licensees, if not trespassers."[9] And one who, for his own convenience in unloading freight,

lan v. New York &c. R. Co. 74 Hun (N. Y.) 115; 26 N. Y. S. 659; De Bolt v. Kansas City &c. Railway Co. 123 Mo. 496; 27 S. W. 575; International &c. R. Co. v. Hall (Tex. Civ. App.); 25 S. W. 52; Chicago &c. R. Co. v. Fillmore, 57 Ill. 265; New Orleans &c. R. Co. v. Bailey, 40 Miss. 395; Railroad Co. v. Hanning, 15 Wall. (U. S.) 649; Campbell v. Portland &c. R. Co. 62 Me. 552; 16 L. R. A. 503; Southern R. Co. v. Goddard 28 Ky. L. 323; 89 S. W. 675; Lovell v. Kansas City &c. R. Co. (Mo. App.); 97 S. W. 193. See, also, O'Callaghan v. Bode, 84 Cal. 489; International &c. R. Co. v. Neira (Tex. Civ. App.); 28 S. W. 95; Chicago &c. R. Co. v. Dignan, 56 Ill. 487; Harvey v. Louisiana &c. R. Co. 114 La. Ann. 1065; 38 So. 859 (so as to employe of express company); Chicago &c. R. Co. v. Cox, 145 Fed. 157.

[7] Turner v. Boston &c. R. Co. 158 Mass. 261; 33 N. E. 520.

[8] Chicago Terminal &c. Co. v. Vandenberg, 164 Ind. 470; 73 N. E. 990, 993 (citing text). See, also, Sullivan v. Tioga &c. R. Co. 112 N. Y. 643; 20 N. E. 569; 8 Am. St. 793; Phillips v. Chicago &c. R. Co. 64 Wis. 475; 25 N. W. 544; Illinois Cent. R. Co. v. Frelka, 110 Ill. 498.

[9] Cleveland &c. R. Co. v. Stephenson, 139 Ind. 641; 37 N. E. 720. See, also, Oatts v. Cincinnati &c. R. Co. 15 Ky. L. 87; 22 S. W. 330. But in Santa Fe &c. Ry. Co. v. Ford (Ariz.); 85 Pac. 1072, 1073, where the plaintiff and his brother were consignees of ice, which was transported in the caboose of defendant's freight train, and being at the station to receive it, the conductor told them that they would have to unload it themselves, as he was short of help, and they boarded the train and proceeded to unload the ice, and as they were doing so plaintiff was thrown from the car and injured by the jar of the train, caused by the negligent making of a coupling, the court said: "Under the facts, as stated, resolving conflicting testimony in favor of plaintiff, plaintiff was not a licensee; he was an invitee, the consignee of freight, interested in its removal from the caboose, engaged at the request of the agent in charge of the defendant's train, to wit, the conductor, in removing from the train merchandise consigned to him. As such he was entitled to protection against carelessness and

erects a movable platform on the right of way, is a mere licensee, and the company is not bound to see that the platform is so placed as not to be struck by a train.[10] One who comes upon the premises of a railroad company by implied invitation will become no more than a licensee if he remains upon the premises, without excuse, an unreasonable time after his business is completed, and this rule has been applied to one who came to a station to take a certain train, and, having missed it, remained in the depot a long time without any business there.[11] So, although a railroad company is in the habit of

negligence of the defendant through its servants, whereby injury might result to him. McIntire Co. v. Bolton, 43 Ohio St. 224; 1 N. E. 333; 54 Am. Rep. 803; Eason v. Sabine &c. R. Co. 65 Tex. 577; 57 Am. Rep. 606; Welch v. Maine Central R. Co. 86 Me. 552; 30 Atl. 116; 25 L. R. A. 658; Jacobson v. St. Paul R. Co. 41 Minn. 206; 42 N. W. 932; Toledo &c. R. Co. v. Hauck, 8 Ind. App. 367; 35 N. E. 573; Illinois &c. R. Co. v. Hoffman, 67 Ill. 287. In support of this assignment of error, however, it is urged that no testimony was given to show that the conductor of the train had authority to deliver freight directly to the consignee or to authorize the consignee to remove freight from his train. Whether the conductor had or had not such authority is immaterial. The plaintiff was present in his own interest, seeking to obtain from the defendant freight to the delivery of which he was entitled. If the defendant's representative, in charge of that freight, requested plaintiff to remove the consignment from the car, plaintiff, acting in his own interest, was justified in removing it, and was entitled to protection from carelessness or negligence on behalf of defendant's employes. It was not incumbent upon him, before acting as his self-interest dictated, to ascertain the defendant's rules governing the conductor's authority. What would be the effect of knowledge by him or notice to him of a limitation upon the conductor's authority is a question which does not here arise; and the rule laid down by us must be limited by this fact." See, also, Louisville &c. R. Co. v. Smith, 27 Ky. L. 257; 84 S. W. 755; Bachant v. Boston &c. R. Co. 187 Mass. 392; 73 N. E. 642; 105 Am. St. 408. In Chicago &c. R. Co. v. Pettit, 111 Ill. App. 172, a local custom under which the company required shippers to repair leaks was held admissible to show that a shipper was not a trespasser or mere licensee while so doing.

[10] McCabe v. Chicago &c. R. Co. 88 Wis. 531; 60 N. W. 260. For a case in which the plaintiff was held guilty of contributory negligence, see Chicago &c. R. Co. v. Pettit, 209 Ill. 452; 70 N. E. 591. But compare St. Louis &c. Ry. Co. v. Kennemore (Tex. Civ. App.); 81 S. W. 802.

[11] Heinlein v. Boston &c. R. Co. 147 Mass. 136; 9 Am. St. 676. See, also, Armstrong v. Medbury, 67 Mich. 250; 34 N. W. 566; 11 Am. St. 585; Hern v. Southern Pac. Co. 29

stopping its trains to allow passengers to get on and off at other places than stations, whenever signaled to do so, the license to others than employes engaged in the performance of their duties to use the right of way extends only to those who come thereon for the purpose of boarding or alighting from the trains.[12]

§ 1249. Difference between invitation and license.—We have shown that the mere sufferance or failure to object is not sufficient to constitute a license unless under such circumstances that a license should be inferred, and we have also stated that there is a difference between a license and an invitation. It is frequently said that while mere permission is no more than a license, yet if the owner or occupant of lands, by any enticement, allurement or inducement, causes others to come upon the same, he owes a duty to such persons to use reasonable care to see that the premises are safe for that purpose and is liable for injuries caused by the violation of such duty to one who is free from contributory negligence.[13] There is, however, no invariable test that can be stated in general terms. That of mutuality, as announced by the Supreme Court of Massachusetts seems to be the best that has been suggested. It is stated in the following words:

Utah, 127; 81 Pac. 902 (became a trespasser). But compare Elgin &c. R. Co. v. Thomas, 215 Ill. 158; 74 N. E. 109.

[12] Matson v. Port Townsend &c. R. Co. 9 Wash. 449; 37 Pac. 705.

[13] Evansville &c. R. Co. v. Griffin, 100 Ind. 221; 50 Am. R. 783; Indiana &c. R. Co. v. Barnhart, 115 Ind. 399; 16 N. E. 121; Sweeny v. Old Colony &c. R. Co. 10 Allen (Mass.) 368; 87 Am. Dec. 644; Zoebisch v. Tarbell, 10 Allen (Mass.) 385; 87 Am. Dec. 660, and note; Kay v. Pennsylvania R. Co. 65 Pa. St. 269; 3 Am. R. 628; Gillis v. Pennsylvania R. Co. 59 Pa. St. 129; 98 Am. Dec. 317; note to Howe v. Omhart, 7 Ind. App. 32; 33 N. E. 466; 2 Am. L. Reg. & Rev. (N. S.) 196; Pittsburgh &c. R. Co. v. Bingham, 29 Ohio St. 364; 23 Am. R. 751; Campbell v. Portland Sugar &c. Co. 62 Me. 552; 16 Am. R. 503; Corby v. Hill, 4 Com. B. (N. S.) 556; Hounsell v. Smith, 7 Com. B. (N. S.) 731; Hardcastle v. South Yorkshire &c. R. Co. 4 Hurl. & N. 67; Binks v. South Yorkshire &c. R. Co. 32 L. J. (N. S.) Q. B. 26; Scott v. London Docks Co. 11 L. T. Rep. (N. S.) 383; Quimby v. Boston &c. R. Co. 69 Me. 340; Grand Rapids &c. Co. v. Martin, 41 Mich. 667; 3 N. W. 173; Coombs v. New Bedford &c. Co. 102 Mass. 572; 3 Am. R. 102; Bennett v. Louisville &c. R. Co. 102 U. S. 577; Pennsylvania R. Co. v. Atha, 22 Fed. R. 920; St. Louis &c. Ry. Co. v. Dooley, 77 Ark. 561; 92 S. W. 789; Pittsburgh &c. R. Co. v. Simons (Ind. App.); 76 N. E. 883, 886, 887 (citing text). See King v. Central

"To come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant."[14] It is believed that the decisions in the cases cited in the preceding section could well have been based upon this ground, although, in some of them, it was not expressly mentioned. But this test fails where the railroad company, by its conduct has induced the public to use a crossing in the belief that it is a public crossing which it will protect them in using, as for instance, where it constructs and opens the crossing and keeps a flagman there, who signals travelers to cross. In such a case the traveler is not invited to come upon business connected with the company, but he is invited and induced to cross by the conduct of the company, but the "inducement" test stated in the first part of this section applies.[15] Illustrative cases of those deemed to have been invited are referred to in the last preceding

of Georgia R. Co. 107 Ga. 754; 33 S. E. 839, 841 (citing text).

[14] Plummer v. Dill, 156 Mass. 426; 31 N. E. 128; 32 Am. St. 463; Hart v. Cole, 156 Mass. 475; 31 N. E. 644; 16 L. R. A. 557; Indermaur v. Dames, L. R. 1 C. P. 274; O'Connor v. Illinois Cent. R. Co. 44 La. Ann. 339; 10 So. 678; note in 2 Am. L. Reg. & Rev. (N. S.) 196; Benson v. Baltimore &c. Co. 77 Md. 535; 26 Atl. 973; 20 L. R. A. 714; 39 Am. St. 436; Bennett v. Louisville &c. R. Co. 102 U. S. 577; Railway Co. v. Ferguson, 57 Ark. 16; 20 S. W. 545; 18 L. R. A. 110; 38 Am. St. 217; 1 Thomp. Neg. (2d ed.) § 968 et seq.; Campbell Neg. § 44; 2 Jaggard Torts, 896; Beach Contrib. Neg. § 51. See, also, King v. Central of Ga. Ry. Co. 107 Ga. 754; 33 S. E. 839.

[15] Sweeny v. Old Colony &c. R. Co. 10 Allen (Mass.) 368; 87 Am. Dec. 644. See, also, Murphy v. Boston &c. R. Co. 133 Mass. 121; Holmes v. Drew, 151 Mass. 578; 25 N. E. 22; Davis v. Central Cong. Soc. 129 Mass. 367; 37 Am. R. 368, Pomponio v. New York &c. R. Co. 66 Conn. 528; 34 Atl. 491; 32 L. R A. 530; 50 Am. St. 124; Hansen v. Southern Pac. R. Co. 105 Cal. 379; 38 Pac. 957; St. Louis &c. R. Co. v. Dooley, 77 Ark. 561; 92 S. W. 789; Sites v. Knott, 197 Mo. 684; 96 S. W. 206; Johnson v. Lake Superior &c. R. Co. 86 Wis. 64; 56 N. W. 161; Clampit v. Chicago &c. R. Co. 84 Iowa, 71; 50 N. W. 673; Taylor v. Delaware &c. R. Co. 113 Pa. St. 162; 8 Atl. 43; 57 Am. R. 446; Byrne v. New York &c. R. Co. 104 N. Y. 362; 10 N. E. 539; 58 Am. R. 512; Chicago &c. R. Co. v. Murowski, 179 Ill. 77; 53 N. E. 572; Pittsburgh &c. Ry. Co. v. Simons (Ind. App); 76 N. E. 883, 886, 887 (citing text): ante, § 1154.

section, and other decisions as to what constitutes an invitation and as to the duty of the company are cited below.[16]

§ 1250. Duty to licensees.—It is said that the licensor owes a duty to his licensee to give him notice of hidden dangers or traps.[17] Expressions to this effect are found in some of the decided cases, but we think that they do not accurately state the law. Doubtless a landowner cannot lawfully shoot a licensee under ordinary circumstances or set spring guns or traps for him,[18] and it may be that if the licensor makes the premises more dangerous after the license is granted in such a way that the increased danger is not open to observation it is his duty to notify the licensee,[19] but we do not believe that he is bound to notify him of ordinary dangers incident to the condition and use of the premises at the time the license was granted. The better rule is that the licensee takes his license subject to its concomitant perils,[20] and the licensor, as a general rule, owes him no

[16] Employes of contractors repairing the way, and the like: Chicago &c. R. Co. v. Goebel, 20 Ill. App. 163; Chicago &c. R. Co. v. Dunleavy, 129 Ill. 132; 22 N. E. 15; Erickson v. St. Paul &c. R. Co. 41 Minn. 500; 43 N. W. 332; 5 L. R. A. 786, and note; Interstate &c. R. Co. v. Fox, 41 Kans. 715; 21 Pac. 797. Mail clerks and parlor-car employes: Chicago &c. R. Co. v. Kelly, 182 Ill. 267; 54 N. E. 979; Young v. New York Cent. &c. R. Co. 13 Daly (N. Y.) 294. Passengers and the like: Illinois Cent. R. Co. v. Hammer, 72 Ill. 347; Louisville &c. R. Co. v. Hirsch, 69 Miss 126; 13 So. 244; Grand Trunk R. Co. v. Anderson, 28 Can. Sup. Ct. 541; Mason v. Chicago &c. R. Co. 89 Wis. 151; 61 N. W. 300. See, also, Tutt v. Illinois Cent. R. Co. 104 Fed. 741; Kentucky &c. R. Co. v. Sydor (Ky.); 82 S. W. 989; 68 L. R. A. 183; Chicago &c. R. Co. v. Stephenson, 33 Ind. App. 95; 69 N. E. 270.

[17] 2 Am. L. Reg. & Rev. (N. S.) 197.

[18] Reardon v. Thompson, 149 Mass. 267; 21 N. E. 369; Woodruff v. Bowen, 136 Ind. 431; 34 N. E. 1113; 22 L. R. A. 198, 204.

[19] See Norfolk &c. R. Co. v. Wheeler, 91 Va. 700; 22 S. E. 514; 29 L. R. A. 825; McKone v. Michigan Cent. R. Co. 51 Mich. 601; 47 Am. R. 596; New Orleans &c. R. Co. v. Hanning, 15 Wall. (U. S.) 649; Corby v. Hill, 4 C. B. (N. S.) 556.

[20] Evansville &c. R. Co. v. Griffin, 100 Ind. 221; 50 Am. R. 783; Indiana &c. R. Co. v. Barnhart, 115 Ind. 399; 16 N. E. 121; Cleveland &c. R. Co. v. Adair, 12 Ind. App 569; 39 N. E. 672; 40 N. E. 822; Faris v. Hoberg, 134 Ind. 269; 33 N. E. 1028; 39 Am. St. 261; Lingenfelter v. Baltimore &c. R. Co. 154 Ind. 49; 55 N. E. 1021, 1022 (citing text); Grethen v. Chicago &c. R. Co. 22 Fed. 609; Gibson v. Leonard, 143 Ill. 182; 32 N. E. 182;

duty except to refrain from wilfully or wantonly injuring him,[21] or

17 L. R. A. 588; 36 Am. St. 376; Sutton v. New York &c. R. Co. 66 N. Y. 243; Matthews v. Bensel, 51 N. J. L. 30; 16 Atl. 195; Schmidt v. Bauer, 80 Cal. 565; 22 Pac. 256; 5 L. R. A. 580, and note; Pittsburgh &c. R. Co. v. Bingham, 29 Ohio St. 364; 23 Am. R. 751; Cleveland &c. R. Co. v. Workman, 66 Ohio St. 509; 64 N. E. 582, 587; 90 Am. St. 602 (citing text); Schreiner v. Great Northern R. Co. 86 Minn. 245; 90 N. W. 400; 58 L. R. A. 75; Atchison &c. R. Co. v. Fuller, 72 Kans. 527; 84 Pac. 140; Illinois Cent. R. Co. v. Godfrey, 71 Ill. 500; 22 Am. R. 112; Sweeny v. Old Colony R. Co. 10 Allen (Mass.) 368; 87 Am. Dec. 644, and note; Diebold v. Pennsylvania Co. 50 N. J. L. 478; Woolwine v. Chesapeake &c. R. Co. 36 W. Va. 329; 15 S. E. 81; 32 Am. St. 859; 16 L. R. A. 271; Holmes v. North-eastern R. Co. L. R. 4 Exch. 255; Sullivan v. Waters, 14 Ir. C. L. R. 460; Blackmore v. Toronto &c. R. Co. 38 Up. Can. Q. B. 172. See, also, Indianapolis v. Emmelman, 108 Ind. 530; 9 N. E. 155; 58 Am. R. 65; Baltimore &c. R. Co. v. Sherman, 30 Gratt. (Va.) 602; Baltimore &c. R. Co. v. State, 62 Md. 479; 50 Am. R. 233; Gillis v. Pennsylvania R. Co. 59 Pa. St. 129; 98 Am. Dec. 317; Akers v. Chicago &c. R. Co. 58 Minn. 540; 60 N. W. 669; 60 Am. & Eng. R. Cas. 30; Spavin v. Lake Shore &c. R. Co. 130 Mich. 579; 90 N. W. 325, 328 (citing text, and holding plaintiff guilty of contributory negligence).

[21] Nicholson v Erie R. Co. 41 N. Y. 525, 530; Cleveland &c. R. Co. v. Tartt, 64 Fed. 823; Parker v. Pennsylvania Co. 134 Ind. 673; 34 N. E. 504; 23 L. R. A. 552; McClaren v. Indianapolis &c. R. Co. 83 Ind. 319; Pennsylvania Co. v. Meyers, 136 Ind. 242; 36 N. E. 32; Wright v. Boston &c. R. Co. 142 Mass. 296; 7 N. E. 866; Johnson v. Boston &c. R. Co. 125 Mass. 75; June v. Boston &c. R. Co. 153 Mass. 79; 26 N. E. 238; Spicer v. Chesapeake &c. R. Co. 34 W. Va. 514; 12 S. E. 553; 11 L. R. A. 385n; Illinois Cent. R. Co. v. Godfrey, 71 Ill. 500; 22 Am. R. 112; Central R. Co. v. Brinson, 70 Ga. 207; 19 Am. & Eng. R. Cas. 42; Illinois Cent. R. Co. v. Hetherington, 83 Ill. 510; Baltimore &c. R. Co. v. State, 62 Md. 479; 50 Am. R. 233; St. Louis &c. Co. v. Fairbairn, 48 Ark. 491; 4 S. W. 50; Morrissey v. Eastern R. Co. 126 Mass. 377; 30 Am. R. 686, and authorities cited in last note supra. See, also, Rosenthal v. New York &c. R. Co. 112 App. Div. (N. Y.) 431; 98 N. Y. S. 476; Illinois Cent. R. Co. v. Lee, 71 Miss. 895; 16 So. 349; McCabe v. Chicago &c. R. Co. 88 Wis. 531; 60 N. W. 260; Means v. Southern Cal. R. Co. 144 Cal. 473; 77 Pac. 1001; Carr v. Missouri Pac. R. Co. 195 Mo. 214; 92 S. W. 874. It certainly owes him no duty of active vigilance to make the place safe for him. Walsh v. Fitchburg R. Co. 145 N. Y. 301; 39 N. E. 1068; 45 Am. St. 615; 27 L. R. A. 724. Even where it is held that a lookout must be kept at places where licensees are to be expected, it is held that the company owes no duty to licensees using its track for their own benefit to keep a bridge in repair. McConkey v. Oregon R. &c. Co. 35 Wash. 55; 76 Pac. 526. So, in Williamson v. Southern R. Co. 104 Va. 146; 51 S.

to exercise ordinary and reasonable care after discovering him to be in peril. "In the language of continental jurisprudence there is no question of culpa between a gratuitous licensee and the licensor, as regards the safe condition of the property to which the license applies. Nothing short of 'dolus' will make the licensor liable."[22] It is held by some of the courts, however, that if a railroad company licenses or acquiesces in the use of its track or premises by others it must exercise reasonable care not only to avoid injuring them after they are discovered to be in danger but also to keep a careful lookout to discover and avoid injury to all who may be expected to be upon their right of way or premises.[23] This rule, especially when applied in favor of those who walk along a railroad track between crossings, notwithstanding much may be said in its favor, seems to us to be not only contrary to the weight of authority but also impracticable and in violation of the true principle that should govern such cases. If

E. 195, it is held that, while it is the duty of the company to use reasonable care to discover, and not to injure, licensees to be expected on its track at a certain point, the company was under no duty to prepare for them in advance, and that its failure to have a light on its engine was not negligence as to such licensees. Compare Seaboard &c. R. Co. v. Vaughn, 104 Va. 113; 51 S. E. 452. But see Heavener v. North Carolina R. Co. (N. Car.); 53 S. E. 513.

[22] Pollock Torts, § 426.

[23] Lynch v. St. Joseph &c. Co. 111 Mo. 601; 19 S. W. 1114; Chicago &c. R. Co. v. Wilgus, 40 Neb. 660; 58 N. W. 1125; Johnson v. Lake Superior &c. R. Co. 86 Wis. 64; 56 N. W. 161 (but see Anderson v. Chicago &c. R. Co. 87 Wis. 195; 58 N. W. 79, 83; 23 L. R. A. 203); Troy v. Cape Fear &c. R. Co. 99 N. Car. 298; 6 S. E. 77; 6 Am. St. 521; Smith v. Norfolk &c. R. Co. 114 N. Car. 728; 19 S. E. 863, 923, and note; 25 L. R. A. 287; 60 Am. & Eng. R. Cas. 102; St. Louis &c. R. Co. v. Crosnoe, 72 Tex. 79; 10 S. W. 342; 37 Am. & Eng. R. Cas. 313. See, also, Daley v. Norwich &c. R. Co. 26 Conn. 591; 68 Am. Dec. 413 (but see Nolan v. New York &c. R. Co. 53 Conn. 461; 4 Atl. 106); Kansas &c. R. Co. v. Pointer, 9 Kan. 620; Brown v. Hannibal &c. R. Co. 50 Mo. 461; 11 Am. R. 420; Murphy v. Chicago &c. R. Co. 45 Iowa, 661; International &c. R. Co. v. Lee (Tex.); 34 S. W. 160, 161; Fiedler v. St. Louis &c. R. Co. 107 Mo. 645; 18 S. W. 847; Chamberlain v. Missouri Pac. R. Co. (Mo.); 33 S. W. 437; St. Louis &c. R. Co. v. Bolton, 36 Tex. Civ. App. 87; 81 S. W. 123; Pickett v. Wilmington &c. R. Co. 117 N. Car. 616; 23 S. E. 264; 30 L. R. A. 257; 53 Am. St. 611. See, also, Roth v. Union Depot Co. 13 Wash. 525; 43 Pac. 641; 44 Pac. 253; 31 L. R. A. 855; McConkey v. Oregon R. &c. Co. 35 Wash. 55; 76 Pac. 526; Jones v. Charleston &c. R. Co. 61 S. Car. 556; 39 S. E. 758; and see post, § 1257.

it be true, as generally conceded, that a licensee takes his license subject to the "concomitant risks and perils," he must surely take it subject to the use of the road in the manner in which it was used at the time the license was granted, that is, subject to the running of trains in the ordinary manner without any special reference to him, and he occupies, therefore, to this extent, substantially the position of a trespasser. In other words, the company owes him no duty of active vigilance to specially look out for and protect him, for he must know that his license is subject to all risks incident to the use of the track by the company in the same manner in which it was used at the time the license was granted and that the company assumes no new obligation or duty. Indeed, it seems to us that he is bound to know that a railroad company has no power to license the use of its tracks in such a manner as to interfere with its duties to the public as a common carrier. If it owes a duty to every bare licensee to run its trains with reference to him, to look out for him, to signal, to slow up and, perhaps to stop wherever it has reason to expect him, it can do little else, its trains cannot be on time and the traveling public must suffer.[24] It certainly is not obliged to patrol its tracks from one end to the other to keep off trespassers and to prevent those who use it longitudinally from claiming a license on the ground of acquiescense. It seems to us, therefore, that the only duty which it owes to such persons, whether they are trespassers or bare licensees, is not to wilfully or wantonly injure them but to use reasonable care to avoid injury to them after their danger is discovered. It seems to us also that some of the courts beg the question when they say that the company must keep a lookout and use care to discover and protect persons on the track where they may be expected, although not at a crossing or the like. Is the company bound to expect them at any such place, and to run its trains with reference to them? Is not the assumption that such a duty rests upon the company an undue assumption? The just and reasonable assumption would seem to be that they will not be on the track when trains are passing or, if they are, that, as they take their license subject to "concomitant perils," they will look out for their own safety without special warning or

[24] The text is cited and this reasoning is approved in Illinois Cent. R. Co. v. Eicher, 202 Ill. 556; 67 N. E. 376, 378.

change by the company in the manner of using its road, and that it may act on this assumption until it discovers their danger.[25]

§ 1251. Liability for injuries to licensees.—We have endeavored to show in the preceding section that there is, ordinarily, no duty to a licensee except to refrain from wilful or wanton injury to him and to use reasonable care to prevent injury to him after discovering his danger.[26] If there is no duty to the plaintiff or no violation of such duty there is, of course, no liability.[27] If wilfulness is relied upon, the complaint must, in most jurisdictions, proceed upon that theory and not upon the theory of mere negligence.[28] But, in such

[25] The text is quoted and the reasoning approved in Cannon v. Cleveland &c. R. Co. 157 Ind. 682, 688; 62 N. E. 8; also in Huff v. Chesapeake &c. R. Co. 48 W. Va. 45; 35 S. E. 866, 868.

[26] Hortenstine v. Virginia &c. R. Co. 102 Va. 914; 47 S. E. 996. This and the two preceding sections are cited in Thomas v. Chicago &c. R. Co. 103 Iowa, 649; 72 N. W. 783, 786; 39 L. R. A. 399, as stating the general rule sustained by the weight of authority, but the court said that it was already committed to a different doctrine, at least under the circumstances.

[27] Thiele v. McManus, 3 Ind. App. 132; 28 N. E. 327; Morrow v. Sweeney, 10 Ind. App. 626; 38 N. E. 187; Faris v. Hoberg, 134 Ind. 269; 33 N. E. 1028; 39 Am. St. 261; Gilson v. Delaware &c. R. Co. 65 Vt. 213; 26 Atl. 70; 36 Am. St. 802, and note; 813; Cooley Torts, 659, 660; Whart. Neg. § 3; 1 Thomp. Neg. (2d ed.) § 227 et seq.; Shearm. & Redf. Neg. § 11; 16 Am. & Eng. Ency. L. 415. See, also, Feeback v. Missouri Pac. Ry. Co. 167 Mo. 206; 66 S. W. 965, 967.

[28] Where the complaint is for wilfulness there can be no recovery for mere negligence, and vice versa. Belt R. &c. Co. v. Mann, 107 Ind. 89; 7 N. E. 893; Pennsylvania R. Co. v. Sinclair, 62 Ind. 301; 30 Am. R. 185, and note; Pennsylvania R. Co. v. Smith, 98 Ind. 42; Louisville &c. R. Co. v. Bryan, 107 Ind. 51; 7 N. E. 807; Chicago &c. R. Co. v. Dickson, 88 Ill. 431; Parker v. Pennsylvania Co. 134 Ind. 673; 34 N. E. 504; 23 L. R. A. 552; Verner v. Alabama &c. R. Co. 103 Ala. 574; 15 So. 872; Highland Ave. &c. R. Co. v. Winn, 93 Ala. 306; 9 So. 509; Levin v. Memphis &c. R. Co. 109 Ala. 332; 19 So. 395; Shearm. & Redf. Neg. § 7. But see 2 Jaggard Torts, 824; Louisville &c. R. Co. v. Hurt, 101 Ala. 34; 13 So. 130; Coleman v. Kentucky Cent. R. Co. 17 Ky. L. 1145; 33 S. W. 945. As to the distinction between wilfulness and negligence, see 1 Thomp. Neg. (2d ed.) § 21; Beach Contrib. Neg. § 62; 16 Am. & Eng. Ency. of Law, 392, et seq.; Bolin v. Chicago &c. R. Co. 108 Wis. 333; 84 N. W. 446. Many of the decisions, however, fail to make this distinction, and a recovery for what is called wilful or wanton negligence has frequently been allowed under a complaint for damages on account of alleged negligence.

a case contributory negligence of the plaintiff is no defense.[29] If negligence is relied upon, negligence of the plaintiff which proximately contributes to his injury will constitute a good defense.[30] The theory of some of the decisions, however, is that, even where there is no wilfulness, the failure of the company to use ordinary care after the discovery of the plaintiff's danger, when the exercise of such care would have prevented the injury, is the proximate cause rather than the original negligence of the plaintiff in going into a place of danger without exercising reasonable care.[31] This subject will be more

[29] Terre Haute &c. R. Co. v. Graham, 95 Ind. 286; 12 Am. & Eng. R. Cas. 77; Pennsylvania R. Co. v. Sinclair, 62 Ind. 301; 30 Am. R. 185; Indianapolis &c. R. Co. v. Boettcher, 131 Ind. 82; 28 N. E. 551; Carroll v. Minnesota &c. R. Co. 13 Minn. 30; 97 Am. Dec. 221; Central R. Co. v. Vaughan, 93 Ala. 209; 9 So. 468; 30 Am. St. 50, and note; International &c. R. Co. v. Tabor, (Tex.); 33 S. W. 894; Kellny v. Missouri Pac. R. Co. 101 Mo. 67; 13 S. W. 806; 8 L. R. A. 783, and note; Derby v. Kentucky Cent. R. Co. 9 Ky. L. 153; 4 S. W. 303; Kansas Pacific R. Co. v. Whipple, 39 Kan. 531; 18 Pac. 730; Florida &c. R. Co. v. Hirst, 30 Fla. 1; 11 So. 506; 16 L. R. A. 631; 32 Am. St. 17, and note; Beach Contrib. Neg. §§ 50, 64; Bishop Non-Cont. Law, § 1042; Cooley Torts, (2d ed.) 810.

[30] Nichols v. Gulf &c. R. Co. 83 Miss. 126; 36 So. 192; Chicago &c. R. Co. v. Pettit, 209 Ill. 452; 70 N. E. 591; Spavin v. Lake Shore &c. R. Co. 130 Mich. 579; 90 N. W. 325; Chicago &c. R. Co. v. Martin, 35 Tex. Civ. App. 186; 79 S. W. 1101; Chesapeake &c. R. Co. v. Farrow's Adm'x, (Va.) 55 S. E. 569; Gulf &c. Ry. Co. v. Hall, 34 Tex. Civ. App. 535; 80 S. W. 133. But see, under a Mississippi statute, Yazoo &c. R. Co. v. Metcalf, 64 Miss. 243; 36 So. 259.

[31] See Patterson's Ry. Acc. L. 51; Beach Contrib. Neg. §§ 25, 54, 55; Smith v. Norfolk &c. R. Co. 114 N. Car. 728; 19 S. E. 923; 25 L. R. A. 287, and note; Farmer v. Wilmington &c. R. Co. 88 N. Car. 564; 20 Am. & Eng. R. Cas. 481; Keefe v. Chicago &c. R. Co. 92 Iowa, 182; 60 N. W. 503. Such cases usually, however, fall within the rule against wilful or wanton injury, because the conduct of an engineer in recklessly running over a child or person whose danger he has discovered in time evinces a willingness to inflict the injury (see Sloniker v. Great Northern R. Co. 76 Minn. 306; 79 N. W. 168), although there is neither negligence nor wilfulness where the person on the track is apparently able to take care of himself and the circumstances are such that the engineer has a right to presume he will get off in time. There are also cases, however, in which it is held that even as to a trespasser the company is liable, not only if its employes actually saw him, but also if they could have seen him in time to have avoided injury by the exercise of ordinary care. Koegel v.

fully discussed, however, when we come to consider the liability to trespassers and persons on railroad tracks.[32] One who is wrongfully ejected from a train has no right to travel on the railroad track if there is another safe and convenient route from the premises, and the company is not liable for injury to him while so doing, in the absence of wilfulness or failure to exercise ordinary care after discovering his danger.[33] But he does not become a trespasser and is not necessarily guilty of contributory negligence unless he fails to get off the track at the earliest practicable opportunity that a reasonably prudent man would have discovered and seized.[34] One who attempts to cross a platform at a railroad station for his own convenience as a short-cut from one street to another is a mere licensee and cannot recover for an injury received by falling into a hole in such platform although the railroad company had passively permitted the plaintiff and the public generally to so use it.[35] So, an employe who goes upon the track or elsewhere upon the company's premises not in the line or discharge of his duty, and without any invitation, express or im-

Missouri Pac. R. Co. 181 Mo. 379; 80 S. W. 905; St. Louis &c. R. Co. v. Bolton, 36 Tex. Civ. App. 87; 81 S. W. 123; Murrell v. Missouri Pac. R. Co. 105 Mo. App. 88; 79 S. W. 505; Deans v. Wilmington &c. R. Co. 107 N. Car. 686; 12 S. E. 77; 22 Am. St. 902; Pickett v. Wilmington &c. R. Co. 117 N. Car. 616; 23 S. E. 264; 30 L. R. A. 257; 53 Am. St. 611; post, § 1257. But in the first case cited notices were posted, and it did not appear that the trainmen had any reason to anticipate him, or that he appeared to be actually in peril, and it was also held that he was guilty of contributory negligence, so that a recovery was denied.

[32] See post, §§ 1253, 1254, 1257.

[33] Verner v. Alabama &c. R. Co. 103 Ala. 574; 15 So. 872. See, also, Bedell v. Berkey, 76 Mich. 435; 43 N. W. 308; 15 Am. St. 370, and note; Forsyth v. Boston &c. R. Co. 103 Mass. 510; Van Schaick v. Hudson River &c. R. Co. 43 N. Y. 527.

[34] Ham v. Delaware &c. Canal Co. 155 Pa. St. 548; 26 Atl. 757; 20 L. R. A. 682. See Nichols v. Washington &c. R. Co. 83 Va. 99; 5 S. E. 171; 5 Am. St. 257.

[35] Redigan v. Boston &c. R. Co. 155 Mass. 44; 28 N. E. 1133; 14 L. R. A. 276; 31 Am. St. 520, and note. See, also, Illinois Cent. R. Co. v. Beard, 49 Ill. App. 232; Lingenfelter v. Baltimore &c. R. Co. 154 Ind. 49; 55 N. E. 1021; Cincinnati &c. R. Co. v. Aller, 64 Ohio St. 183; 60 N. E. 205. So held where part of the roof of a building blew off and injured the plaintiff, who was on the premises without business with the company. Pittsburgh &c. R. Co. v. Bingham, 29 Ohio St. 364; 23 Am. St. 751; Lary v. Cleveland &c. R. Co. 78 Ind. 323; 41 Am. R. 572.

plied, is at most a mere licensee to whom the company owes no duty to keep such place safe.[36]

§ 1252. Who are trespassers.—It may be stated, as a general rule, that any one who goes upon the track or premises of a railroad company, except at a public crossing or in a highway, without the invitation or license of the company, express or implied, is a trespasser.[37] An invitation to the public is implied, however, to come upon the premises of the company, at proper places to do business with it, and a license or even an invitation may be implied where the company constructs, maintains, and permits the use of a crossing not originally public under such circumstances that all persons who desire to use it may do so in the well-founded belief that it is a public crossing.[38] So,

[36] Cleveland &c. R. Co. v. Martin, 13 Ind. App. 485; 41 N. E. 1051 (where a section man, having only half an hour for dinner, on a cold day, went into the company's pump house to dine); Baker v. Chicago &c. R. Co. 95 Iowa, 163; 63 N. W. 667; Burling v. Illinois &c. R. Co. 85 Ill. 18; Mulherrin v. Delaware &c. R. Co. 81 Pa. St. 366; Sullivan v. Waters, 14 Ir. C. L. R. 460; Pennsylvania Co. v. Meyers, 136 Ind. 242; 36 N. E. 32; Pittsburgh &c. R. Co. v. Adams, 105 Ind. 151; 5 N. E. 187; Cowhill v. Roberts, 71 Hun (N. Y.) 127; 24 N. Y. S. 533; Gillshannon v. Stony Brook &c. R. Co. 10 Cush. (Mass.) 228; Texas &c. R. Co. v. Skinner, 4 Tex. C. App. 661; 23 S. W. 1001; Mellor v. Merchants' &c. R. Co. 150 Mass. 362; 23 N. E. 100; 5 L. R. A. 792, and note; Cleveland &c. Ry. Co. v. Workman, 66 Ohio St. 509; 64 N. E. 582, 587; 90 Am. St. 602 (citing text, and holding that an employe who used a "speeder" on the main track for his own business and convenience, and not in the performance of any duty, though without objection by the company, was at most a bare licensee, and that the company owed no special duty to look out for him). See, also, Louisville &c. Ry. Co. v. Jolly, 28 Ky. L. 989; 90 S. W. 977. But compare Ryan v. Fowler, 24 N. Y. 410; 82 Am. Dec. 315; Ewald v. Chicago &c. R. Co. 70 Wis. 420; 36 N. W. 12; Cleveland &c. R. Co. v. Marsh, 63 Ohio St. 236; 58 N. E. 821; 52 L. R. A. 142; Wabash R. Co. v. Erb, 36 Ind. App. 650; 73 N. E. 939; International &c. R. Co. v. Brooks, (Tex. Civ. App.); 54 S. W. 1056; 5 Am. St. 178.

[37] In Atchison &c. R. Co. v. Spaulding, 69 Kans. 431; 77 Pac. 106; 66 L. R. A. 587, and note; 105 Am. St. 175, an injunction was granted to enjoin one who made a practice of riding a bicycle along the plaintiff's track. See, generally, as to injunction against trespassers, note to Moore v. Halliday, 99 Am. St. 731–753.

[38] Ante, § 1249. See, also, Stewart v. Cincinnati &c. R. Co. 89 Mich. 315; 50 N. W. 852; 17 L. R. A. 539; 49 Am. & Eng. R. Cas. 456; Retan v. Lake Shore &c. R. Co. 94 Mich. 146; 53 N. W. 1094; 55 Am. & Eng. R. Cas. 97; Nichols v. Washington &c. R. Co.

according to many of the authorities, where the public have for a long time crossed the track of a railroad company at one particular place, with its acquiescence, a license may be implied and a duty may rest upon the company to exercise reasonable care in running its trains at such crossing, although not in a public highway.[39] But in most of the cases in which this broad statement is made, it will be found that there was something from which an invitation might be implied or a custom to give signals, or the like, which the traveler had a right to expect, and other well-considered decisions make this distinction.[40] As we have already shown, mere sufferance or passive acquiescence in the occasional use of the track between crossings does not necessarily amount to a license and where nothing more is shown, one who so uses the track is a trespasser.[41] But, as will hereafter appear, some of the courts infer a license from frequent use and hold that, in any event the company should use reasonable care to discover and not to

83 Va. 99; 5 S. E. 171; 32 Am. & Eng. R. Cas. 27; Spooner v. Delaware &c. R. Co. 115 N. Y. 22; 21 N. E. 696; Murphy v. Boston &c. R. Co. 133 Mass. 121; Baltimore &c. R. Co. v. Slaughter (Ind.), 79 N. E. 186.

[39] Byrne v. New York &c. R. Co. 104 N. Y. 362; 10 N. E. 539; Barry v. New York &c. R. Co. 92 N. Y. 289; Swift v. Staten Island &c. R. Co. 123 N. Y. 645; 25 N. E. 378; Owens v. Pennsylvania R. Co. 41 Fed. 187; Taylor v. Delaware &c. R. Co. 113 Pa. St. 162; 8 Atl. 432; 28 Am. & Eng. R. Cas. 656; 57 Am. R. 446; Philadelphia &c. R. Co. v. Troutman, 11 W. N. C. (Pa.) 453; 6 Am. & Eng. R. Cas. 117; Kelly v. Southern &c. R. Co. 28 Minn. 98; 9 N. W. 588; 6 Am. & Eng. R. Cas. 264; Harriman v. Pittsburg &c. R. Co. 45 Ohio St. 11; 12 N. E. 451; 4 Am. St. 507; Norfolk &c. R. Co. v. Wilson, 90 Va. 263; 18 S. E. 35; Norfolk &c. R. Co. v. Carper, 88 Va. 556; 14 S. E. 328; Delaney v. Milwaukee &c. R. Co. 33 Wis. 67. See, also, Murrell v. Missouri Pacific R. Co. 105 Mo. App. 88; 79 S. W. 505; Morgan v. Wabash &c. R. Co. 159 Mo. 262; 60 S. W. 195; St. Louis &c. R. Co. v. Bolton, 36 Tex. Civ. App. 87; 81 S. W. 123; Union Pac. Ry. Co. v. Connolly (Neb.), 109 N. W. 368.

[40] See Atchison &c. R. Co. v. Parsons, 42 Ill. App. 93; Evans v. Atlantic &c. R. Co. 62 Mo. 49; Stewart v. Pennsylvania R. Co. (Ind.); 14 Am. & Eng. R. Cas. 679; Wright v. Boston &c. R. Co. 142 Mass. 296; 7 N. E. 866; Morrissey v. Eastern R. Co. 126 Mass. 377; 30 Am. R. 686, and note; Illinois Cent. R. Co. v. Godfrey, 71 Ill. 500; 22 Am. R. 112.

[41] Ante, § 1248. See, also, Egan v. Montana Cent. R. Co. 24 Mont. 569; 63 Pac. 831. And the fact that the company does not own its right of way does not affect his status as a trespasser. Dorsey v. Louisville &c. R. Co. 26 Ky. L. 232; 80 S. W. 1131.

injure persons on the track at places where it may reasonably expect them to be. One court has even held that where persons have been accustomed for a long time to use a railroad track as a path, without objection from the company, they are not trespassers and the company is liable to them for injuries caused by its alleged negligence in the failure to exercise such care, notwithstanding a statute forbidding any person to use a railway track as a highway and expressly providing that it should be deemed to be a trespass in any action brought by him against the company.[42] As we have elsewhere shown, one may properly step upon a railroad track which is a part of a street without becoming a trespasser,[43] but it has been held that one who walks along between the rails of a track laid in an alley, but not so imbedded as to constitute part of the roadway is a trespasser.[44] Where, by mutual consent, two railway companies having adjacent and parallel tracks upon which cars are habitually left standing, permit the watchmen separately employed by each one to stand upon the tracks of each company irrespective of the one which employed him, for the purpose of examining and taking the numbers of the cars, a watchman while so engaged upon the track of the company which did not employe him is not a trespasser thereon.[45] It has also been

[42] Le May v. Missouri Pac. R. Co. 105 Mo. 361; 16 S. W. 1049. See, also, Davis v. Chicago &c. R. Co. 58 Wis. 646; 17 N. W. 406; 46 Am. R. 667; Mason v. Chicago &c. R. Co. 89 Wis. 151; 61 N. W. 300. But see Missouri Pac. R. Co. v. Moseley, 57 Fed. 921, and Anderson v. Chicago &c. R. Co. 87 Wis. 195; 58 N. W. 79, 83; 23 L. R. A. 203.

[43] Ante, §§ 1093, 1094. See, also, as to liability for injuries to persons lawfully near track by objects thrown from cars. St. Louis &c. R. Co. v. Neely, 63 Ark. 636; 40 S. W. 130; 37 L. R. A. 616; Jeffersonville &c. R. Co. v. Riley, 39 Ind. 568; Chicago &c. R. Co. v. O'Neil, 172 Ill. 527; 50 N. E. 216; Sullivan v. Vicksburg &c. R. Co. 39 La. Ann. 800; 4 Am. St. 239; Bradford v. Boston &c. R. Co. 160 Mass. 392; 35 N. E. 1131; and see generally Fletcher v. Baltimore &c. R. Co. 168 U. S. 135; 18 Sup. Ct. 35; Baltimore &c. R. Co. v. Cumberland, 176 U. S. 232; 20 Sup. Ct. 380; Louisville &c. R. Co. v. Downey, 18 Ind. App. 140; 47 N. E. 494; Goodrich v. Burlington &c. R. Co. 103 Iowa, 412; 72 N. W. 653; St. Louis &c. R. Co. v. Underwood, 74 Ark. 610; 86 S. W. 804.

[44] Montgomery v. Alabama &c. R. Co. 97 Ala. 305; 12 So. 170. But compare Booth v. Union Term. R. Co. 126 Iowa, 8; 101 N. W. 147; Illinois &c. R. Co. v. Mitchell, 214 Ill. 151; 73 N. E. 449.

[45] Watts v. Richmond &c. R. Co. 89 Ga. 277; 15 S. E. 365; McMarshall v. Chicago &c. R. Co. 80 Iowa, 757; 45 N. W. 1065; 20 Am. St. 445, and note.

held that one who goes upon the track in an emergency, as to recover his hat which has been carried there by the wind,[46] or who wanders upon it from a highway on a dark night,[47] is not strictly a trespasser. But in a recent case where a boy's hat blew off and he went under a car in the defendant's yard to get it, the court said that he was a trespasser or at least the defendant was not bound to keep a lookout for him.[48]

§ 1253. Duty to trespassers.—The general rule is that the owner or occupier of premises owes no duty to a trespasser thereon except to do him no wilful or wanton injury.[49] A trespasser is a wrong-doer, and it is a general principle of jurisprudence that the courts will not aid a wrong-doer.[50] The fact that the trespasser is a wrong-doer does not, however, justify malicious, wanton or wilful maltreatment of him, and the failure to use reasonable care to avoid injury to him after the discovery of his danger may sometimes be sufficient evidence of wilfulness or wantonness.[51] But neither negli-

[46] Bernhard v. Rensselaer &c. R. Co. 1 Abb. Ct. App. 131.

[47] Baltimore &c. R. Co. v. Boteler, 38 Md. 568.

[48] Wagner v. Chicago &c. R. Co. 124 Iowa, 462; 100 N. W. 332.

[49] Kirtley v. Chicago &c. R. Co. 65 Fed. R. 386, 392; Philadelphia &c. R. Co. v. Hummell, 44 Pa. St. 375; 84 Am. Dec. 457; Augusta R. Co. v. Andrews, 89 Ga. 653; 16 S. E. 203; Maynard v. Boston &c. R. Co. 115 Mass. 458; 15 Am. R. 119; Wright v. Boston &c. R. Co. 129 Mass. 440; Lary v. Cleveland &c. R. Co. 78 Ind. 323; 41 Am. R. 572; Terre Haute &c. R. Co. v. Graham, 95 Ind. 286; 48 Am. R. 719; Brown v. European &c. R. Co. 58 Me. 384; Cleveland &c. R. Co. v. Tartt, 64 Fed. R. 823; Frost v. Eastern R. Co. 64 N. H. 220; 10 Am. St. 396; Duff v. Allegheny &c. R. Co. 91 Pa. St. 458; 36 Am. R. 675; Bresnahan v. Michigan Cent. R. Co. 49 Mich. 410. See, also, Rosenthal v. New York &c. R. Co. 112 App. Div. (N. Y.) 438; 98 N. Y. S. 476; Dillon v. Connecticut River R. Co. 154 Mass. 478; 28 N. E. 899; Ward v. Southern Pac. R. Co. 25 Oreg. 433; 36 Pac. 166; 23 L. R. A. 715; Lando v. Chicago &c. R. Co. 81 Minn. 279; 83 N. W. 1089, 1090. In the note to Union Pac. R. Co. v. Cappier, (66 Kan. 649; 12 Pac. 281); 69 L. R. A. 513, 544, where many authorities are reviewed it is said that "the rule approved by the preponderance of authority is that the duty of exercising ordinary care to avoid injury to another is due to trespassers as well as to other persons, but that such duty does not arise as to trespassers until their presence or disability is discovered, and hence no duty exists to discover their presence."

[50] 1 Jaggard on Torts, 189; Bishop's Noncont. Law, § 54; Kirtley v. Chicago &c. R. Co. 65 Fed. R. 386, 392.

[51] Or, it may, perhaps, constitute the proximate cause of the injury

gence nor wilfulness can ordinarily be shown in this way where an adult or person apparently able to take care of himself is upon a railroad track, because the railroad employes have a right to assume, in the absence of anything to the contrary, that he will get off the track or take such other precautions as may be available to avoid injury to himself.[52] In some jurisdictions, however, it is held that these rules do not apply so strictly against children; that the owner of premises may be liable for injuries to children where he has left something naturally calculated to attract them to the place where they were injured; and that it is the duty of the engineer or other employes of a railroad company in charge of its train to keep a lookout even for trespassers upon the track. It is doubtless true that the company may owe such a duty to the passengers, but we believe the better rule to be that trespassers cannot, ordinarily at least, complain of the failure to perform it. The entire subject, however, will be more fully and specifically treated in subsequent sections.

§ 1254. Liability for injuries to trespassers.—There is, as we have seen, some conflict among the authorities as to the duty due a trespasser and this makes it difficult to determine the liability of the company in such cases. But when the question of the duty of the company to a trespasser is settled the question as to its liability to him is comparatively free from difficulty. If the company wilfully injures him it will be liable even though he may have been guilty

and entitle the trespasser, in some jurisdictions to recover as for negligence. See, generally, Planz v. Boston &c. R. Co. 157 Mass. 377; 32 N. E. 356; Denver &c. R. Co. v. Harris, 122 U. S. 597; 7 Sup. Ct. 1286; Lake Shore &c. R. Co. v. Prentice, 147 U. S. 101, 107; 13 Sup. Ct. 261; Seaboard &c. R. Co. v. Joyner (Va.); 23 S. E. 773; Wallace v. City &c. R. Co. 26 Ore. 174; 37 Pac. 477; 25 L. R. A. 663, and note; Scheffler v. Minneapolis &c. R. Co. 32 Minn. 518; 21 N. W. 711; Isbell v. New York &c. R. Co. 27 Conn. 393; 71 Am. Dec. 78; Haden v. Sioux City &c. R. Co. 92 Iowa, 226; 60 N. W. 537; Texas &c. R. Co. v. O'Donnell, 58 Tex. 27; Isabel v. Hannibal &c. R. Co. 60 Mo. 475; O'Leary v. Brooks El. Co. 7 N. Dak. 554; 75 N. W. 919, 921 (citing text); Haley v. Kansas City &c. R. Co. 113 Ala. 640; 21 So. 357; Buswell Personal Injuries, §§ 71, 73, 120; Davies v. Mann, 10 Mees. & W. 546; 2 Thomp. Neg. (2nd ed.) § 1710; 1 Shearm. & Redf. Neg. §§ 98, 99.

[52] Smalley v. Southern R. Co. 57 S. Car. 243; 35 S. E. 489, 492, 493 (quoting text).

of contributory negligence.[53] So, in some jurisdictions, the term "gross negligence" is still used and it is held that the company is liable where the conduct of its servants, resulting in injury to the trespasser is grossly negligent or so reckless as to evince an entire disregard of consequences or a willingness to inflict the injury, and that it is liable if they fail to use reasonable care to avoid injury to him after discovering his danger and apparent inability to take care of himself, if such care would have prevented the injury. Several of the courts even go so far as to hold the company liable in such a case where it fails to use reasonable care to discover the trespasser in time; but this we regard as contrary to principle.[54] On the other hand it has been held in many cases that one who trespasses upon a railroad track or other dangerous place upon the company's premises is guilty of contributory negligence, and this is certainly true unless he uses care proportioned to the danger, or in other words, such reasonable care as the circumstances demand. If he does not do so, the company is not liable unless it wilfully or wantonly injures him, or at least fails to use due care after discovering his danger and inability to escape. These rules, and the modifications or exceptions sometimes made in the case of children or persons obviously unable to take care of themselves, will be fully considered and illustrated in subsequent sections.

§ 1255. Trespassers on cars.—A railroad company owes trespassers no contract duty. Indeed, as already stated, the general rule is that it owes them no duty except not to wilfully injure them, and this rule applies to those who are attempting to steal a ride or

[53] Johnson v. Chicago &c. R. Co. 116 Iowa, 639; 88 N. W. 811, 812 (citing text). This is well settled as shown in subsequent sections.

[54] At least at places not frequented by the public and where there is no good reason to expect them. Louisville &c. R. Co. v. Vittitoe, 19 Ky. L. 612; 41 S. W. 269, and cases cited; Louisville &c. R. Co. v. Hathaway, 28 Ky. L. 628; 89 S. W. 724; 2 L. R. A. (N. S.) 498, and note, and this rule is held to apply as to children. Louisville &c. R. Co. v. Logsdin, 118 Ky. 600; 81 S. W. 657. But in Louisville &c. R. Co. v. Daniel, 28 Ky. L. 1146; 91 S. W. 691, it is said that where trespassers habitually use a railroad track with the knowledge and acquiescence of the company, their presence must be provided for by the company as a fact within its knowledge. See ante, § 1250, and post, § 1257, for further consideration of this question.

otherwise trespass upon the company's cars.[55] They are not in a position to invoke the doctrine of apparent authority and can only hold the company liable for acts of its employes done within the scope of their actual authority, express or implied.[56] Indeed, we think the better rule is that a trespasser who is ejected from a train by a brakeman or other subordinate employe not in charge of the train must show, in order to recover from the company for injuries so inflicted, that such employe possessed authority to do the act which caused the injury.[57] There are, however, authorities

[55] Toledo &c. R. Co. v. Brooks, 81 Ill. 245, 292; Planz v. Boston &c. R. Co. 157 Mass. 377; 32 N. E. 356; Brevig v. Chicago &c. R. Co. 64 Minn. 168; 66 N. W. 401; Duff v. Allegheny &c. R. Co. 91 Pa. St. 458; 36 Am. R. 675; Pennsylvania R. Co. v. Price, 96 Pa. St. 256; Waterbury v. New York &c. R. Co. 17 Fed. 671; Brown v. Missouri &c. R. Co. 64 Mo. 536; Chicago &c. R. Co. v. Smith, 46 Mich. 504; 9 N. W. 830; 41 Am. R. 177; 4 Am. & Eng. R. Cas. 535; Richmond &c. R. Co. v. Burnsed, 70 Miss. 437; 12 So. 958; 35 Am. St. 656; Southwestern R. Co. v. Singleton, 66 Ga. 252; Hoar v. Main Cent. R. Co. 70 Me. 65; 35 Am. R. 299; Eaton v. Delaware &c. R. Co. 57 N. Y. 382; 15 Am. R. 513; Morgan v. Oregon Short Line R. Co. 27 Utah, 92; 74 Pac. 523. See, also, McNamara v. Great Northern R. Co. 61 Minn. 296; 63 N. W. 726; Bollinger v. Texas &c. R. Co. 47 La. Ann. 721; 17 So. 253; 49 Am. St. 379; Illinois Cent. R. Co. v. Meacham, 91 Tenn. 428; 19 S. W. 232; Jordan v. Grand Rapids &c. R. Co. 162 Ind. 464; 70 N. E. 524; 102 Am. St. 217; Pittsburgh &c. R. Co. v. Redding, 140 Ind. 101; 39 N. E. 921; 34 L. R. A. 767. See, also, St. Louis &c. R. Co. v. Reed, 76 Ark. 106; 88 S. W. 836; Purple v. Union Pac R. Co. 114 Fed. 123; 57 L. R. A. 700; Wabash R. Co. v. Kingsley, 177 Ill. 558; 52 N. E. 931, 932 (citing text); Udell v. Citizens St. R. Co 152 Ind. 507; 52 N. E. 799; 71 Am. St. 336; Bjornquist v. Boston &c. R. Co. 185 Mass. 130; 70 N. E. 53; 102 Am. St. 332. But compare Louisville &c. R. Co. v. Popp, 96 Ky. 99; 27 S. W. 992.

[56] Brevig v. Chicago &c. R. Co. 64 Minn. 168; 66 N. W. 401, 404. See, also, Whistler v. Cowan, 26 Ohio Cir. Ct. R. 511, affirmed in 70 Ohio St. 514; 72 N. E. 1167; Rathbone v. Oregon R. Co. 40 Ore. 225; 66 Pac. 909; Morris v. Brown, 111 N. Y. 318; 18 N. E. 722; 7 Am. St. 751.

[57] Lake Shore &c. R. Co. v. Peterson, 144 Ind. 214; 42 N. E. 480; Marion v. Chicago &c. R. Co. 59 Iowa, 428; 13 N. W. 415; 44 Am. R. 687; 8 Am. & Eng. R. Cas. 177; Farber v. Missouri Pac. R. Co. 116 Mo. 81; 22 S. W. 631; 20 L. R. A. 350; Pennsylvania Co. v. Toomey, 91 Pa. St. 256; Cauley v. Pittsburg &c. R. Co. 98 Pa. St. 498; Corcoran v. Concord &c. R. Co. 56 Fed. 1014; Texas &c. R. Co. v. Moody. (Tex. Civ. App.); 23 S. W. 41; International &c. R. Co. v. Anderson, 82 Tex. 516; 17 S. W. 1039; 27 Am. St.

which hold that the ejection of trespassers is within the scope of the implied authority of a brakeman,[58] and where an employe is placed in charge of the train such authority may be implied.[59] In one case a boy who was trespassing upon a freight train was struck by a piece of coal thrown at him by a brakeman, and was injured in trying to get off but it was held that he could not recover from the company because the brakeman had no implied authority to eject trespassers.[60] In another case it was held that a boy who was

902; Bess v. Chesapeake &c. R. Co. 35 W. Va. 492; 14 S. E. 234; 29 Am. St. 820. See, also, Illinois Cent. R. Co. v. King, 179 Ill. 91; 53 N. E. 552, 554; 70 Am. St. 93; Galaviz v. International &c. R. Co. 15 Tex. Civ. App. 61; 38 S. W. 234; Illinois Cent. R. Co. v. Latham, 72 Miss. 32; 16 So. 757.

[58] Hoffman v. New York &c. R. Co. 87 N. Y. 25; 41 Am. R. 337, and note; Kansas City &c. R. Co. v. Kelly, 36 Kan. 655; 14 Pac. 172; 59 Am. R. 596, and note; Brevig v. Chicago &c. R. Co. 64 Minn. 168; 66 N. W. 401; Dixon v. Northern Pac. R. Co. 37 Wash. 310; 79 Pac. 943; 107 Am. St. 712; O'Banion v. Missouri Pac. R. Co. 65 Kans. 352; 69 Pac. 353; McKeon v. New York &c. R. Co. 183 Mass. 271; 67 N. E. 329; 97 Am. St. 437; Patterson's Ry. Acc. Law, § 111. See, also, Smith v. Louisville &c. R. Co. 95 Ky. 11; 23 S. W. 652; 22 L. R. A. 72.

[59] Carter v. Railway Co. 98 Ind. 552; 49 Am. R. 780; Patterson's Ry. Acc. Law, § 111. Thus in Folley v. Chicago &c. R. Co. 16 Okla. 32; 84 Pac. 1090, it is held that a conductor has such implied authority and that while a 15 year old country boy, who is ignorant of the means and manner of operating and managing railroad trains, goes upon a freight train at the direction of a brakeman and without right, such person is a trespasser, and the conductor may lawfully expel such boy from the train; yet if such conductor, in the exercise of such authority, while the train is moving at a rate of speed rendering it dangerous to get off, by threats of violence and show of force causes such boy to alight from the moving train, and injury results, such acts of the conductor under such circumstances constitute gross negligence, or wanton and willful carelessness, and the railway company will be liable for the resulting injuries. Citing Holmes v. Wakefield, et al 12 Allen (Mass.), 580; 90 Am. Dec. 171; Ramsden v. Boston &c. R. Co. 104 Mass. 117; 6 Am. R. 200; Rounds v. Delaware &c. R. Co. 64 N. Y. 129; 21 Am. R. 597; Hoffman v. New York &c. R. Co. 87 N. Y. 25; 41 Am. R. 337; Townley v. Chicago &c. R. Co. 53 Wis. 626; 11 N. W. 55; Pierce v. North Carolina R. Co. 124 N. Car. 83; 32 S. E. 399. See, also, Alabama &c. R. Co. v. Livingston, 84 Miss. 1; 36 So. 256; Hayes v. Southern R. Co. (N. Car.); 53 S. E. 847.

[60] Towanda Coal Co. v. Heeman, 86 Pa. St. 418. But compare Polatty v. Charleston &c. R. 67 S. Car. 391; 45 S. E. 932.

injured in jumping from an engine upon which he was a trespasser could not recover although he was frightened off by the fireman.[61] And in still another case it was held that a boy who was playing upon a flat car, and who was injured in jumping off in obedience to an employe's order, could not recover from the company because it owed him no duty, and that his father could not recover because of his contributory negligence in permitting the boy to trespass upon the car.[62] So, one of the courts which considers that a brakeman has implied authority to eject trespassers, has recently held that where a person bribed the brakeman to let him ride in a freight car, they thereby became joint trespassers and the former could not recover from the company for an assault by the brakeman in afterwards ejecting him in an improper manner.[63] The company may be held liable, however, although the injured person be a trespasser, if its employes, while acting within the scope of their actual authority, wilfully injure him or eject him with unnecessary force and violence.[64] The fact that an employe who is not in charge of the train,

[61] Chicago &c. R. Co. v. Smith, 46 Mich. 504; 9 N. W. 830; 41 Am. R. 177. See, also, Bjornquist v. Boston &c. R. Co. 185 Mass. 130; 70 N. E. 53; 102 Am. St. 332; Albert v. Boston El. R. Co. 185 Mass. 210; 70 N. E. 52. But compare Pollack v. Pennsylvania R. Co. 210 Pa. St. 631; 60 Atl. 311; 105 Am. St. 843; Gulf &c. R. Co. v. Gibson (Tex. Civ. App.); 93 S. W. 469.

[62] Cauley v. Pittsburgh &c. R. Co. 95 Pa. St. 398. See, also, St. Louis &c. R. Co. v. Cochran, 77 Ark. 398; 91 S. W. 747; 40 Am. R. 664, and note.

[63] Brevig v. Chicago &c. R. Co. 64 Minn. 168; 66 N. W. 401.

[64] Louisville &c. R. Co. v. Dunkin, 92 Ind. 601; 15 Am. & Eng. R. Cas. 422; Carter v. Louisville &c. R Co. 98 Ind. 552; 49 Am. R. 780; St. Louis &c. R. Co. v. Reagan, 52 Ill. App. 488; Schultz v. Third Ave. R. Co. 89 N. Y. 242; 9 Am. & Eng. R. Cas. 412; Southern Pac. R. Co. v. Kennedy, 9 Tex. Civ. App. 232; 29 S. W. 394; Benton v. Chicago &c. R. Co. 55 Iowa, 496. See, also, Thompson v. Yazoo &c. R. Co. 72 Miss. 715; 17 So. 229; Chicago &c. R. Co. v. Doherty, 53 Ill. App. 282; Brill v. Eddy, 115 Mo. 596; 22 S. W. 488 (receiver held liable for act of watchman in removing boy from car). Alabama &c. R. Co. v. Frazier, 93 Ala. 45; 9 So. 303; 30 Am. St. 28, and note; Smith v. Louisville &c. R. Co. 95 Ky. 11; 23 S. W. 652; 22 L. R. A. 72; Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179; 58 Am. R. 387. See, also, Houston &c. R. Co. v. Bowen, 36 Tex. Civ. App. 165; 81 S. W. 80; Folley v. Chicago &c. R. Co. 16 Okla. 32; 84 Pac. 1090; Hayes v. Southern Ry. Co. (N. Car.); 53 S. E. 847; Pollack v. Penna. R. Co. 210 Pa. St. 631; 60 Atl. 311; 105 Am. St. 843; Parulo v. Philadelphia &c. R. Co. 145 Fed. 664.

and has no authority in the premises, invites or permits a person to ride on the train without paying fare does not make the latter a passenger or impose upon the company any greater duty to him than it owes to an ordinary trespasser.[65] Although the youth, inexperience, or ignorance, of the person injured may sometimes be important in determining the question of contributory negligence, it cannot be considered as enlarging or extending the implied authority of the company's employes. It "cannot operate to enlarge the boundaries of the agent's authority"[66] nor "confer an authority on one who has none."[67]

§1256. Strangers at stations.—We shall elsewhere consider the liability of railroad companies to passengers, and those intending to become passengers for injuries received at stations. But there are others to whom a railroad company may owe a duty at its

[65] Chicago &c. R. Co. v. Casey, 9 Bradw. (Ill.) 632 (invitation by engineer); Chicago &c. R. Co. v. Michie, 83 Ill. 427; Sherman v. Hannibal &c. R. Co. 72 Mo. 62; 37 Am. R. 423; Snyder v. Hannibal &c. R. Co. 60 Mo. 413; Flower v. Pennsylvania &c. R. Co. 69 Pa. St. 210; 8 Am. R. 251. See, also, Kansas City &c. R. Co. v. Williford, 115 Tenn. 108; 88 S. W. 178. This doctrine has even been extended to a case in which the conductor permitted a boy to ride upon the train, without paying fare, in violation of the rules of the company. Duff v. Allegheny &c. R. Co. 91 Pa. St. 458; 36 Am. R. 675; 2 Am. & Eng. R. Cas. 1. See, also, Hot Springs &c. R. Co. v. Dial, 58 Ark. 318; 24 S. W. 500; Keating v. Michigan Cent. &c. R. Co. 97 Mich. 154; 37 Am. St. 328. But compare Waterbury v. New York &c. R. Co. 17 Fed. 671, and note; Harris v. Southern Ry Co. 25 Ky. L. 559; 76 S. W. 151.

[66] Chicago &c. R. Co. v. Casey, 9 Bradw. (Ill.) 632, 643.

[67] Flower v. Pennsylvania R. Co. 69 Pa. St. 210; 8 Am. R. 251; Towanda Coal Co. v. Heeman, 86 Pa. St. 418; Snyder v. Hannibal &c. R. Co. 60 Mo. 413. See, also, Barney v. Hannibal &c. R. Co. 126 Mo. 372; 28 S. W. 1069; 26 L. R. A. 847; Keating v. Michigan Cent. R. Co. 97 Mich. 154; 56 N. W. 346; 37 Am. St. 328. But it may be of importance upon the question of the negligence or conduct of an employe in authority in evicting him from the train at a dangerous place or the like. Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179; 58 Am. R. 387; Louisville &c. R. Co. v. Sullivan, 81 Ky. 624; 50 Am. R. 186; Kline v. Central Pac. R. Co. 37 Cal. 400; 99 Am. Dec. 282; Lovett v. Salem &c. R. Co. 9 Allen (Mass.), 557. See, also, Pollack v. Penna. R. Co. 210 Pa. St. 631; 60 Atl. 311; 105 Am. St. 843; Enright v. Pittsburgh &c. R. Co. 198 Pa. St. 166; 47 Atl. 938; 53 L. R. A. 330; 82 Am. St. 795; Peterson v. South &c. R. (N. Car.) 55 S. E. 618.

stations, although they are neither passengers nor employes. It undoubtedly owes a duty to exercise reasonable care to all who come to its stations upon its own invitation, express or implied. Thus, a railroad company is liable to one who comes to the station to meet a friend who is on the company's train, or, to use a familiar quotation, "to welcome the coming or speed the parting guest," for injuries caused him by the failure of the company to exercise reasonable care to keep the station platform in a safe condition and properly lighted.[68] So, a traveler who goes to the depot for a time-table, to see when his train leaves, or whether there is any change in the schedule, is not a trespasser upon the company's walk leading to the depot and may recover for an injury received, without fault on his part, by the negligence of the company in throwing off mail bags upon such walk, where he has no knowledge of any such custom.[69] Indeed, railroad companies have been held liable in many cases for injuries to persons rightfully upon the station

[68] New York &c. R. Co. v. Mushrush, 11 Ind. App. 192; 37 N. E. 954; Cherokee Packet Co. v. Hilson, 95 Tenn. 1; 31 S. W. 737; Hamilton v. Texas &c. R. Co. 64 Tex. 251; 53 Am. R. 756; 21 Am. & Eng. R. Cas. 336; Louisville &c. R. Co. v. Berry, 88 Ky. 222; 10 S. W. 472; 21 Am. St. 329; Doss v. Missouri &c. R. Co. 59 Mo. 27; 21 Am. R. 371; McKone v. Michigan &c. R. Co. 51 Mich. 601; 17 N. W. 74; 47 Am. R. 596. See, also, Tobin v. Portland &c. R. Co. 59 Me. 183; 8 Am. R. 415; Ingalls v. Adams Express Co. 44 Minn. 128; 46 N. W. 325 (police officer); Langan v. St. Louis &c. R. Co. 72 Mo. 392; 3 Am. & Eng. R. Cas. 355 (passenger's servant); Baltimore &c. R. Co. v. Rose, 65 Md. 485; 4 Atl. 899; Sullivan v. Vicksburg &c. R. Co. 39 La. Ann. 800; 2 So. 586; 4 Am. St. 239; 30 Am. & Eng. R. Cas. 168; Watkins v. Great Western R. Co. 46 L. J. C. P. 817. Nor is such a person necessarily a trespasser because he fails to leave the platform at once and take the nearest route home. New York &c. R. Co. v. Mushrush, 11 Ind. App. 192; 37 N. E. 954; Keefe v. Boston &c. R. Co. 142 Mass. 251; 7 N. E. 874. But he may become a trespasser or bare licensee by unreasonable delay. Heinlein v. Boston &c. R. Co. 147 Mass. 136; 16 N. E. 698; 9 Am. St. 676. See, also, Harris v. Stevens, 31 Vt. 79; 73 Am. Dec. 337.

[69] Bradford v. Boston &c. R. Co. 160 Mass. 392; 35 N. E. 1131. See, also, St. Louis &c. R. Co. v. Fairbairn, 48 Ark. 491; 4 S. W. 50; Hale v. Grand Trunk R. Co. 60 Vt. 605; 15 Atl. 300; 1 L. R. A. 187. So, as to injuries caused in handling baggage and the like, Atchison &c. R. Co. v. Johns, 36 Kans. 769; 14 Pac. 237; 59 Am. R. 609; Keefe v. Boston &c. R. Co. 142 Mass. 251; 7 N. E. 874; Louisville &c. R. Co. v. Shanks, 94 Ind. 598; Tebbutt v. Bristol &c. R. Co. L. R. 6 Q. B. 75.

platform by mail bags negligently thrown from passing trains by postal clerks with the knowledge and consent of the companies.[70] But where there is no custom to throw out mail bags at the particular platform and the company has no reason to apprehend that they will be so thrown out, it is not, it seems, liable for the act of a postal clerk in so doing,[71] and it owes no duty to a stranger or trespasser to exercise care in this regard or to keep the crane used to catch the mail pouch in safe condition.[72] The company is, of course, liable to one, who, in response to its notification to call and get goods that have been shipped to him and received at its freight depot, comes to such depot, and, while walking along a proper passage way in the exercise of due care, is injured by freight falling upon him which had been carelessly piled up by the company's servants.[73] It has also been held that where a lunch stand is kept at a railroad station by authority of the company, which can only be reached by going over the company's platform, the company is responsible for the condition of the platform to persons who pass over it to get lunch.[74] But the company owes

[70] Galloway v. Chicago &c. R. Co. 36 Minn. 346; 57 N. W. 1058; 23 L. R. A. 442; 45 Am. St. 468; Snow v. Fitchburg R. Co. 136 Mass. 552; 49 Am. R. 40, and note; 18 Am. & Eng. R. Cas. 161; Carpenter v. Boston &c. R. Co. 97 N. Y. 494; 49 Am. R. 540; 21 Am. & Eng. R Cas. 331. See, also, Williams v. Louisville &c. R. Co. 98 Ky. 247; 32 S. W. 934; 41 S. W. 1100; Sargent v. St. Louis &c. R. Co. 114 Mo. 348; 21 S. W. 823; 19 L. R. A. 460; Carver v. Minneapolis &c. R. Co. 120 Iowa, 346; 94 N. W. 862. So, where the servants of the company are negligent in handling baggage. Tebbutt v. Bristol &c. R. Co. L. R. 6 Q. B. 73.

[71] Muster v. Chicago &c. R. Co. 61 Wis. 325; 18 Am. & Eng. R. Cas. 113; Walton v. New York &c. R. Co. 139 Mass. 556; 2 N. E. 101. See, also, Walker v. Hannibal &c. R. Co. 121 Mo. 575; 26 S. W. 360; 24 L. R. A. 363; 42 Am. St. 547; 59 Am. & Eng. R. Cas. 607; Cunningham v. Grand Trunk R. Co. 31 U. C. Q. B. 350.

[72] Poling v. Ohio River R. Co. 38 W. Va. 645; 18 S. E. 782. But see Illinois Cent. R. Co. v. Wall, 53 Ill. App. 588.

[73] Danville &c. R. Co. v. Brown, 90 Va. 340; 18 S. E. 278. See, also, Toledo &c. R. Co. v. Grush, 67 Ill. 262; 16 Am. R. 618; Pittsburgh &c. R. Co. v. Ives, 12 Ind. App. 602; 40 N. E. 923; Williams v. Louisville &c. R. Co. 98 Ky. 247; 32 S. W. 934; 41 S. W. 1100; Ward v. Maine Cent. R. Co. 96 Me. 136; 51 Atl. 947; Foss v. Chicago &c. R. Co. 33 Minn. 392; 23 N. W. 553; Moore v. Wabash R. Co. 84 Mo. 481; International &c. R. Co. v. Neira (Tex. Civ. App.), 28 S. W. 95.

[74] Dillingham v. Teeling (Tex.).

no such duty to a hotel-keeper, who goes to its depot to solicit guests for his own sole benefit,[75] unless, perhaps, where it has invited, or, at least, licensed him so to do.[76] It may, indeed, be stated as a general rule, that one who goes upon the platform at a railroad station from mere curiosity, or for the transaction of business in no way connected with the company, cannot recover for injuries received because of defects therein.[77]

§1257. Injuries to trespassers upon track.—What we have already said concerning the limited duty to trespassers applies to trespassers upon a railroad track.[78] It is generally, and, we think,

34 S. W. 1094. See, also, Clussman v. Long Island R. Co. 9 Hun (N. Y.), 618 (telegraph office kept by company).

[75] Post v. Texas &c. R. Co. (Tex.) 23 S. W. 708.

[76] See Tobin v. Portland &c. R. Co. 59 Me. 183; 8 Am. R. 415.

[77] St. Louis &c. R. Co. v. Fairbairn, 48 Ark. 491; 4 S. W. 50; 30 Am. & Eng. R. Cas. 166; Gillis v. Pennsylvania R. Co. 59 Pa. St. 129; 98 Am. Dec. 317; Kansas City R. Co. v. Kirksey, 48 Ark. 366; 3 S. W. 190; Baltimore &c. R. Co. v. Schwindling, 101 Pa. St. 258; 47 Am. R. 706; 8 Am. & Eng. R. Cas. 544; Pittsburgh &c. R. Co. v. Bingham, 29 Ohio St. 364; 23 Am. R. 751; Burbank v. Illinois Cent. R. Co. 42 La. Ann. 1156; 8 So. 580; 11 L. R. A. 720, and note; 45 Am. & Eng. R. Cas. 593. See, also, Omaha &c. R. Co. v. Martin, 14 Neb. 295; 15 N. W. 696; 19 Am. & Eng. R. Cas. 236; Redigan v. Boston &c. R. Co. 155 Mass. 44; 28 N. E. 1133; 14 L. R. A. 276; 31 Am. St. 520, and note; Clark v. Howard, 88 Fed. 199; Montgomery &c. R. Co. v. Thompson, 77 Ala. 448; 54 Am. R. 72; Cincinnati &c. R. Co. v. Aller, 64 Ohio St. 183; 60 N. E. 205; Williams v. Kansas City R. Co. 96 Mo. 275; 9 S. W. 573; Dobbins v. Missouri &c. R. Co. 91 Tex. 60; 41 S. W. 62; 38 L. R. A. 573; 66 Am. St. 856; Norfolk &c. R. Co. v. Wood, 99 Va. 156; 37 S. E. 846. In the first case above cited, the general rule was stated as in the text, but it was held that one who went upon the company's premises to read a notice of stock killed, which was posted there in pursuance of the statute, with the owner of missing stock, who could not read, was invited there and that the company was bound to use ordinary care to keep the platform in repair for such persons.

[78] Ante, § 1253; also Cleveland &c. R. Co. v. Adair, 12 Ind. App. 569; 39 N. E. 672; Atchison &c. R. Co. v. Todd, 54 Kan. 551; 38 Pac. 804; St. Louis &c. R. Co. v. Monday, 49 Ark. 257; 4 S. W. 782; St. Louis &c. R. Co. v. Bryant (Ark.), 99 S. W. 693; Louisville &c. R. Co. v. Redmons, 28 Ky. L. 1293; 91 S. W. 722; Illinois Cent. R. Co. v. Johnson (Ky.), 97 S. W. 745; Morrissey v. Eastern R. Co. 126 Mass. 377; 30 Am. R. 686, and note; Mason v. Missouri &c. R. Co. 27 Kan. 83; 41 Am. R. 405; Tennis v. Rapid Trans-

correctly, held that a railroad company is not bound to keep a lookout for trespassers upon the track.[79] But some authorities hold that it must keep a lookout for trespassers as well as others.[80]

it R. Co. 45 Kan. 503; 25 Pac. 876; Roden v. Chicago &c. R. Co. 133 Ill. 72; 23 Am. St. 585; Dillon v. Connecticut River R. Co. 154 Mass. 478; 28 N. E. 899; Spicer v. Chesapeake &c. R. Co. 34 W. Va. 514; 12 S. E. 553; 11 L. R. A. 385, and note; Louisville &c. R. Co. v. Williams, 69 Miss. 631; 12 So. 957; Candelaria v. Atchison &c. R. Co. 6 N. Mex. 266; 27 Pac. 497; Toomey v. Southern Pac. R. Co. 86 Cal. 374; 24 Pac. 1074; 10 L. R. A. 139, and note.

[79] Burg v. Chicago &c. R. Co. 90 Iowa, 106; 57 N. W. 680; 48 Am. St. 419; 60 Am. & Eng. R. Cas. 159; Thomas v. Chicago &c. R. Co. 93 Iowa, 248; 61 N. W. 967; McAllister v. Burlington &c. R. Co. 64 Iowa, 395; 20 N. W. 488; Scheffler v. Minneapolis &c. R. Co. 32 Minn. 518; 21 N. W. 711; Memphis &c. R. Co. v. Womack, 84 Ala. 149; 4 So. 618; East Tennessee &c. R. Co. v. King, 81 Ala. 177; 2 So. 152; Georgia Pac. R. Co. v. Ross, 100 Ala. 490; 14 So. 282; Baltimore &c. R. Co. v. State, 62 Md. 479; 50 Am. R. 233; State v. Baltimore &c. R. Co. 69 Md. 494; 9 Am. St. 436, and note; Ward v. Southern Pac. R. Co. 25 Ore. 433; 36 Pac. 156; 23 L. R. A. 715; 60 Am. & Eng. R. Cas. 34; Woodruff v. Northern Pac. Co. 47 Fed. 689; Louisville &c. R. Co. v. Greene (Ky.), 19 Am. & Eng. R. Cas. 95; Terre Haute &c. R. Co. v. Graham, 95 Ind. 286; 48 Am. R. 719; 12 Am. & Eng. R. Cas. 77; Givens v. Kentucky Cent. R. Co. 12 Ky. L. 950; 15 S. W. 1057; Louisville &c. R. Co. v. Williams, 69 Miss. 631; 12 So. 957; Anderson v. Chicago &c. R. Co. 87 Wis. 195; 58 N. W. 79; 23 L. R. A. 203; 60 Am. & Eng. R. Cas. 86; Chenery v. Fitchburg R. Co. 160 Mass. 211; 35 N. E. 554; 22 L. R. A. 575. See, also, Byrnes v. Boston &c. R. Co. 181 Mass. 322; 63 N. E. 897; Cleveland &c. R. Co. v. Cline, 111 Ill. App. 416; Northwestern El. R. Co. v. O'Malley, 107 Ill. App. 599; Sheehan v. St. Paul &c. R. Co. 76 Fed. 201; Cleveland &c. R. Co. v. Lartt, 64 Fed. 823; Smalley v. Southern R. Co. 57 S. Car. 243; 35 S. E. 489; Yates v. Illinois Cent. R. Co. 28 Ky. L. 75; 89 S. W. 161; Smith v. Illinois Cent. R. Co. 28 Ky. L. 723; 90 S. W. 254; Illinois Cent. R. Co. v. Johnson (Ky.), 97 S. W. 745; Chesapeake &c. Ry. Co. v. Farrow (Va.), 55 S. E. 569; Alabama &c. R. Co. v. Moorer, 116 Ala. 642; 22 So. 900, 901 (quoting text). In several of these jurisdictions, however, while this is the general rule it is modified as to trespassers or licensees at certain places where they are to be anticipated.

[80] Troy v. Cape Fear &c. R. Co. 99 N. Car. 298; 6 S. E. 77; 6 Am. St. 521; Clark v. Wilmington &c. R. Co. 109 N. Car. 430; 14 S. E. 43; 14 L. R. A. 749; McDonald v. International &c. R. Co. 86 Tex. 1; 22 S. W. 939; 40 Am. St. 803; Smith v. Norfolk &c. R. Co. 114 N. Car. 728; 19 S. E. 863, 923; 25 L. R. A. 286 (apparently modifying former North Carolina decisions which are extreme). But see Pickett v. Wilmington &c. R. Co. 117 N. Car. 616; 23 S. E. 264; 30 L. R. A. 257; 53 Am.

And in some jurisdictions the rule is modified so far as to require the company to keep a lookout in cities and other places where trespassers or licensees may reasonably be expected.[81] Under most

St. 611; Railroad Co. v. Sympkins, 54 Tex. 615; 38 Am. R. 632, and note; 6 Am. & Eng. R. Cas. 11; Patton v. East Tennessee &c. R. Co. 89 Tenn. 370; 15 S. W. 919; 12 L. R. A. 184; 48 Am. & Eng. R. Cas. 581; Gunn v. Ohio River R. Co. 36 W. Va. 165; 14 S. E. 465; 32 Am. St. 842; East Tennessee &c. R. Co. v. St. John, 5 Sneed (Tenn.), 524; 73 Am. Dec. 149; Missouri &c. R. Co. v. Hanner, 34 Tex. Civ. App. 354; 78 S. W. 708; Olivaras v. San Antonio &c. R. Co. (Tex. Civ. App.) 77 S. W. 981; Texas &c. R. Co. v. Watkins, 88 Tex. 20; 29 S. W. 232. This is said to be the rule in Maryland, North Carolina, Tennessee, Texas and West Virginia. See note in 69 L. R. A. 546, et seq. But there are apparently conflicting authorities in Maryland and North Carolina, and it is doubtful if this is the unqualified rule in those states.

[81] South &c. R. Co. v. Donovan, 84 Ala. 141; 4 So. 142; Alabama &c. R. Co. v. Guest, 144 Ala. 373; 39 So. 654; Southern R. Co. v. Chatman, 124 Ga. 1026; 53 S. E. 692, 694, 695 (quoting text); Louisville &c. R. Co. v. Daniel, 28 Ky. L. 1146; 91 S. W. 691; Johnson v. Louisville &c. R. Co. 29 Ky. L. 36; 91 S. W. 707; Davis v. Chicago &c. R. Co. 58 Wis. 646; 17 N. W. 406; 46 Am. R. 667; Townley v. Chicago &c. R. Co. 53 Wis. 626; 11 N. W. 55; Cassida v. Oregon R. &c. Co. 14 Ore. 551; 13 Pac. 438; Chicago &c. R. Co. v. Grablin, 38 Neb. 90; 56 N. W. 796; 57 N. W. 522; Battishill v. Humphreys, 64 Mich. 494; 31 N. W. 894; Johnson v. Lake Superior &c. Co. 86 Wis. 64; 56 N. W. 161; Reilly v. Hannibal &c. R. Co. 94 Mo. 600; 7 S. W. 407; Garner v. Trumbull, 94 Fed. 321; Felton v. Aubrey, 74 Fed. 359. In Williams v. Kansas City &c. R. Co. 96 Mo. 275; 9 S. W. 573, it is shown that this is as far as the rule has been modified in Missouri, although some of the cases state in general terms that the company must keep a lookout for trespassers and licensees, and is liable if it ought to have discovered the injured party in time, but negligently failed to do so. See, also, Powell v. Missouri Pac. R. Co. 59 Mo. App. 626; Fearons v. Kansas City El. R. Co. 180 Mo. 208; 79 S. W. 394; Norfolk &c. R. Co. v. Carper, 88 Va. 556; 14 S. E. 328; Whalen v. Chicago &c. R. Co. 75 Wis. 654; 44 N. W. 849; Chesapeake &c. R. Co. v. Rodgers, 100 Va. 324; 41 S. E. 732; Blankenship v. Chesapeake &c. R. Co. 94 Va. 449; 27 S. E. 20. See the principal and dissenting opinions in Brown v. Boston &c. R. Co. (N. H.) 64 Atl. 194, on the question as to the rule where trespassers are to be expected. In Illinois Cent. R. Co. v. Murphy (Ky.), 97 S. W. 729, the Kentucky decisions holding that no duty arises until the trespasser's peril is discovered, are collected, and it is said that, while divisible into two classes, they are all based on that one principle where his presence is neither known nor to be reasonably anticipated, but that where the presence of such a person should be anticipated as probable, the train should

statutes and ordinances trespassers upon the track are not entitled to the benefit of signals required to be given at public crossings,[82] nor to the benefit of a speed ordinance.[83] So, it has been held in some cases that one who trespasses upon the track is ipso facto guilty of negligence,[84] and there are many cases in which persons have been held guilty of contributory negligence in trespassing upon the track and then failing to exercise such care as their dangerous position and the circumstances required.[85]

§ 1257a. Presumption that person will get off track—Discovery

be operated with a lookout and under control so as to stop, if necessary, before injury is done.

[82] Ante, § 1158, and authorities there cited; also Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369; 20 S. E. 550; 26 L. R. A. 553; 44 Am. St. R. 145; Shackleford v. Louisville &c. R. Co. 84 Ky. 43; 4 Am. St. 189; Spicer v. Chesapeake &c. R. Co. 34 W. Va. 514; 12 S. E. 553; 11 L. R. A. 385; Parker v. Wilmington &c. R. Co. 86 N. Car. 221; Cleveland &c. R. Co. v. Workman, 66 Ohio St. 509; 64 N. E. 582; 90 Am. St. 602.

[83] Clemens v. Chicago &c. R. Co. 128 Iowa, 394; 104 N. W. 431.

[84] State v. Baltimore &c. R. Co. 58 Md. 482; 15 Am. & Eng. R. Cas. 409, and note; McAllister v. Burlington &c. R. Co. 64 Iowa, 395; 20 N. W. 488; Illinois Cent. R. Co. v. Hall, 72 Ill. 222; Schexnaydre v. Texas &c. R. Co. 46 La. Ann. 248; 14 So. 513; 49 Am. St. 321 (deaf mute); Tucker v. Baltimore &c. R. Co. 59 Fed. 968; Savannah &c. R. Co. v. Meadows, 95 Ala. 137; 10 So. 141; Dell v. Phillips &c. Co. 169 Pa. 549; 32 Atl. 601; Philadelphia &c. R. Co. v. Hummell, 44 Pa. St. 375; 84 Am. Dec. 457; Parker v. Pennsylvania Co. 134 Ind. 673; 34 N. E. 504; 23 L. R. A. 552; Little Schuylkill &c. R. Co. v. Norton, 24 Pa. St. 465; 64 Am. Dec. 672, and note; Grethen v. Chicago &c. R. Co. 22 Fed. 609; Glass v. Memphis &c. R. Co. 94 Ala. 581; 10 So. 215; Roden v. Chicago &c. R. Co. 133 Ill. 72; 24 N. E. 425; 23 Am. St. 585.

[85] Kirtley v. Chicago &c. R. Co. 65 Fed. 386; Missouri Pac. R. Co. v. Moseley, 57 Fed. 921; Hughes v. Galveston &c. R. Co. 67 Tex. 595; 4 S. W. 219; Central Trust Co. v. Wabash &c. R. Co. 26 Fed. 896, and note; Frazer v. South &c. R. Co. 81 Ala. 185; 1 So. 85, and note; 60 Am. R. 145; Bresnahan v. Michigan Cent. R. Co. 49 Mich. 410; 13 N. W. 797; 8 Am. & Eng. R. Cas. 147; McClaren v. Indianapolis &c. R. Co. 83 Ind. 319; Teunenbrock v. South Pac. R. Co. 59 Cal. 269; 6 Am. & Eng. R. Cas. 8; Kansas City R. Co. v. Cook, 66 Fed. 115; 28 L. R. A. 181; Virginia Midland R. Co. v. Barksdale, 82 Va. 330; Cleveland &c. R. Co. v. Workman, 66 Ohio St. 509; 64 N. E. 582; 90 Am. St. 602; Spaven v. Lake Shore &c. R. Co. 130 Mich. 579; 90 N. W. 325; International &c. R. Co. v. Ploeger (Tex. Civ. App.), 96 S. W. 56; Ayers v. Wabash R. Co. 190 Mo. 228; 88 S. W. 608.

of peril—Wilfulness.—As a general rule the company's employes may presume that one apparently able to do so will get off the track in time.[86] But where a very young child is seen upon the track they can not safely act upon the presumption that it will get off the track or exercise the care of an adult.[87] So, even in the case of an adult the circumstances may be such that no such presumption can be indulged.[88] And, as we have else-

[86] Ante, § 1153; Bouwmeester v. Grand Rapids &c. R. Co. 67 Mich. 87; 34 N. W. 414; St. Louis &c. R Co. v. Monday, 49 Ark. 257; 4 S. W. 782; Syme v. Richmond &c. R. Co. 113 N. Car. 558; 18 S. E. 114; Pennsylvania Co. v. Myers, 136 Ind. 242; 36 N. E. 32; Cleveland &c. R. Co. v. Klee, 154 Ind. 430, 434; 56 N. E. 234; Indianapolis &c. R. Co. v. McClaren, 62 Ind. 566; Nichols v. Louisville &c. R. Co. 9 Ky. L. 702; 6 S. W. 339; Louisville &c. R. Co. v. Redmons, 28 Ky. L. 1293; 91 S. W. 722; Kennedy v. Denver &c. R. Co. 10 Col. 493; 16 Pac. 210; Candee v. Kansas City &c. R. Co. 130 Mo. 142; 31 S. W. 1029; Campbell v. Kansas City &c. R. Co. 55 Kan. 536; 40 Pas. 997; Louisville &c. R. Co. v. Cronback, 12 Ind. App. 66; 41 N. E. 15; Omaha &c. R. Co. v. Cook, 42 Neb. 905; 62 N. W. 235; Houston &c. R. Co. v. O'Donnell (Tex.), 92 S. W. 409; note in 69 L. R. A. 550.

[87] Galveston &c. R. Co. v. Hewitt, 67 Tex. 473; 3 S. W. 705; 60 Am. R. 32; Missouri &c. Ry. Co. v. Hammer, 34 Tex. Civ. App. 354; 78 S. W. 708; Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179; 9 N. E. 310; 10 N. E. 70; 58 Am. R. 387; Spooner v. Delaware &c. R. Co. 115 N. Y. 22; 21 N. E. 696; Donahoe v. Wabash &c. R. Co. 83 Mo. 543; 53 Am. R. 594; Payne v. Humeston &c. R. Co. 70 Iowa, 584; 31 N. W. 886; Pennsylvania R. Co. v. Morgan, 82 Pa. St. 134; Hyde v. Union Pac. R. Co. 7 Utah, 356; 26 Pac. 979; Kenyon v. New York &c. R. Co. 5 Hun (N. Y.) 479. But the presumption may usually be indulged where the child is apparently old enough and able to take care of himself. Missouri Pac. R. Co. v. Hansen, 48 Neb. 232; 66 N. W. 1105 (child twelve years old); Meredith v. Richmond &c. R. Co. 108 N. Car. 616; 13 S. E. 137 (boy thirteen years old); Cleveland &c. R. Co. v. Klee, 154 Ind. 430, 434; 56 N. E. 234 (boy nine years old); Trudell v. Grand Trunk Ry. Co. 126 Mich. 73; 85 N. W. 250; 53 L. R. A. 271 (boy seven years old).

[88] Cincinnati &c. R. Co. v. Cooper, 120 Ind. 469; 22 N. E. 340; 6 L. R. A. 241, and note; 16 Am. St. 334; Herring v. Wilmington &c. R. Co. 10 Ired. (N. Car.) 402; 51 Am. Dec. 395; Lake Shore &c. R. Co. v. Miller, 25 Mich. 274; Tanner v. Louisville &c. R. Co. 60 Ala. 621; St. Louis &c. R. Co. v. Manly, 58 Ill. 300. And it has been held that the trainmen have no right to act on such assumption until they have given a warning signal at such a distance as should enable him to hear it and get off the track. Kelley v. Ohio River R. Co. (W. Va.) 52 S. E. 520; 2 L. R. A. (N. S.) 898, 901 (citing text). See, also, International &c. R. Co. v. Smith, 62

where said, the company is liable where it wilfully injures a trespasser [89] or fails to exercise reasonable care after discovering, or, according to some of the authorities, after it ought to have discovered, his danger and inability to escape, if the exercise of such care would have prevented the injury.[90] Although there is a clear distinction between negligence and wilfulness, yet a reckless and wanton disregard of consequences, evincing a willingness to inflict injury, may amount to wilfulness, although there is no direct proof of actual intention to inflict the injury complained of.[91] Thus, where a trespasser was seen by the engineer upon a long trestle in time to have stopped the train, and the latter did nothing to stop or slacken the speed of the train, but went on, speculating on the chances of the trespasser's reaching the end of the trestle before the train, although it must have been apparent that the trespasser could not escape, it was held that the engineer was guilty of

Tex. 254; Louisville &c. R. Co. v. Tinkham, 19 Ky. L. 1784; 44 S. W. 439; Central R. &c. Co. v. Denson, 84 Ga. 774; 11 S. E. 1039; Texas &c. Ry. Co. v. Brannon (Tex. Civ. App.), 96 S. W. 1095.

[89] Kansas Pac. R. Co. v. Whipple, 39 Kan. 531; 18 Pac. 730; Lake Shore &c. R. Co. v. Bodemer, 139 Ill. 596; 32 Am. St. 218; 29 N. E. 692; Esrey v. Southern Pac. R. Co. 103 Cal. 541; 37 Pac. R. 500; Palmer v. Chicago &c. R. Co. 112 Ind. 250; Dennis v. Louisville &c. R. Co. 116 Ind. 42; 1 L. R. A. 448, and note; ante, §§ 1253, 1254.

[90] Sutzin v. Chicago &c. R. Co. 95 Iowa, 304; 63 N. W. 709; Omaha &c. R. Co. v. Cook, 37 Neb. 435; Union Pac. R. Co. v. Mertes, 35 Neb. 204; 52 N. W. 1099; Mobile &c. R. Co. v. Watly, 69 Miss. 145; 13 So. 825; Raines v. Chesapeake &c. R. Co. (W. Va.) 60 Am. & Eng. R. Cas. 75; Louisville &c. R. Co. v. Lohges, 6 Ind. App. 288; 33 N. E. 449; Wren v. Louisville &c. R. Co. 14 Ky L. 324; 20 S. W. 215; Gulf &c. R. Co. v. Lankford, 9 Tex. Civ. App. 593; 29 S. W. 933; 2 Thomp. Neg. (2d ed.) § 1711; 1 Shearm. & Redf. Neg. § 99; ante, § 1175.

[91] Palmer v. Chicago &c. R. Co. 112 Ind. 250; 14 N. E. 70; Pennsylvania R. Co. v. Sinclair, 62 Ind. 301; 30 Am. R. 185, and note; Lake Erie &c. R. Co. v. Brafford (Ind. App.), 43 N. E. 882; Lake Shore &c. R. Co. v. Bodemer, 139 Ill. 596; 29 N. E. 692; 32 Am. St. 218; Louisville &c. R. Co. v. Trammell, 93 Ala. 350; 9 So. 870. See, also, Southern R. Co. v. Chatman, 124 Ga. 1026; 53 S. E. 692 (citing text). But it involves conduct which is quasi criminal. Louisville &c. R. Co. v. Bryan, 107 Ind. 51; Parker v. Pennsylvania Co. 134 Ind. 673; 34 N. E. 504; 23 L. R. A. 552. See, also, Williams v. Central of Ga. R. Co. (Ala.) 40 So. 143; Alabama Great So. R. Co. v. Guest, 144 Ala. 373; 39 So. 654; Lando v. Chicago &c. R. Co. 81 Minn. 279; 83 N. W. 1089; Bartlett v. Wabash R. Co. 220 Ill. 163; 77 N. E. 96.

such recklessness as amounted to wilfulness, that the company was liable for running over and killing such trespasser while upon the trestle, regardless of his contributory negligence.[92] But it has been held that trainmen are not obliged to stop the train or slow up as soon as they discover a trespassing object lying beside the track that "looks like a man," and that if he is in a safe position they are not bound to anticipate that he may move so as to place himself in peril.[93] In some other cases, however, especially where the man was helpless or the object was a young child a contrary view has been taken.[94]

[92] Central R. &c. Co. v. Vaughan, 93 Ala. 209; 9 So. 468; 30 Am. St. 50. See, also, St. Louis &c. R. Co. v. Bolton, 36 Tex. Civ. App. 87; 81 S. W. 123; Purcell v. Chicago &c. R. Co. 109 Iowa, 628; 80 N. W. 682; 77 Am. St. 557; Peirce v. Walters, 164 Ill. 560; 45 N. E. 1068; Clark v. Wilmington &c. R. Co. 109 N. Car. 430; 14 S. E. 43; 14 L. R. A. 749; Vanarsdall v. Louisville &c. R. Co. 23 Ky. L. 1666; 65 S. W. 858; 77 S. W. 1103. But compare Ullrich v. Cleveland &c. R. Co. 151 Ind. 358; 51 N. E. 95. See, generally, as to persons on trestles or bridges, Southern R. Co. v. Bush, 122 Ala. 470; 26 So. 168; Mason v. Missouri Pac. R. Co. 27 Kans. 83; 41 Am. R. 405; Bogan v. Carolina &c. R. Co. 129 N. Car. 154; 39 S. E. 808; 55 L. R. A. 418; Smalley v. Southern R. Co. 57 S. Car. 243; 35 S. E. 489; Gunn v. Ohio River R. Co. 42 W. Va. 676; 26 S. E. 546; 36 L. R. A. 575; Chicago &c. R. Co. v. Kotoski, 199 Ill. 383; 65 N. E. 350; Chicago &c. R. Co. v. Gruss, 200 Ill. 195; 65 N. E. 693; Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369; 20 S. E. 550; 26 L. R. A. 553; 44 Am. St. 145.

[93] Louisville &c. R. Co. v. Hathaway, 28 Ky. L. 628; 89 S. W. 724; 2 L. R. A. (N. S.) 498; Goodman v. Louisville &c. R. Co. 116 Ky. 900; 77 S. W. 174; 63 L. R. A. 657; New York &c. R. Co. v. Kelly, 93 Fed. 745; Murch v. Western &c. R. Co. 78 Hun (N. Y.) 601; 29 N. Y. S. 490; Little Rock &c. R. Co. v. Haynes, 47 Ark. 497; 1 S. W. 774; Missouri Pac. R. Co. v. Prewitt, 59 Kans. 734; 54 Pac. 1067; Louisville &c. R. Co. v. Williams, 69 Miss. 631; 12 So. 957; Norfolk &c. R. Co. v. Dunaway, 93 Va. 29; 24 S. E. 698. In most of these cases, however, while the nature of the object could not be clearly discerned, the trainmen did not think it was a human being, or did not think he was in peril. See, also, Sanders v. Texas &c. R. Co. (La. Ann.) 42 So. 764.

[94] Meeks v. Southern Pac. R. Co. 56 Cal. 513; 38 Am. R. 67; Keyser v. Chicago &c. R. Co. 56 Mich. 559; 23 N. W. 311; 56 Am. R. 405; Isabel v. Hannibal &c. R. Co. 60 Mo. 475; East Tenn. &c. R. Co. v. St. John, 5 Sneed (Tenn.) 525; 73 Am. Dec. 149; Hyde v. Union Pac. R. Co. 7 Utah, 356; 26 Pac. 979. See, also, Seaboard &c. R. Co. v. Joyner, 92 Va. 334; 23 S. E. 773; Campbell v. Kansas City &c. R. Co. 55 Kans. 536; 40 Pac. 997. For a discussion of the general rule as to indulging the presumption that one on or

§ 1258. Injuries to persons in company's yards.—No duty rests upon a railroad company in favor of trespassers or bare licensees, who use its track as a footway, to keep its switches blocked in its private yard in order to prevent injury to such persons.[95] So, it has been held that staking cars across a highway in the railroad company's yard is not an unlawful act, nor negligence per se, and that one who travels along the right of way of a railroad company is a trespasser and cannot recover for injuries received where a highway crosses the tracks of the company in its own yard from a car which is being staked along the track on such right of way.[96] The court was of the opinion that the highway crossing was simply for the purpose of passing from one side of the railroad to the other, and that the plaintiff did not cease to be a trespasser merely because he happened to have reached the crossing at the time he was injured. In another recent case it was held that one who crosses on a railroad ferry-boat in violation of the rules of the company forbidding the carriage of passengers thereon, and, in seeking to return, again enters the company's yard, remains a trespasser in proceeding through such yard to reach a public ferry-boat after he has been ordered off the railroad boat, although the company's employes direct him as to the way through the yard to the ferry landing, which way is at least as safe as any other exit.[97] Even as to employes, the company is under no obligation to ring the bell or sound the whistle upon a switching engine engaged in making up trains in its yard, for the purpose of notifying such employes, who are familiar with the operation of the yard.[98] If one who is

near the track will get or keep out of the way, and the limits of the right to act on such presumption, together with a review of numerous authorities, see note to Union Pac. R. Co. v. Cappier, 66 Kans. 649; 72 Pac. 281; 69 L. R. A. 513, 550–556.

[95] International &c. R. Co. v. Lee. (Tex. 34 S. W. 160; Akers v. Chicago &c. R. Co. 58 Minn. 540; 60 N. W. 669; 60 Am. & Eng. R. Cas. 30.

[96] Kelly v. Michigan Cent. R. Co. 65 Mich. 186; 31 N. W. 904; 8 Am. St. R. 876. Sherwood, J., dissented in this case, and the decision is certainly very close to the line. Compare Johnson v. Louisville &c. R. Co. 29 Ky. L. 36; 91 S. W. 707.

[97] Kansas City &c. R. Co. v. Cook, 66 Fed. 115; 28 L. R. A. 181. The court said: "Plaintiff was not rightfully in the yard; his being there was negligence. The railroad company owed him no duty except to avoid, after discovering his danger, any wanton or unnecessary injury being done him." See, also, Richmond &c. R. Co. v. Watts, 92 Ga. 88; 17 S. E. 983.

[98] Aerkfetz v. Humphreys, 145 U.

not an employe, without the knowledge or consent of the company, goes into its yard which is interlaced with tracks, upon which engines and cars are being switched and changed, he must use care commensurate with the peril in which he has placed himself, and the company owes him no duty except not to injure him wilfully, or by negligence after its employes see his danger and inability to escape in time to prevent such injury by the exercise of due care.[99] The switch-yard of a railroad company is usually even a more dangerous place than the right of way where there is but a single track, and as it is likely to be in continuous use by the company in switching, storing and repairing cars, making up trains, or the like, there is, perhaps, still less reason for implying a license or invitation to strangers to use such premises than in the case of the right of way where there is but a single track. In any event, what we have heretofore stated in regard to the risks taken by the licensee and the limited duty due him from the company must apply with at least equal force where the license is to use the company's private yard and tracks therein.[100] Where, however a public street crosses the tracks in a railroad yard, one who is crossing on such street is not

S. 418; 12 Sup. Ct. 835. See, also, Goodes v. Boston &c. R. Co. 162 Mass. 287; 38 N. E. 500; Lake Erie &c. R. Co. v. Hennessey (Ind. App.) 78 N. E. 670. But compare Pittsburgh &c. R. Co. v. Bovard, 223 Ill. 176; 79 N. E. 128. And, on the other hand, it seems that the rule that one who crosses a railroad track must, as a matter of law, look and listen before doing so, does not apply to one who is employed in a railroad yard and whose duties make it necessary for him to frequently go upon the tracks. Jordan v. Chicago &c. R. Co. 58 Minn. 8; 59 N. W. 633; 49 Am. St. 486.

[99] Rome R. Co. v. Tolbert, 85 Ga. 447; 11 S. E. 849; Central R. &c. Co. v. Rylee, 87 Ga. 491; 13 S. E. 584; 13 L. R. A. 634; Missouri Pac. R. Co. v. Moseley, 57 Fed. 921; St. Louis &c. R. Co. v. Monday, 49 Ark. 257; 4 S. W. 782; Huff v. Chesapeake &c. Ry. Co. 48 W. Va. 45; 35 S. E. 866, 867 (quoting text). See, also, Tucker v. Baltimore &c. R. Co. 59 Fed. 968; Chicago &c. R. Co. v. Caulfield, 63 Fed. 396; Murdock v. Yazoo &c. R. Co. (Miss.) 29 So. 25; Kendall v. Louisville &c. R. Co. 25 Ky. L. 793; 76 S. W. 376; Johnson v. Louisville &c. R. Co. 29 Ky. L. 36; 91 S. W. 707.

[100] See Clark v. Michigan Cent. R. Co. 113 Mich. 24; 71 N. W. 327; 67 Am. St. 442; Bledsoe v. Grand Trunk R. Co. 126 Mich. 312; 85 N. W. 738; Lingenfelter v. Baltimore &c. R. Co. 154 Ind. 49; 55 N. E. 1021; Illinois Cent. R. Co. v. Arnola, 78 Miss. 787; 78 So. 768; 84 Am. St. 645; Cleveland &c. R. Co. v. Ballentine, 84 Fed. 935.

a trespasser or bare licensee. In such a case the railroad may be liable for injuries under circumstances which would not make it liable to a trespasser. Thus, in a recent case, the company was held liable to a traveler upon a street, where it crossed the tracks, for injury by a steer, which, owing to its crippled condition, had been unloaded to be killed, and was negligently allowed to recover and run loose in the yard through which the street crossed.[101] It has also been held that yards about a passenger depot are a public place and that one is not a trespasser who follows a beaten path in an attempt to get on a train about to leave, although such path is some feet away from the depot.[102]

§ 1259. Liability for injury to trespassing children—Turn-table cases.—In actions of injuries to children, as in other cases, there can be no recovery unless the defendant has been guilty of a breach of duty.[103] We presume that no court would deny this fundamental doctrine, but, as suggested in a recent case, it is sometimes lost sight of and "in dealing with cases which involve injuries to children courts and juries have sometimes strangely confounded legal obligations with sentiments independent of law."[104] There is sharp conflict among the authorities, however, as to what the duty of a railroad company is to children who come upon its premises as trespassers or mere licensees. We believe the true rule to be that, although the age of the child may be important in determining the question of contributory negligence or the duty of the company after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers or bare licensees not invited or enticed by it than it is to keep them safe for adults.[105]

[101] Texas &c. R. Co. v. Juneman, 71 Fed. 939. See, also, as to failure to block guard rail in street, Goodrich v. Burlington &c. R. Co. 103 Iowa, 412; 72 N. W. 653; Louisville &c. R. Co. v. Phillips, 112 Ind. 59; 13 N. E. 132; 2 Am. St. 155; Gulf &c. R. Co. v. Walker, 70 Tex. 126; 7 S. W. 831; 8 Am. St. 582; Littlejohn v. Richmond &c. R. Co. 49 S. Car. 12; 26 S. E. 967.

[102] Willis v. Vicksburg &c. R. 115 La. Ann. 53; 38 So. 892.

[103] 2 Thomp. Neg. (2d ed) § 1805, et seq.

[104] Indianapolis v. Emmelman, 108 Ind. 530; 9 N. E. 155; 58 Am. R. 65.

[105] McEachen v. Boston &c. R. Co. 150 Mass. 515; 23 N. E. 231; Morrissey v. Eastern R. Co. 126 Mass. 377; 30 Am. R. 686, and note; Pennsylvania Co. v. McMullen, 132 Pa. St. 107; 19 Atl. 27; Emerson v. Peteler, 35 Minn. 481; 29 N. W. 311; 59 Am. R. 337; Gavin v. Chicago, 97

On the other hand while it may be contributory negligence for a child to play upon the track or any other dangerous place, yet if he has a right to be there, as, for instance in a public highway, where it crosses the track, it has been held that he cannot be treated as a trespasser.[106] So, if the company invites, allures or entices a child into a place of danger and negligently injures such child while there it may be held liable, in the absence of contributory negli-

Ill. 66; 37 Am. R. 99; Indianapolis v. Emmelman, 108 Ind. 530; 9 N. E. 155; 58 Am. R. 65; Cauley v. Pittsburgh &c. R. Co. 95 Pa. St. 398; 40 Am. R. 664, and note; Gillespie v. McGowan, 100 Pa. St. 144; 45 Am. R. 365; Baltimore &c. R. Co. v. Schwindling, 101 Pa. St. 258; 47 Am. R. 706; Overholt v. Vieths, 93 Mo. 422; 6 S. W. 74; 3 Am. St. 557; Sherman v. Hannibal &c. R. Co. 72 Mo. 62; 37 Am. R. 423; Frost v. Eastern R. Co. 64 N. H. 220; 9 Atl. 790; 10 Am. St. 396; Clark v. Manchester, 62 N. H. 577; McDermott v. Kentucky Cent. R. Co. 93 Ky. 408; 20 S. W. 380; Bannon v. Baltimore &c. R. Co. 24 Md. 108; Chicago &c. R. Co. v. McLaughlin, 47 Ill. 265; Atchison &c. R. Co. v. Flinn, 24 Kan. 627; Central Branch &c. R. Co. v. Henigh, 23 Kan. 347; 33 Am. R. 167; Nolan v. New York &c. R. Co. 53 Conn. 461; 4 Atl. 106; Klix v. Nieman, 68 Wis. 271; 32 N. W. 223; 60 Am. R. 854; McAlpin v. Powell, 70 N. Y. 126; 26 Am. R. 555; Fredericks v. Ill. Cent. R. Co. 46 La. Ann. 1180; 15 So. 413; Buswell Pers. Inj. § 78, and note. See, also, Trudell v. Grand Trunk R. Co. 126 Mich. 73; 85 N. W. 250, 253; 53 L. R. A. 271, 273 (quoting text); Alabama &c. R. Co. v. Moorer, 116 Ala. 642; 22 So. 900, 901 (quoting text); Jefferson v. Birmingham &c. Co. 116 Ala. 294; 22 So. 546, 548; 38 L. R. A. 458; 67 Am. St. 116 (quoting text); Hasting v. Southern R. Co. 143 Fed. 260, 264 (citing text). But see Harriman v. Pittsburg &c. R. Co. 45 Ohio St. 11; 12 N. E. 451; 4 Am. St. 507; Callahan v. Eel River &c. R. Co. 92 Cal. 89; 28 Pac. 104; Union Pac. R. Co. v. McDonald, 152 U. S. 262; 14 Sup. Ct. 619; Lynch v. Nurdin, 1 Q. B. 29; Powers v. Harlow, 53 Mich. 507; 19 N. W. 257; 51 Am. R. 154; Chicago &c. R. Co. v. Bockoven, 53 Kan. 279; 36 Pac. 322; Birge v. Gardner, 19 Conn. 507; 50 Am. Dec. 261; Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179; 10 N. E. 70; 58 Am. R. 387; Westerfield v. Levis, 43 La. Ann. 63; 9 So. 52; Mackey v. Vicksburg, 64 Miss. 777; 2 So. 178; Pittsburgh &c. R. Co. v. Shields, (Ohio) 31 Cent. L. J. 168, and note; Kentucky Cent. R. Co. v. Gastineau, 83 Ky. 119; note to Newman v. Phillipsburgh &c. R. Co. 8 L. R. A. 842; Bransom v. Labrot, 81 Ky. 638; 50 Am. R. 193; 2 Thomp. Neg. (2d ed.) § 1805 et seq.; Beach on Contrib. Neg. § 204; Cooley Torts, 303, and see turntable cases hereinafter cited.

[106] Krenzer v. Pittsburgh &c. R. Co. 151 Ind. 587; 68 Am. St. 252; 43 N. E. 649; 52 N. E. 220; Louisville &c. R. Co. v. Sears, 11 Ind. App. 654; 38 N. E. 837; Huerzeler v. Central &c. R. Co. 139 N. Y. 490; 34 N. E. 1101; McGuire v. Spence, 91 N. Y. 303; 43 Am. R. 668.

gence, for such injury. Some of the authorities have applied this rule in favor of children when they would not have applied it to adults and have held railroad companies liable where that which allured them was not near any public place in which they had a right to be and where they necessarily became intruders or trespassers before they could reach it. This is particularly true of some of the turn-table cases. In an early case the supreme court of the United States held that, "while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts," and that when it leaves a turn-table unlocked and unguarded in an exposed place where children are likely to be attracted by it, this may be considered as a constructive invitation to them and the company held liable for their injury.[107] This decision has been followed in many other cases,[108] in some of which the doctrine therein announced was stretched to its utmost limits in its applica-

[107] Railroad Co. v. Stout, 17 Wall. (U. S.) 657.

[108] Keefe v. Milwaukee &c. R. Co. 21 Minn. 297; 18 Am. R. 393; O'Malley v. St. Paul &c. R. Co. 43 Minn. 289; 45 N. W. 440; Kansas Cent. R. Co. v. Fitzsimmons, 22 Kan. 686; 31 Am. R. 203; Nagel v. Missouri Pac. R. Co. 75 Mo. 653; 42 Am. R. 418; Barrett v. Southern Pac. R. Co. 91 Cal. 296; 27 Pac. 666; 25 Am. St. 186; Evansich v. Gulf &c. R. Co. 57 Tex. 123; Fort Worth &c. R. Co. v. Robertson (Tex.) 14 L. R. A. 781, and note; Ferguson v. Columbus &c. R. Co. 77 Ga. 102; Atchison &c. R. Co. v. Bailey, 11 Neb. 332; Bridger v. Asheville &c. R. Co. 27 S. Car. 456; 3 S. E. 860; 13 Am. St. 653; Ilwaco R. Co. v. Hedrick, 1 Wash. 446; 25 Pac. 335; 22 Am. St. 169. See, also, Union Pacific R. Co. v. McDonald, 152 U. S. 262; 14 Sup. Ct. 619; Chicago &c. R. Co. v. Fox (Ind. App.) 70 N. E. 81; Edgington v. Burlington &c. R. Co. 116 Iowa, 410; 90 N. W. 95; 57 L. R. A. 561, citing and reviewing the authorities; East Tenn. &c. R. Co. v. Cargille, 105 Tenn. 628; 59 S. W. 141; Chicago &c. R. Co. v. Krayenbuhl, 65 Neb. 889; 91 N. W. 880; 59 L. R. A. 920. While the court in the Stout Case, supra, stated the rule as to the duty to trespassers too boardly, without even limiting it to children, what was directly decided was that it was for the jury to determine whether the turn-table was a dangerous machine and the company negligent under the particular circumstances of the case. Some of the other cases have assumed that a turn-table is exceptionally dangerous and attractive in itself, and in this, it seems, while professedly relying on that case, have gone to a still greater extreme.

tion to the facts. But some of the ablest courts of the land, in recent decisions, have refused to follow it,[109] and in this we believe they are justified by reason, if not by the weight of authority. But even if a railroad company should be held liable, as in some of the cases, where it leaves a turn-table unguarded and unfastened in an exposed place near a highway or a place where the public have a right to go and children frequently do go, it does not follow, it seems to us, that it would be liable where the turn-table is far from such a place in an isolated position upon the company's grounds, and we believe that, in such a case, the court might so hold as a matter of law.[110]

[109] Daniels v. New York &c. R. Co. 154 Mass. 349; 28 N. E. 283; 33 Cent. L. Jour. 322; 13 L. R. A. 248; 26 Am. St. 253; Delaware &c. R. Co. v. Reich, 61 N. J. L. 635; 40 Atl. 682; 41 L. R. A. 837; 68 Am. St. 727; Paolino v. McKendall, 24 R. I. 432; 53 Atl. 268; 60 L. R. A. 133; 96 Am. St. 736; Ryan v. Towar, 128 Mich. 463; 87 N. W. 644; 55 L. R. A. 310; 92 Am. St. 481; Uthermohlen v. Bogg's Run Co. 50 W. Va. 457; 40 S. E. 410; 55 L. R. A. 911; 88 Am. St. 884; Walker v. Potomac &c. R. Co. (Va.) 53 S. E. 113 (reviewing authorities). Walsh v. Fitchburg R. Co. 145 N. Y. 301; 39 N. E. 1068; 27 L. R. A. 725; 45 Am. St. 615; Frost v. Eastern R. Co. 64 N. H. 220; 9 Atl. 790; 10 Am. St. 396. See, also, Lake Shore &c. R. Co. v. Clark, 41 Ill. App. 343; Holbrook v. Aldrich, 168 Mass. 16; 46 N. E. 115; 36 L. R. A. 493; 60 Am. St. 394. In Bates v. Nashville &c. R. Co. 90 Tenn. 36; 15 S. W. 1069; 25 Am. St. 665, and Kolsti v. Minneapolis &c. R. Co. 32 Minn. 133; 19 N. W. 655, it was held proper to instruct the jury that the company was not required to so fasten or secure the turn-table that boys could not displace such fastening and put the table in motion. But compare Callahan v. Eel River &c. R. Co. 92 Cal. 89; 28 Pac. 104.

[110] See St. Louis &c. R. Co. v. Bell, 81 Ill. 76; 25 Am. R. 269; Walker v. Potomac &c. R. Co. (Va.) 53 S. E. 113; Kaumeier v. City Elec. R. Co. 116 Mich. 306; 74 N. W. 481; 40 L. R. A. 385, 387 (citing text). Certainly this must be true where the child could not have been attracted by it until after he became a trespasser. See Chicago &c. R. Co. v. Bockoven, 53 Kan. 279; 36 Pac. 322, 333; Chambers v. Mineral &c. R. Co. (Ala.) 39 So. 170, 171 (citing this section). In several jurisdictions, while the doctrine of the turn-table cases is followed, it is limited in its application. See Stendal v. Boyd, 73 Minn. 53; 75 N. W. 735; 42 L. R. A. 288; 72 Am. St. 597; Dobbins v. Missouri &c. R. Co. 91 Tex. 60; 41 S. W. 62; 38 L. R. A. 573; 66 Am. St. 856; Savannah &c. R. Co. v. Beavers, 113 Ga. 398; 39 S. E. 82; 54 L. R. A. 314; Witte v. Stifel, 126 Mo. 295; 28 S. W. 891; 47 Am. St. 668; Houck v. Chicago &c. R. Co. 116 Mo. App. 559; 92 S. W. 738, 741; Peters v. Bowman, 115 Cal. 345; 47 Pac. 113, 598; 56 Am. St. 106.

§ 1260. Injury to trespassing children—Illustrative and conflicting cases.—The importance of this subject renders desirable a statement of what has been held in some of the conflicting authorities. On the one hand it has been held, in accordance with what we regard as the true rule, that cars are not "dangerous machines" and attractive to children, within the meaning of the rule adopted in some of the turn-table cases, and that a railroad company owes no duty to a child trespassing in its yards to see that he does not jump on its cars, or to fence its freight yard,[111] nor to keep its cars in good repair, or the doors shut,[112] nor to guard them so that such a child cannot be injured by loosening the brakes.[113] So, where a railroad company kept old cars and coal dumps in its yard, which was enclosed by a fence from which trespassers had knocked off planks, leaving it open in places, and children were accustomed to go into the yard to play, notwithstanding they were frequently warned and driven out by the employes of the company, it was held that the company had done nothing to invite children there and was not liable for injury to a boy while riding on a coal dump pushed by his companions.[114] In another case it appeared that section men had left a hand-car, when they quit work, at the foot of an embankment, four or five feet below the level of the track, and not near any public place; that some boys had found it and placed

[111] Barney v. Hannibal &c. R. Co. 126 Mo. 372; 28 S. W. 1069; 26 L. R. A. 847; 11 Lewis' Am. R. & Corp. R. 668. See, also, Rushenburg v. St. Louis &c. R. Co. 109 Mo. 112; 19 S. W. 216; Bishop v. Union R. Co. 14 R. I. 314; 51 Am. R. 386; Catlett v. St. Louis &c. R. Co. 57 Ark. 461; 21 S. W. 1062; 54 Am. & Eng. R. Cas. 113; Louisville &c. R. Co. v. Hurt (Ky.) 13 S. W. 275; Chicago &c. R. Co. v. Stumps, 69 Ill. 409. But see as to effect of failure to fence, generally: Keyser v. Chicago &c. R. Co. 56 Mich. 559; 23 N. W. 311; 56 Am. R. 405; Schmidt v. Milwaukee &c. R. Co. 23 Wis. 186; Union Pac. R. Co. v. McDonald, 152 U. S. 262; 14 Sup. Ct. 619, and note to 31 Am. & Eng. R. Cas. 423; note to Bottoms v. Seaboard &c. R. Co. 25 L. R. A. 784.

[112] McEacheon v. Boston &c. R. Co. 150 Mass. 515; 23 N. E. 231; Curley v. Missouri Pac. R. Co. 98 Mo. 13; 10 S. W. 593.

[113] Central Branch &c. R. Co. v. Henigh, 23 Kan. 347; 33 Am. R. 167; Haesley v. Winona &c. R. Co. 46 Minn. 233; 48 N. W. 1023; 24 Am. St. 220. See, also, Gay v. Essex &c. R. Co. 159 Mass. 238; 34 N. E. 258; 21 L. R. A. 448; 38 Am. St. 415.

[114] O'Connor v. Illinois Cent. R. Co. 44 La. Ann. 339; 10 So. 678.

it upon the track, when the boy who was injured was attracted to it by seeing them run it on the track, and that he thereupon joined in the sport and was injured by jumping or falling off while it was descending a grade at a high rate of speed. It was held that the company was not negligent in leaving the hand-car unlocked beside the track, and was not liable for such injuries.[115] So, it has been held in many cases that a railroad company is not obliged to keep a lookout for trespassing children upon its track, under ordinary circumstances, or move its cars with reference to them until their presence in danger is discovered.[116] On the other hand, it has been held that where a railroad company allows cars to stand with open doors on a side-track near its depot and close to a public street, where, as it knows, children are in the habit of going to play, it is negligence for it to back other cars against those standing upon the switch, for the purpose of coupling without any notice and without seeking to ascertain whether children were in the cars.[117] So, it has been held that a railroad company is liable for an injury to a boy caused by the explosion of a torpedo which had been left

[115] Robinson v. Oregon &c. R. Co. 7 Utah, 493; 27 Pac. 689; 13 L. R. A. 765, and note.

[116] Morrissey v. Eastern &c. R. Co. 126 Mass. 377; 30 Am. R. 686. and note; Wright v. Boston &c. R. Co. 142 Mass. 296; 7 N. E. 866; Cleveland &c. R. Co. v. Adair, 12 Ind. App. 569; 39 N. E. 672; Woodruff v. Northern Pacific R. Co. 47 Fed. 689; Chrystal v. Troy &c. R. Co. 105 N. Y. 164; 11 N. E. 380; Masser v. Chicago &c. R. Co. 68 Iowa, 602; 27 N. W. 776; Hepfel v. St. Paul &c. R. Co. 49 Minn. 263; 51 N. W. 1049; Central &c. R. Co. v. Rylee, 87 Ga. 491; 13 S. E. 584; 13 L. R. A. 634, and note; Mitchell v. Philadelphia &c. R. Co. 132 Pa. St. 226; 19 Atl. 28; Pennsylvania R. Co. v. McMullen, 132 Pa. 107; 19 Atl. 27; 19 Am. St. 591; McDermott v. Kentucky Cent. R. Co. 93 Ky. 408; 20 S. W. 380; Louisville &c. R. Co. v. Williams, 69 Miss. 631; 12 So. 957; Williams v. Kansas City &c. R. Co. 96 Mo. 275; 9 S. W. 573; Givens v. Kentucky Cent. R. Co. (Ky.) 15 S. W. 1057; Trudell v. Grand Trunk R. Co. 126 Mich. 73; 85 N. W. 250, 253; 53 L. R. A. 271, 273 (citing text); Wagner v. Chicago &c. R. Co. 122 Iowa, 360; 98 N. W. 141. See, also, Horn v. Chicago &c. R. Co. 124 Iowa, 281; 99 N. W. 1068. But compare Lange v. Missouri Pac. R. Co. 115 Mo. App. 582; 91 S. W. 989.

[117] Louisville &c. R. Co. v. Popp, 96 Ky. 99; 27 S. W. 992; 10 Lewis Am. R. & Corp. 280. See, also, Davis v. St. Louis &c. Ry. Co. (Tex. Civ. App.) 92 S. W. 831; Black v. Michigan Cent. R. Co. (Mich.) 109 N. W. 1052; Lange v. Missouri Pac. R. Co. 115 Mo. App. 582; 91 S. W. 989.

upon the track by its employes at a place where children were in the habit of going with the knowledge and acquiescence of the company and was picked up by another boy who was with him.[118] In another case it was held that where a railroad company had built a stock-yard some distance from the nearest public place and and a child was injured while swinging on a defective gate within the inclosure the company could not be held liable, although it knew that children were in the habit of playing in the vicinity, if such child first climbed over the outer fence or gate therein to get within the inclosure and upon the inside gate, but that it might be liable if the outside gate was negligently left open and the child entered in that way, or if the company had knowledge that children frequently climbed over the outer gate and swung upon the defective gate and took no measure to keep them away or prevent injury to them.[119] There are also cases to which we have referred in a former section, in which it is held that railroad companies must keep a lookout for children upon their tracks, although trespassers or bare licensees, wherever they may reasonably be expected; but most of the courts which have adopted this rule apply it in favor of adults as well as children.

§ 1261. Contributory negligence of children.—The general rule is well settled that children are only required to exercise such care for their own safety as may reasonably be expected in view of their age and condition,[120] or, in other words a child must exercise such

[118] Harriman v. Pittsburg &c. R. Co. 45 Ohio St. 11; 12 N. E. 451; 4 Am. St. 507; Pittsburgh &c. R. Co. v. Shields (Ohio) 31 Cent. L. J. 168. But see Carter v. Columbia &c. R. Co. 19 S. Car. 20; 45 Am. R. 754; McShane v. Toronto &c. R. Co. 31 Ont. 185; Obertoni v. Boston &c. R. 186 Mass. 481; 71 N. E. 980; 67 L. R. A. 422. The Harriman Case is also distinguished in Cleveland &c. R. Co. v. Marsh, 63 Ohio St. 236; 58 N. E. 821; 52 L. R. A. 142.

[119] Chicago &c. R. Co. v. Bockoven, 53 Kan. 279; 36 Pac. 322. See, also, Chicago &c. R. Co. v. Fox, (Ind. App.) 70 N. E. 81, and authorities there cited.

[120] Union Pac. R. Co. v. McDonald, 152 U. S. 262; 14 Sup. Ct. 619; 60 Am. & Eng. R. Cas. 1; Railroad Co. v. Gladmon, 15 Wall. (U. S.) 401; Chicago &c. R. Co. v. Grablin, 38 Neb. 90; 56 N. W. 796; 57 N. W. 522; 60 Am. & Eng. R. Cas. 133, 138; Baker v. Flint &c. R. Co. 68 Mich. 90; 35 N. W. 836; Baltimore &c. R. Co. v. McDonnell, 43 Md. 534; Byrne v. New York &c. R. Co. 83 N. Y. 620; Illinois Cent. R. Co. v. Slater, 129 Ill. 91; 21 N.

care as other children of the same age are accustomed to exercise under similar circumstances,[121] unless there is evidence that he is of more or less than average intelligence or the like. This simply means that he, like every one else, must exercise ordinary or reasonable care under the circumstances. The question is usually one for the jury to determine,[122] but the child may be so young that the court may say that he was non sui juris and incapable of contributory negligence or so old and intelligent that he was guilty

E. 575; 6 L. R. A. 418; 16 Am. St. 242; Edgington v. Burlington &c. R. Co. 116 Iowa, 410; 90 N. W. 95; 57 L. R. A. 561; Christensen v. Oregon Short Line R. Co. 29 Utah, 192; 80 Pac. 746; Fishburn v. Burlington &c. R. Co. 127 Iowa, 483; 103 N. W. 481; Young v. Small, 188 Mass. 4; 73 N. E. 1019; Plumley v. Birge, 124 Mass. 57; 26 Am. R. 645; Ridenhour v. Kansas City &c. R. Co. 102 Mo. 270; 13 S. W. 889; 14 S. W. 760; note to Slattery v. O'Connell, 10 L. R. A. 653; 1 Thomp. Neg. (2d ed.) § 292 et seq.; Beach Contrib. Neg. § 136; Shearm. & Redf. Neg. § 73; Pierce Railroads, 332.

[121] Cincinnati &c. R. Co. v. Wright (Ind.) 43 N. E. 688; Wolfe v. Peirce, 24 Ind. App. 680; 57 N. E. 555; Cleveland Rolling Mill Co. v. Corrigan, 46 Ohio St. 283; 20 N. E. 466; 3 L. R. A. 385; 15 Am. St. 596; Haynes v. Raleigh &c. Co. 114 N. Car. 203; 19 S. E. 344; 26 L. R. A. 810; 41 Am. St. 786; Illinois Cent. R. Co. v. Slater, 129 Ill. 91; 21 N. E. 575; 6 L. R. A. 418; 16 Am. St. 242; Collins v. South Boston &c. R. Co. 142 Mass. 301; 7 N. E. 856; 56 Am. R. 675; Townley v. Chicago &c. R. Co. 53 Wis. 626; 11 N. W. 55; Goldstein v. People's R. Co. (Del.) 60 Atl. 975; Murray v. Richmond &c. R. Co. 93 N. Car. 92. See, also, numerous authorities cited in note in 49 Am. St. 409 et seq. But see Western &c. R. Co. v. Young, 81 Ga. 397; 7 S. E. 912; 12 Am. St. 320; Gulf &c. R. Co. v. McWhirter, 77 Tex. 356; 14 S. W. 26; 19 Am. St. 755.

[122] Louisville &c. R. Co. v. Sears, 11 Ind. App. 654; 38 N. E. 837; Houston &c. R. Co. v. Simpson, 60 Tex. 103; Collins v. South Boston &c. R. Co. 142 Mass. 301; 7 N. E. 856; 56 Am. R. 675; Pekin v. McMahon, 154 Ill. 141; 39 N. E. 484; 27 L. R. A. 206; 45 Am. St. 114; Chicago &c. R. Co. v. Becker, 84 Ill. 483; Lange v. Missouri Pac. R. Co. 115 Mo. App. 582; 91 S. W. 989; Dowling v. New York &c. R Co. 90 N. Y. 670; Stone v. Dry Dock &c. R. Co. 115 N. Y. 104; 21 N. E. 712 (with which compare, however, Tucker v. New York &c. R. Co. 124 N. Y. 308; 26 N. E. 916); 21 Am. St. 670; Strawbridge v. Bradford, 128 Pa. St. 200; 18 Atl. 346; 15 Am. St. 670; Schierhold v. North Beach &c. R. Co. 40 Cal. 447; Davis v. St. Louis &c. R. Co. (Tex. Civ. App.) 92 S. W. 831; Edwards v. Chicago &c. R. Co. (S. Dak.) 110 N. W. 832; Zwack v. New York &c. R. Co. 160 N. Y. 362; 54 N. E. 785; note to Slattery v. O'Connell, 10 L. R. A. 653.

of contributory negligence as a matter of law, where it is clear that he did not exercise such care as should reasonably be expected of children of the same age and intelligence under the circumstances. There is no fixed period below which children are non sui juris and at which they at once become sui juris. Thus, it has been held that children of various ages, from one to seven years, were non sui juris,[123] while in other cases children less than seven years old have been held sui juris, and even capable of being adjudged guilty of contributory negligence as matter of law for not exercising such care as might reasonably be expected of children of that age.[124] In supposed analogy to the rule of the criminal law it has been held in some jurisdictions that a child between seven and fourteen years of age is presumptively incapable of exercising judgment and discretion and that after he has attained that age the contrary presumption prevails, although the presumption may be rebutted in either case.[125] But, as a matter of fact, a child of ordinary intelligence

[123] Chicago City R. Co. v. Wilcox, 138 Ill. 370; 27 N. E. 899; 21 L. R. A. 76, and note (citing cases, but not deciding the question); Chicago City R. Co. v. Tuohy, 196 Ill. 510; 63 N. E. 997; 58 L. R. A. 270 (at least prima facie incapable of such conduct as will constitute contributory negligence); Central Trust Co. v. Wabash &c. R. Co. 31 Fed. 246; Barnes v. Shreveport &c. R. Co. 47 La. Ann. 1218; 17 So. 782; 49 Am. St. 400, and note reviewing the authorities; Citizens' St. R. Co. v. Stoddard, 10 Ind. App. 278; 37 N. E. 723; Mangam v. Brooklyn R. Co. 38 N. Y. 455; 98 Am. Dec. 66, and note; Bottoms v. Seaboard &c. R. Co. 114 N. Car. 699; 19 S. E. 730; 25 L. R. A. 784, and note; 41 Am. St. 799; Freer v. Cameron, 4 Rich. L. (S. Car.) 228; 55 Am. Dec. 663, and note; Texas &c. R. Co. v. Fletcher, 6 Tex. Civ. App. 738; 26 S. W. 446; Norfolk &c. R. Co. v. Ormsby, 27 Gratt. (Va.) 455; Schmidt v. Milwaukee &c. R. Co. 23 Wis. 186; 99 Am. Dec. 158; Keyser v. Chicago &c. R. Co. 56 Mich. 559; 23 N. W. 311; 56 Am. R. 405; Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138; 70 N. E. 995; Bish. Non-Cont. Law, § 586; 1 Thomp. Neg. (2d ed.) § 310; Beach Contrib. Neg. § 117.

[124] Hayes v. Norcross, 162 Mass. 546; 39 N. E. 282; Wright v. Boston R. Co. 142 Mass. 296; 7 N. E. 866; Cleveland &c. R. Co. v. Tartt, 64 Fed. 830.

[125] Lovell v. DeBardelaben &c. Co. 90 Ala. 13; 7 So. 756; Pratt &c. Co. v. Brawley, 83 Ala. 371; 3 So. 555; 3 Am. St. 751; Rhodes v. Georgia &c. R. Co. 84 Ga. 320; 10 S. E. 922; 20 Am. St. 362; Trumbo v. City St. Car Co. 89 Va. 780; 17 S. E. 124; Nagle v. Allegheny Valley R. Co. 88 Pa. St. 35; 32 Am. R. 413, explained in Kehler v. Schwenk, 144 Pa. St. 348; 22 Atl. 910; 13 L. R. A. 374, and note; 27 Am. St. 633.

and capacity, between seven and fourteen years of age, is, as every one knows, capable of exercising some judgment and care, and no child on arriving at the age of fourteen makes a sudden leap from darkness into light, from mental incapacity to judgment and discretion, from inability to exercise any discretion or care to ability to exercise distinction and care.[126] We think, therefore, that there is no foundation for any such presumption, and that the better rule is that it is usually for the jury to determine, without regard to any such arbitrary presumption, whether the particular child has exercised such care, if any, under the circumstances, as might reasonably be expected of a child of his age and capacity, and that a child under fourteen years of age may be declared guilty of contributory negligence by the court, as a matter of law, where the facts are undisputed and no other inference could reasonably be drawn by ordinary and reasonable men. While most of the courts, we think, would admit the correctness of this rule, yet they differ when they come to apply it to the facts. We shall refer briefly to some of the cases in which the question arose as to whether very young children were guilty of negligence as matter of law, selecting, as far as possible, those in which the children were trespassers or bare licensees. In one case a boy between ten and eleven years old, who had been warned against playing on a turn-table, was held guilty of contributory negligence as a matter of law, although he did not fully understand the danger,[127] and in another case a boy between seven and eight years old was held guilty of contributory negligence as matter of law in going to sleep on the track.[128] So, a boy eleven

[126] See authorities cited in note 122, supra; also, Hepfel v. St. Paul &c. R. Co. 49 Minn. 263; 51 N. W. 1049; Holmes v. Atlantic Ave. R. Co. 16 N. Y. S. 743; Bridger v. Asheville &c. R. Co. 27 S. Car. 456; 3 S. E. 860; 13 Am. St. 653; Central R. &c. Co. v. Golden, 93 Ga. 510; 21 S. E. 68; Paducah &c. R. Co. v. Hoehl, 12 Bush. (Ky.) 41. See, also, note in 49 Am. St. 410, 411, where numerous authorities are cited; Rohloff v. Fair Haven &c. R. Co. 76 Conn. 689; 58 Atl. 5.

[127] Twist v. Winona &c. R. Co. 39 Minn. 164; 39 N. W. 402; 12 Am. St. 626. So where the boy was thirteen years old. Merryman v. Chicago &c. R. Co. 85 Iowa, 634; 52 N. W. 545. But see Union Pac. R. Co. v. Dunden, 37 Kans. 1; 14 Pac. 501.

[128] Krenzer v. Pittsburgh &c. R. Co. 151 Ind. 587; 43 N. E. 649; 68 Am. St. 252. See, also, Raden v. Georgia R. Co. 78 Ga. 47. So a little girl seven and a half years old was held guilty of contributory negligence where she stood on a

years old was held guilty of contributory negligence in trespassing upon the track without paying attention.[129] And in many other cases children of from seven to twelve years of age have been held guilty of contributory negligence in crossing in front of a rapidly moving train,[130] in climbing over or crawling under cars,[131] and in crossing without paying any attention when they must have seen the approaching train if they had looked.[132] So, where a boy sixteen years old deliberately stood on a railroad track with his back to an engine which was twenty feet away and which he knew was liable to move at any moment, he was held negligent as matter of law.[133] On the other hand, there are many cases in which, under

track, without taking any precautions, and was run over by a train which was in plain view for a long distance. Dull v. Cleveland &c. R Co. 21 Ind. App. 571; 52 N. E. 1013. See, also, Trudell v. Grand Trunk R. Co. 126 Mich. 73; 85 N. W. 250; 53 L. R. A. 271.

[129] Masser v. Chicago &c. R. Co. 68 Iowa, 602; 27 N. W. 776. See, also, Central R. Co. v. Brinson, 70 Ga. 207; Houston &c. R. Co. v. Smith, 77 Tex. 179; 13 S. W. 972. That very young children may be trespassers, see Baltimore &c. R. Co. v. Bradford, 20 Ind. App. 348; 49 N. E. 388; 67 Am. St. 252; Dull v. Cleveland &c. R. Co. 21 Ind. App. 571; 52 N. E. 1013. But see note in 49 Am. St. 406 et seq.

[130] Motel v. Sixth Ave. R. Co. 99 N. Y. 632; Wendell v. New York &c. R. Co. 91 N. Y. 420; Manahan v. Steinway &c. R. Co. 125 N. Y. 760; 26 N. E. 736; Payne v. Chicago &c. R. Co. 129 Mo. 405; 31 S. W. 885; Chicago &c. R. Co. v. Laughlin (Kan.) 87 Pac. 749 (boy 13 years old).

[131] Ante, § 1169; Powers v. Chicago &c. R. Co. 57 Minn. 322; 59 N. W. 307; Oregon &c. Co. v. Egley, 2 Wash. 409; 26 Pac. 973; 26 Am. St. 860; Gay v. Essex &c. R. Co. 159 Mass. 238; 34 N. E. 186; 21 L. R. A. 448; 38 Am. St. 415; Wallace v. New York &c. R. Co. 165 Mass. 236; 42 N. E. 1125; Studer v. Southern Pac. Co. 121 Cal. 400; 53 Pac. 942; 66 Am. St. 39. See Ecliff v. Wabash &c. R. Co. 64 Mich. 196; 31 N. W. 180; Ostertag v. Pacific R. Co. 64 Mo. 421; Central R. &c. Co. v. Rylee, 87 Ga. 491; 13 S. E. 584; 13 L. R. A. 634; Lewis v. Baltimore &c. R. Co. 38 Md. 588; 17 Am. R. 521; Fitzgerald v. Chicago &c. R. Co. 114 Ill. App. 118.

[132] Tucker v. New York &c. R. Co. 124 N. Y. 308; 26 N. E. 916; 21 Am. St. 670; Sheets v. Connolly St. R. Co. 54 N. J. L. 518; 24 Atl. 483; Shirk v. Wabash R. Co. 14 Ind. App. 126; 42 N. E. 656. See, also, Marden v. Boston &c. R. Co. 159 Mass. 393; 34 N. E. 404; Given v. Kentucky Cent. R. Co. (Ky.) 15 S. W. 1057; Fezler v. Wilmar &c. R. Co. 85 Minn. 252; 88 N. W. 746; Anderson v. Central R. Co. 68 N. J. L. 269; 53 Atl. 391.

[133] Lofdahl v. Minneapolis &c. R. Co. 88 Wis. 421; 60 N. W. 795. See, also, Benedict v. Minneapolis &c. R. Co. 86 Minn. 224; 90 N. W. 360; 57 L. R. A. 639.

somewhat similar circumstances, it was held that the children could not be said to have been negligent as matter of law, although they would undoubtedly have been so adjudged if they had been adults, and in some instances it seems to us, from the facts stated, that they did not exercise any care whatever, or, at least, that they did not exercise such care as might reasonably be expected of children of their age and capacity.[134]

§ 1262. Imputable negligence.—In some jurisdictions the rule prevails that in actions by or on behalf of children who are non sui juris the contributory negligence of their parents, custodians or others who stand in loco parentis is imputed to them.[135] This rule, how-

[134] See Taylor v. Delaware &c. R. Co. 113 Pa. St. 162; 8 Atl. 43; 57 Am. R. 446; Powers v. Harlow, 53 Mich. 507; 19 N. W. 507; 51 Am. R. 154; Kansas Central R. Co. v. Fitzsimmons, 22 Kans. 686; 31 Am. R. 203, and note; Stone v. Dry Dock &c. R. Co. 115 N. Y. 104; 21 N. E. 712; Omaha &c. R. Co. v. Morgan, 40 Neb. 604; 59 N. W. 81; Dealey v. Mullen, 149 Mass. 432; 21 N. E. 763; Barry v. New York &c. R. Co. 92 N. Y. 289; 44 Am. R. 377; Mackey v. Vicksburg, 64 Miss. 777; 2 So. 178; Wyatt v. Citizens' R. Co. 55 Mo. 485; Avey v. Galveston &c. R. Co. 81 Tex. 243; 16 S. W. 1015; 26 Am. St. 809; Eswin v. St. Louis &c. R. Co. 96 Mo. 290; 9 S. W. 577; Tobin v. Missouri Pac. R. Co. (Mo.) 18 S. W. 996; Houston &c. R. Co. v. Boozer, 70 Tex. 530; 8 S. W. 119; 8 Am. St. 615; Wright v. Detroit &c. R. Co. 77 Mich. 123; 43 N. W. 765; Rauch v. Lloyd, 31 Pa. St. 358; 72 Am. Dec. 747; Huerzeler v. Central &c. R. Co. 139 N. Y. 490; 34 N. E. 1101; McGuire v. Chicago &c. R. Co. 37 Fed. 54; Lake Erie &c. R. Co. v. Mackey, 53 Ohio St. 370; 41 N. E. 980; 29 L. R. A. 757. The general subject is discussed and numerous authorities on both sides are reviewed in the note to Barnes v. Shreveport &c. R. Co. (47 La. Ann. 1218); 49 Am. St. 406 et seq.

[135] Hartfield v. Roper, 21 Wend. (N. Y.) 615; 34 Am. Dec. 273, and note; Meeks v. Southern Pac. R. Co. 52 Cal. 602; Lovett v. Salem &c. R. Co. 9 Allen (Mass.) 557; Wright v. Malden &c. Co. 4 Allen (Mass.) 283; Holly v. Boston &c. Co. 8 Gray (Mass.) 123; 69 Am. Dec. 233; Carey v. Smith, 152 Mass. 294; 25 N. E. 734; 23 Am. St. 842; Brown v. European &c. R. Co. 58 Me. 384; Smith v. Atchison &c. R. Co. 25 Kan. 738; Mangam v. Brooklyn &c. R. Co. 38 N. Y. 455; 98 Am. Dec. 66, and note; Kyne v. Wilmington &c. R. Co. 8 Houst. (Del.) 185; 14 Atl. 922; Ohio &c. R. Co. v. Stratton, 78 Ill. 88; Toledo &c. R. Co. v. Grable, 88 Ill. 441 (but later cases render it doubtful if this doctrine now prevails in Illinois); Louisville &c. R. Co. v. Murphy, 9 Bush (Ky.) 522; Fitzgerald v. St. Paul &c. R. Co. 29 Minn. 336; 43 Am. R. 212; Hathaway v. Toledo &c. R. Co. 46

ever, has met with well-merited criticism,[136] and is denied in most jursdictions.[137] So, even where it obtains, it will not prevent a recovery if the child exercised such reasonable and ordinary care as an adult would have exercised under the same circumstances.[138]

Ind. 25; Lafayette &c. R. Co. v. Huffman, 28 Ind. 287; 92 Am. Dec. 318; Pittsburgh &c. R. Co. v. Vining, 27 Ind. 513; 92 Am. Dec. 269. But see Louisville &c. R. Co. v. Sears, 11 Ind. App. 654; 38 N. E. 837; Cleveland &c. R. Co. v. Keely, 138 Ind. 600; 37 N. E. 406; Evansville v. Senhenn, 151 Ind. 52; 47 N. E. 634; 51 N. E. 88; 41 L. R. A. 728; 68 Am. St. 218, showing that this is not now the rule in Indiana in an action by the child; Wail v. Dry Dock &c. R. Co. 119 N. Y. 147; 23 N. E. 487; Barrett v. Southern Pac. Co. 91 Cal. 296; 27 Pac. 666; 25 Am. St. 186; McGeary v. Eastern R. Co. 135 Mass. 363. See, also, Waite v. Northeastern R., El. Bl. & El. 719.

[136] Beach Contrib. Neg. § 127, et seq.; 1 Thomp. Neg. (2d ed.) § 292, et seq.; 1 Shearm. & Red. Neg. (4th ed.) § 75; 2 Jaggard Torts, 984; Cooley Torts, 681; Buswell Pers. Inj. § 108.

[137] Bottoms v. Seaboard &c. R. Co. 114 N. Car. 699; 19 S. E. 730; 25 L. R. A. 784; 41 Am. St. 799; Newman v. Phillipsburg &c. R. Co. 52 N. J. L. 446; 19 Atl. 1102; 8 L. R. A. 842; Kay v. Pennsylvania R. Co. 65 Pa. St. 269; 3 Am. R. 628; Robinson v. Cone, 22 Vt. 213; 54 Am. Dec. 67; Wymore v. Mahaska County, 78 Iowa, 396; 43 N. W. 264; 6 L. R. A. 545; 16 Am. St. 449, and note; Winters v. Kansas City &c. R. Co. 99 Mo. 509; 12 S. W. 652; 17 Am. St. 591; 6 L. R. A. 536; Cleveland &c. R. Co. v. Manson, 30 Ohio St. 451; Norfolk &c. R. Co. v. Ormsby, 27 Gratt. (Va.) 455; Huff v. Ames, 16 Neb. 139; 19 N. W. 623; 49 Am. R. 716; Galveston &c. R. Co. v. Moore, 59 Tex. 64; 46 Am. R. 265; Norfolk &c. R. Co. v. Groseclose, 88 Va. 267; 13 S. E. 454; 29 Am. St. 718; Shippy v. Au Sable, 85 Mich. 280; 48 N. W. 584; Pratt &c. Co. v. Brawley, 83 Ala. 371; 3 So. 555; 3 Am. St. 751; Daley v. Norwich &c. R. Co. 26 Conn. 591; 68 Am. Dec. 413; Ferguson v. Columbus &c. R. Co. 77 Ga. 102; Allen v. Texas &c. R. Co. (Tex. Civ. App.) 27 S. W. 943; Northern Tex. Trac. Co. v. Roye (Tex. Civ. App.), 86 S. W. 621; St. Louis &c. R. Co. v. Rexroad, 59 Ark. 180; 26 S. W. 1037; Louisville &c. R. Co. v. Gobin, 52 Ill. App. 565; Westbrook v. Mobile &c. R. Co. 66 Miss. 560; 6 So. 321; 14 Am. St. 587, and note; Bisaillon v. Blood, 64 N. H. 565; 15 Atl. 147; Chicago City R. Co. v. Wilcox (Ill.) 8 L. R. A. 494, and note (reversed on rehearing, 138 Ill. 370; 21 L. R. A. 77); Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369; 20 S. E. 550; 26 L. R. A. 553; 44 Am. St. 145; Ives v. Welden, 114 Iowa, 476; 87 N. W. 408; 54 L. R. A. 854; 89 Am. St. 379; Evansville v. Senhenn, 151 Ind. 42; 47 N. E. 634; 57 N. E. 88; 41 L. R. A. 728; 68 Am. St. 218; Berry v. Lake Erie R. Co. 70 Fed. 679; Mattson v. Minnesota &c. R. Co. 95 Minn. 477; 104 N. W. 443; 111 Am. St. 483.

[138] Chicago City R. Co. v. Robinson, 127 Ill. 1; 18 N. E. 772; 4 L. R. A. 126; Wiswell v. Doyle, 160

Where, however, the action is brought by the parent for his own benefit it is justly held that he can not recover if the child was non sui juris and the parent was guilty of contributory negligence in permitting it to go into a dangerous place where it was injured by reason of its failure to exercise ordinary care,[139] or if the child although sui juris, was injured by reason of its failure to exercise such care as might reasonably be expected of one of its age and capacity.[140] But a parent is not necessarily negligent in permitting a child to go with a custodian apparently capable of taking care of it to a place where there is a concealed danger unknown to both,[141] and it has been held that the fact that the child escaped through a door momentarily left open and ran into a place of danger does not necessarily show negligence on the part of the parents,[142] and that domestic exigencies,[143]

Mass. 42; 35 N. E. 107; 39 Am. St. 451; O'Brien v. McGlinchy, 68 Me. 552, 556.

[139] Bellefontaine &c. R. Co. v. Snyder, 18 Ohio St. 399; 24 Ohio St. 670; Smith v. Hestonville &c. R. Co. 92 Pa. St. 450; 37 Am. R. 705; Tucker v. Draper, 62 Neb. 66; 86 N. W. 917; 54 L. R. A. 321; Pollack v. Pennsylvania R. Co. 210 Pa. St. 634; 60 Atl. 312; 105 Am. St. 846, and note; St. Louis &c. Ry. Co. v. Cochran (Ark.), 91 S. W. 747; Schlenks v. Central &c. R. Co. (Ky.) 23 S. W. 539; Westbrook v. Mobile &c. R. Co. 66 Miss. 560; 6 So. 321; 14 Am. St. 587; Foley v. New York &c. R. Co. 78 Hun (N. Y.) 248; 28 N. Y. S. 816; Evansville &c R. Co. v. Wolf, 59 Ind. 89; Pratt &c. R. Co. v. Brawley, 83 Ala. 371; 3 Am. St. 751; 3 So. 555; Glassey v. Hestonville &c. R. Co. 57 Pa. St. 172; Westerberg v. Kinzua &c. R. Co. 142 Pa. St. 471; 21 Atl. 878; 24 Am. St. 510; Bamberger v. Citizens' St. R. Co. 95 Tenn. 18; 31 S. W. 163; Williams v. Texas &c. R. Co. 60 Tex. 205; Senn v. Southern R. Co. 124 Mo. 621; 28 S. W. 66; Westerfield v. Levis, 43 La. Ann. 63; 9 So. 52; Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369; 20 S. E. 550; 26 L. R. A. 553; 44 Am. St. 145 (negligence of custodian imputed to father but not to mother).

[140] Chicago &c. R. Co. v. Harney, 28 Ind. 28; 92 Am. Dec. 282; Burke v. Broadway &c. R. Co. 34 How. Pr. (N. Y.) 239; Fitzgerald v. St. Paul &c. R. Co. 29 Minn. 336; 13 N. W. 168; 43 Am. R. 212.

[141] Union Pac. R. Co. v. McDonald, 152 U. S. 262; 14 Sup. Ct. 619; 60 Am. & Eng. R. Cas. 1. See, also, Huerzeler v. Central Cross Town R. Co. 139 N. Y. 490; 34 N. E. 1101.

[142] Weissner v. St. Paul &c. R. Co. 47 Minn. 468; 50 N. W. 606; Pittsburg &c. R. Co. v. Pearson, 72 Pa. St. 169; Houston City R. Co. v. Dillon, 3 Tex. Civ. App. 303; 22 S. W. 1066; Morgan v. Illinois &c. R. Co. 5 Dill. (U. S.) 96; Farris v. Cass Ave. R. Co. 80 Mo. 325.

[143] Citizens' St. R. Co. v. Stoddard, 10 Ind. App. 278; 37 N. E. 723; Slattery v. O'Connell, 153 Mass. 94; 26 N. E. 430; 10 L. R. A. 653, and note; McMahon v. North-

or even poverty,[144] may sometimes excuse the parents from the exercise of such watchfulness as might otherwise be required of them.

§ 1263. Liability for injury to persons on adjacent highway.—Railroad companies should so construct and maintain their premises which abut upon highways, and their tracks which run along or across highways, that they shall not cause injury to travelers who are lawfully and properly using such highways, and if the company is negligent in this respect it will be liable to a traveler, who, while exercising due care on his part, is injured by such negligence.[145] Thus, where a traveler, while walking upon a highway under a bridge upon which a railroad crossed the highway, was injured by a brick which fell from one of the abutments, the company was held liable.[146] So, where a bolt upon an elevated railroad company's track broke and fell, with an iron plate, upon a traveler who was driving upon the highway under the structure, it was held that the company was liable, in the absence of proof of proper inspection.[147] In another case, the plaintiff was injured by cross-ties which fell from a moving gondola car upon him while he was walking along a pathway outside of the

ern Cent. R. Co. 39 Md. 438; Atchison &c. R. Co. v. Calvert, 52 Kan. 547; 34 Pac. 976; Elgin &c. R. Co. v. Raymond, 47 Ill. App. 242.

[144] Pittsburg &c. R. Co. v. Pearson, 72 Pa. St. 169; Philadelphia &c. R. Co. v. Long, 75 Pa. St. 257; O'Flaherty v. Union R. Co. 45 Mo. 70; 100 Am. Dec. 343; Isabel v. Hannibal &c. R. Co. 60 Mo. 475; Walters v. Chicago &c. R. Co. 41 Iowa, 71. But this holding is questionable. See Illinois &c. R. Co. v. Slater, 129 Ill. 91; 21 N. E. 575; 6 L. R. A. 418; 16 Am. St. 242; Mayhew v. Burns, 103 Ind. 328; 2 N. E. 793; Cumming v. Brooklyn City R. Co. 104 N. Y. 669; 10 N. E. 855.

[145] Beatty v. Central Iowa R. Co. 58 Iowa, 242; 12 N. W. 332; Titcomb v. Fitchburg R. Co. 12 Allen (Mass.) 254; Conlon v. Eastern R. Co. 135 Mass. 195; Goldthorpe v. Hardman, 13 Mees. & W. 377; Robbins v. Jones, 15 Com. B. (N. S.) 221; North Penn. R. Co. v. Robinson, 44 Pa. St. 175. See, also, notes to Lepnick v. Gaddis, 26 L. R. A. 686; Baltimore &c. R. Co. v. Breinig, 25 Md. 378; 90 Am. Dec. 49, et seq.; Sweeny v. Old Colony R. Co. 10 Allen, 368; 87 Am. Dec. 644; Fletcher v. Baltimore &c. R. Co. 168 U. S. 135; 18 Sup. Ct. 35; Elliott Roads and Streets (2d ed.), § 782; ante, §§ 1107, 1109.

[146] Kearney v. London &c. R. Co. L. R. 5 Q. B. 411. See, also, Pennsylvania &c. R. Co. v. Graham, 63 Pa. St. 290; 3 Am. R. 549; Cooke v. Boston &c. R. Co. 133 Mass. 185; Dickie v. Boston &c. R. Co. 131 Mass. 516.

[147] Volkmar v. Manhattan &c. R. Co. 134 N. Y. 418; 31 N. E. 870; 30 Am. St. 678. See, also, Lowery v. Manhattan &c. R. Co. 99 N. Y. 158; 1 N. E. 608; 52 Am. R. 12.

railroad right of way, and it was held that the mere fact that the ties fell from the car and injured him was, under the doctrine of res ipsa loquitur, prima facie evidence of negligence on the part of the railroad company.[148] So, where cars are derailed by the negligence of the company and run into an adjacent building, causing damage to person and property, the company is liable in the absence of contributory negligence.[149] But it has been held that a railroad company owes no duty with respect to the speed of its trains to one who is casually near its track in the country where there is no road or pathway, and, although some of its cars leave the track, owing to the high rate of speed, and injure such person, the company is not liable, at least, unless, for some reason, the injury might have been anticipated.[150] If, however, the company has invited or induced the public to use a footway over and along one side of its bridge and separated from it by a fence from its track, it is liable to one who is injured while using such footway without contributory negligence, by reason of its failure to exercise ordinary care.[151] In the case just cited the company failed to give any signal and the engine struck a man who was upon the track at the crossing and knocked some tools which he was carrying over the fence and against the plaintiff, who was upon the footway. It was held that he was

[148] Howser v. Cumberland &c. R. Co. 80 Md. 146; 30 Atl. 906; 27 L. R. A. 154; 45 Am. St. 332; 11 Lewis' Am. R. & Corp. R. 702. See, also, Chicago &c. R. Co. v. O'Neil, 172 Ill. 527; 50 N. E. 216; Kansas Pac. R. Co. v. Ward, 4 Colo. 30; Chesapeake &c. R. Co. v. Davis (Ky.) 60 S. W. 14. Several of the courts have shown a tendency to unduly extend this doctrine, it seems to us, under the lead of Judge Thompson, and it is, perhaps, doubtful if the case just cited does not do so. See the article on "Res Ipsa Loquitur," by Judge Thompson, in 10 Cent. L. Jour. 261; Byrne v. Boadle, 2 Hurl. & C. 722; Bigelow's Lead. Cas. 578; Mullen v. St. John, 57 N. Y. 567; 15 Am. R. 530; Hogan v. Manhattan R. Co. 149 N. Y. 23; 43 N. E. 403.

[149] Walsh v. Missouri Pac. R. Co. 102 Mo. 582; 14 S. W. 873; Lane v. Illinois Cent. R. Co. 43 La. Ann. 833; 9 So. 560; Lake Erie &c. R. Co. v. Lowder, 7 Ind. App. 537; 34 N. E. 447. But see Ewing v. Pittsburgh &c. R. Co. 147 Pa. St. 40; 23 Atl. 340; 14 L. R. A. 666, and note; 30 Am. St. 709, and note.

[150] Holland v. Sparks, 92 Ga. 753; 18 S. E. 990. See, also, Dillon v. Connecticut &c. R. Co. 154 Mass. 478; 28 N. E. 899.

[151] Hamill v. Pennsylvania R. Co. 56 N. J. L. 370; 24 L. R. A. 531; 60 Am. & Eng. R. Cas. 124. See, also, Kentucky &c. Bridge Co. v. Montgomery (Ky.), 67 S. W. 1008; 57 L. R. A. 781.

entitled to recover from the company for the injury thus caused. But in another recent case it was held that where the defendant negligently ran its locomotive through a street at a dangerous rate of speed and struck a person whose body was thus hurled against the plaintiff while the latter was standing on the defendant's station platform, such injury to the plaintiff was not the natural and probable consequence of the defendant's negligence and the plaintiff could not recover therefor.[152]

§ 1264. Liability for frightening horses.—A railroad company is not liable for injuries resulting from horses becoming frightened upon a highway at the mere sight of its trains or the noises necessarily incident to the running of trains and the operation of the road.[153] Thus, there can be no recovery where the horse is frightened by a statutory signal properly given.[154] So, on the other hand, the failure to give a statutory signal will not render the company liable if it is not the proximate cause of the injury,[155] and, according to what we regard as the better rule, the company owes no duty to one who is

[152] Evansville &c. R. Co. v. Welch, 25 Ind. App. 308; 58 N. E. 88; 81 Am. St. 102.

[153] Favor v. Boston &c. R. Co. 114 Mass. 350; 19 Am. R. 364; Lamb v. Old Colony R. Co. 140 Mass. 79; 2 N. E. 932; 54 Am. R. 449; Flint v. Norwich &c. R. Co. 110 Mass. 222; Whitney v. Maine Cent. R. Co. 69 Me. 208; Hahn v. Southern Pac. R. Co. 51 Cal. 605; Burton v. Philadelphia &c. R. Co. 4 Harr. (Del.) 252; Yingst v. Lebanon &c. St. R. Co. 167 Pa. St. 438; 31 Atl. 687; Ochiltree v. Chicago &c. R. Co. 93 Iowa, 628; 62 N. W. 7, 11; Heininger v. Great Northern &c. R. Co. 59 Minn. 458; 61 N. W. 558; Peru &c. R. Co. v. Hasket, 10 Ind. 409; 71 Am. Dec. 335; Baltimore &c. R. Co. v. Thomas, 60 Ind. 107; Marion &c. R. Co. v. Dubois, 23 Ind. App. 342; 55 N. E. 266; Ohio &c. R. Co. v. Trowbridge, 126 Ind. 391; 26 N. E. 64; Louisville &c. R. Co. v. Schmidt, 134 Ind. 16; 33 N. E. 774; Dewey v. Chicago &c. Ry. Co. 99 Wis. 455; 75 N. W. 74, 75 (citing text).

[154] Barron v. Chicago &c. R. Co. 89 Wis. 79; 61 N. W. 303; Phillips v. New York &c. R. Co. 84 Hun (N. Y.) 412; 32 N. Y. S. 299.

[155] Leavitt v. Terre Haute &c. R. Co. 5 Ind. App. 513; 32 N. E. 866; Pennsylvania Co. v. Hensil, 70 Ind. 569; 36 Am. R. 188. So, where a car is left in a highway in violation of statute, the violation of the statute must be a proximate cause of the frightening of the horses and resulting injury in order to render the company liable. Cleveland &c. Co. v. Wynant, 114 Ind. 525, 532; 17 N. E. 118; 5 Am. St. 644. See, also, McDonald v. International &c. R. Co. 86 Tex. 1; 22 S. W. 939; 40 Am. St. 803, and note; also, Gilson v. Delaware &c. Co. 65 Vt. 213; 26 Atl. 70; 36 Am. St. 802, and note.

not upon the highway near the crossing to give the statutory signals, and it is not, therefore, liable to one whose horse, while upon a parallel highway which does not cross the track or in a field, is frightened and runs away because the statutory signals were not given for the crossing of a neighboring highway and the owner thus failed to hear and prepare for the approach of the train.[156] But much necessarily depends upon the language and purpose of the particular statute in question, and the authorities upon the subject are not all in accord.[157] If the failure to give the statutory signals is the proximate cause of the injury, one to whom that duty is due, and who is himself free from contributory negligence, may, of course, recover from the company under ordinary circumstances.[158] So, on the other hand, there are, perhaps, exceptional cases in which the company may be held liable for injuries caused by giving the statutory signals, as, for instance, where the engineer sees that

[156] Louisville &c. R. Co. v. Lee, 47 Ill. App. 384; St. Louis &c. R. Co. v. Payne, 29 Kan. 166; Williams v. Chicago &c. R. Co. 135 Ill. 491; 26 N. E. 661; 11 L. R. A. 352; 25 Am. St. 397; East Tenn. &c. R. Co. v. Feathers, 10 Lea (Tenn.) 103. To same effect, see Louisville &c. R. Co. v. Hall, 87 Ala. 708; 6 So. 277; 4 L. R. A. 710; 13 Am. St. 84; Nashville &c. R. Co. v. Hembree, 85 Ala. 481; 5 So. 173; O'Donnell v. Providence &c. R. Co. 6 R. I. 211; Holmes v. Central &c. Co. 37 Ga. 593; Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369; 20 S. E. 550; 26 L. R. A. 553; 44 Am. St. 145; Elwood v. New York &c. R. Co. 4 Hun (N. Y.) 808; Blanchard v. Lake Shore &c. R. Co. 126 Ill. 416; 18 N. E. 799; 9 Am. St. 630; Favor v. Boston &c. R. Co. 114 Mass. 350; 19 Am. R. 364; Hall v. Brown, 54 N. H. 495; Pike v. Chicago &c. R. Co. 39 Fed. 754; Everett v. Great Northern R. Co. (Minn.) 111 N. W. 281, 283 (quoting text).

[157] See Ransom v. Chicago &c. R. Co. 62 Wis. 178; 22 N. W. 147; 51 Am. R. 718; Wakefield v. Connecticut &c. R. Co. 37 Vt. 330; 86 Am. Dec. 711; Norton v. Eastern R. Co. 113 Mass. 366; Harty v. Central R. Co. 42 N. Y. 468; 7 N. W. 9; 9 N. W. 116; Hart v. Chicago &c. R. Co. 56 Iowa, 166; 41 Am. R. 93; Lonergan v. Illinois Cent. R. Co. 87 Iowa, 755, 759; 49 N. W. 852; 53 N. W. 236; 17 L. R. A. 254, and note; Chicago &c. R. Co. v. Metcalf, 44 Neb. 848; 63 N. W. 51; 28 L. R. A. 824.

[158] Cosgrove v. New York &c. Co. 87 N. Y. 88; 41 Am. R. 355; 6 Am. & Eng. R. Cas. 35; Ransom v. Chicago &c. R. Co. 62 Wis. 178; 22 N. W. 147; 51 Am. R. 718; Rosenberger v. Grand Trunk R. Co. 8 Ont. App. 482; 15 Am. & Eng. R. Cas. 448; Grand Trunk R. Co. v. Rosenberger, 9 Can. S. C. 311; 19 Am. & Eng. R. Cas. 8. See, also, Rupard v. Chesapeake &c. R. Co. 88 Ky. 280; 11 S. W. 70; 7 L. R. A. 316, and note.

the horse is already frightened and its driver in danger, and that no one else is near who could be affected by the failure to give the signal.[159] In order to render the company liable, however, for injuries caused by giving statutory signals, it must be a very clear case of negligence or wilfulness, for an engineer cannot be expected, upon the spur of the moment, to survey the surroundings and determine with absolute accuracy whether he shall give the signals in compliance with the statute and thus, perhaps, add to the fright of horses and probability of injury to them and their driver, or disobey the letter of the statute with the possibility of a fine for so doing, and injury or death to his passengers and those who may be about to cross the track. Although a railroad company is not liable, under ordinary circumstances, for the fright of horses caused by the operation of its road in the usual manner, it is liable for frightening horses and causing injury by unnecessary and excessive whistling or letting off steam under such circumstances as to constitute negligence or wilfulness.[160] Such act must be a proximate cause of the

[159] See Louisville &c. R. Co. v. Stanger, 7 Ind. App. 179; Louisville &c. R. Co. v. Smith, 107 Ky. 178; 53 S. W. 269; Houston &c. R. Co. v. Blan (Tex. Civ. App.), 62 S. W. 552, 553 (citing text).

[160] Hill v. Portland &c. R. Co. 55 Me. 438; 92 Am. Dec. 601; Pennsylvania R. Co. v. Barnett, 59 Pa. St. 259; 98 Am. Dec. 346; Toledo &c. R. Co. v. Harmon, 47 Ill. 298; 95 Am. Dec. 489 (wilfulness); Chicago &c. R. Co. v. Dunn, 52 Ill. 451; Chicago &c. R. Co. v. Dickson, 88 Ill. 431; Borst v. Lake Shore &c. R. Co. 66 N. Y. 639; Billman v. Indianapolis &c. R. Co. 76 Ind. 166; 40 Am. R. 230; 6 Am. & Eng. R. Cas. 41; Louisville &c. R. Co. v. Schmidt, 81 Ind. 264; 8 Am. & Eng. R. Cas. 248; Indianapolis &c. R. Co. v. Boettcher, 131 Ind. 82; 28 N. E. 551; Chicago &c. R. Co. v. Cummings, 24 Ind. App. 192; 53 N. E. 1026, 1028 (citing text); Manchester &c. R. Co. v. Fullarton, 14 Com. B. N. S. 54; 108 Eng. Com. L. 54; Stott v. Grand Trunk R. Co. 24 U. C. C. P. 347; Northern Pac. R. Co. v. Sullivan, 53 Fed. 219; Texas &c. R. Co. v. Scoville, 62 Fed. 730; 27 L. R. A. 179, and note (wilfulness); Cobb v. Columbia &c. R. Co. 37 S. Car. 194; 15 S. E. 878 (wilfulness); Nashville &c. R. Co. v. Starnes, 9 Heisk. (Tenn.) 52; 24 Am. R. 296 (wilfulness); Rodgers v. Baltimore &c. R. Co. 150 Ind. 397; 49 N. E. 453, 455 (citing text); Weil v. St. Louis &c. R. Co. 64 Ark. 535; 43 S. W. 967, 968 (citing text); Dunn v. Wilmington &c. R. Co. 124 N. Car. 252; 32 S. E. 711, 712 (citing text). Where an electric car running along the highway at the usual rate of speed threw up water and made a loud roaring and hissing noise frightening a horse the company was held liable. Ayars v. Camden &c. R. Co. 63 N. J. L. 416; 43 Atl. 678. As to whether

injury, however, and, where negligence alone is relied upon, the injured party must be free from contributory negligence. The mere sounding of a whistle, or the like, even at a place of extraordinary danger where horses are likely to be present, is not actionable negligence per se.[161] The company may also be liable where it negligently leaves hand-cars or other obstructions upon a highway,[162] or negligently leaves a derrick projecting over a highway in such a manner as would naturally frighten horses of ordinary gentleness.[163] And this doctrine was applied and the company was held liable where a mail crane was erected by the company beside a highway so that when a mail bag was strung up it was calculated to frighten horses of ordinary gentleness and did frighten the plaintiff's horse and thereby injured him, although the bag was actually placed in position by government employes.[164] But it has been held that it is not liable where horses are frightened at a car in the highway unless horses of ordinary gentleness would naturally be frightened thereby.[165] And it has also been held that there can be no recovery where the complaint alleges and proceeds upon the theory that the horses

the car should be stopped or speed slackened, see Terre Haute Elec. R. Co. v. Yant, 21 Ind. App. 486; 51 N. E. 732; 69 Am. St. 376; Steimer v. Philadelphia Trac. Co. 134 Pa. St. 199; Doster v. Charlotte St. R. Co. 117 N. Car. 651; 23 S. E. 449; 34 L. R. A. 481, and note; and compare Lake Erie &c. R. Co. v. Juday, 19 Ind. App. 436; 49 N. E. 843; Muncie St. R. Co. v. Maynard, 5 Ind. App. 372; 32 N. E. 343; Ward v. Maine Cent. R. Co. 96 Me. 136; 51 Atl. 947.

[161] Cincinnati &c. R. Co. v. Gaines, 104 Ind. 526; 4 N. E. 34; 5 N. E. 746; 54 Am. R. 334; Billman v. Indianapolis &c. R. Co. 76 Ind. 166; 40 Am. R. 230; Culp v. Atchison &c. R. Co. 17 Kan. 475; Philadelphia &c. R. Co. v. Stinger, 78 Pa. St. 219. The text is also cited to this effect in Baltimore &c. R. Co. v. Rodgers, 150 Ind. 397; 49 N. E. 453, 455. See, also, 2 Thomp. Neg. (2d ed.) § 1910.

[162] Myers v. Richmond &c. R. Co. 87 N. Car. 345; 8 Am. & Eng. R. Cas. 293; Ohio &c. R. Co. v. Trowbridge, 126 Ind. 391; 26 N. E. 64; Southern Ind. R. Co. v. Norman, 165 Ind. 126; 74 N. E. 896, 897 (citing text); Bussian v. Milwaukee &c. R. Co. 56 Wis. 325; 14 N. W. 452; 10 Am. & Eng. R. Cas. 716; Vars v. Grand Trunk R. Co. 23 U. C. C. P. 143; Elliott Roads and Streets, 449. See, also, Grimes v. Louisville &c. R. Co. 3 Ind. App. 573; 30 N. E. 200.

[163] Jones v. Housatonic R. Co. 107 Mass. 261.

[164] Cleghorn v. Western R. Co. 134 Ala. 601; 33 So. 10; 60 L. R. A. 269.

[165] Gilbert v. Flint &c. R. Co. 51 Mich. 488; 16 N. W. 868; 47 Am. R. 592. See, also, Cleveland &c. R. Co. v. Wynant, 114 Ind. 525; 17 N. E.

were frightened at the car and the evidence shows that they were frightened at a noise in the car.[166]

§ 1265. Liability to strangers for wilful acts of employes.—We shall elsewhere consider the question as to the liability of a railroad company for the wilful acts of its employes affecting passengers. We shall here treat of the liability to others than passengers. The general rule is that a master is liable for the wilful acts of his servants if done in obedience to the master's order or within the scope of their employment or line of their duty, but not otherwise.[167] The master may also render himself liable by ratifying the act.[168] Rail-

118; 5 Am. St. 644; Elliott Roads and Streets, 450; 2 Thomp. Neg. (2d. ed.) § 1915; Piollett v. Summers, 106 Pa. St. 95; 51 Am. R. 496. As to the evidence in such cases, contrast Cleveland &c. R. Co. v. Wynant, 114 Ind. 525; 17 N. E. 118; 5 Am. St. 644; Cleveland &c. R. Co. v. Wynant, 134 Ind. 681; 34 N. E. 569; Bloor v. Delafield, 69 Wis. 273; 34 N. W. 115; 18 Am. & Eng. Corp. Cas. 289; Ayer v. Norwich, 39 Conn. 376; 12 Am. R. 396, with Darling v. Westmoreland, 52 N. H. 401; 13 Am. R. 55, and, Crocker v. McGregor, 76 Me. 282; 49 Am. R. 611.

[166] Cleveland &c. R. Co. v. Wynant, 100 Ind. 160, 165, 166.

[167] Cooley Torts, 534, 535; Jaggard Torts, 276, et seq.; Wood Law of Master and Servant (2d ed.) 524, 565; note to Davis v. Houghtellin, 33 Neb. 582; 50 N. W. 765; 14 L. R. A. 737; note to Gilliam v. South &c. R. Co. 70 Ala. 268; 15 Am. & Eng. R. Cas. 138; "Assaults by Servants," 38 Cent. L. J. 447; note Pittsburgh &c. R. Co. v. Shields, 31 Cent. L. J. 168; "Master's Liability for Wilful or Malicious Acts of Servants," 2 Am. L. Reg. & Rev. (1894) 120. See, also, Moran v. Rockland &c. R. 99 Me. 127; 58 Atl. 676; Bowen v. Illinois Cent. R. Co. 136 Fed. 306, 312; 70 L. R. A. 915 (quoting text); Parnlo v. Philadelphia &c. R. Co. 145 Fed. 664. The narrower doctrine supposed to have been announced in McManus v. Cricket, 1 East 106, which was followed in many of the earlier cases is now repudiated in most jurisdictions. Limpus v. London General Omnibus Co. 1 H. & C. 526, and Green v. London &c. Co. 7 C. B. (N. S.) 290, are leading cases. "In an action against a railroad company to recover for the death of a boy killed by a detective while stealing a ride on a freight train, if the evidence shows that he acted maliciously or in the pursuit of some purpose of his own, the defendant railroad company, in whose employ he was, is not bound by his act; but if, while acting within the general scope of his employment, he disregards his master's orders or exceeds his powers, the master will be responsible for his conduct." Sharp v. Erie R. Co. 184 N. Y. 100; 76 N. E. 923.

[168] International &c. R. Co. v. Miller, 9 Tex. Civ. App. 104; 28 S. W.

road companies have been held liable for the act of their engineers in wantonly and wilfully frightening horses by blowing the whistle or letting off steam,[169] for an assault by an employe left in charge of a ticket office growing out of a controversy over his failure to give the plaintiff the proper change,[170] for an assault by an employe in charge of a train upon one who got upon the platform of a baggage car in violation of the rules of the company,[171] for an assault by a gate-keeper upon one who had a proper ticket and was attempting to pass through the gate at a station to take passage upon a train,[172] for the shooting of a trespasser upon a bridge by a watchman whose duty it was to guard the same,[173] and for the act of a street-car driver in purposely running into a carriage.[174] So, where an employe of a railroad company in peaceable possession of a line of road was shot and injured by employes of another company while attempting to take possession and drive away the servants of the former company, for which purpose the latter company had armed such employes, it was held that the defendant company was

283; Bass v. Chicago &c. R. Co. 39 Wis. 636; Gasway v. Atlanta &c. R. Co. 58 Ga. 216; 1 Jaggard Torts, 43, 421.

[169] Ante, § 1264.

[170] Fick v. Chicago &c. R. Co. 68 Wis. 469; 32 N. W. 527; 60 Am. R. 878, and note. See, also, McKernan v. Manhattan R. Co. 22 J. & S. (N. Y.) 354; Christian v. Columbus &c. R. Co. 79 Ga. 460; 7 S. E. 216; 90 Ga. 124; 15 S. E. 701; Daniel v. Petersburg R. Co. 117 N. Car. 592; 23 S. E. 327.

[171] Rounds v. Delaware &c. R. Co. 64 N. Y. 129; 21 Am. R. 597. See, also, Stewart v. Brooklyn &c. R. Co. 90 N. Y. 588; 43 Am. R. 185; Western &c. R. Co. v. Turner, 72 Ga. 292; 53 Am. R. 842. But see Louisville &c. R. Co. v. Douglass, 69 Miss. 723; 11 So. 933; 30 Am. St. 582.

[172] Indianapolis Union R. Co. v. Cooper, 6 Ind. App. 202; 33 N. E. 219. The plaintiff, however, was held to be a passenger and the liability of the company was placed upon the ground of a violation of the duty to a passenger.

[173] Haehl v. Wabash R. Co. 119 Mo. 325; 24 S. W. 737. See, also, St. Louis &c. R. Co. v. Hackett, 58 Ark. 381; 24 S. W. 881; 41 Am. St. 105; Denver &c. R. Co. v. Harris, 122 U. S. 597; 7 Sup. Ct. 1286; Southern R. Co. v. James, 118 Ga. 340; 45 S. E. 303; 63 L. R. A. 257. But compare Golden v. Newbroad, 52 Iowa, 59; 2 N. W. 537; 35 Am. R. 257; Georgia R. Co. v. Wood, 94 Ga. 124; 21 S. E. 288; 47 Am. St. 146; Candif v. Louisville &c. R. Co. 42 La. Ann. 477; 7 So. 601; Chicago &c. R. Co. v. Smith, 10 Kans. App. 162; 63 Pac. 294; Turley v. Boston &c. R. Co. 70 N. H. 348; 47 Atl. 261.

[174] Cohen v. Dry Dock R. Co. 69 N. Y. 170; Mott v. Consumers' Ice Co. 73 N. Y. 543.

liable to him.[175] If an employe steps aside from the line of his duty and commits an independent tort on his own account and outside of the scope of his employment the master is not liable therefor.[176] Thus a railroad company is not liable for injuries inflicted by an employe in a purely personal quarrel with one between whom and the corporation there is no connection or privity,[177] nor for an assault by a trainman on one who had been a passenger but had left the train and ceased to be a passenger at the time of the assault.[178] So, where a conductor stops his train, pursues a boy to his father's

[175] Denver &c. R. Co. v. Harris, 122 U. S. 597; 7 Sup. Ct. 1286.

[176] Jaggard Torts, 276; Buswell Law of Personal Injuries, § 37; Stephenson v. Southern Pac. Co. 93 Cal. 558; 29 Pac. 234; 15 L. R. A. 475; 27 Am. St. 223; Hower v. Ulrich, 156 Pa. St. 410; 27 Atl. 37; Candiff v. Louisville &c. R. Co. 42 La. Ann. 477; 7 So. 601; Williams v. Pullman Pallace Car Co. 40 La. Ann. 87; 3 So. 631; 8 Am. St. 512; Gabrielson v. Waydell, 135 N. Y. 1; 31 N. E. 969; 17 L. R. A. 228; 31 Am. St. 793, and note; Evansville &c. R. Co. v. Baum, 26 Ind. 70; Rounds v. Delaware &c. R. Co. 64 N. Y. 129; 21 Am. R. 597; Alabama &c. R. Co. v. Harris, 71 Miss. 74; 14 So. 263; Alabama &c. R. Co. v. McAfee, 71 Miss. 70; 14 So. 260; Campbell v. Northern Pac. R. Co. 51 Minn. 488; 53 N. W. 768. See, also, Waaler v. Great Northern R. Co. 18 S. Dak. 420; 100 N. W. 1097; 70 L. R. A. 731, and note; with which, however, compare Jackson v. American Tel. Co. 139 N. Car. 347; 51 S. E. 1015; 70 L. R. A. 738; Barmore v. Vicksburg &c. R. Co. 85 Miss. 426; 38 So. 210; 70 L. R. A. 627.

[177] Cofield v. McCabe, 58 Minn. 218; 59 N. W. 1005. See, also, Little Miami R. Co. v. Wetmore, 19 Ohio St. 110; 2 Am. R. 373; Campbell v. Northern Pac. Railroad Co. 51 Minn. 488; 53 N. W. 768; Illinois Cent. R. Co. v. Ross, 31 Ill. App. 170; Wood v. Detroit &c. R. Co. 52 Mich. 402; 18 N. W. 124; 50 Am. R. 259; Pittsburgh &c. R. Co. v. Donahue, 70 Pa. St. 119. See, also, Smith v. Memphis &c. Co. (Tenn.) 1 S. W. 104 (an extreme case). It has also been held that a railroad company is not liable for an injury received where a fireman from mere wantonness placed a torpedo on the track. Chicago &c. R. Co. v. Epperson, 26 Ill. App. 72. See, also, Jones v. Grand Trunk R. Co. 45 Up. Can. (Q. B.) 193; Carter v. Columbia &c. R. Co. 19 S. Car. 20; 45 Am. R. 754. But compare Harriman v. Pittsburgh &c. R. Co. 45 Ohio St. 11; 4 Am. St. 507.

[178] Central R. Co. v. Peacock, 69 Md. 257; 14 Atl. 709; 9 Am. St. 425; Eads v. Metropolitan &c. R. Co. 43 Mo. App. 536; McGilvray v. West End St. R. Co. 164 Mass. 122; 41 N. E. 116; Crocker v. New London &c. R. Co. 24 Conn. 249. But see Peeples v. Brunswick &c. R. Co. 60 Ga. 281; Savannah &c. R. Co. v. Bryan, 86 Ga. 312; 12 S. E. 307; 22 Am. St. 464; Wise v. Covington &c. R. Co. 13 Ky. L. 110;

house, with a pistol in his hand, seizes him and carries him off on the train, such an act is not within the scope of the conductor's employment and the company is not liable therefor.[179] It has also been held that a railroad company is not liable for injuries received by a stranger whom its engineer has, by threats of personal violence, compelled to uncouple cars,[180] nor for injuries caused by hot water turned by the engineer and fireman in sport upon one whom they had invited to ride upon the engine,[181] nor for an assault upon one who was wrongfully riding upon a freight train by invitation of the conductor, in the absence of anything to show that the assailant was acting within the scope of his employment.[182] There is conflict among authorities as to when, if at all, a railroad company is liable for a wrongful arrest or the like made or instigated by its employes. On the one hand it has been held that the company is not liable for a false arrest instigated by a ticket agent after the act for which the arrest was made had been fully consummated, as, for instance, where he causes the arrest of one suspected of having attempted to rob the till under his charge, after the attempt had ceased,[183] or

[179] Gilliam v. South &c. R. Co. 70 Ala. 268; 15 Am. & Eng. R. Cas. 138. But see Girvin v. New York Cent. R. Co. 166 N. Y. 289; 59 N. E. 921; Chicago &c. R. Co. v. Kerr (Neb.), 104 N. W. 49.

[180] New Orleans &c. R. Co. v. Harrison, 48 Miss. 112; 12 Am. R. 356. See, also, Louisville &c. R. Co. v. Douglass, 69 Miss. 723; 11 So. 933; 30 Am. St. 582; Flower v. Pennsylvania R. Co. 69 Pa. St. 210; 8 Am. R. 251.

[181] International &c. R. Co. v. Cooper, 88 Tex. 607;; 32 S. W. 517. But see Terre Haute &c. R. Co. v. Jackson, 81 Ind. 19, as to liability in case of passenger; also see Enting v. Chicago &c. R. Co. 116 Wis. 13; 92 N. W. 358; 60 L. R. A. 158; 96 Am. St. 936; Alsever v. Minneapolis &c. R. Co. 115 Iowa, 338; 88 N. W. 841; 56 L. R. A. 748, in which the company was held liable to strangers. But compare Berry v. Boston &c. R. Co. 188 Mass. 536; 74 N. E. 933.

[182] Smith v. Louisville &c. R. Co. 124 Ind. 394; 24 N. E. 753. It did not appear in what capacity the assailant worked for the company. It was simply alleged that he was a servant of the company. A somewhat similar case, where a passenger was assaulted by some one carrying a lantern and wearing a badge and lettered cap, but not shown to have been a servant of the company, is Sachrowitz v. Atchison &c. R. Co. 37 Kans. 212. But see Louisville &c. R. Co. v. Kendall, 138 Ind. 313; 36 N. E. 415. In Parulo v. Philadelphia &c. R. Co. 145 Fed. 664, a somewhat similar case, it was left to the jury to determine whether the plaintiff was assaulted by an employe of the company.

[183] Allen v. London &c. R. Co. L. R. 6 Q. B. 65. See, also, Porter

causes the arrest of one suspected of passing a counterfeit bill after having accepted the same.[184] On the other hand, it has been held that the company is liable for the conduct of a ticket agent who immediately charges a woman who has purchased a ticket from him with giving him counterfeit money, and, upon her refusal to make it good, places his hand upon her shoulder, calls her a counterfeiter and prostitute, and orders her to remain until he calls a policeman to arrest and search her.[185] So, it has been held in some jurisdictions that the company is liable for the act of its conductor in wrongfully arresting or causing the arrest of a passenger as disorderly or a trespasser who refuses to pay fare,[186] while in others it has been held that there is no liability in such cases.[187] The company is liable for a wrongful assault or arrest made or caused

v. Chicago &c. R. Co. 41 Iowa, 358; Mali v. Lord, 39 N. Y. 381; 100 Am. Dec. 448.

[184] Mulligan v. New York &c. R. Co. 129 N. Y. 506; 29 N. E. 952; 14 L. R. A. 791; 26 Am. St. 539; Lafitte v. New Orleans &c. R. Co. 43 La. Ann. 34; 8 So. 701; 12 L. R. A. 337. See, also, Abrahams v. Deakin, L. R. (1891), 1 Q. B. 516; Galveston &c. R. Co. v. Donahoe, 56 Tex. 162; Daniels v. Atlantic Coast Line R. Co. 136 N. Car. 517; 48 S. E. 816; 67 L. R. A. 455, and cases cited.

[185] Palmeri v. Manhattan R. Co. 133 N. Y. 261; 30 N. E. 1001; 16 L. R. A. 136; 28 Am. St. 632. So the company has been held liable for the act of its baggage master, in charge of a waiting room, in assisting in the wrongful arrest of a passenger. Texas &c. R. Co. v. Dean, 98 Tex. 517; 85 S. W. 1135; 70 L. R. A. 943.

[186] Krulevitz v. Eastern R. Co. 143 Mass. 228; 9 N. E. 613; Lafitte v. New Orleans &c. R. Co. 43 La. Ann. 34; 8 So. 701; 12 L. R. A. 337; Winneger v. Central &c. R. Co. 85 Ky. 547; 4 S. W. 237; Gillingham v. Ohio River R. Co. 35 W. Va. 588; 14 S. E. 243; 14 L. R. A. 798; 29 Am. St. 827; Moore v. Metropolitan R. Co. L. R. 8 Q. B. 36. See, also, Wheeler &c. Co. v. Boyse, 36 Kans. 350; 12 Pac. 362; 59 Am. R. 571 (liability for false imprisonment); Lynch v. Metropolitan &c. R. Co. 90 N. Y. 77; 43 Am. R. 141 (same); Corbett v. Twenty-third St. R. Co. 42 Hun (N. Y.), 587 (same); Texas &c. R. Co. v. Williams, 62 Fed. 440; Duggan v. Baltimore &c. R. Co. 159 Pa. St. 248; 28 Atl. 182, 186; 39 Am. St. 672.

[187] See Cunningham v. Seattle &c. Co. 3 Wash. 471; 28 Pac. 745; Edwards v. London &c. R. Co. L. R. 5 C. P. 445; Poulton v. London &c. R. Co. L. R. 2 Q. B. 534. It would seem that this is within the scope of the conductor's duties, and if so, the company would be liable if the arrest was wrongful. Compare Sullivan v. Old Colony R. Co. 148 Mass. 119; 18 N. E. 678; 1 L. R. A. 513.

by a detective employed by it in the course of such employment, even though he has also been given police powers by the public authorities at its request.[188] But it has been held that a corporation is not liable for a false arrest ordered by its superintendent for an alleged assault upon himself while in charge of its property.[189] In very many instances the question whether the employe or servant was acting within the scope of his authority in such a sense as to make the employer liable for his torts is one of fact, but there are cases where the question is one of law.[190]

§ 1265a. Care in the operation of handcars towards trespassers.—

[188] St. Louis &c. R. Co. v. Hackett, 58 Ark. 381; 24 S. W. 881; 41 Am. St. 105; Dickson v. Waldron, 135 Ind. 507; 35 N. E. 1; 24 L. R. A. 483; 41 Am. St. 440; Evansville &c. R. Co. v. McKee, 99 Ind. 519; 50 Am. R. 102; Pennsylvania Co. v. Weddle, 100 Ind. 138; Union Depot R. Co. v. Smith, 16 Col. 361; 27 Pac. 329; Harris v. Louisville &c. R. Co. 35 Fed. 116; King v. Illinois Cent. R. Co. 69 Miss. 245; 10 So. 42; Edwards v. Midland R. Co. L. R. 6 Q. B. D. 287; Eichengreen v. Louisville &c. R. Co. 96 Tenn. 229; 34 S. W. 219; 31 L. R. A. 702; 54 Am. St. 833. But see Wells v. Washington Market Co. 19 Wash. Law R. 52; Fitzpatrick v. New York &c. R. Co. 15 N. Y. Week. Dig. 506; Jardine v. Cornell, 50 N. J. L. 485; Hershey v. O'Neill, 36 Fed. 168; Tolchester &c. Co. v. Steinmeier, 72 Md. 313; 20 Atl. 188; 8 L. R. A. 846. As shown in these last cases, the rule must be carefully applied, and the corporation is not liable for the act of the police officer as such and not as a servant of the company. See, also, Walker v. Southeastern R. Co. 23 L. T. R. (C. P.) 14. And it has been held that the presumption is that a police officer in arresting a disorderly person is acting in his official capacity and not as agent for the company although it pays him. Foster v. Grand Rapids &c. R. Co. 140 Mich. 689; 104 N. W. 380. But it was held liable if the arrest was made at the request of the conductor for failure to pay fare.

[189] Tolchester &c. Co. v. Steinmeier, 72 Md. 313; 20 Atl. 188; 8 L. R. A. 846. See, also, Stevens v. Midland &c. R. Co. 10 Exch. 352. Most of the decisions upon the general subject are cited in the opinions and notes to the cases referred to in the note to Texas &c. R. Co. v. Dean, 70 L. R. A. 943. See, also, Cobb v. Simon, 124 Wis. 467; 102 N. W. 891; Johnston v. Chicago &c. R. Co. (Wis.) 110 N. W. 424, 426 (citing text).

[190] Ante, § 210; post, § 1266; 1 Elliott's Gen. Pr. § 426; Lake Shore &c. R. Co. v. Peterson, 144 Ind. 214; 42 N. E. 480; 43 N. E. 1. Held a question of fact in Sharp v. Erie R. Co. 184 N. Y. 100; 76 N. E. 923. So in Girvin v. New York Cent. &c. R. Co. 166 N. Y. 289; 59 N. E. 921, and in many other cases already cited.

It has been held that the rule of law in regard to persons in charge of a locomotive, when a trespasser is seen walking along on a bridge, is not strictly applied to persons in charge of a handcar. Thus, one operating a handcar across a trestle or bridge has the right to assume that persons crossing ahead of him will step off the track and permit him to pass, particularly where it appears that others have done so and that there is sufficient room. He owes no duty towards such trespassers until he discovers by their behavior and conduct that they can not and do not intend to leave the track, and such conduct or behavior must manifest itself positively. It will not be inferred from the mere act of remaining on the track.[191]

§ 1265b. Care towards persons lawfully at work on the track.—The law does not require persons at work on the track to maintain a constant lookout for approaching trains and at the same time pursue their labor, but it does require of the operatives of trains the exercise of an active vigilance to avoid injuring such persons and that they should give reasonable danger signals to attract the attention of men so employed so as to enable them to get out of the way before it is too late.[192] Whether a railroad company has been negligent in the matter of giving such signals is usually a question of fact for the jury.[193] Persons at work around railroad yards are presumed to know the methods of work employed in such yards—as for example, that cars are frequently bumped together with great force—and they are required to anticipate this danger and protect themselves therefrom.[194] Contributory negligence defeating a recovery for injuries was ascribed in one case to the act of an experienced clerk employed in a railroad yard to take car numbers, in standing with one foot between the rails of a parallel track while engaged in this work without looking or listening for approaching trains on this track.[195]

[191] Wright v. Southern Railway Railway Co. 132 N. C. 327; 43 S. E. 845.

[192] Haley v. New York &c. R. Co. 7 Hun, 84; Goodfellow v. Boston &c. R. Co. 106 Mass. 461; Baltimore &c. R. Co. v. State, 33 Md. 542; McWilliams v. Detroit Mills Co. 31 Mich. 274; Barton v. New York &c. R. Co. 1 N. Y. S. Ct. (T. & C.) 297, affirmed in 56 N. Y. 660; Stinson v. New York &c. R. Co. 32 N. Y. 333; O'Leary v. Chicago &c. R. Co. Ia. 103 N. W. 362.

[193] Galveston &c. R. Co. v. Levy, 35 Tex. Civ. App. 107; 79 S. W. 879.

[194] Rock Island &c. R. Co. v. Dormady, 103 Ill. App. 127; O'Day v. Chicago &c. R. Co. 97 Ill. App. 632.

[195] Wilson v. Illinois Cent. R. Co.

§ 1265c. Persons engaged in loading and unloading cars.—Shippers and consignees of freight on railroad premises for the purpose of loading and unloading cars are properly there and are not trespassers, or bare licensees, and the railroad company is bound to use reasonable care to avoid injuring them while so engaged.[196] If such persons while so engaged, and without negligence on their own part other than that inattention to their own safety which an absorption in the duties in which they are engaged naturally produces, are hurt by the negligence of the railway company, they have an action for damages.[197] It is a duty of switch crews with knowledge,[198] or the means of knowledge that persons are loading or unloading cars, to warn them of an intention to switch cars over a track on which their car is placed.[199] These persons do not assume the risk of injuries from this cause.[200] The persons actually at work must be notified; it is not sufficient to notify their employers.[201] Furthermore the railroad company owes to persons engaged in this work the duty to furnish cars in such repair that they may be used with reasonable safety.[202] But the person engaged in this work will not

210 Ill. 603; 71 N. E. 398, affirming 109 Ill. App. 542.

[196] Ward v. Maine Central R. Co. 96 Me. 136; 51 Atl. 947; Bachant v. Boston &c. R. Co. 187 Mass. 392; 73 N. E. 642; Chicago &c. R. Co. v. Goebel, 119 Ill. 515; Missouri &c. R. Co. v. Holman, 15 Tex. Civ. App. 16; St. Louis &c. R. Co. v. Fenlaw (Tex. Civ. App.), 36 S. W. 295; Weatherford &c. R. Co. v. Duncan, 88 Tex. 611; 32 S. W. 878; International &c. R. Co. v. Hall (Tex. Civ. App.), 25 S. W. 52; St. Louis &c. R. Co. v. Ridge, 20 Ind. App. 547; 49 N. E. 828; Gessly v. Missouri Pac. R. Co. 32 Mo. App. 413; Union &c. R. Co. v. Harwood, 31 Kan. 388; Foss v. Chicago &c. R. Co. 33 Minn. 392.

[197] Texas &c. R. Co. v. Pennell, 2 Tex. Civ. App. 127; 21 S. W. 273.

[198] Chicago &c. R. Co. v. Shaw, 116 Fed. 621; Elgen &c. R. Co. v. Thomas, 115 Ill. App. 508, affirmed in 215 Ill. 158; 74 N. E. 109; Fisher v. New York Dock Co. 91 App. Div. 526; 87 N. Y. S. 117; St. Louis &c. R. Co. v. Kennemore (Tex. Civ. App.), 81 S. W. 802; Copley v. Union Pacific R. Co. 26 Utah, 361; 73 Pac. 517; Pratt v. New York &c. R. Co. 187 Mass. 5; 72 N. E. 328.

[199] Central of Georgia R. Co. v. Duffy, 116 Ga. 346; 42 S. E. 510.

[200] Kansas Southern R. Co. v. Moles, 121 Fed. 351; Lake Erie &c. R. Co. v. Gaughan, 26 Ind. App. 1; 58 N. E. 1072; Louisville &c. R. Co. v. Smith (Ky.), 84 S. W. 755; 27 Ky. L. 257; St. Louis &c. R. Co. v. Kennemore, 81 S. W. 802; O'Leary v. Erie R. Co. 169 N. Y. 289; 62 N. E. 346.

[201] Central of Georgia R. Co. v. Duffy, 116 So. 346; 42 S. E. 510.

[202] Cincinnati &c. R. Co. v. Vaught, 78 S. W. 859; 25 Ky. L. R. 1766; Sheltram v. Michigan Central R. Co. 128 Mich. 669; 87 N. W. 893;

be allowed to recover for injuries towards which his own negligence has contributed.[203] Thus, for example, a recovery was denied to one engaged in unloading cars who crawled under a car to repair a leak and was injured by a car bumping against his car and it appeared that such person was well-acquainted with the danger of thus placing himself without having someone at the side of the car to warn him of this form of danger.[204]

§ 1265d. Injuries to employes of independent contractors.—A person employed by one who has entered into a contract with a railroad company to do work upon the road is neither a servant of the railroad company nor a trespasser upon its tracks, and if free from contributory negligence, is entitled to recover for injuries inflicted upon him by the negligence of the servants of the railroad company.[205] But the duty to use reasonable care in this relation is a reciprocal duty, and the servant of a contractor can not recover for injuries, the result of an accident to which his own negligence has contributed,[206] as for example, where the servant of an ice company employed to ice cars ventured upon the roof of the car to be iced, at a time when it was slippery with sleet—in this case he assumed the danger of an obvious risk.[207] But an employe of a contractor engaged to perform a particular work may become a trespasser by venturing on the railroad premises away from the place of his employment, as for example, where a painter of a freight depot, without any invitation from the railroad company left the place where he was at work and while attempting to cross between the parts of a broken train, was injured by their sudden coming together.[208]

Sykes v. St. Louis &c. R. Co. 88 Mo. App. 193; Tateman v. Chicago &c. R. Co. 96 Mo. App. 448; 70 S. W. 514.

[203] Louisville &c. R. Co. v. Smith (Ky.), 84 S. W. 755; 27 Ky. L. 257.

[204] Chicago &c. R. Co. v. Pettit, 209 Ill. 452; 70 N. E. 591.

[205] Galveston &c. R. Co. v. Garteiser, 9 Tex. Civ. App. 456; 29 S. W. 939; St. Louis &c. R. Co. v. Ridge, 20 Ind. App. 547; 49 N. E. 828; Kentucky &c. Bridge Co. v. Sydnor, 119 Ky. 18; 82 S. W. 989; 26 Ky. L. 951; 68 L. R. A. 183.

[206] Johnson v. Minneapolis &c. R. Co. 140 Mich. 292; 103 N. W. 594.

[207] Baker v. Louisville &c. R. Co. 106 Tenn. 490; 61 S. W. 1029; 53 L. R. A. 474.

[208] Furey v. New York &c. R. Co. 67 N. J. L. 270; 51 Atl. 505. But see Pittsburg &c. R. Co. v. Cozatt (Ind. App.), 79 N. E. 534. In this case an employe of an independent con-

§ 1265e. Care required of deaf, blind and other defective persons.—Persons of defective sight and hearing are bound to exercise that degree of care for their safety on railroad tracks, that ordinarily prudent persons, likewise afflicted, would exercise under the circumstances.[209] Persons lacking either of these senses are required to exercise greater caution in the use of their remaining faculties.[210] It may be said generally that where those in charge of the train, not knowing that a trespasser is deaf, sound the signals which they ought to give a person possessing the sense of hearing, in ample time to allow him to quit the track in safety, and upon seeing that he does not quit the track, they do what they reasonably can to stop the train to prevent death or injury, then the railroad company will not be liable and the catastrophe will be charged to the contributory negligence of the injured person. The engineer has a right to presume, in the absence of knowledge that a trespasser on the track is deaf, that he will quit the track in time to avoid injuries; and the railroad company will not be answerable for damages caused because its engineer acted on this presumption until the contrary became apparent.[211] But if the engineer knows the person on the track ahead of him is deaf and can not hear the signal and he nevertheless runs him down, the company will be liable.[212] Contributory negligence can not be charged to insane persons any more than to children of tender years. But if an adult idiot is allowed to make a pathway of a railroad track, and in so doing is run over by a train

tractor repairing a depot, left the place of his work and went to the depot platform to procure a lifting jack. There was no agreement between the railroad and the independent contractor or the employe who should furnish the necessary appliances. The employe could have, by going across the street, obtained a jack from a private individual; but he undertook to use the jack belonging to the railroad. It was held that the employe was not a trespasser on the railroad property while procuring the jack, and the railroad company could not defeat an action for injuries occasioned by its employes moving a car and injuring him, on the theory that it owed him no duty.

[209] Toledo &c. R. Co. v. Hamett, 115 Ill. App. 268; Hamlin v. Columbia &c. R. Co. 37 Wash. 448; 79 Pac. 991; Maloy v. Wabash &c. R. Co. 84 Mo. 270; Kennedy v. Denver &c. R. Co. 10 Colo. 493; 16 Pac. 210; Mobile &c. R. Co. v. Stroud, 64 Miss. 784.

[210] 1 Thomp. Neg. (2d ed.) Sec. 336–338.

[211] Schexnaydre v. Texas &c. R. Co. 46 La. Ann. 248; 14 So. 513.

[212] International &c. R. Co. v. Smith, 62 Tex. 252.

and injured, the railroad company will not be charged with negligence merely because the railroad company did not stop the train in time to avoid the injury where it is not shown that the engineer knew that the trespasser was of infirm mind.[213]

§ 1265f. Persons injured while drunk and asleep on railroad track.—The cases generally hold that an intoxicated man who seats himself on a railroad track and there sinks into a drunken stupor is guilty of contributory negligence as a matter of law.[214] The railroad company rests under no special duty to maintain a special lookout for these persons; it discharges its full duty when its employes exercise reasonable care to avoid injuring him, after discovering his position.[215] The law does not make it a duty of the railroad company to equip cars with lights similar to locomotive lights to enable the trainmen on backing cars to discern the presence of drunken trespassers on the track.[216] In a recent case where an intoxicated person was ejected from a signal tower by the operator, and while wandering along a track was struck by a train, it was held that neither the ejection of the trespasser from the tower nor the operator's failure to warn train crews about to pass of the likelihood of encountering such trespasser was negligence.[217]

§ 1265g. Injuries in making "running" or "flying switches."—The practice of making running or flying switches is inherently dangerous and is so considered and condemned by the courts in numerous decisions.[218] The courts have not hesitated to hold railroad

[213] Daily v. Richmond &c. R. Co. 106 N. Car. 301; 11 S. E. 320.

[214] Ayers v. Wabash R. Co. 190 Mo. 228; 88 S. W. 608.

[215] Sullivan v. St. Louis &c. R. Co. 36 S. W. 1020; Murch v. Western &c. R. Co. 78 Hun, 601; 29 N. Y. S. 490; Smith v. Fordyce (Texas,), 18 S. W. 663; Columbus &c. R. Co. v. Wood, 86 Ala. 164; 5 So. 463; Felder v. Louisville &c. R. Co. 2 McMull. (S. C.) 403; Richardson v. Wilmington R. Co. 8 Rich. L. (S. C.) 120; Missouri &c. R. Co. v. Brown, 75 Tex. 267; 12 S. W. 1117; 18 S. W. 670; New York &c. R. Co. v. Kelly, 93 Fed. 745.

[216] Gilliam v. Texas &c. R. Co. 114 La. 272; 38 So. 166.

[217] Southern R. Co. v. Back, 103 Vir. 778; 50 S. E. 257.

[218] Chicago &c. R. Co. v. Dignan, 56 Ill. 487; Haley v. New York &c. R. Co. 7 Hun (N. Y.), 84; Kay v. Pennsylvania R. Co. 65 Pa. St. 269; Sutton v. New York &c. R. Co. 66 N. Y. 243; Illinois &c. R. Co. v. Baches, 55 Ill. 379; Murphy v. Chicago &c. R. Co. 45 Ia. 661; Illinois &c. R. Co. v. Hammer, 72 Ill.

companies liable for injuries to trespassers on the track thus inflicted on the ground of negligence. The case of this negligence seems specially plain where the cars are sent in swift motion, with no one at the brakes, upon switch tracks commonly used by persons for foot-paths and crossings without objection from the company, though not at a public crossing.[219] It would seem a duty owed by the railroad company, even to trespassers, to station lookouts in such positions on the moving cars that they can watch the tracks ahead of them and warn persons thereon of their danger.[220] The Kentucky court of appeals on this subject has said: "Humanity positively forbids the owner of property that is dangerous to human life and safety to knowingly turn such property loose, even upon his own ground, where it will do mischief, even to a technical trespasser. Such conduct is regarded as utterly at war with the principles of humanity, and as smacking of savagery. That the party hurt was a mere trespasser, and, otherwise than in this legal aspect, perfectly innocent and harmless, does not excuse the person that injured him by means manifestly injurious to human life and safety. By being technically a trespasser he does not forfeit all right of protection. This fact is made manifest in various ways; for instance, although, ordinarily, the conductor in running his train is not bound to look out for trespassers, yet he is bound, if he discovers him in time, to use all means at his command to protect him."[221] It has been held that to detach cars from a locomotive, and put it out of the power of the trainmen to stop or control them, starting them down a grade to a point where a person is on the track with his back towards the train, where it is the duty of the company to lookout even for trespassers and to allow the cars so detached to continue a speed in excess of that limited by a municipal ordinance,—is such gross negligence as will render the company liable to the person thereby in-

347; 85 Ill. 526; Meneo v. Central R. Co. 84 N. Y. S. 448; McCarty v. New York &c. R. Co. 73 App. Div. (N. Y.) 34; 76 N. Y. S. 321.

[219] St. Louis &c. R. Co. v. Crosnoe, 72 Tex. 79; 10 S. W. 342; Meneo v. Central R. Co. 84 N. Y. S. 448; McCarty v. New York &c. R. Co. 73 App. Div. (N. Y.) 34; 76 N. Y. S. 321.

[220] Patton v. East Tennessee &c. R. Co. 89 Tenn. 370; 15 S. W. 919; '12 L. R. A. 184.

[221] Conley v. Cincinnati &c. R. Co. 89 Ky. 402; 11 Ky. L. 602; 12 S. W. 764. But see Martin v. Georgia R. &c. Co. 95 Ga. 361; 22 S. E. 626; Illinois &c. R. Co. v. Beard, 49 Ill. App. 232.

jured, although he was on the track as a trespasser, and was guilty of contributory negligence.[222]

§ 1265h. Persons injured while attempting rescues.—The attempt to save the life of one who is in peril on a railroad track is regarded by the courts as an act of such merit that contributory negligence is not charged to the person injured or killed in the attempt, unless he has acted under circumstances of great rashness.[223] He is not regarded as a trespasser under the rules and if he is injured through the negligence of the railroad company he may recover.[224] On this question the supreme court of Ohio has said: "There was but the fraction of a minute in which to resolve and act, or action would come too late. Under these circumstances it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue altogether if the danger was imminent. The attendant circumstances must be regarded; the alarm, the excitement, and confusion usually present on such occasions; the uncertainty as to the proper move to be made, the promptness required, and the liability to mistake as to what is best to be done suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under those or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence per se, is neither supported by principle nor authority."[225] A person injured while attempting to make a rescue is not generally regarded as guilty of

[222] Georgia &c. R. Co. v. O'Shields, 90 Ala. 29; 8 So. 248. See, also, International &c. R. Co. v. Brooks (Tex. Civ. App.), 54 S. W. 1056.

[223] Eckert v. Long Island R. Co. 43 N. Y. 502; Linnehan v. Sampson, 126 Mass. 506; Peyton v. Texas &c. R. Co. 41 La. Ann. 861; 6 So. 690; Pennsylvania Co. v. Langendorf, 48 Ohio St. 316; 28 N. E. 172; Condiff v. Kansas City &c. R. Co. 45 Kan. 256; 25 Pac. 562; Donahoe v. Wabash &c. R. Co. 83 Mo. 543, 560; San Antonio &c. R. Co. v. Gray, 95 Tex. 424; 67 S. W. 763; Peirce v. Walters, 164 Ill. 560; 45 N. E. 1068, affirming 63 Ill. App. 562; Becker v. Louisville &c. R. Co. 110 Ky. 474; 61 S. W. 997; 22 Ky. L. 1893; 53 L. R. A. 267.

[224] San Antonio &c. R. Co. v. Gray, 95 Tex. 424; 67 S. W. 763.

[225] Pennsylvania Co. v. Langendorf, 48 Ohio St. 316; 28 N. E. 172.

contributory negligence, though he was wrongfully on the track when he discovered the other person's peril.[226] On the question of negligence of the railroad company there is a holding that the fact that those in charge of the train saw the peril of the rescuer in time to avoid killing him, may be proved by circumstantial evidence.[227] The rule is manifestly different where peril is encountered in attempting to rescue chattels. If a person puts himself in a position of danger in front of an approaching train in order to rescue property from injury or destruction, he is generally regarded as guilty of contributory negligence as a matter of law, and there can be no recovery of damages for personal injury or death.[228]

§ 1265i. Whether railroad company required to care for trespasser after injury.—It is the general rule that a railroad company not negligent in injuring a trespasser can not be made liable on the ground that its servants were negligent in caring for him after the accident. The railroad company is under no legal obligation to take charge of the wounded man, however strong the moral obligation may be.[229] If, however, the railroad company is liable to the injured

[226] San Antonio &c. R. Co. v. Gray, 95 Tex. 424; 67 S. W. 763. But see Cleveland &c. R. Co. v. Tartt, 64 Fed. 823, where a recovery by the father injured while attempting to save the life of his son, was refused on the ground that the father brought the son into the situation of peril by his own voluntary act.

[227] San Antonio &c. R. Co. v. Gray, 95 Tex. 424; 67 S. W. 763.

[228] Morris v. Lake Shore &c. R. Co. 148 N. Y. 182; 42 N. E. 579; Baltimore &c. R. Co. v. Driskell, 101 Ill. App. 137.

[229] Griswold v. Boston &c. R. Co. 183 Mass. 434; 67 N. E. 354; Union Pacific R. Co. v. Cappier, 66 Kansas, 649; 72 Pac. 281. But see Northern &c. R. Co. v. State, 29 Md. 420. In this case it appeared that the body of a person, who had been run down by an express train at night, was brought to a station near at hand, and was by the station-master placed upon some rubbish in a warehouse, on the supposition that life was extinct, without examination by a physician, although the propriety of such examination was suggested to the company's agents. In the morning it appeared that the injured man had revived during the night, and dragged himself a considerable distance along the floor, where he was found dead, with his body yet warm, in a stooping posture, pressing his hand upon his leg, to stop the flow of blood from an artery which had been cut. There was no evidence of any serious injury to his brain, and he undoubtedly bled to death from lack of attendance. The court held that, even though the accident was caused by the negligence of

person on the ground of negligence, then the failure of the trainman to take charge of the wounded man may be considered by the jury as aggravating the damages.[230]

the deceased, it was proper to submit to the jury whether his death did not result from subsequent neglect of the defendant's servants. The court said: "It is the settled policy of the law to give such agents and servants a large and liberal discretion, and hold the companies liable for all their acts, within the most extensive range of their charter powers."

[230] Union Pacific v. Cappier, 66 Kansas, 649; 72 Pac. 281; Whitesides v. Southern R. Co. 128 N. C. 229; 38 S. E. 879.

CHAPTER LIII.

INJURIES TO EMPLOYES.

§ 1266. Introductory.—It is our purpose in this chapter to treat of the class of persons employed by railroad companies usually denominated "servants" or "employes." We do not propose to treat at large of the relation of master and servant, but, although it is our purpose to confine our discussion to the doctrine of master and servant only in so far as it applies to railroad companies in the capacity of employers, still it is necessary to an intelligent understanding of the subject to speak, incidentally, at least, of the general doctrine. We have elsewhere touched upon the subject.[1]

[1] Ante, Chapter VI, §§ 203, 233, Chapter XIII, §§ 283, 303. In a subsequent chapter we have discussed the statutory changes in the law of master and servant. Post, Chapter LV. The present chapter deals with the general common law rules governing that subject.

There is a distinction between corporate representatives such as officers and agents[2] and servants or employes although it is very difficult to accurately mark the difference. Agents and officers, it may be said in a general way, represent the corporation to a much greater extent than do servants or employes although servants and employes are to a limited extent corporate representatives. The scope of authority is, as a rule, to be determined from the facts of the particular case and is usually a question of fact.[3] But the extent of the authority of an agent or employe may sometimes be a question of law to be determined by the court.[4] Whatever the rank or position of an employe, his acts within the line of his duty and scope of his authority will bind the corporation, but outside of that no matter how high his rank, the corporation will not be bound, so that in all cases the controlling question is, so far as concerns the doctrine of respondeat superior, what was the scope of the employe's authority? The question is not always, we may say by the way, whether there was actual authority, for if the employer has clothed the employe with the indicia of authority beyond that actually conferred he will usually be bound if the acts of the employe are within the limits of the apparent authority.

§ 1267. Contract the basis of the employer's duty.—The foundation of the employer's duty is a contract of service creating the relation of employer and employe.[5] The contract may create express duties

[2] Ante, § 301.

[3] Ante, § 210.

[4] In the case of Lake Shore &c. R. Co. v. Peterson, 144 Ind. 214; 42 N. E. 480; 43 N. E. 1, the court quoted from Elliott's General Practice, § 426, the following: "Where the facts are undisputed, or the authority is conferred by a writing, the scope of such authority is generally a question of law for the court." Mobile &c. R. Co. v. Thomas, 42 Ala. 672; Ludwig v. Gorsuch, 154 Pa. St. 413; 26 Atl. 434; Nofsinger v. Ring, 4 Mo. App. 576; London &c. Society v. Hagerstown &c. Bank, 36 Pa. St. 498, 502; 78 Am. Dec. 390. See Arkansas &c. Ry. Co. v. Dickinson (Ark.), 95 S. W. 802.

[5] Nimmo v. Walker, 14 La. Ann. 581; Baxter v. Gray, 4 Scott, N. R. 374; Gillshannon &c. v. Stonybrook R. Co. 10 Cush. (Mass.) 228; Mound City &c. Co. v. Conlon, 92 Mo. 221; 4 S. W. 922; Willis v. Toledo &c. R. Co. 72 Mich. 160; Cooley Torts, 42. See, also, Christiansen v. Graves Tank Works, 223 Ill. 142; 79 N. E. 97. But see where the company was held liable as an undisclosed principal, McClure v. Detroit &c. R. Co. (Mich.) 109 N. W. 847.

and there are always implied duties.[6] A wrongful breach of duty on the part of the employer will give a right of action to an employe for compensatory damages provided the employe is free from contributory fault.[7] But where there is no duty there can be no actionable negligence.[8] It is necessary, therefore, in order to create a duty in favor of one as the employe of another that the contract of service should embrace the act out of which the negligence arises.[9]

[6] The cases holding the employer liable for a failure to exercise ordinary care in furnishing a safe place in which to work and safe appliances with which to work, are familiar examples of implied duty growing out of the contract of service. Mary Lee, &c. R. Co. v. Chambliss, 97 Ala. 171; 11 So. 897; 53 Am. & Eng. R. Cas. 254; Gulf &c. R. Co. v. Johnson, 1 Tex. Civ. App. 103; 20 S. W. 1123; Gorham v. Kansas City &c. R. Co. 113 Mo. 408; 20 S. W. 1060; Meador v. Lake Shore &c. R. Co. 138 Ind. 290; 37 N. E. 721; 46 Am. St. 384; Harker v. Burlington &c. R. Co. 88 Iowa, 409; 55 N. W. 316; 45 Am. St. 242; Dickson v. Omaha &c. R. Co. 124 Mo. 140; 27 S. W. 476; 25 L. R. A. 320, and note; 46 Am. St. 429; Ragon v. Toledo &c. R. Co. 97 Mich. 265; 56 N. W. 612; 37 Am. St. 336. We have elsewhere considered the duty of the employer to provide safe working places and appliances and the cases there referred to show the nature of the implied duty arising out of the contract of service.

[7] Or, as Judge Thompson puts it: "If the master has failed in his duty in this respect, and the servant has, in consequence of such failure, been injured, without fault on his part, and without having voluntarily assumed the risk of the consequences of the master's negligence, with full knowledge, or competent means of knowledge, of the danger, he may recover damages of the master." 4 Thomp. Neg. § 3759, and numerous authorities there cited.

[8] Kahl v. Love, 37 N. J. L. 5; Warner v. Railroad Co. 6 Phila. 537; Rich v. New York &c. R. Co. 87 N. Y. 382. An English author says: "It is essential to the successful maintenance of an action for negligence to show the existence of a duty on the part of the plaintiff to the defendant and a loss suffered as a direct consequence of the breach of such duty." Robert's Duty and Liability of Employers, 22; Pollock Torts, 352; Cooley Torts, 659; 16 Am. & Eng. Ency. of Law, 415.

[9] Robert's Duty and Liability of Employers, 448. Post, § 1303; ante, § 1267. See Smith v. Oxford &c. Co. 42 N. J. L. 467; 36 Am. R. 535; Missouri &c. R. Co. v. Texas &c. R. Co. 38 Fed. 816; Interstate &c. R. Co. v. Fox, 41 Kan. 715; 21 Pac. 797; Sobieski v. St. Paul &c. R. Co. 41 Minn. 169; 42 N. W. 863; Kansas City &c. R. Co. v. Kier, 41 Kan. 661; 21 Pac. 770; 13 Am. St. 311; Union Pac. R. Co. v. Springsteen, 41 Kan. 724; 21 Pac. 774; Louisville &c. R. Co. v. Hall, 87 Ala. 708; 6 So. 277; 4 L. R. A. 710; 13 Am. St. 84; Georgia R. Co. v. Nelms, 83 Ga. 70; 9 S. E. 1049; 20 Am. St.

§ 1267a. Who are employes.—It is sometimes difficult to determine whether a particular person is an employe to whom the duty of a master is owing. So, although one may be an employe in a general sense it is sometimes difficult to determine whether, at the time of injury, the relation existed and he was acting as such. The relation of mail clerks, express messengers and the like will be considered in another section, and so will that of volunteers and of employes while going to and from work and the like. But there are a few peculiar cases not elsewhere considered, and to these we now call attention. Persons frequently ride on engines or the like and perform services for the company, with its consent, for the purpose of learning the road and work, but without pay, in the mutual expectation of afterwards having regular employment. Such persons are frequently called "student" firemen, "student" brakemen, or the like, and it is held that they are employes.[10] An express messenger who also performed services for a railroad company as a baggageman, with its approval and consent has likewise been held to be an employe of such company.[11] So, there are other cases in which the same person may be an employe of two companies, being, for instance, a general servant of one and a special servant of another.[12] It has also been held that where two railroad companies receive cars from each other over a delivery track at a certain point, a person, employed by one of them to take

308; Tustchell v. Grand Trunk &c. R. Co. 39 Fed. 419; McGovern v. Central Vt. R. Co. 6 N. Y. S. 838; Guthrie v. Maine &c. R. Co. 81 Me. 572; 18 Atl. 295; Seese v. Northern Pac. R. Co. 39 Fed. 487; Gorman v. Minneapolis &c. R. Co. 78 Iowa. 509; 43 N. W. 303; Central R. Co. v. Lanier, 83 Ga. 587; 10 S. E. 279; Doyle v. St. Paul &c. R. Co. 42 Minn. 79; 43 N. W. 787. In a recent case where a brakeman was injured by a piece of ice thrown by another brakeman who did not know that any one was present, it was held that it was necessary to allege that the brakeman who threw the ice was acting within the scope of his employment or in the line of his duty. Galveston &c. R. Co. v. Henefy (Tex. Civ. App.), 99 S. W. 884.

[10] Weisser v. Southern Pac. R. Co. 148 Cal. 426; 83 Pac. 439; Millsaps v. Louisville &c. R. Co. 69 Miss. 423; 13 So. 696; Alabama &c. R. Co. v. Burks (Ala.), 41 So. 638. See, also, Barstow v. Old Colony R. Co. 143 Mass. 535; 10 N. E. 255; Cleveland &c. R. Co. v. Osgood 36 Ind. App. 34; 73 N. E. 285; Atchison &c. R. Co. v. Fronk (Kans.), 87 Pac. 698.

[11] Missouri &c. R. Co. v. Reasor, 28 Tex. Civ. App. 302; 68 S. W. 332.

[12] Vary v. Burlington &c. R. Co. 42 Ia. 246; Nashville &c. R. Co. v. Carroll, 6 Heisk. (Tenn.) 347. Sometimes the question is for the

the number of its cars and inspect their seals, as trains are made up by the other is to be deemed an employe of the latter within the meaning of a statute requiring every railroad company to adjust or block frogs, switches and guard-rails so as to prevent the feet of its employes from being caught therein.[13] But a sleeping car porter, employed and paid by the sleeping car company, which owned and controlled the car and was paid a compensation by the railroad company for running its car over the road, is not an employe of the railroad company.[14] So, one who has the privilege of entering cars to sell or furnish lunches or the like is not an employe, but is usually a bare licensee.[15]

§ 1268. Employer's duty to furnish a reasonably safe working place.—It is the doctrine of the modern cases, that the employer is bound to exercise ordinary or reasonable care to provide a reasonably safe working place for his employes,[16] and this duty is a personal one which can not be delegated so as to escape liability for

jury. Shultz v. Chicago &c. R. Co. 40 Wis. 589.

[13] Atkyn v. Wabash R. Co. 41 Fed. 193. As to duty and liability to employes of another company upon whose track it is operating or where they operate on the same track, see Cleveland &c. R. Co. v. Berry, 152 Ind. 607; 53 N. E. 453; 46 L. R. A. 33, and note; Chicago &c. R. Co. v. Stephenson, 33 Ind. App. 95; 69 N. E. 270; Atwood v. Chicago &c. R. Co. 72 Fed. 447; Byrne v. Kansas City &c. R. Co. 61 Fed. 605; 24 L. R. A. 693; Miller v. Minnesota &c. R. Co. 76 Ia. 655; 39 N. W. 188; 14 Am. St. 258; Dean v. East Tenn. &c. R. Co. 98 Ala. 586; 13 So. 489; 4 Thomp. Neg. § 3730. See, also, Union R. Co. v. Tate, 151 Fed. 550.

[14] Chicago &c. Ry. Co. v. Hamler, 215 Ill. 525; 74 N. E. 705; 106 Am. St. 187, also holding that a contract between such porter and sleeping car company releasing the railroad companies over whose lines the car was run, from liability for personal injuries is valid and binding.

[15] Fluker v. Georgia &c. R. Co. 81 Ga. 461; 8 S. E. 529; 2 L. R. A. 843; 12 Am. St. 328; Wencker v. Missouri &c. R. Co. 169 Mo. 592; 70 S. W. 145. See, also, for additional cases as to what is necessary to create the relation. Stevens v. Armstrong, 6 N. Y. 435; McCluskey v. Cromwell, 11 N. Y. 593, 599; Doyle v. Union Pac. Ry. Co. 147 U. S. 413; 13 Sup. Ct. 333; McCullough v. Shoneman, 105 Pa. St. 5; 51 Am. R. 194; Philadelphia &c. Co. v. Orbann, 119 Pa. St. 37; 12 Atl. 816.

[16] Hunt v. Chicago &c. R. Co. 26 Iowa, 363; Wabash &c. R. Co. v. McDaniels, 107 U. S. 454; 2 Sup. Ct. 932; Aerfetz v. Humphrey, 145 U. S. 418; 12 Sup. Ct. 835; Choctaw &c. R. Co. v. McDade, 191 U. S. 64; 24 Sup. Ct. 24, 25; Galveston

a failure to perform it. But the master is not an insurer of the servant's safety, and is not at all hazards bound to provide or maintain an absolutely safe working place.[17] It is held in very many cases under the general rule stated, that the employer is bound to exercise ordinary care to put and keep the road bed and tracks in a reasonably safe condition.[18] Whether the employer is or is not

&c. R. Co. v. Goodwin (Tex. Civ. App.), 26 S. W. 1007; Dillingham v. Crank, 87 Tex. 104; 27 S. W. 93; Cook v. St. Paul &c. R. Co. 34 Minn. 46; 24 N. W. 311; Gibson v. Pacific R. Co. 46 Mo. 163; 2 Am. R. 497; Snow v. Housatonic &c. R. Co. 8 Allen (Mass.), 441; 85 Am. Dec. 720, and note; Patterson v. Pittsburgh &c. R. Co. 76 Pa. St. 389; 18 Am. R. 412; Russell v. Minneapolis &c. R. Co. 32 Minn. 230; 20 N. W. 147; Bessex v. Chicago &c. R. Co. 45 Wis. 477; Hutchinson v. New York &c. R. Co. 5 Exch. 343. The text is cited in Cincinnati &c. R. Co. v. Gray, 101 Fed. 623; 50 L. R. A. 47, 53. But see post, § 1302, as to the rule where the servant is employed to make the place safe.

[17] Cleveland &c. R. Co. v. Snow, (Ind. App.), 74 N. E. 908 (citing text); Ladd v. New Bedford R. Co. 119 Mass. 412; 20 Am. R. 331; Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 457; 16 Sup. Ct. 618; York v. Kansas City &c. R. Co. 117 Mo. 405; 22 S. W. 1081; Norfolk &c. R. Co. v. Stevens, 97 Va. 631; 34 S. E. 525; 46 L. R. A. 367; Anderson v. Michigan Cent. R. Co. 107 Mich. 591; 65 N. W. 585; Culver v. South Haven &c. R. Co. 138 Mich. 443; 101 N. W. 663, 664 (citing text). See, also, Devlin v. Wabash R. Co. 87 Mo. 545; McKee v. Chicago &c. R. Co. 83 Ia. 616; 50 N. W. 209; 13 L. R. A. 817; Patton v. Southern R. Co. 82 Fed. 979; Hach v. St. Louis &c. R. Co. 117 Mo. App. 11; 93 S. W. 825, 827 (citing text); American Bridge Co. v. Bainum, 146 Fed. 367.

[18] Tonans &c. R. Co. v. Richmond &c. R. Co. 84 Va. 192; 4 S. E. 339; Snow v. Housatonic &c. R. Co. 8 Allen (Mass.), 441; 85 Am. Dec. 720, and note; Hulehan v. Green Bay &c. R. Co. 68 Wis. 520; 31 Am. & Eng. R. Cas. 322; Bessex v. Chicago &c. R. Co. 45 Wis. 477; Vautrain v. St. Louis &c. R. Co. 8 Mo. App. 538; Fagundes v. Central &c. R. Co. 79 Cal. 97; 21 Pac. 437; 3 L. R. A. 824; Lewis v. St. Louis &c. R. Co. 59 Mo. 495; 21 Am. R. 385; Houston &c. R. Co. v. Dunham, 49 Tex. 181; Davis v. Central &c. R. Co. 55 Vt. 84; 45 Am. R. 590; Calvo v. Charlotte &c. R. Co. 23 S. Car. 526; 55 Am. R. 28; 28 Am. & Eng. R. Cas. 327; St. Louis &c. R. Co. v. Weaver, 35 Kan. 412; 11 Pac. 408; 57 Am. R. 176, and note; Colorado &c. R. Co. v. Ogden, 3 Colo. 499; O'Donnell v. Allegheny &c. R. Co. 59 Pa. St. 239; 98 Am. Dec. 336; Hardy v. Carolina &c. R. Co. 76 N. Car. 5; Bowen v. Chicago &c. R. Co. 95 Mo. 268; 8 S. W. 230; Galveston &c. R. Co. v. Croskell, 6 Tex. Civ. App. 160; 25 S. W. 486; Walling v. Congaree &c. R. Co. 41 S. Car. 388; 19 S. E. 723. See, also, Kansas City &c. R. Co. v. Webb, 97 Ala. 157; 11 So. 888; Valley R. Co. v. Keegan, 87 Fed. 849; Lake Erie &c.

liable for injuries caused by a defect in the working place depends, primarily, upon whether there was or was not negligence on the part of the employe. It is a mistake to suppose that evidence that a defect existed and that an accident occurred is sufficient to establish liability, for such evidence must usually be supplemented by evidence of negligence and by evidence that the negligence was the proximate cause of the injury.[19] It has also been held that there is

R. Co. v. Morrisey, 177 Ill. 376; 52 N. E. 299; Pennsylvania Co. v. Brush, 130 Ind. 347; 28 N. E. 615; Pennsylvania Co. v. Sears, 136 Ind. 460; 34 N. E. 15; 36 N. E. 303; Chicago &c. R. Co. v. Lee, 29 Ind. App. 480; 64 N. E. 675 (but not extraordinary care nor the highest degree of care); Eastman v. Lake Shore &c. R. Co. 101 Mich. 597; 60 N. W. 309; Louisville &c. R. Co. v. Victory (Ky.), 47 S. W. 440; Fisher v. Chesapeake &c. R. Co. 104 Va. 635; 52 S. E. 373; 2 L. R. A. (N. S.) 954, and note. But compare Kerrigan v. Pennsylvania R. Co. 194 Pa. St. 98; 44 Atl. 1069, and cases cited, and see post, § 1272. It has been held that the company owes a servant, engaged in loading cylinders with a derrick car, the duty of exercising ordinary care to supply a reasonably safe track for that particular work, and that it is not sufficient that it furnish and keep the track in such repair as a track is usually kept in for the purpose of running trains over it. Texas Cent. R. Co. v. George (Tex. Civ. App.), 89 S. W. 1090. But it has also been held that so far as its employes are concerned the company is under no obligation to repair its track, which has become unsafe, provided due and timely notice of such defect is given so that the employes may avoid the danger. St. Louis &c. R. Co. v. Mize (Ark.), 95 S. W. 488. And where a railroad fireman, employed in removing snow from the track, was killed by a derailment of the locomotive, and it appeared that a week before the accident the railroad had a gang of men shoveling snow from the track, who removed the loose snow, but allowed patches of ice as high as the top of the rails to remain, and a day or two before the accident, there was another fall of snow, and on the day of the accident it was attempted to remove the snow by a snow plow propelled by locomotives, it was held that the liability of the railroad depended on the question whether it was negligent in the conduct of the work, and not whether it was negligent in failing to furnish a safe place to work. Neagle v. Syracuse &c. R. Co. 185 N. Y. 270; 77 N. E. 1064.

[19] Burnes v. Kansas City &c. R. Co. 129 Mo. 41; 31 S. W. 347; Mickee v. Walter A. Wood &c. Co. 71 Hun, 569; 28 N. Y. S. 918; Nutt v. Southern &c. R. Co. 25 Ore. 291; 35 Pac. 653; LaPierre v. Chicago &c. R. Co. 99 Mich. 212; 58 N. W. 60; Ragon v. Toledo &c. R. Co. 97 Mich. 265; 56 N. W. 612; 37 Am. St. 336; Watts v. Hart, 7 Wash. 178; 34 Pac. 423, 771. In Mobile &c. R. Co. v. Vallowe, 214 Ill. 124; 73 N. E. 416, 417, the text is cited in support of the prop-

no liability for injuries caused by the condition of the road bed if the company has furnished and maintained one as good as others in general use,[20] but this is not always conclusive, nor is evidence as to what others have or have not done always admissible.[21] A railroad company is not liable for injuries resulting from the act of a wrong-doer in making the track unsafe.[22] We suppose, however, that the company would be liable if it neglected for an unreasonable time after notice of the act of the wrong-doer, or after it ought to have taken notice, to use ordinary care and diligence to make the track safe.

§ 1269. Structures near the track.—Many courts hold that structures erected or suffered to remain so near the track as to endanger the safety of employes while engaged in the performance of duties required of them by their contract of service constitute a breach of the employer's duty to exercise ordinary care to put and keep the working place in a reasonably safe condition for use.[23]

osition that liability does not depend upon the existence of danger, but upon the existence of negligence on the part of the employer.

[20] Atchison &c. R. Co. v. Alsdurf, 47 Ill. 200. See, also, Cleveland &c. R. Co. v. Haas, 35 Ind. App. 626; 74 N. E. 1003; Southern Pac. R. Co. v. Gloyd, 138 Fed. 388; Chicago &c. R. Co. v. Driscoll, 176 Ill. 330; 52 N. E. 921.

[21] See Union Pac. R. Co. v. O'Brien, 161 U. S. 451; 16 Sup. Ct. 618; Indiana &c. R. Co. v. Bundy, 152 Ind. 590; 53 N. E. 175. But compare Doyle v. St. Paul &c. R. Co. 42 Minn. 79; 43 N. W. 787. See, generally, 3 Elliott Ev. § 2505.

[22] Illinois &c. R. Co. v. Quirk, 51 Ill. App. 607. See, also, Bennett v. Long Island R. Co. 21 N. Y. App. Div. 25; 47 N. Y. S. 258.

[23] Gates v. Chicago &c. R. Co. 4 S. Dak. 433; 57 N. W. 200; Southern &c. R. Co. v. Markey (Texas), 19 S. W. 392; Kelleher v. Milwaukee &c. R. Co. 80 Wis. 584; 50 N. W. 942; Piddock v. Union Pac. R. Co. 5 Utah, 612; 19 Pac. 191; 1 L. R. A. 131, and note; Allen v. Burlington &c. R. Co. 57 Iowa, 623; 11 N. W. 614; Chicago &c. R. Co. v. Russell, 91 Ill. 298; 33 Am. R. 54; Stoltenburg v. Pittsburgh &c. R. Co. 165 Pa. St. 377; 30 Atl. 980; Rouse v. Ledbetter, 56 Kan. 348; 43 Pac. 249; Southern Kans. R. Co. v. Michaels, 57 Kans. 474; 46 Pac. 938; Texas &c. R. Co. v. Hohn, 1 Texas Civ. App. 36; 21 S. W. 942; Kansas City &c. R. Co. v. Burton, 97 Ala. 240; 12 So. 88; 53 Am. & Eng. R. Cas. 115; Ft. Worth &c. R. Co. v. Graves (Tex. Civ. App.), 21 S. W. 606. See Scagel v. Chicago &c. R. Co. 83 Iowa, 380; 49 N. W. 990; Stackman v. Chicago &c. R. Co. 80 Wis. 428; 50 N. W. 404; East Tennessee &c. R. Co. v. Thompson, 94 Ala. 636; 10 So. 280; Bryce v. Chicago &c. R. Co. 103 Ia. 665; 72 N. W. 780, 782 (citing text);

Other courts, however, hold that the risk from structures near the track is one of the risks of the service which the employe assumes.[24] It seems to us that where the employe has knowledge or is chargeable with knowledge of the existence and situation of such structures he assumes the risk of dangers from them, for we can see no reason why the general rule that an employe assumes the risk of the dangers of the service does not apply,[25] but if the employe does not know of the danger or is not chargeable with knowledge of it and it is caused by the employer's negligence the employer is

Choctaw &c. R. Co. v. McDade, 191 U. S. 64; 24 Sup. Ct. 24 (holding it negligence as a matter of law to maintain an iron spout attached to a water tank so as to constitute a constant menace to its employes when it might just as well have been so placed as to be safe); Texas &c. R. Co. v. Swearingen, 196 U. S. 51; 25 Sup. Ct. 164. See, also, Boston &c. R. Co. v. Gokey, 149 Fed. 42.

[24] Austin v. Boston &c. R. Co. 164 Mass. 282; 41 N. E. 288; Sisco v. Lehigh &c. R. Co. 145 N. Y. 296; 39 N. E. 958; Lovejoy v. Railroad Co. 125 Mass. 79; 28 Am. R. 206; Thain v. Old Colony R. Co. 161 Mass. 353; 37 N. E. 309; Goodes v. Boston &c. R. Co. 162 Mass. 287; 38 N. E. 500; Scidmore v. Milwaukee &c. R. Co. 89 Wis. 188; 61 N. W. 765; Fisk v. Fitchburg &c. R. Co. 158 Mass. 238; 33 N. E. 510; Davis v. Columbia &c. R. Co. 21 S. Car. 93; Seymour v. Maddox, 16 Q. B. 326; Ryan v. Canada &c. R. Co. 10 Ont. 745. See Jennings v. Tacoma &c. R. Co. 7 Wash. 275; 34 Pac. 937; McKee v. Chicago &c. R. Co. 83 Iowa, 616; 50 N. W. 209; 13 L. R. A. 817; 48 Am. & Eng. R. Cas. 154.

[25] Clark v. St. Paul &c. R. Co. 28 Minn. 128; 9 N. W. 581; Rains v. St. Louis &c. R. Co. 71 Mo. 164; 36 Am. R. 459; Walsh v. St. Paul &c. R. Co. 27 Minn. 367; 8 N. W. 145; Evansville &c. R. Co. v. Henderson, 142 Ind. 596; 42 N. E. 216; Content v. New York &c. R. Co. 165 Mass. 267; 43 N. E. 94; Pennsylvania Co. v. Finney, 145 Ind. 551; 42 N. E. 816; Hughes v. Winona &c. R. Co. 27 Minn. 137; 6 N. W. 553; Jolly v. Detroit &c. R. Co. 93 Mich. 370; 53 N. W. 526; Wilson v. Lake Shore &c. R. Co. (Mich.) 108 N. W. 1021; Larson v. St. Paul &c. R. Co. 43 Minn. 423; 45 N. W. 722; Olson v. St. Paul &c. R. Co. 38 Minn. 117; 35 N. W. 866; Gibson v. Erie R. Co. 63 N. Y. 449; 20 Am. R. 552; DeForest v. Jewett, 88 N. Y. 264; Tuttle v. Detroit &c. R. Co. 122 U. S. 189; 7 Sup. Ct. 1166; Randall v. Baltimore &c. R. Co. 109 U. S. 478; Missouri &c. R. Co. v. Somers, 71 Tex. 700; 9 S. W. 741. See, generally, Foley v. Jersey City Electric Light Co. 54 N. J. L. 411; 24 Atl. 487; Platt v. Chicago &c. R. Co. 84 Iowa, 694; 51 N. W. 254. Some of the cases exonerate the employer on the ground of contributory negligence, but we think the true ground is that a known danger is one of the risks of the service.

liable.[26] If the structure or obstruction has not been near the track a sufficient length of time for an employe to acquire, by the exercise of ordinary care, knowledge of the danger from it, and he has no warning of such danger, then there is, as we believe, an actionable breach of the employer's duty, provided the employer knows or is chargeable with knowledge of the danger, and has been guilty of negligence in not removing it or has been guilty of negligence in failing to warn the employe of the new or increased danger.[27] But railroad companies have often been held liable where land-slides and the like that ought to have been foreseen have injured employes and no proper inspection or precaution was taken or warning given.[28] Where the obstruction on or near the track is not placed there by the employer, then there is no breach of the employer's duty unless it is affirmatively shown that the employer was guilty of negligence in not removing the obstruction or was guilty of negligence in not warning the employe.[29] A temporary obstruction caused by cars breaking loose from a train

[26] Scanlon v. Boston &c. R. Co. 147 Mass. 484; 18 N. E. 209; 9 Am. St. 732, distinguishing Ladd v. New Bedford &c. R. Co. 119 Mass. 412; 20 Am. R. 331; Yeaton v. Boston &c. R. Co. 135 Mass. 418; Leary v. Boston &c. R. Co. 139 Mass. 580; 2 N. E. 115; 52 Am. R. 733, and note; Nugent v. Boston &c. R. Co. 80 Me. 62; 12 Atl. 797; 6 Am. St. 151; Leach v. Oregon Short Line R. Co. 29 Utah, 285; 81 Pac. 90. See, also, Boston &c. R. Co. v. Gokey, 149 Fed. 42.

[27] St. Louis &c. R. Co. v. Biggs, 53 Ill. App. 550; Dixon v. Western Union Tel. Co. 71 Fed. 143; Martin v. Louisville &c. R. Co. 95 Ky. 612; 26 S. W. 801; Kansas City &c. R. Co. v. Burton, 97 Ala. 240; 12 So. 88; 53 Am. & Eng. R. Cas. 115; Welch v. New York &c. R. Co. 17 N. Y. S. 342. See, also, Louisville &c. R. Co. v. Bouldin, 121 Ala. 197; 25 So. 903; Little Rock &c. R. Co. v. Voss (Ark.), 18 S. W. 172; Galveston &c. R. Co. v. Pitts (Tex. Civ. App.), 42 S. W. 255; Illinois Term. R. Co. v. Thompson, 210 Ill. 226; 71 N. E. 328; Chicago &c. R. Co. v. Stevens, 189 Ill. 226; 59 N. E. 577; Northern Ala. R. Co. v. Mansell, 138 Ala. 548; 36 So. 459. But in all cases where temporary obstructions are near the track the rule of non-liability for the negligence of fellow-servants exerts an important influence.

[28] Fisher v. Chesapeake &c. R. Co. 104 Va. 635; 52 S. E. 373; Gleeson v. Virginia Midland R. Co. 140 U. S. 435; 11 Sup. Ct. 859; Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 452; 16 Sup. Ct. 618; Bean v. Western N. Car. R. Co. 107 N. Car. 731; 12 S. E. 600.

[29] Lake Shore &c. R. Co. v. Brazzill, 2 Ohio Dec. 691. See, also, Fredericks v. Northern Cent. R. Co. 157 Pa. St. 103; 27 Atl. 689; 22 L. R. A. 306; Nashville &c. R. Co. v. Hayes (Tenn.), 99 S. W. 362.

is not within the general rule that the employer must provide a reasonably safe working place.[30] A distinction is made between cases where the obstruction is a temporary one, such as brush by the side of the track,[31] and cases where the structure is of a permanent nature.[32] We think that there is just ground for such a distinction, but that if the employe knows of the obstruction and does not exercise ordinary care to avoid injury from it he cannot recover. If the track runs through a forest where the trees are thick and can be readily seen and the dangers from them apprehended there is reason for holding that the employe assumes the risk,[33] and the same rule must apply where trees or brushes are growing along the right of way and employes have knowledge, or are chargeable with knowledge of their situation. Some of the courts seem to require proof of actual knowledge in order to exculpate the employer,[34] but we think this view erroneous, for if the facts are such as make it negligence on the part of the employe

[30] Jenkins v. Richmond &c. R. Co. 39 S. Car. 507; 18 S. E. 182; 39 Am. St. 750.

[31] Oregon &c. R. Co. v. Tracy, 66 Fed. 931, distinguishing Kohn v. McNulta, 147 U. S. 238; 13 Sup. Ct. 298; Southern &c. Co. v. Seley, 152 U. S. 145; 14 Sup. Ct. 530; Tuttle v. Detroit &c. R. Co. 122 U. S. 189; 7 Sup. Ct. 1166.

[32] Babcock v. Old Colony R. Co. 150 Mass. 467; 23 N. E. 325; Eames v. Texas &c. R. Co. 63 Tex. 660; Hulehan v. Green Bay &c. R. Co. 68 Wis. 520; 32 N. W. 529; McClarney v. Chicago &c. R. Co. 80 Wis. 277; 49 N. W. 963; Union &c. R. Co. v. O'Brien, 49 Fed. 538. In Gaffney v. New York &c. R. Co. 15 R. I. 456; 7 Atl. 284; 31 Am. & Eng. R. Cas. 265, it is held that the employer is not liable where the placing of obstructions near the track is the act of a fellow-servant. See, also, Brown v. Minneapolis &c. R. Co. 31 Minn. 553; 18 N. W. 834; 15 Am. & Eng. R. Cas. 333; Hodgkins v. Eastern &c. Co. 119 Mass. 419; Brodeur v. Valley Falls R. Co. 16 R. I. 448; 17 Atl. 54.

[33] Manning v. Chicago &c. R. Co. 105 Mich. 260; 63 N. W. 312. But see Pittsburgh &c. R. Co. v. Parish, 28 Ind. App. 189; 62 N. E. 514; 91 Am. St. 120.

[34] Dorsey v. Phillips &c. Construction Co. 42 Wis. 583; Johnson v. St. Paul &c. R. Co. 43 Minn. 53; 44 N. W. 884; Illinois Cent. R. Co. v. Welch, 52 Ill. 183; 4 Am. R. 593; Chicago &c. R. Co. v. Russell, 91 Ill. 298; 33 Am. R. 54. But see as to Illinois doctrine, Lake Shore &c. R. Co. v. O'Conner, 115 Ill. 254; 3 N. E. 501; Chicago &c. R. Co. v. Avery, 8 Ill. App. 133. See, generally, Sweet v. Michigan &c. R. Co. 87 Mich. 559; 49 N. W. 882. This last case, however, is explained and limited or overruled in Phelps v. Chicago &c. Ry. Co. 122 Mich. 171; 81 N. W. 101, 102, 103; 89 N. W. 66.

not to know there can be no recovery.[35] In many cases it has been held that the company was not liable either because it was not negligent, or because the plaintiff had assumed the risk or was guilty of contributory negligence, where the structure was not more than eighteen inches or two feet from passing cars,[36] and in others the company has been held liable where the structure was even further from the track.[37]

§ 1270. Failure to fence.—There is a conflict upon the question

[35] Pennsylvania Co. v. Finney, 145 Ind. 551; 42 N. E. 816; Muldowney v. Illinois &c. R. Co. 39 Iowa, 615; McKee v. Chicago &c. R. Co. 83 Iowa, 616; 50 N. W. 209; 13 L. R. A. 817; O'Neal v. Chicago &c. R. Co. 132 Ind. 110; 31 N. E. 669; Wormell v. Maine &c. R. Co. 79 Me. 397; 10 Atl. 49; 1 Am. St. 321; Bell v. New York &c. R. Co. 168 Mass. 443; 47 N. E. 118; Austin v. Boston &c. R. Co. 164 Mass. 282; 41 N. E. 288; Nashville &c. R. Co. v. Hayes (Tenn.), 99 S. W. 362; Batterson v. Chicago &c. R. Co. 53 Mich. 125; 18 N. W. 584; Illick v. Flint &c. R. Co. 67 Mich. 632; 35 N. W. 708; Bryce v. Chicago &c. R. Co. 103 Ia. 665; 72 N. W. 780, 783 (for the jury, however,); Phelps v. Chicago &c. Ry. Co. 122 Mich. 171; 81 N. W. 101, 102; 84 N. W. 66 (quoting text).

[36] Among the strongest or most extreme cases are: Kenney v. Meddaugh, 118 Fed. 209; Sisco v. Lehigh &c. R. Co. 145 N. Y. 296; 39 N. E. 958; McKee v. Chicago &c. R. Co. 83 Ia. 616; 50 N. W. 209; 13 L. R. A. 817; Bellows v. Pennsylvania R. Co. 157 Pa. 51; 27 Atl. 685; Ryan v. New York &c. R. Co. 169 Mass. 267; 47 N. E. 877; Missouri Pac. R. Co. v. Somers (Mo.), 9 S. W. 741; Allen v. Burlington &c. R. Co. 64 Ia. 94; 19 N. W. 870; Kelly v. Baltimore &c. R. Co. (Pa. St.) 11 Atl. 659; New York &c. R. Co. v. Ostman, 146 Ind. 452; 45 N. E. 651; Cleveland &c. R. Co. v. Haas, 35 Ind. App. 626; 74 N. E. 1003. See, also, Davis v. Columbia &c. R. Co. 21 S. Car. 105; Wilson v. Louisville &c. R. Co. 85 Ala. 269; Chicago Term. R. Co. v. Schiavone, 216 Ill. 275; 74 N. E. 1048.

[37] Among the strongest or most extreme cases permitting recovery are: Central Trust Co. v. East Tennessee R. Co. 73 Fed. 661; Whipple v. New York &c. R. Co. 19 R. I. 587; 35 Atl. 305; 61 Am. St. 796; Chicago &c. Ry. Co. v. Stevens, 189 Ill. 226; 59 N. E. 577; Baltimore &c. R. Co. v. Roberts, 161 Ind. 1; 67 N. E. 530; Bryce v. Chicago &c. R. Co. 103 Ia. 665; 72 N. W. 780; Texas &c. R. Co. v. Swearingen, 196 U. S. 51; 25 Sup. Ct. 164. The authorities in this and the preceding note are selected largely from the same jurisdiction in order to show how close to the line many cases fall and when such courts do or do not allow a recovery. Most of them are reviewed, with a statement of the facts and exact point decided, in Cleveland &c. R. Co. v. Haas, 35 Ind. App. 626; 74 N. E. 1003. See, also, Denver &c. R. Co. v. Burchard (Colo.), 86 Pac. 749.

whether the failure of a railroad company to fence is such a breach of an employer's duty as gives an injured employe a right of action. The weight of authority, although, as yet, there is but scant authority upon the question, seems to support the doctrine that the company is liable.[38] But there are well-reasoned cases asserting a different doctrine.[39] It is somewhat difficult to successfully maintain the proposition that the duty to fence is owing to an employe, since that duty is created for a different purpose than that of protecting employes, but the duty is held to exist in favor of passengers,[40] and by analogy the rule, perhaps, may be extended to employes. The question must, as we believe, depend largely upon the provisions of the statute,[41] and some of the cases here-

[38] Dickson v. Omaha &c. R. Co. 124 Mo. 140; 27 S. W. 476; 46 Am. St. 429; 25 L. R. A. 320; Quackenbush v. Wisconsin &c. R. Co. 62 Wis. 411; 22 N. W. 519; Donnegan v. Erhardt, 119 N. Y. 468; 23 N. E. 1051; 7 L. R. A. 527; Atchison v. Reesman, 60 Fed. 370; 23 L. R. A. 768; Magee v. North Pacific R. Co. 78 Cal. 430; 12 Am. St. 69; Blair v. Milwaukee &c. R. Co. 20 Wis. 254; Hayes v. Mich. Cent. R. Co. 111 U. S. 228; Terre Haute &c. R. Co. v. Williams, 172 Ill. 379; 50 N. E. 116; 64 Am. St. 44; ante, § 1192.

[39] Wabash R. Co. v. Brown, 5 Ill. App. 590; Fleming v. St. Paul &c. R. Co. 27 Minn. 111; 6 N. W. 448; Sweeney v. Central Pac. R. Co. 57 Cal. 15; McMillan v. Saratoga &c. R. Co. 20 Barb. (N. Y.) 449; Patton v. Central &c. R. Co. 73 Iowa, 306; 35 N. W. 149; Langlois v. Buffalo &c. R. Co. 19 Barb. (N. Y.) 364; Dewey v. Chicago &c. R. Co. 31 Iowa, 373; Patton v. Central &c. R. Co. 73 Iowa, 306; 35 N. W. 149; Cowan v. Union Pac. R. Co. 35 Fed. 43.

[40] Buxton v. North Eastern &c. R. Co. L. R. 3 Q. B. 549; Fordyce v. Jackson, 56 Ark. 594; 20 S. W. 528, 597; Gulf &c. R. Co. v. Wilson, 79 Tex. 371; 15 S. W. 280; 11 L. R. A. 486; 23 Am. St. 345; Louisville &c R. Co. v. Hendricks, 128 Ind. 462. In some of the cases the company has been held liable for a failure to fence to persons who wandered on the track, but we think it doubtful whether those cases are well decided. Keyser v. Chicago &c. R. Co. 56 Mich. 559; 56 Am. R. 405; Shuettgen v. Wisconsin &c. R. Co. 80 Wis. 498; Isabel v. Hannibal &c. R. Co. 60 Mo. 475. See Singleton v. Eastern Counties R. Co. 7 C. B. N. S. 287; Chicago &c. R. Co. v. Grablin, 38 Neb. 90; 56 N. W. 797. It seems to us that there is no such specific duty owing to persons who without invitation, express or implied, go upon a railroad track, as enables them to recover upon the sole ground of a failure to fence the track.

[41] Manson v. Eddy, 3 Tex. Civ. App. 148; Cowan v. Union &c. R. Co. 35 Fed. 43. See Ward v. Bonner, 80 Tex. 168.

tofore cited are grounded on a statute. Where there is no statute giving a right of action, either expressly or impliedly, to injured employes, the rule, as we think, is that there is no liability, but on this question there is conflict of authority. We suppose that if the employe has knowledge of the fact that the road is not fenced, he must, in any event, under the general rule, be held to assume the risk. Unless so declared by statute there cannot, in our opinion, be a liability because of the bare fact that there is no fence, for the employer is not, as a general rule, liable unless the breach of duty is a negligent one.[42] If this general rule governs, then it is necessary to supplement evidence of the failure to fence by evidence that there was negligence on the part of the company in not constructing and maintaining a fence.

§ 1271. Bridges.—Bridges form part of the working place of train men and some other classes of railroad employes, and, generally, the rules which prescribe the duty of the employer as to the safety of the working place apply to bridges,[43] but there

[42] The general rule is that the employe must "prove affirmatively the fact of negligence, and that it is such a kind of negligence as violates the special and limited duty of an employe." Erie &c. R. Co. v. Smith, 125 Pa. St. 259; 11 Am. St. 895; Mensch v. Pennsylvania &c. R. Co. 150 Pa. St. 598; 17 L. R. A. 450; Pennsylvania Co. v. Mason, 109 Pa. St. 296; 58 Am. R. 722; Philadelphia &c. R. Co. v. Hughes, 119 Pa. St. 301; Pittston &c. Co. v. McNulty, 120 Pa. St. 414.

[43] Knahtla v. Oregon &c. R. Co. 21 Ore. 136; 27 Pac. 91; Galveston &c. R. Co. v. Daniels, 1 Tex. Civ. App. 695; 28 S. W. 711; Texas &c. R. Co. v. Smith, 67 Fed. 524; 31 L. R. A. 321, and note; Bogart v. Delaware &c. R. Co. 145 N. Y. 283; Terre Haute &c. R. Co. v. Fowler, 154 Ind. 682; 56 N. E. 228; 48 L. R. A. 531; Bolden v. Southern R. Co. 123 N. Car. 614; 31 S. E. 851; Bateman v. Peninsular R. Co. 20 Wash. 133; 54 Pac. 996; McCabe &c. Const. Co. v. Wilson (Okl.), 87 Pac. 324 (quoting text). In the case last cited a quotation is also made from Union Pac. Ry. Co. v. O'Brien, 161 U. S. 451; 16 Sup. Ct. 618, as follows: "The general rule undoubtedly is that a railroad company is bound to provide suitable and safe materials and structures in the construction of its road and appurtenances, and if, from a defective construction thereof, an injury happens to one of its servants, the company is liable for the injury sustained. The servant undertakes the risks of the employment as far as they spring from defects incident to the service, but he does not take the risks of the negligence of the master itself. The master is not to be held as guarantying

is much diversity of opinion upon one phase of the question. It is held by some of the courts that dangers from low bridges are not assumed as risks of the service.[44] Other courts assert a contrary doctrine.[45] The doctrine that dangers from low bridges are

or warranting absolute safety under all circumstances, but it is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track, and other structures, including sufficient culverts for the escape of water collected and accumulated by its embankments and excavations." And the following cases are cited: Hough v. Texas &c. R. Co. 100 U. S. 213; 25 L. Ed. 612; Texas &c. R. Co. v. Cox, 145 U. S. 593; 12 Sup. Ct. 905; 36 L. Ed. 829; Gardner v. Michigan Cent. R. 150 U. S. 349, 359; 14 Sup. Ct. 140; 37 L. Ed. 1107; Union P. Ry. v. Daniels, 152 U. S. 684; 14 Sup. Ct. 756; 38 L. Ed. 597; Chicago &c. R. v. Swett, 45 Ill. 197; 92 Am. Dec. 206; Toledo &c. R. v. Conroy, 68 Ill. 560; Stoher v. Iron Mountain R. 91 Mo. 509; 4 S. W. 389; Paulmier &c. R. Co. 34 N. J. L. 151; Snow v. Housatonic R. Co. 8 Allen (Mass.), 441; 85 Am. Dec. 720; Huddleston v. Lowell Machine Shops, 106 Mass. 282; Smith v. Harlem R. Co. 19 N. Y. 127; 75 Am. Dec. 305; Patterson v. Connelsville R. Co. 76 Pa. 389; 18 Am. Rep. 412. Where the employe has knowledge of the dangerous condition of a bridge and without complaint continues in the service, the general rule is, that he assumes the risk. Louisville &c. R. Co. v. Sandford, 117 Ind. 265, 268.

[44] Pennsylvania &c. R. Co. v. Sears, 136 Ind. 460; Chicago &c. R. Co. v. Carpenter, 56 Fed. 451; Louisville &c. R. Co. v. Wright, 115 Ind. 378; 16 N. E. 145; 7 Am. St. 432; St. Louis &c. R. Co. v. Irwin, 37 Kan. 701; 16 Pac. R. 146; 1 Am. St. 266; Baltimore &c. R. Co. v. Rowan, 104 Ind. 88; 3 N. E. 627; Chicago &c. R. Co. v. Johnson, 116 Ill. 206; 4 N. E. 381; Flanders v. Chicago &c. R. Co. 51 Minn. 193; 53 N. W. 544; Cincinnati &c. R. Co. v. Sampson, 97 Ky. 65; 30 S. W. 12. See Darling v. New York &c. R. Co. 17 R. I. 708; 24 Atl. 462; 16 L. R. A. 643, and note; Miller v. Boston &c. R. Co. 73 N. H. 330; 61 Atl. 360.

[45] Gibson v. Erie &c. R. Co. 63 N. Y. 449; 20 Am. R. 552; Williams v. Delaware &c. R. Co. 116 N. Y. 628; 22 N. E. 1117; Ryan v. Long Island &c. R. Co. 51 Hun (N. Y.), 607; Carbine v. Bennington &c. R. Co. 61 Vt. 348; 17 Atl. 491; Louisville &c. R. Co. v. Hall, 87 Ala. 708; 6 So. 277; 4 L. R. A. 710; 13 Am. St. 84; Jones v. Louisville &c. R Co. 82 Ky. 610; Wells v. Burlington &c. R. Co. 56 Iowa, 520; Robel v. Chicago &c. R. Co. 35 Minn. 84; Stirk v. Central &c. R. Co. 79 Ga. 495; 5 S. E. 105; Baylor v. Delaware &c. R. Co. 40 N. J. Law, 23; 29 Am. R. 208; Atlee v. South Carolina R. Co. 21 S. Car. 550; Baltimore &c. R. Co. v. Stricker, 51 Md. 47; 34 Am. R. 291; Williamson v. Newport &c. R. Co. 34 W. Va. 657; 12 L. R. A. 297; 26 Am. St. 927; Pittsburgh &c. R. Co. v. Sentmeyer, 92 Pa. St. 276; 37 Am. R. 684. See, Hines v. New York &c.

not risks assumed by employes is an anomalous one, but it is not unfounded in reason. We suppose that the fact that an employe has knowledge of danger from a low bridge is always an important factor in cases where the question of contributory negligence is involved, for while the fact of such knowledge may not of itself establish contributory negligence, it may, in connection with other circumstances, establish such negligence, since the rule is, that care must be proportionate to the known danger. With knowledge of the character of the bridge and the danger from it, employes must exercise such care as time, opportunity and the like, render proper or they will be guilty of contributory negligence. Granting that the employe does not assume the risk of danger from low bridges, still, there may be such contributory negligence as will defeat a recovery, for if the employe knows the danger, he is under a duty to exercise care, and this duty requires him to exercise prudence and caution to avoid exposure to the known danger, so that if he voluntarily and without justification goes into a place that exposes him to injury he cannot recover.[46] It seems quite clear that there is a breach of the employer's duty where the company knows that its bridges are so low as to endanger the safety of persons it sends out upon its trains to discharge the duties required of them without warning or notice of such danger,[47] but it is somewhat difficult

R. Co. 78 Hun (N. Y.), 239; 28 N. Y. S. 829. Injury caused by insufficient ventilation of tunnel, no liability. Baltimore &c. R. Co. v. State, 75 Md. 526; 23 Atl. 310; Owen v. New York &c. R. Co. 1 Lans. (N. Y.) 108; Northern &c. R. Co. v. Husson, 101 Pa. St. 1; 47 Am. R. 690; 12 Am. & Eng. R. Cas. 241.

[46] Schlaff v. Louisville &c. R. Co. 100 Ala. 377; 14 So. 105. A brakeman who stands upon the top of a train which is approaching a low bridge is guilty of contributory negligence unless it affirmatively appears that some emergency or some extraordinary circumstances rendered his act in taking such a position excusable. Rock v. Retroff Co. 15 N. Y. Supp. 872. See Dukes v. Eastern &c. R. Co. 41 Hun (N. Y.) 705; 4 N. Y. S. 562; Devitt v. Pacific &c. R. Co. 50 Mo. 302; Rains v. St. Louis &c. R. Co. 71 Mo. 164; 36 Am. R. 459; Brossman v. Lehigh &c. R. Co. 113 Pa. St. 490; 57 Am. R. 479; Sheeler v. Chesapeake, 81 Va. 188; 59 Am. R. 654; Clark v. Richmond &c. R. Co. 78 Va. 709; 49 Am. R. 394; Wells v. Burlington &c. R. Co. 56 Iowa, 520; Hall v. Union Pac. R. Co. 5 McCrary (U. S.), 257; Warden v. Old Colony &c. R. Co. 137 Mass. 204; Riley v. Connecticut River R. Co. 135 Mass. 292; Baltimore &c. R. Co. v. Stricker, 51 Md. 47; 34 Am. St. 291.

[47] As to warning by "whipping straps" or "telltales," required by some statutes, see Wallace v. Cen-

to defend the cases which hold that there is a duty to construct bridges of such a height as to enable employes on trains to pass under them in safety while standing on top of the cars, and that injury from low bridges is not assumed, as one of the risks of the service. The general rule that the employe takes the risk of injury fully known to him[48] would seem to apply in a proper case to dangers from low bridges. In a recent case a doctrine similar to the "low bridge" doctrine was applied where a railroad conductor was struck, while in the proper performance of his duty on top of a car, by the overhanging limb of a tree, the court holding that it was the duty of the company to remove overhanging limbs when necessary to provide a safe working place, that danger therefrom was not a danger incident to the service, and that it was for the jury to say whether the employe had assumed the risk.[49]

§ 1271a. **Narrow bridges.**—A railroad company may be liable to any employe who is injured, without fault on his part, by a bridge that is too narrow to permit employes to perform their duties in the exercise of reasonable care with reasonable safety, where he has no warning and is not deemed to have assumed the risk,

tral Vt. R. Co. 138 N. Y. 302; 33 N. E. 1069; Fitzgerald v. New York Central &c. R. Co. 59 Hun (N. Y.), 225; Louisville &c. R. Co. v. Hall, 91 Ala. 113; 24 Am. St. 863 (not required unless by statute). As to injury from defective "telltale," see Warden v. Old Colony R. Co. 137 Mass. 204; Darling v. New York &c. R. Co. 17 R. I. 708; 16 L. R. A. 643, and note. See, also, McGarrity v. New York &c. R. Co. 25 R. I. 269; 55 Atl. 718; Hollingsworth v. Chicago &c. R. Co. 160 Ind. 259; 65 N. E. 750.

[48] Kelley v. Silver Spring &c. R. Co. 12 R. I. 112; Dynen v. Leach, 26 L. J. N. S. Exch. 221; Seymour v. Maddox, 16 Q. B. 326; Senior v. Ward, 1 El. & El. 385; Assop. v. Yates 2 H. & N. 768; Chicago &c. R. Co. v. Jackson, 55 Ill. 492; Ladd v. New Bedford &c. R. Co. 119 Mass. 412; 20 Am. R. 331; Evansville &c. R. Co. v. Henderson, 134 Ind. 636; 33 N. E. 1021; Vincennes &c. R. Co. v. White, 124 Ind. 376; 24 N. E. 747; Pennsylvania Co. v. Brush, 130 Ind. 347; 28 N. E. 615; Indianapolis &c. R. Co. v. Watson, 114 Ind. 20; 5 Am. St. 578.

[49] Pittsburgh &c. R. Co. v. Parish, 28 Ind. App. 189; 62 N. E. 514. 91 Am. St. 120. See, also, South Side El. R. Co. v. Nesvig, 214 Ill. 463; 73 N. E. 749; where the company was held liable for injury caused by operating its trains too near a pole although the pole was erected by another company on its own ground.

as well as for injuries caused by low bridges.[50] But if the bridge is a standard bridge of the usual width and the cars in question are of the usual width it would seem that there would, ordinarily, be no negligence in so maintaining a bridge that had long been found safe and suitable and that, as employes could not expect bridges to be wider than the standard and ordinary width they should be deemed to have assumed the risk. And there are authorities denying liability in such cases.[51]

§ 1272. Negligence of employer in failing to keep premises safe—Switch yards.—The general rule as to the duty of the employer to exercise ordinary care to make and keep working places reasonably safe for use applies to switch yards or yards where

[50] Bryce v. Chicago &c. R. Co. 103 Ia. 665; 72 N. W. 780. See, also, ante, § 1269, 1272; Leach v. Oregon Short Line R. Co. 29 Utah, 285; 81 Pac. 90.

[51] Cleveland &c. R. Co. v. Haas, 35 Ind. App. 626; 74 N. E. 1003; Sheeler v. Chesapeake &c. R. Co. 81 Va. 188; 59 Am. R. 654; Illick v. Flint &c. R. Co. 67 Mich. 632; 35 N. W. 708. See, also, Wolf v. East Tenn. &c. R. Co. 88 Ga. 210; 14 S. E. 199; Bellows v. Pennsylvania &c. R. Co. 157 Pa. St. 51; 27 Atl. 685; Fulford v. Lehigh Valley R. Co. 185 Pa. St. 329; 39 Atl. 1115, and ante, § 1268. In Illick v Flint &c. R. Co. 67 Mich. 632; 35 N. W. 708, 710, it is said: "A railroad company cannot be required to condemn and remove a bridge, which is without fault in its plan or defect in its structure, while it is in good repair, and safe for the passage of trains, simply because some engineer shall pronounce it not as good or convenient as some other kind. Railroad companies must be allowed to use their own discretion as to the kind of bridges they will use, and when and under what circumstances they will remove or replace them, while they are safe. Any other rule would be both unjust and oppressive. As between the employers and employed, it is unquestionably the duty of the railroad company to provide a track and equipments which will be reasonably safe; but this does not oblige the company to make use of the latest improvements, or to change the structures upon its road so as to conform to the most recent or advanced improvements and ideas upon such subjects; neither does good railroading require any such thing." See, also, Tuttle v. Detroit &c. R. Co. 122 U. S. 189; 7 Sup. Ct. 1166, 1168; Sisco v. Lehigh &c. R. Co. 145 N. Y. 296, 300; 39 N. E. 958. And a bridge or roadway may be reasonably safe although it does not conform to the general standard. Northern Ala. Ry. Co. v. Mansell, 138 Ala. 548; 36 So. 459, 463, citing Louisville &c. R. Co. v. Hall, 87 Ala. 708; 6 So. 277; 4 L. R. A. 710; 13 Am. St. 84; Louisville &c. R. Co. v. Jones, 130 Ala. 456; 30 So. 586.

trains are made up;[52] so does the rule holding employes to the exercise of care,[53] and so also does the rule concerning the assumption of the risks of the service.[54] Yardmen or other employes whose duties require them to perform services in the yards of the company are entitled to the protection of the rule requiring the master to use ordinary care to make the working place reasonably safe but they are held to assume risks from defects known to them if they continue in the service, except in cases where the master promises to repair.[55] As shown in the next section, it is generally held that the operation of a railroad without blocking the switches is not negligence. There is some conflict of authority upon the question as as to the duty of the company, to properly cover ditches and drains in its yards. Some of the cases hold that it is the duty of the company to use reasonable care in covering culverts and ditches,[56]

[52] Southerland v. Northern Pac. R. Co. 43 Fed. 646; Grant v. Union Pacific R. Co. 45 Fed. 673; Randall v. Baltimore &c. R. Co. 109 U. S. 478; 3 Sup. Ct. 322; Chicago &c. R. Co. v. Kneirim, 152 Ill. 458; 43 Am. St. 259; Cincinnati &c. R. Co. v. Gray, 101 Fed. 623; 50 L. R. A. 47, 53 (citing text). See, also, Atchison &c. R. Co. v. Swarts, 58 Kans. 235; 48 Pac. 953; Texas &c. R. Co. v. Guy (Tex. Civ. App.), 23 S. W. 633; Texas &c. R. Co. v. McCoy, 90 Tex. 264; 38 S. W. 36; Lake Erie &c. R. Co. v. Mugg, 132 Ind. 168; 31 N. E. 564; Northern Pac. R. Co. v. Teeter, 63 Fed. 527; Brooke v. Chicago &c. R. Co. 81 Ia. 504; 47 N. W. 74.

[53] Peoria &c. R. Co. v. Ross, 55 Ill. App. 638; Crisswell v. Montana &c. R. Co. 17 Mont. 189; 42 Pac. 767; Crawford v. Houston &c. R. Co. 89 Tex. 89; 33 S. W. 534; Loring v. Kansas City &c. R. Co. 128 Mo. 349; 31 S. W. 6.

[54] Naylor v. New York &c. R. Co. 33 Fed. 801; Caron v. Boston &c. R. Co. 164 Mass. 523; 42 N. E. 112; Aerkfetz v. Humphreys, 145 U. S. 418; 12 Sup. Ct. 835. See Parker v. New York &c. R. Co. 18 R. I. 773; 30 Atl. 849. But while the risks incident to the employment at such a place are assumed, by a car checker, yet it has been held that where it was customary to give warning of the approach of cars kicked down on the track where he and other car checkers were at work, he had a right to rely on such custom and govern himself accordingly. Meadowcroft v. New York &c. R. Co. (Mass.) 79 N. E. 266.

[55] Scidmore v. Milwaukee &c. R. Co. 89 Wis. 188; 61 N. W. 765; McDugan v. New York &c. R. Co. 31 N. Y. S. 135; Albert v. New York &c. R. Co. 80 Hun (N. Y.), 152; 29 N. Y. S. 1126; Gulf &c. R. Co. v. Hohl (Tex. Civ. App.), 29 S. W. 1131; Sheets v. Chicago &c. R. Co. 139 Ind. 682; 39 N. E. 154. See Linton &c. Co. v. Persons, 11 Ind. App. 264; 39 N. E. 214.

[56] Franklin v. Winona &c. R. Co. 37 Minn. 409; 34 N. W. 898; 5 Am.

while others assert a somewhat different doctrine.[57] It seems to us that it is the duty of the employer to use reasonable care to cover drains and ditches in yards where trains are made up and employes are required to couple and uncouple cars and to transfer cars from place to place.[58] We do not believe, however, that the duty extends to all places within the yard limits but only to places where the duties of their service require the yardmen and other employes to work. The rule which we favor does not, as we think, apply to places on the line of the road where switching is not customarily or habitually done, and danger from open drains and ditches at such places are ordinary incidental risks of the service assumed by the employes.[59] Where the employe knows, or is chargeable with knowledge that drains and ditches are uncovered then, under the general rule that employes assume the risks of the service he is deemed to assume the risk of danger from such drains and culverts.[60] A like difference of opinion exists as to ballasting tracks.[61] The duty of a railroad company to employes engaged in

St. 856. See, also, Smith v. Boston &c. R. Co. 73 N. H. 325; 61 Atl. 359.

[57] Little Rock &c. R. Co. v. Townsend, 41 Ark. 382.

[58] Gardner v. Michigan &c. R. Co. 150 U. S. 349; 14 Sup. Ct. 140, denying the doctrine of Gardner v. Michigan &c. R. Co. 58 Mich. 584; 26 N. W. 301. See, also, Kerrigan v. Penna. R. Co. 194 Pa. St. 98; 44 Atl. 1069; Hollenbeck v. Missouri Pac. R. Co. (Mo.) 34 S. W. 494; 38 S. W. 723; Burdict v. Missouri Pac. R. Co. 123 Mo. 221; 27 S. W. 453; 26 L. R. A. 384, and note; 45 Am. St. 528; Houston &c. R. Co. v. Pinto, 60 Tex. 516; Harr v. New York Cent. &c. R. Co. 114 N. Y. 623; 21 N. E. 1049. And see as to cattle guards and the like, Fredenburg v. Northern Cent. R. Co. 114 N. Y. 582; 21 N. E. 1049; 11 Am. St 697; Sweat v. Boston &c. R. Co. 156 Mass. 284; 31 N. E. 296; Kennedy v. Lake Superior &c. Co. 93 Wis. 32; 66 N. W. 1137; Illinois Cent. R. Co. v. Sanders, 166 Ill. 270; 46 N. E. 799; Cregg v. Chicago &c. R. Co. 91 Mich. 624; 52 N. W. 62.

[59] Deforest v. Jewett, 88 N. Y. 264; 8 Am. & Eng. R. Cas. 495; Gibson v. Erie &c. R. Co. 63 N. Y. 449; 20 Am. R. 552; Couch v. Charlotte &c. R. Co. 22 S. Car. 557; Koontz v. Chicago &c. R. Co. 65 Iowa, 224; 21 N. W. 577; 54 Am. R. 5; 18 Am. & Eng. R. Cas. 85; Southern Pac. R. Co. v. Gloyd, 138 Fed. 388. See, also, Kerrigan v. Pennsylvania R. Co. 194 Pa. St. 98; 44 Atl. 1069.

[60] Spencer v. New York &c. R. Co. 67 Hun (N. Y.), 196; 22 N. Y. S. 100.

[61] Holding that no such duty exists or that the risk is assumed are Finnell v. Delaware &c. R. Co. 129 N. Y. 669; 29 N. E. 825; Philadelphia &c. R. Co. v. Schertle, 97 Pa. St. 420; 39 Am. R. 813; Bat-

a switch yard was clearly and correctly defined in a recent case by the supreme court of the United States,[62] where it was held that the company discharges its duty if it provides competent co-servants and prescribes such regulations "as experience shows may be best calculated to secure the safety" of employes.

§ 1272a. Switch-yards—Blocking frogs.—It is generally held that the operation of a railroad without blocking its frogs, switches or guard rails is not negligence.[63] It is certainly not negligence as

terson v. Chicago &c. R. Co. 53 Mich. 125; 18 N. W. 584; Pennsylvania Co. v. Hankey, 93 Ill. 580. But in some jurisdictions the contrary has been held as to tracks in yards. Texas &c. R. Co. v. Crowder, 70 Tex. 222; 7 S. W. 709; Bonner v. Hickey (Tex. Civ. App.), 23 S. W. 85; Gulf &c. R. Co. v. Redeker, 67 Tex. 181; 2 S. W. 513. See, also, St. Louis &c. R. Co. v. Robbins, 57 Ark. 377; 21 S. W. 886. A track may be temporarily in bad condition while undergoing repair without making the company liable to employes. Cleveland &c. R. Co. v. Sloan, 11 Ind. App. 401; 39 N. E. 174; Smith v. Boston &c. R. Co. 73 N. H. 325; 61 Atl. 359.

[62] Central &c. R. Co. v. Keegan, 160 U. S. 259; 16 Sup. Ct. 269, citing and approving Potter v. New York &c. R. Co. 136 N. Y. 77; 32 N. E. 603. See, also, Tuttle v. R. Co. 122 U. S. 189; 7 Sup. Ct. 1166; Kohn v. McNulta, 147 U. S. 238; 13 Sup. Ct. 298.

[63] Sheets v. Chicago &c. R. Co. 139 Ind. 682; 39 N. E. 154; Missouri &c. R. Co. v. Lewis, 24 Neb. 848; 40 N. W. 401; 2 L. R. A. 67, and note; Hewitt v. Flint &c. R. Co. 67 Mich. 61; 34 N. W. 659; Southern Pacific R. Co. v. Seley, 152 U. S. 145; 14 Sup. Ct. 530, reversing Seley v. Southern Pacific R. Co. 6 Utah 319; 23 Pac. 751; Lake Shore &c. R. Co. v. McCormick, 74 Ind. 440; McGinnis v. Canada &c. Bridge Co. 49 Mich. 466; Little Rock &c. R. Co. v. Eubanks. 48 Ark. 460; 3 S. W. 808; 3 Am. St. 245, and note; Kilpatrick v. Choctaw &c. R. Co. 121 Fed. 11, affirmed in 195 U. S. 624; 25 Sup. Ct. 789; Wabash R. Co. v. Kithcart, 144 Fed. 108. In Chicago &c. R. Co. v. Lonergan, 118 Ill. 41; 7 N. E. 55, the court seems to hold that the company is not bound to use unblocked switches for the reason that the practice of blocking switches is nothing more than an experiment. The court, however, recognized as authority cases which declare that employers are not bound to discard appliances in use and procure more modern ones, and said: "An employer is not required to change his machinery in order to apply or adopt any new invention, Whart. Negl. 213." See, generally, 4 Thomp. Neg. (2d ed.) § 3986, et seq. Spencer v. New York &c. R. Co. 67 Hun, 196; 22 N. Y. S. 100; Gilbert v. Burlington &c. R. Co. 128 Fed. 533; Rush v. Missouri Pac. R. Co. 36 Kan. 129; 12 Pac. 582; Wilson v. Winona &c. R. Co. 37 Minn. 326; 33 N. W. 908; 5 Am. St. 851; Mayes

a matter of law, in the absence of any statute upon the subject, although there are cases holding that the question is for the jury.[64] But if the company undertakes to block its frogs and allows them to become defective it may be liable to an employe who is injured thereby although it would not have been liable if it had not assumed any such duty.[65] So, where, as in some jurisdictions, a statute requires frogs and switches to be blocked the company will usually be liable to an employe who is injured by its failure to perform such duty, without fault on his part.[66] And this statutory duty is one that cannot be delegated so as to relieve the company from liability.[67]

§ 1273. Machinery and appliances—Master's duty respecting.— It is the duty of the master to exercise ordinary care to furnish the employes reasonably safe machinery and appliances with which to work.[68] The duty is discharged if the employe exercises ordi-

v. Chicago &c. R. Co. 63 Iowa, 562; 14 N. W. 340. In many of these cases it is also held that the risk is one assumed by the employe. See, also, Wabash R. Co. v. Ray, 152 Ind. 392; 51 N. E. 920.

[64] Coates v. Burlington &c. R. Co. 62 Ia. 486; 17 N. W. 760; Huhn v. Missouri Pac. R. Co. 92 Mo. 440; 4 S. W. 937; Missouri Pac. R. Co. v. Lewis, 24 Neb. 848; 40 N. W. 401; 2 L. R. A. 67, and note; Hohem v. Chicago &c. R. Co. 80 Wis. 299; 50 N. W. 99. Contra, Kilpatrick v. Choctaw &c. R. Co. 121 Fed. 11, affirmed in 195 U. S. 624; 25 Sup. Ct. 789, and other cases cited in last preceding note. In Smith v. Fordyce, 190 Mo. 1; 88 S. W. 679, it was held that, while it was not negligence as matter of law, to fail to have a derailing switch, yet it was a question for the jury.

[65] Hunt v. Kane, 100 Fed. 256. See, also, Turner v. Boston &c. R. Co. 158 Mass. 261; 33 N. E. 520.

[66] Ashman v. Flint &c. R. Co. 90 Mich. 567; 51 N. W. 645; Grand v. Michigan Cent. R. Co. 83 Mich. 564; 47 N. W. 837; 11 L. R. A. 402; Pittsburgh &c. R. Co. v. Burroughs, 9 Ohio Dec. 324; Le May v. Canadian Pac. R. Co. 17 Ont. App. 293; 18 Ont. 314. See, also, Narramore v. Cleveland &c. R. Co. 96 Fed. 298; 48 L. R. A. 68, and note; Curtis v. Chicago &c. R. Co. 95 Wis. 460; 70 N. W. 665.

[67] Ashman v. Flint &c. R. Co. 90 Mich. 567; 51 N. W. 645; Le May v. Canadian Pac. R. Co. 17 Ont. App. 293.

[68] Union Pac. R. Co. v. O'Brien, 161 U. S. 451; 16 Sup. Ct. 618; Texas &c. R. Co. v. Cox, 145 U. S. 593; 12 Sup. Ct. 905; Gardner v. Michigan Cent. R. Co. 150 U. S. 349; 14 Sup. Ct. 140; Union Pac. R. Co. v. Daniels, 152 U. S. 684; 14 Sup. Ct. 756; Gulf &c. Co. v. Wells, 81 Tex. 685; 17 S. W. 511; Washington &c. R. Co. v. McDade, 135 U. S. 554; 10 Sup. Ct. 1044; Southern Pacific R. Co. v. Seley,

nary care, although the machinery or appliances may not, in fact, be safe or free from defects.[69] The degree of care required is ordinary care, but to reach that degree it must be care reasonably proportionate to the dangers against which the employer is required to provide.[70] But it is error to assert that the highest degree of care is required,[71] for the standard is ordinary care, although in order to determine what constitutes ordinary care in the particular instance, the dangers of the service must be considered. What would be ordinary care under some circumstances might not be ordinary care under other circumstances.[72]

152 U. S. 145; 14 Sup. Ct. 530; Baltimore &c. R. Co. v. Baugh, 149 U. S. 368; 13 Sup. Ct. 914; Chicago &c. R. Co. v. Swett, 45 Ill. 197; 92 Am. Dec. 206, and note. See, generally, Texas Central R. Co. v. Lyons (Tex. Civ. App.), 34 S. W. 362; Cleveland &c. R. Co. v. Selsor, 55 Ill. App. 685; Krampe v. St. Louis &c. Asso. 59 Mo. App. 277; Moore v. Southern R. Co. (N. Car.) 53 S. E. 745; note to Brazil Block Coal Co. v. Gibson, 160 Ind. 319; 66 N. E. 882; 98 Am. St. 281, 291, et seq.

[69] Atchison &c. R. Co. v. Napole, 55 Kan. 401; 40 Pac. 669; Texas &c. R. Co. v. Bingle, 9 Tex. Civ. App. 322; 29 S. W. 674; Galveston &c. R. Co. v. Gormley (Tex.), 27 S. W. 1051; Atchison &c. R. Co. v. Winston, 56 Kan. 456; 43 Pac. 777; Louisville &c. R. Co. v. Bates, 146 Ind. 564; 45 N. E. 108, and authorities cited. Titus v. Railroad Co. 136 Pa. St. 618; 20 Am. St. 944; 20 Atl. 517; McCabe v. Montana Cent. R. Co. 30 Mont. 323; 76 Pac. 701. The company does not owe a duty to furnish absolutely safe coal. Vissman v. Southern Ry. Co. 28 Ky. L. 429; 89 S. W. 502.

[70] Washington &c. Co. v. McDade, 135 U. S. 554; 10 Sup. Ct. 1044; Texas &c. Co. v. Thompson, 70 Fed. 944; Union Pac. R. Co. v. Daniels, 152 U. S. 684; 14 Sup. Ct. 756; Mather v. Rillston, 156 U. S. 391; 15 Sup. Ct. 464; Northern Pacific R. Co. v. Mares, 123 U. S. 710; 8 Sup. Ct. 321. See, also, Friel v. Citizens' R. Co. 115 Mo. 503; 22 S. W. 498; Jones v. New York &c. R. Co. 22 Hun (N. Y.), 284.

[71] Texas Central R. Co. v. Lyons (Tex. Civ. App.), 34 S. W. 362; Gulf &c. R. Co. v. Wells, 81 Tex. 685; 17 S. W. 511; International &c. R. Co. v. Williams, 82 Tex. 342; 18 S. W. 700; East Tenn. &c. R. Co. v. Aiken, 89 Tenn. 245; 45 S. W. 1082; Allen v. Union Pac. R. Co. 7 Utah, 239; 26 Pac. 297.

[72] Wabash R. Co. v. Ray, 152 Ind. 392, 399; 51 N. E. 920, 922 (citing text). In a recent case where the handhold on the manhole of an engine tender, while primarily used to raise the manhole cover, was also commonly used, without objection from the railroad, by brakemen and others as the most convenient and the safest way to assist them in getting on and off the tender, it was held that the railroad is bound to exercise ordinary care to see that such handhold is in a

§ 1274. Appliances generally used sufficient.—The general rule is that if the employer uses ordinary care to provide and to keep in reasonably safe condition, appliances of a kind that are in common use, he is not guilty of negligence.[73] If he conforms to the ordinary usages of business and procures such appliances and machinery as are in common use, and exercises reasonable care to keep them in a reasonably safe condition, he is not guilty of negligence, and if not guilty of negligence an injured employe has no right of action against him.[74] The test of liability on the part of the

reasonably safe condition for the use to which the brakemen and other employes put it. Wood v. Southern R. Co. 104 Va. 650; 52 S. E. 371. See, also, Coates v. Boston &c. R. Co. 153 Mass. 297; 26 N. E. 864; 10 L. R. A. 769; McIntyre v. Boston &c. R. Co. 163 Mass. 189; 39 N. E. 1012. But, ordinarily, the master is not obliged to make safe for one purpose an appliance intended for another and the employe assumes the risk of using it for his own convenience.

[73] Maharjah, The, 40 Fed. 784; Washington &c. R. Co. v. McDade, 135 U. S. 554; 10 Sup. Ct. 1044; Lafflin v. Buffalo &c. R. Co. 106 N. Y. 136; 12 N. E. 599; 60 Am. R. 433; Michigan &c. R. Co. v. Coleman, 28 Mich. 440; Harley v. Buffalo &c. Co. 142 N. Y. 31; 36 N. E. 813; Whitwam v. Wisconsin &c. R. Co. 58 Wis. 408; 17 N. W. 124; Lehigh &c. Co. v. Hayes, 128 Pa. St. 294; 18 Atl. 387; 5 L. R. A. 441; 15 Am. St. 680; Allison &c. Co. v. McCormick, 118 Pa. St. 519; 12 Atl. 273; 4 Am. St. 613; Chicago &c. R. Co. v. Du Bois, 56 Ill. App. 181; McCarthy v. Boston &c. Co. 165 Mass. 165; 42 N. E. 568; Carey v. Boston &c. R. Co. 158 Mass. 228; 33 N. E. 512; Myers v. Hudson Iron Co. 150 Mass. 125; 22 N. E. 631; 15 Am. St. 176. See, generally, East St. Louis Provision Co. v. Hightower, 92 Ill. 139; St. Louis &c. R. Co. v. Needham, 69 Fed. 823; Port Royal &c. R. Co. v. Davis, 95 Ga. 292; 22 S. E. 833. See, also, notes in 65 Am. St. 738, and in 98 Am. St. 295. But see Martin v. California &c. Ry. Co. 94 Cal. 326; 29 Pac. 645; Smith v. Fordyce, 190 Mo. 1; 88 S. W. 679.

[74] Titus v. Bradford &c. R. Co. 136 Pa. St. 618; 20 Atl. 517; 20 Am. St. 944; Kehler v. Schwenk, 144 Pa. St. 348; 22 Atl. 510; 13 L. R. A. 374, and note; 27 Am. St. 633; Pennsylvania Co. v. Congdon, 134 Ind. 226; 39 Am. St. 251; Georgia &c. R. Co. v. Nelms, 83 Ga. 70; 20 Am. St. 308; Texas &c. R. Co. v. Rhodes, 71 Fed. 145; Doyle v. White &c. Co. 35 N. Y. S. 760; Smith v. Old Colony &c. R. Co. 10 R. I. 22. See, generally, Dougan v. Champlain Transportation Co. 56 N. Y. 1; Loftus v. Union &c. Co. 84 N. Y. 455; 38 Am. R. 533, and note; Burke v. Wetherbee, 98 N. Y 562; La Pierre v. Chicago &c. R. Co. 99 Mich. 212; 58 N. W. 60; Southern Pac. R. Co. v. Gloyd, 138 Fed. 388; Carr v. St. Clair Tunnel Co. 131 Mich. 592; 92 N. W. 110, 111 (citing text and applying this rule to the making of a "flying switch"). See, also, Turner v. Detroit &c. R. Co. 139 Mich. 142; 100

employer is negligence. If there is no negligence there is no liability, and the rule is that where the employer does what is commonly and generally done by persons or corporations engaged in the same general line of business, he is not guilty of actionable negligence.[75]

§ 1275. Latent defects.—The general rule is that an employer is not liable to an employe for injury caused by latent defects in appliances or machinery.[76] It is not to be understood, however,

N. W. 268; Weed v. Chicago &c. R. Co. (Neb.) 99 N. W. 827.

[75] Reese v. Hershey, 163 Pa. St. 253; 29 Atl. 707; 43 Am. St. 795; Bertha &c. Co. v. Martin, 93 Va. 791; 22 S. E. 869; Vinton v. Schaub, 32 Vt. 612; Jones v. Malvern &c. Co. 58 Ark. 125; 23 S. W. 679; Delaware &c. Co. v. Nuttall, 119 Pa. St. 149; 13 Atl. 65; Allison &c. Co. v. McCormick, 118 Pa. St. 519; 12 Atl. 273; 4 Am. St. 613; Louisville &c. R. Co. v. Allen, 78 Ala. 494; Grand Rapids &c. R. Co. v. Huntley, 38 Mich. 537; 31 Am. R. 321. See Georgia &c. Co. v. Propst, 83 Ala. 518; 3 So. 764; Richmond &c. R. Co. v. Jones, 92 Ala. 218; 9 So. 276. In Choctaw &c. R. Co. v. Stroble (Ark.), 96 S. W. 116, it is held that "whether it was negligence for a railroad company to furnish employes a hand car with a defective brake with which to haul ties a short distance along the track is a question for the jury; there being testimony that it was customary in doing such work to use push cars without brakes or other appliances for stopping them or checking their speed, and that a load of ties would be so high that, if there was a brake, it could not be reached by the men pushing it along." And in McDonnell v. New York &c. R. Co. (Mass.) 78 N. E. 548, it is held that a railroad company is not bound as a matter of law to furnish a stationary ladder or one with hooks for the use of a fireman in climbing to the top of its engines, but is only bound to exercise reasonable care to see that the ladders furnished are safe and proper for the use for which they are intended. A custom or practice may be negligent and inexcusable. Hosic v. Chicago &c. Ry. Co. 75 Ia. 683; 9 Am. St. 518; 37 N. W. 963; Allen v. Burlington &c. R. Co. 64 Ia. 94; 19 N. W. 870.

[76] Moore v. Pennsylvania Co. 167 Pa. St. 495; 31 Atl. 734; Mackin v. Boston &c. R. Co. 135 Mass. 201; 46 Am. R. 456; 15 Am. & Eng. R. Cas. 196; Fay v. Minneapolis &c. R. Co. 30 Minn. 231; 15 N. W. 241; 11 Am. & Eng. R. Cas. 193; Atchison &c. R. Co. v. Wagner, 33 Kan. 660; 7 Pac. 204; Smith v. Potter, 46 Mich. 258; 2 Am. & Eng. R. Cas. 140; Reid v. Central &c. R. Co. 81 Ga. 694; Louisville &c. R. Co. v. Hinder, 19 Ky. L. 840; 30 S. W. 399; Chestnut v. Southern Ind. Ry. Co. 157 Ind. 509; 62 N. E. 32; Louisville &c. R. Co. v. Campbell, 97 Ala. 147; 12 So. 574; Galveston &c. R Co. v. Buch, 27 Tex. Civ. App. 283; 65 S. W. 681.

that the employer is not under a duty to exercise ordinary care in causing reasonably careful and proper inspections to be made. If the defect is one which an ordinarily careful inspection would reveal it cannot be regarded as a latent defect within the rule which exonerates the master from liability in cases of injuries attributable to latent defects,[77] but a defect which reasonably careful inspection will not reveal is a latent defect within the rule.[78]

§ 1276. Delegation of master's duty.—The modern decisions affirm that a master cannot escape liability by delegating the duty owing employes.[79] There is now little doubt as to the general rule, but there is doubt as to what constitutes the master's duty. We have heretofore shown what the duty of the master is, and we shall now consider duties that are not those of the master. There are

[77] Dobbin v. Richmond &c. R. Co. 81 N. C. 446; 31 Am. R. 512. See, also, Carroll v. Tidewater Oil Co. 67 N. J. L. 679; 52 Atl. 275.

[78] Chicago &c. R. Co. v. Hagar, 11 Ill. App. 498; Philadelphia R. Co. v. Hughes, 119 Pa. St. 301; 13 Atl. 286; 33 Am. & Eng. R. Cas. 348, See, also, Texas &c. Ry. Co. v. Barrett, 166 U. S. 617; 17 Sup. Ct. 707; Shankweiler v. Baltimore &c. R. Co. 148 Fed. 195.

[79] Hough v. Railroad Co. 100 U. S. 213; Union Pac. R. Co. v. Daniels, 152 U. S. 684; 14 Sup. Ct. 756; Gardner v. Michigan &c. R. Co. 150 U. S. 349; 14 Sup. Ct. 140; Baltimore &c. R. Co. v. Baugh, 149 U. S. 368; 13 Sup. Ct. 914; Fuller v. Jewett, 80 N. Y. 46; 36 Am. R. 575; Rogers v. Ludlow Manufacturing Co. 144 Mass. 198; 11 N. E. 77; 59 Am. R. 68, and note; Spicer v. South Boston Iron Co. 138 Mass. 426; Chicago &c. R. Co. v. Kneirim, 152 Ill. 458; 39 N. E. 454; 43 Am. St. 259; Mullin v. California &c. R. Co. 105 Cal. 77; 38 Pac. 535; Indiana &c. R. Co. v. Parker, 100 Ind. 181, and cases cited; Indiana &c. R. Co. v. Snyder, 140 Ind. 647; 39 N. E. 912; Northern &c. R. Co. v. Charless, 51 Fed. 562; 2 C. C. A. 380; Flike v. Boston &c. R. Co. 53 N. Y. 549; 13 Am. R. 545; Bowers v. Union &c. R. Co. 4 Utah, 215; Morton v. Detroit &c. R. Co. 81 Mich. 423; 46 N. W. 111; Gunter v. Graniteville &c. R. Co. 18 S. Car. 262; 44 Am. R. 573; Hannibal &c. R. Co. v. Fox, 31 Kan. 587; 3 Pac. 320; 15 Am. & Eng. R. Cas. 325; Criswell v. Pittsburgh &c. R. Co. 30 W. Va. 798; 6 S. E. 31; 33 Am. & Eng. R. Cas. 232; Brown v. Minneapolis &c. R. Co. 31 Minn. 553; 18 N. W. 834; Moon v. Richmond &c. R. Co. 78 Va. 745; 17 Am & Eng. R. Cas. 531; Hankins v. New York &c. R. Co. 142 N. Y. 416; 37 N. E. 466; 40 Am. St. 616; 25 L. R. A. 396; Slater v. Jewett, 85 N. Y. 61; 39 Am. R. 627; McLean v. Pere Marquette R. Co. 137 Mich. 482; 100 N. W. 748; Northern Ala. R. Co. v. Mansell, 138 Ala. 548; 36 So. 459.

duties which may be delegated, and where duties are rightfully delegated the fellow-servant rule applies except where otherwise provided by statute. It may be safely said that if the duty is one that may be delegated the master is not responsible at common law for the negligence of the person to whom the duty is assigned. In other words the right to assign or delegate a duty conclusively implies that the duty is not that of the master in such a sense as to render him responsible for negligence in its performance. There are, it is obvious, many duties which may be intrusted to subordinate employes, and where such a duty is performed by a subordinate employe, generally called a servant, the common master is not liable to the co-employes or fellow servants for the negligence of the servant by whom the duty is performed, unless made so by statute. Duties incident to the running of trains are, as a rule, duties that may be delegated. Thus the duty of opening and closing switches is a duty that may be delegated as it is not in a just sense the duty of the master.[80] The fact that a rule of the company leaves to a conductor a discretion as to the manner in which a train in his charge may be moved over the summit of a heavy grade does not make him a vice-principal, nor is the duty of moving the train that of the company in such a sense that it cannot be delegated.[81] So, the duty to use reasonable care to supply and maintain safe appliances does not so extend to their use that it can never be delegated, and it is said that it "is not extended to all the passing risks which arise from short-lived causes."[82]

§ 1277. Employer not bound to abandon appliances because

[80] St. Louis &c. R. Co. v. Needham, 63 Fed. 107; 11 C. C. A. 56; 25 L. R. A. 833. The case cited holds that brakemen and switchmen are fellow servants. The following cases were cited, Randall v. Baltimore &c. R. Co. 109 U. S. 478; 3 Sup. Ct. 322; Roberts v. Chicago &c. R. Co. 33 Minn. 218; 22 N. W. 389; Harvey v. New York &c. R. Co. 88 N. Y. 481, 484; Slattery v. Toledo &c. R. Co. 23 Ind. 81; Chicago &c. R. Co. v. Henry, 7 Ill. App. 322; Walker v. Boston &c. R. Co. 128 Mass. 8; Miller v. Southern Pacific R. Co. 20 Ore. 285; 26 Pac. 70; Quebec &c. Co. v. Marchant. 133 U. S. 375; 10 Sup. Ct. 397; Baltimore &c. R. Co. v. Andrews, 50 Fed. 728; 1 C. C. A. 636; 17 L. R. A. 190; Northern Pacific R. Co. v. Hambly, 154 U. S. 349; 14 Sup. Ct. 983.

[81] Wooden v. Western &c. Co. 147 N. Y. 508; 42 N. E. 199.

[82] Whittaker v. Bent, 167 Mass 588; 46 N. E. 121, quoted in Northern Pac. R. Co. v. Dixon, 194 U. S.

newer ones are in use.—An employer is not bound to abandon the use of machinery or appliances merely because newer and better ones come into use. If the appliances are in common use and in good repair the employer is not to be deemed negligent because he does not cast them aside and procure newer ones. If there is no negligence on the employer's part there can be no actionable wrong simply because the appliances are not replaced by better and safer ones, although it is within the power of the employer to procure them.[83] But it is held that railroad companies should keep reasonably abreast with the times.[84]

§ 1278. Inspection—Duty of.—It is the duty of the employer to exercise reasonable care and diligence in inspecting appliances which the employe is required to use in the performance of the duties of his service.[85] The duty to inspect is, however, owing only to an employe whose duty requires him to use the appliances, for

346; 24 Sup. Ct. 686, also in Baltimore &c. R. Co. v. Brown, 146 Fed. 24, 29. See, also, Cully v. Northern Pac. R. Co. 35 Wash. 241; 77 Pac. 202.

[83] Homertake &c. Co. v. Fullerton, 69 Fed. 923, 929; Marsh v. Chickering, 101 N. Y. 396; 5 N. E. 56; Chicago &c. R. Co. v. Linney, 59 Fed. 45; 7 C. C. A. 656; Hodgkins v. Eastern R. Co. 119 Mass. 419; Southern Pac. R. Co. v. Seley, 152 U. S. 145; 14 Sup. Ct. 535; Sweeney v. Berlin &c. Envelope Co. 101 N. Y. 520; 5 N. E. 358; 54 Am. R. 722, and note; Walsh v. Whiteley, L. R. 21 Q. B. Div. 371; Gilbert v. Gould, 144 Mass. 601; 12 N. E. 368; Sullivan v. India &c. R. Co. 113 Mass. 396; Sheets v. Chicago &c. R. Co. 139 Ind. 682; 39 N. E. 154; Lake Shore &c. R. Co. v. McCormick, 74 Ind. 440. See, also, Nutt v. Southern Pac. R. Co. 25 Oreg. 291; 35 Pac. 653, 654; Watts v. Hart, 7 Wash. 178; 34 Pac. 423; Buttner v. South Baltimore &c. Co. 101 Md. 168; 60 Atl. 597; note in 65 Am. St. 740.

[84] Richmond &c. R. Co. v. Jones, 92 Ala. 218; 9 So. 278; Tennessee &c. R. Co. v. Kyle, 93 Ala. 1; 8 So. 764; 12 L. R. A. 103; Greenlee v. Southern R. Co. 122 N. Car. 977; 30 S. E. 115; 41 L. R. A. 399; 65 Am. St. 734; Gulf &c. R. Co. v. Warner (Tex. Civ. App.), 36 S. W. 118; Smith v. Fordyce, 190 Mo. 1; 88 S. W. 679.

[85] Northern &c. R. Co. v. Herbert, 116 U. S. 642; 6 Sup. Ct. 590; Indiana &c. R. Co. v. Snyder, 140 Ind. 647; 39 N. E. 912; Atchison &c. R. Co. v. Wagner, 33 Kan. 660; 7 Pac. 204; Johnson v. Missouri Pacific R. Co. 96 Mo. 340; 9 S. W. 790; 9 Am. St. 351; Fuller v. Jewett, 80 N. Y. 46; 36 Am. R. 575; Brann v. Chicago &c. R. Co. 53 Iowa, 595; 6 N. W. 5; 36 Am. R. 243; Wedgwood v. Chicago &c. R. Co. 41 Wis. 478; 44 Wis. 44; Bessex v. Railway Co. 45 Wis. 482; Little Rock &c. R. Co. v. Leverett, 48

there is no such duty owing to one who voluntarily goes outside of the duties required of him by the contract of employment and makes use of appliances in another department or intended for use by a different class of employes.[86] There is, it is to be kept in mind, no absolute duty to furnish safe appliances or to keep them in safe condition for use, but there is a duty to exercise reasonable care in that regard.[87] Reasonable care requires that inspections should be made at reasonable intervals of time and that ordinary care should be exercised to secure qualified and competent inspectors.[88] The employer is only required to make reasonable and practicable inspections and is not required to tear appliances or machinery into pieces.[89] If the tests in common use are applied with reasonable

Ark. 333; 3 S. W. 50; 3 Am. St. 230; Siela v. Hannibal &c. R. Co. 82 Mo. 430; Nicholds v. Chrystal &c. R. Co. 126 Mo. 55; 28 S. W. 991; Galveston &c. R. Co. v. Templeton, 87 Tex. 42; 26 S. W. 1066; Paine v. Eastern R. Co. 91 Wis. 340; 64 N. W. 1005. There are no rigid rules applicable to the care to be exercised in making inspections except that the care exercised must be ordinary or reasonable. If the process of inspection is that commonly employed, or if it is reasonably adapted to the kinds of appliance requiring inspection, it is sufficient. Allen v. Union &c. R. Co. 7 Utah, 239; 26 Pac. 297.

[86] Millar v. Madison &c. R. Co. 130 Mo. 517; 31 S. W. 574; Central &c. R. Co. v. Chapman, 96 Ga. 769; 22 S. E. 273; Alabama &c. R. Co. v. Hall, 105 Ala. 599; 17 So. 176; Preston v. Chicago &c. R. Co. 98 Mich. 128; 57 N. W. 31; Illinois Cent. R. Co. v. Daniels, 73 Miss. 258; 19 So. 830; Young v. Boston &c. R. Co. 69 N. H. 356; 41 Atl. 268. See East St. Louis &c. R. Co. v. Craven, 52 Ill. App. 415; Jayne v. Sebewaing Co. 108 Mich. 242; 65 N. W. 971.

[87] Texas &c. R. Co. v. Rhodes, 71 Fed. 145; Nord Deutscher &c. Co. v. Ingebregsten, 57 N. J. L. 400; 31 Atl. 619; 51 Am. St. 604; Ohio &c. R. Co. v. Pearcy, 128 Ind. 197; 27 N. E. 479; Hill v. Southern Pac. Co. 23 Utah, 94; 63 Pac. 814; Atchison &c. R. Co. v. Napole, 55 Kans. 401; 40 Pac. 669.

[88] Gibson v. Northern &c. R. Co. 22 Hun (N. Y.), 289. It is not necessary that the inspection be continuous for it is sufficient if it be made at reasonable intervals. Krampe v. St. Louis &c. R. Co. 59 Mo. App. 277; Grand Rapids &c. R. Co. v. Huntley, 38 Mich. 537; 31 Am. R. 321; Ketterman v. Dry Fork R. Co. 48 W. Va. 606; 37 S. E. 683, 689 (citing text). But where there has been an unusual strain or the like an inspection at the time or before using again may be required. Norfolk &c. R. Co. v. Nunnally, 88 Va. 546; 14 S. E. 367. See, also, St. Louis &c. R. Co. v. George, 85 Tex. 150; 19 S. W. 1036.

[89] 2 Richmond &c. R. Co. v. Elliott,

care and skill the employer is not guilty of an actionable breach of the duty of inspection.[90] The duty to inspect is a continuing one, that is, it requires inspections to be made, with ordinary care and in the mode commonly adopted, at reasonable intervals, since an employer is chargeable with notice of the liability of machinery and appliances to become weakened by age and decay.[91] The duty of inspection extends to working places,[92] cars,[93] engines,[94] and to

149 U. S. 266; 13 Sup. Ct. 837; Chicago &c. R. Co. v. DuBois, 56 Ill. App. 181; Indianapolis &c. R. Co. v. Toy, 91 Ill. 474; 33 Am. R. 57; Smith v. Chicago &c. R. Co. 42 Wis. 520. In Hover v. Chicago &c. R. Co. (Tex. Civ. App.) 89 S. W. 1084, it is held that the fact that a railroad company tested but one wheel out of every fifty purchased does not show negligence with respect to an injured servant, in the absence of proof that other or further test was necessary or usual, or that the customary test was not applied to the wheel which caused the injury; that evidence that the inspection was the same in kind and character as that in use by railroads generally, and that the inspector, who was unusually competent and experienced, knew when he made the inspection that his son was to go out on the engine or tender in question, was relevant. See, also, to the effect that such an inspection as will seriously embarrass the master's work is not required. Smoot v. Mobile &c. R. Co. 67 Ala. 13; Philadelphia &c. R. Co. v. Hughes, 119 Pa. St. 301; 13 Atl. 286.

[90] Texas &c. R. Co. v. Barrett, 166 U. S. 617; 17 Sup. Ct. 707; Shandrew v. Chicago &c. R. Co. 142 Fed. 320; Manser v. Eastern Counties R. Co. 3 L. T. R. (N. S.) 585; Perry v. Michigan Central &c. R. Co. (Wis.) 65 N. W. 608; Fenderson v. Atlantic &c. R. Co. 56 N. J. L. 708; 31 Atl. 767; Jones v. Malvern &c. R. Co. 58 Ark. 125; 23 S. W. 679; Racine v. New York &c. R. Co. 70 Hun (N. Y.), 453; 24 N. Y. 388; Murphy v. Phillips, 35 L. T. R. (N. S.) 477; Morton v. Detroit &c. R. Co. 81 Mich. 423; 46 N. W. 111.

[91] Indiana Car Co. v. Parker, 100 Ind. 181, 193; Indianapolis v. Scott, 72 Ind. 196; Board of Comrs. v Bacon, 96 Ind. 31; Rapho Tp. v. Moore, 68 Pa. St. 404; 8 Am. R. 202; Wabash &c. R. Co. v. Morgan, 132 Ind. 430; 31 N. E. 661; St. Louis &c. Ry. Co. v. Brown, 67 Ark. 295; 54 S. W. 865, 869 (citing text). See, generally, as to the duty of inspection, De Graff v. New York &c. R. Co. 76 N. Y. 125; Ft. Wayne &c. R. Co. v. Gildersleeve, 33 Mich. 133; Carlson v. Phenix Bridge Co. 132 N. Y. 273; 30 N. E. 750; Louisville &c. R. Co. v. Berry, 2 Ind. App. 427; Randolph v. New York Cent. &c. R. Co. 69 N. J. 420; 55 Atl. 240 (only practicable, reasonable test and not laboratory test required).

[92] Ohio &c. R. Co. v. Heaton, 137 Ind. 1; 35 N. E. 687; 19 L. R. A. 365; 33 Am. St. 690; Linton &c. Co. v. Persons, 11 Ind. App. 264; 39 N. E. 214.

[93] Sheedy v. Chicago &c. R. Co. 55 Minn. 357; 57 N. W. 60; Union

all appliances of a character which ordinary care requires should be examined and inspected.[95] It is true that some appliances may re-

&c. R. Co. v. Snyder, 152 U. S. 684; 14 Sup. Ct. 756; Brann v. Chicago &c. R. Co. 53 Iowa, 595; 6 N. W. 5; 36 Am. R. 243. See, Evans v. Chamberlain, 40 S. Car. 104; 18 S. E. 213; Bailey v. Rome &c. R. Co. 139 N. Y. 302; 34 N. E. 918; Beard v. Chesapeake &c. R. Co. 90 Va. 351; 18 S. E. 559; Texas &c. R. Co. v. Barrett, 67 Fed. 214; Settle v. St. Louis &c. R. Co. 127 Mo. 336; 30 S. W. 125; 48 Am. St. 633; Rodney v. St. Louis &c. R. Co. 127 Mo. 676; 30 S. W. 150. See, also, Smith v. Thomson-Houston Elec. Co. 188 Mass. 371; 74 N. E. 664; Crawford v. United R. &c. Co. 101 Md. 402; 61 Atl. 287; 70 L. R. A. 489. In St. Louis &c. R. Co. v. Johnson (Kans.), 86 Pac. 156, 159, it is said: "The defect was an obvious one which the most casual inspection would have disclosed. The jury therefore rightfully inferred that the car was put into the train without inspection. Missouri Pacific R. Co. v. Barber, 44 Kan. 612; 24 Pac. 969. The railroad company was charged in the petition with negligence in not having the car inspected, and in putting it into the train for the employes to use in its dangerous and defective condition. Its duty required it to use the reasonable diligence to provide the employes with reasonably safe appliances for the performance of their duties. Atchison &c. R. Co. v. Penfold, 57 Kan. 148; 45 Pac. 574; Missouri Pacific R. Co. v. Dwyer, 36 Kan. 58; 12 Pac. 352. The doctrine of assumed risks has no application. In the absence of notice deceased had the right to assume that the car and its appliances were reasonably safe. Missouri Pacific R. Co. v. Barber, 44 Kan. 612; 24 Pac. 969; Atchison &c. R. Co. v. Seeley, 54 Kan. 21; 37 Pac. 104; Atchison R. Co. v. Penfold, 57 Kan. 148; 45 Pac. 574; Southern Kansas R. Co. v. Michaels, 57 Kan. 474; 46 Pac. 938; Atchison R. Co. v. Bancord, 66 Kan. 81; 71 Pac. 253. It has been repeatedly declared to be the duty of the railroad company to inspect its cars before putting them in the service. Solomon R. Co. v. Jones, 30 Kan. 601; 2 Pac. 657; St. Louis &c. R. Co. v. Weaver, 35 Kan. 412; 11 Pac. 408; 57 Am. R. 176; Atchison &c. R. Co. v. Napole, 55 Kan. 401; 40 Pac. 669; Atchison &c. R. Co. v. Wagner, 33 Kan. 661; 7 Pac. 204."

[94] Coontz v. Missouri &c. R. Co. 121 Mo. 652; 26 S. W. 661; 59 Am. & Eng. R. Cas. 169; O'Mellia v. Kansas City &c. R. Co. 115 Mo. 205; 21 S. W. 503; Finley v. Richmond &c. R. Co. 59 Fed. 419; Gibson v. Minneapolis &c. R. Co. 55 Minn. 177; 56 N. W. 686; 43 Am. St. 482; Tennessee &c. R. Co. v. Kyle, 93 Ala. 1; 8 So. 764; 12 L. R. A. 103; Southern &c. R. Co. v. Lafferty, 57 Fed. 536; Ryan v. New York &c. R. Co. 88 Hun (N. Y.), 269; 34 N. Y. S. 665; Fry v. Great Northern R. Co. 95 Minn. 87; 102 N. W. 733.

[95] Louisville &c. R. Co. v. Campbell, 97 Ala. 147; 12 So. 574; Kansas City &c. R. Co. v. Ryan, 52 Kan. 637; 35 Pac. 292; 59 Am. & Eng. R. Cas. 136; Lake Erie &c. R. Co. v. McHenry, 10 Ind. App. 525; 37

quire inspection oftener than others, but the courts cannot lay down specific rules for determining how frequently inspections should be made. The rule for determining the frequency of inspections is that they must be made as often as ordinary care requires, but what is ordinary care in one class of cases may not be ordinary care in other classes. Conformity to common usage or custom will be ordinary care in regard to the frequency of inspections as it is in regard to other matters concerning the employer's duty.[96]

§ 1278a. Simple tools.—There are some cases in which, where the employe has the custody and care of the tool himself or makes his own selection of an unfit tool from a number of proper tools the master is not liable[97] as he might otherwise be. And this doctrine has often been applied and even extended in the case of so-called simple tools. Many authorities are cited and the rule is thus stated in a recent case:[98] "When the appliances or machinery furnished employes are at all complicated in character or construction, the employer is charged with the duty of making such reasonable inspection as is necessary to detect defects. But the master is under no duty to inspect simple or common tools, or to discover or remedy defects arising necessarily from the ordinary use of such instru-

N. E. 186; Louisville &c. R. Co. v. Hinder, 16 Ky. L. 841; 30 S. W. 399. We have not attempted to cite all the cases upon the topics referred to in the text, for the cases are much too numerous for citation.

[96] Alabama &c. R. Co. v. Arnold, 84 Ala. 159; 4 So. 359; 5 Am. St. 354; Louisville &c. R. Co. v. Campbell, 97 Ala. 147; 12 So. 574; Holland v. Tenn. &c. R. Co. 91 Ala. 444; 8 So. 524; 12 L. R. A. 232; Louisville &c. R. Co. v. Hall, 87 Ala. 708; 6 So. 277; 4 L. R. A. 710; 13 Am. St. 84; 39 Am. & Eng. R. Cas. 298; Georgia &c. R. Co. v. Propst, 83 Ala. 518; 3 So. 764; Louisville &c. R. Co. v. Jones, 83 Ala. 376; 30 So. 902; 34 Am. & Eng. R. Cas. 417; Galveston &c R. Co. v. Davis, 4 Tex. Civ. App. 468; 23 S. W. 1019.

[97] See Hefferen v. Northern Pac. R. Co. 45 Minn. 471; 48 N. W. 1 (distinguished in Morris v. Eastern R. Co. 88 Minn. 112; 92 N. W. 535); Dernfier v. Lewis, 131 Mich. 144; 91 N. W. 152; Merganthaler &c. Co. v. Taylor, 28 Ky. L. 923; 90 S. W. 968; Chicago &c. R. Co. v. Bragonier, 119 Ill. 51; 7 N. E. 688; Toledo &c. R. Co. v. Eddy, 72 Ill. 138; Peoria &c. R. Co. v. Hardwick, 48 Ill. App. 562; Cregan v. Marston, 126 N. Y. 568; 27 N. E. 952; Green v. Sansom, 41 Fla. 94; 35 So. 332.

[98] Koschman v. Ash (Minn.), 108 N. W. 514, 515, where the rule was applied to a common hammer or sledge.

ments."[99] But, where the defect is not obvious and the master keeps and controls the tool, without any opportunity on the part of the employe to select or examine it, and has assumed to inspect and keep it in repair, we think that this doctrine is not fairly applicable, at least where the defect is not caused while the employe is using the tool.[100] In some cases, however, the company has also been held free from liability on the ground that the injury from a sliver flying from a hammer, or the like, was a pure accident.[101]

§ 1279. Foreign cars—Duty of inspection.—There is wide diversity of opinion as to the duty of a railroad company to inspect cars

[99] Citing Miller v. Erie R. Co. 21 App. Div. (N. Y.) 45, 47 N. Y. S. 285 (a push-pole by which an engine on one track was able to move a car on an adjoining track); Marsh v. Chickering, 101 N. Y. 396; 5 N. E. 56 (a ladder); Cahill v. Hilton, 106 N. Y. 512, 518; 13 N. E. 339 (a ladder); Webster Mfg. Co. v. Nisbett, 205 Ill. 273; 68 N. E. 936 (a hammer); Meador v. Lake Shore &c. R. Co. 138 Ind. 290; 37 N. E. 721; 46 Am. St. 384 (a ladder); Wachsmuth v. Electric Crane Co. 118 Mich. 275; 76 N. W. 497 (a snaphammer); Dompier v. Lewis, 131 Mich. 144; 91 N. W. 152 (a hammer); O'Brien v. Railway Co. 36 Tex. Civ. App. 528; 82 S. W. 319 (a wrench); Railway Co. v. Larkin, 98 Tex. 225; 82 S. W. 1026 (a defective globe on a lantern); Lynn v. Sugar Ref. Co. 128 Ia. 501; 104 N. W. 577 (a hammer of soft steel with which to break lumps of coal); Garragan v. Iron Works, 158 Mass. 596; 33 N. E. 652; Martin v. Highland Co. 128 N. C. 264; 38 S. E. 876; 83 Am. St. 671; Georgia &c. R. Co. v. Brooks, 84 Ala. 138; 4 So. 289; Georgia R. Co. v. Nelms, 83 Ga. 70; 9 S. E. 1049; 20 Am. St. 308; Power Co. v. Murphy, 115 Ind. 566; 18 N. E. 30; Labatt, Master & Servant, § 154. See, also, Dessecker v. Phoenix Mills Co. (Minn.) 108 N. W. 516. In such cases it is thought that the employe who uses the tool has a better opportunity to discover the defect or judge of the sufficiency of the tool than the master.

[100] See Stork v. Charles &c. Cooperage Co. 127 Wis. 318; 106 N. W. 841; Vant Hull v. Great Northern R. Co. 90 Minn. 329; 96 N. W. 789; Guthrie v. Louisville &c. Co. 11 Lea (Tenn.), 372; 47 Am. R. 286; Baltimore &c. R. Co. v. Amos, 20 Ind. App. 378; 49 N. E. 854. See, also, Deckerd v. Wabash R. Co. 111 Mo. App. 117; 85 S. W. 982; Drake v. San Antonio &c. R. Co. (Tex.) 89 S. W. 407; Standard Oil Co. v. Fordeck, 34 Ind. App. 181; 71 N. E. 163; Nichols v. Pere Marquette R. Co. (Mich.) 108 N. W. 1016.

[101] Gulf &c. R. Co. v. Blockman 87 Miss. 192; 39 So. 479; Cincinnati &c. R. Co. v. Phinney (Ind. App.), 77 N. E. 296. See, also, as to proximate cause, Goransson v. Riter &c. Co. 186 Mo. 300; 85 S. W. 338. And see Langhorn &c. Co. v. Wiley 28 Ky. L. 1186; 91 S. W. 255.

received from other companies. Courts of high standing hold that there is a duty to inspect foreign cars, and that danger from such cars is not an ordinary risk of the service assumed by the employe.[102] In other cases the ruling is that the company receiving a foreign car is not under a duty to inspect,[103] while still other cases seem to hold

[102] Baltimore &c. R. Co. v. Mackey, 157 U. S. 72; 15 Sup. Ct. 491. In the case cited the court adopted as authority the cases of Gottlieb v. New York &c. R. Co. 100 N. Y. 462; 3 N. E. 344; Goodrich v. New York &c. R. Co. 116 N. Y. 398; 22 N. E. 397; 5 L. R. A. 750; 15 Am. St. 410. The doctrine asserted in Baltimore &c. R. Co. v. Mackey, 157 U. S. 72; 15 Sup. Ct. 491, is upheld by other decisions of the same court and is affirmed by other courts. Texas &c. R. Co. v. Archibald, 170 U. S. 665; 18 Sup. Ct. 777; Dooner v. Delaware &c. R. Co. 164 Pa. St. 17; 10 Am. R. & Corp. R. 264; 30 Atl. 269; Mateer v. Missouri &c. R. Co. 105 Mo. 320; 15 S. W. 970; International &c. R. Co. v. Kernan, 78 Tex. 294; 14 S. W. 668; 9 L. R. A. 703, and note; 22 Am. St. 52; Bomar v. Louisiana &c. R. Co. 42 La. Ann. 983; Missouri &c. R. Co. v. White, 76 Tex. 102; 13 S. W. 65; 18 Am. St. 33; Texas &c. R. Co. v. O'Fiel, 78 Tex. 486; 15 S. W. 33; Missouri &c. R. Co. v. Chambers, 17 Tex. Civ. App. 487; 43 S. W. 1090, 1093 (citing text); Jones v. New York &c. R. Co. 92 N. Y. 628; Mason v. Richmond &c R. Co. 111 N. C. 482; 16 S. E. 698; 18 L. R. A. 845; 32 Am. St. 814; Reynolds v. Boston &c. R. Co. 64 Vt. 66; 24 Atl. 134; 33 Am. St. 908; Fay v. Minneapolis &c. R. Co. 30 Minn. 231; 15 N. W. 241; 11 Am. & Eng. R. Cas. 193; Louisville &c. R. Co. v. Williams, 95 Ky. 199; 24 S. W. 1; 44 Am. St. 214. See, also, Illinois Cent. R. Co. v. Price, 72 Miss. 862; 18 So. 415; Bender v. St. Louis &c. R. Co. 137 Mo. 240; 37 S. W. 142; Atchison &c. R. Co. v. Penfold, 57 Kans. 148; 45 Pac. 574; Keith v. New Haven &c. R. Co. 140 Mass. 175; 3 N. E. 28; Bennett v. Northern Pac. R. Co. 2 N. Dak. 112; 49 N. W. 408; 13 L. R. A. 465. In Moon v. Northern Pac. R. Co. 46 Minn. 106; 48 N. W. 679; 24 Am. St. 194; 4 Am. R. & Corp. R. 323, it was held that the company which furnished the car to the company by whom the injured was employed was liable to the servant.

[103] Baldwin v. Chicago &c. R. Co. 50 Iowa, 680; Indianapolis &c. R. Co. v. Flanigan, 77 Ill. 365; Michigan &c. R. Co. v. Smithson, 45 Mich. 212; Hathaway v. Michigan Cent. R. Co. 51 Mich. 253; 16 N. W. 634; 47 Am. R. 569; Smith v. Potter, 46 Mich. 258; 9 N. W. 273; Whitman v. Wisconsin &c. R. Co. 58 Wis. 408; 17 N. W. 124; Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439, 445; 20 N. E. 287; 10 Am. St. 67; Mackin v. Boston &c. R. Co. 135 Mass. 201; 46 Am. R. 456; Keith v. New Haven &c. R. Co. 140 Mass. 175; 3 N. E. 28; Smith v. Flint &c. R. Co. 46 Mich. 258; 9 N. W. 273; 41 Am. R. 161; Railroad Co. v. Fitzpatrick, 42 Ohio St. 318; Thyng v. Fitchburg &c. R. Co. 156 Mass. 13; 30 N. E. 169; 32 Am. St. 425; Neutz v. Jackson &c. Co.

that there is a duty to conduct an inspection for obvious defects but not for latent ones.[104] It is by no means easy to define the duty of a railroad company in relation to foreign cars because of the conflict of authority as well as because of the difficulty inherent in the subject. If the defects are obvious, then upon the long- and well-established principle that defects open to observation must be observed by the employe and that risks from such defects are assumed as risks of the service, the employer would not ordinarily be liable, so that it is difficult to support by satisfactory reasoning the doctrine of the cases which hold that the company is guilty of actionable negligence if it does not provide against obvious defects in foreign cars. So, too, there is much difficulty in supporting the cases which hold that there is a general duty to inspect, for the well-established principle is that an employer is bound to use ordinary care in making inspections and ordinary care depends upon time, means and opportunity to a great extent, and it is a matter of which judicial notice must be taken that the requirements and exigencies of commerce often render it necessary to forward cars without delay. If a car laden with perishable articles is delayed the company is liable in the event that injury to the articles results from the delay. There is much reason for the doctrine that employes are held to have knowledge of the customs and requirements of commerce and must be held to assume the risks arising from obedience to such customs and requirements. We venture the opinion, not, indeed, without hesitation, that the rule most consistent with principle is that where there is time and opportunity for inspection then one must be made with ordinary care and skill, but if the exigencies and requirements are such that there is no time or op-

139 Ind. 411; 38 N. E. 324; 39 N. E. 147.

[104] Chicago &c. R. Co. v. Fry, 131 Ind. 319; 28 N. E. 989; Gutridge v. Missouri Pacific R. Co. 94 Mo. 468; 7 S. W. 476; 4 Am. St. 392; Missouri Pacific R. Co. v. Barber, 44 Kan. 612; 24 Pac. 969; Thomas v. Missouri Pac. R. Co. 109 Mo. 187; 18 S. W. 980; 6 Am. R. & Corp. R. 197. See Texas &c. R. Co. v. Charlton, 60 Tex. 397; 15 Am. & Eng. R. Cas. 350; Mexican &c. R. Co. v. Shean (Tex.), 18 S. W. 151; Toledo &c. R. Co. v. Asbury, 84 Ill. 429; McMullen v. Carnegie Co. 158 Pa. St. 518; 27 Atl. 1043; 23 L. R. A. 448. It is sufficient if it is made with ordinary care, considering the time, place and opportunity. Louisville &c. R. Co. v. Bates, 146 Ind. 564, 569; 45 N. E. 108; Ballou v. Chicago &c. R. Co. 54 Wis. 257; 11 N. W. 559; 41 Am. R. 31.

portunity for inspection a railroad company is not guilty of culpable negligence in failing to inspect. Where there is no defect in the cars received from another company, although buffers may be of unequal height, the company receiving them is not guilty of negligence in using them if the buffers are of a kind commonly used.[105] If the company would not be liable to the employe if the car were its own it cannot be liable no matter which one of the conflicting lines of decisions be regarded as expressing the law.

§ 1280. Employer's duty to promulgate rules.—One of the duties of a railroad company to its employes is to promulgate rules for the conduct of its business and the government of its employes.[106] The

[105] Northern Pac. R. Co. v. Blake, 63 Fed. 45, citing Michigan &c. R. Co. v. Smithson, 45 Mich. 212; 7 N. W. 791; Baldwin v. Chicago &c. R. Co. 50 Iowa, 680; Indianapolis &c R. Co. v. Flanigan, 77 Ill. 365; Hathaway v. Michigan &c. R. Co. 51 Mich. 253; 16 N. W. 634; 47 Am. R. 569; Thomas v. Missouri Pac. R. Co. 109 Mo. 187; 18 S. W. 980; Kohn v. McNulta, 147 U. S. 238; 13 Sup. Ct. 298; Chicago &c. R. Co. v. Linney, 59 Fed. 45, 48; 7 C. C. A. 656. See, also, Louisville &c. R. Co. v. Boland, 96 Ala. 626; 11 So. 667; 18 L. R. A. 260; Simms v. South Carolina R. Co. 26 S. Car 490; 2 S. E. 486; Norfolk &c. R. Co. v. Brown, 91 Va. 668; 22 S. E 496; Whitcomb v. Standard Oil Co. 153 Ind. 513, 518; 55 N. E. 440. In Northern &c. Pac. R. Co. v. Blake, 63 Fed. 45, the cases of Louisville &c. R. Co. v. Fawley, 110 Ind. 18; 9 N. E. 594; Missouri Pac. R. Co. v. Callbreath, 66 Tex. 526; 1 S. W. 622; Hungerford v. Chicago &c. R. Co. 41 Minn. 444; 43 N. W. 324, and Reynolds v. Boston &c. R. Co. 64 Vt. 66; 24 Atl. 134; 33 Am. St. 908, are distinguished.

[106] Crew v. St. Louis &c. R. Co. 20 Fed. 87; Ford v. Lake Shore &c R. Co. 124 N. Y. 493; 26 N. E. 1101; 12 L. R. A. 454; Gulf &c. R. Co. v. Finley, 11 Tex. Civ. App. 64; 32 S. W. 51; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 219; 12 N. E. 380; Vose v. Lancashire &c. R. Co. 2 H. & N. 128; Haynes v. East Tennessee &c. R. Co. 3 Cold. (Tenn.) 222; Abel v. President &c. 103 N. Y. 581; 9 N. E. 325; 57 Am. R. 773; Corcoran v. Delaware &c. R. Co. 126 N. Y. 673; 27 N. E. 1022; Lewis v. Seifert, 116 Pa. St. 628; 11 Atl. 514; 2 Am. St. 631; Lake Shore &c. R. Co. v. Lavalley, 36 Ohio St. 221; Cumberland &c. R. Co. v. State, 44 Md. 283; Ford v. Fitchburg &c. R. Co. 110 Mass. 240; 14 Am. R. 598; Cooper v. Central R. Co. 44 Iowa, 134; Kansas &c. R. Co. v. Salmon, 14 Kan. 512; Morgan v. Hudson &c. R. Co. 133 N. Y. 666; 31 N. E. 234; Illinois &c. R. Co. v. Whittemore, 43 Ill. 420; 92 Am. Dec. 138; Hough v. Railway Co. 100 U. S. 213; Smith v. Oxford &c. R. Co. 42 N. J. L. 467; 36 Am. R. 535; Chicago &c. R. Co. v. Taylor, 69 Ill. 461; 18 Am. R. 626; Smith v. Boston &c. R. Co. 73 N. H. 325; 61 Atl. 359; Merrill

duty to promulgate rules is a personal duty and cannot be delegated,[107] that is, the master cannot escape the liability to an employe injured because of a failure to promulgate rules by entrusting the duty to an agent or employe. It seems clear on principle that the duty of the employer to promulgate rules and the duty of the employes to obey them are reciprocal and that disobedience should defeat a recovery unless it is clearly established that the rules were abrogated.[108] As we have elsewhere said there is, as we believe, a tendency in the wrong direction upon this subject insomuch as, according to some of the cases, employes by continued disobedience may practically annul all rules. The employer is under a duty to use reasonable care to establish such rules as will make it reasonably safe for the employes to perform the duties required of them by their contract of service, but if ordinary care is exercised in framing rules there is no actionable breach of duty although accidents may occur. If the employer adopts and enforces such rules as experience shows to be reasonably necessary the duty required by law is discharged, since it is obvious that ordinary care, which is the measure of duty, does not require that rules shall be framed that will meet every emergency or contingency that may arise in railroad service.[109]

v. Oregon Short Line R. Co. 29 Utah 264; 81 Pac. 85. As to what is sufficient promulgation or notice of the rule to employes, see LaCroy v. New York &c. R. Co. 132 N. Y. 570; 30 N. E. 391; Abel v. Delaware &c. R. Co. 103 N. Y. 581; 9 N. E. 325; 57 Am. R. 773; Grady v. Southern R. Co. 92 Fed. 491; Georgia Pac. R. Co. v. Dooley, 86 Ga. 294; 12 S. E. 923; 12 L. R. A. 324, and note; Port Royal &c. R. Co. v. Davis, 95 Ga. 292; 22 S. E. 833; Lehigh Valley R. Co. v. Snyder, 56 N. J. L. 326; 28 Atl. 376; Evansville &c. R. Co. v. Holcomb, 9 Ind. App. 198; 36 N. E. 39; Pilkinton v. Gulf &c. R. Co. 70 Tex. 226; 7 S. W. 226; Louisville &c. R. Co. v. Bocock, 107 Ky. 223; 51 S. W. 580; Norfolk &c. R. Co. v. Williams, 89 Va. 165; 15 S. E. 522.

[107] Merrill v. Oregon Short Line R. Co. 29 Utah 264; 81 Pac. 85.

[108] Green v. Brainerd &c. R. Co. 85 Minn. 318; 88 N. W. 974, 976 (citing text); Pennsylvania Co. v. Whitcomb, 111 Ind. 212; 12 N. E. 380; Sloan v. Georgia Pac. R. Co. 86 Ga. 15; 12 S. E. 179; Benage v. Lake Shore &c. R. Co. 102 Mich. 72; 60 N. W. 286.

[109] Doing v. New York &c. R. Co. 73 Hun (N. Y.), 270; 26 N. Y. S. 405; Atchison &c. R. Co. v. Carruthers, 56 Kan. 309; 43 Pac. 230; Gulf &c. R. Co. v. Finley, 11 Tex. Civ. App. 64; 32 S. W. 51; Ely v. New York &c. R. Co. 88 Hun (N. Y.), 323; 34 N. Y. S. 739; McDugan v. New York &c. R. Co. 10 Misc. (N. Y.) 336; 31 N. Y. S. 135; Kudik v. Lehigh &c. R. Co. 78 Hun (N. Y.), 492; 29 N. Y. S. 533. See, also, Olsen v.

The fact that the master does not promulgate rules is not of itself sufficient to entitle an employe who is injured in the service of his employer to recover, for it must appear in order to charge the master that the failure to promulgate rules was the proximate cause of the injury, nor will such failure shield the employe from the consequences of his contributory negligence.[110] The employer is not charged with the absolute duty of securing an observance of rules, but is bound to exercise ordinary care and diligence to secure an observance of the rules.[111] The cases are not agreed as to whether the question of the sufficiency and reasonableness of rules is a question of law or of fact, and it is difficult to lay down a general rule that will justly apply to all cases, but we think that ordinarily the question is one of law[112]

North Pac. &c. Co. 100 Fed. 384; Texas &c. R. Co. v. Echols, 87 Tex. 339; 27 S. W. 60; 28 S. W. 517; Voss v. Delaware &c. R. Co. 62 N. J. L. 59; 41 Atl. 224; Morgan v. Hudson River &c. Co. 133 N. Y. 666; 51 N. E. 234. But compare Nolan v. New York &c. R. Co. 70 Conn. 159; 39 Atl. 115; 43 L. R. A. 305, and note; Terre Haute &c. R. Co. v. Becker, 146 Ind. 202; 45 N. E. 96; Holmes v. Southern Pac. Co. 120 Cal. 357; 52 Pac. 652; Crew v. St. Louis &c. R. Co. 20 Fed. 87.

[110] Sheets v. Chicago &c. R. Co. 139 Ind. 682; 39 N. E. 154. See, also, Kascsak v. Central R. Co. 101 N. Y. S. 211.

[111] Rutledge v. Missouri Pac. R. Co. 123 Mo. 121; 24 S. W. 1053; 27 S. W. 327. In all such matters in adopting and enforcing rules the standard is ordinary or reasonable care. Kansas City &c. R. Co. v. Hammond, 58 Ark. 324; 24 S. W. 723; Berrigan v. New York &c. R. Co. 131 N. Y. 582; 30 N. E. 57. But it is said that the master's duty is not performed by merely promulgating the rules and using ordinary care in selecting men to enforce them. Merrill v. Oregon Short Line R. Co. 29 Utah 264; 81 Pac. 85. In Pittsburgh R. Co. v. Lightheiser, 163 Ind. 247; 71 N. E 218, it is held that an allegation that an engineer violated a rule of the company is not sufficient to show actionable negligence per se, and that it must also be shown that the plaintiff relied upon the observance of the rule, and was thereby misled to his injury, or the like.

[112] Larow v. New York &c. R. Co. 61 Hun (N. Y.), 11; 15 N. Y. S. 384; Louisville &c. R. Co. v. Fleming, 14 Lea (Tenn.), 128; Tracy v. New York &c. R. Co. 9 Bos. (N. Y.) 396; Old Colony &c. R. Co. v. Tripp, 147 Mass. 35; 17 N. E. 89; 9 Am. St. 661; 33 Am. & Eng. R. Cas. 488, note; Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420; 92 Am. Dec. 138; Hoffbauer v. Davenport R. Co. 52 Iowa, 342; 3 N. W. 121; 35 Am. R. 278; Tullis v. Hassell, 54 N. Y. Sup. Ct. 391; Little Rock &c. R. Co. v. Barry, 84 Fed. 949. See, also, Rosney v. Erie R. Co. 135 Fed. 311; Wallace v. Boston &c. R. Co. 72 N. H. 504; 57 Atl. 913. But see Shepard v. Northern &c. R. Co. 63 Hun (N. Y.), 634; 18 N. Y. S.

for the court. There may be cases where the ordinary rule cannot be justly applied,[113] but they seldom arise.

§ 1281. Time-tables or schedules.—It is, as a general rule, the duty of a railroad company to cause time-tables or schedules to be prepared. This duty rests, as we think, upon the same principle as that upon which the duty to make rules is founded. The duty of the company is to exercise reasonable care in the preparation of such tables or schedules, and for a negligent breach of this duty the company is liable to an employe who has a right to rely upon such schedules or tables, and who is free from contributory fault. But this rule does not, by any means, extend to all employes, for some of them are bound to keep out of the way of extra or wild trains as well as scheduled trains. It is held that the duty to prepare time-schedules is one that cannot be delegated.[114] While it is the duty of the railroad company to cause time-tables to be prepared, it is not bound to adhere to them without change, but, on the contrary, it may change them at its discretion. Where, however, changes are made, reasonable notice or warning of changes should be given.[115] The employer is not liable, however, for the act of a fellow servant who fails in matters of detail respecting time-tables.[116] An employe who does not conform to the schedule rules is guilty of contributory negligence unless just reason exists for his failure to conform to them.[117]

665; State v. Overton, 24 N. J. L. 435; 61 Am. Dec. 671; Prather v. Richmond &c. R. Co. 80 Ga. 427; 9 S. E. 530; 12 Am. St. 263; Ford v. Lake Shore &c. R. Co. 124 N. Y. 493; 26 N. E. 1101; 12 L. R. A. 454.

[113] Bass v. Chicago &c. Co. 36 Wis. 450; 17 Am. R. 495; Day v. Owen, 5 Mich. 520; 72 Am. Dec. 62; Pittsburgh &c. R. Co. v. Henderson, 37 Ohio St. 549. See, also, Chicago &c. R. Co. v. McLallen, 84 Ill. 109; Morgan v. New York &c. R. Co. 133 N. Y. 666; 31 N. E. 234.

[114] Frost v. Oregon &c. R. Co. 69 Fed. 936. See Baltimore &c. R. Co. v. Camp, 65 Fed. 952; 13 C. C. A. 233.

[115] Slater v. Jewett, 85 N. Y. 61; 39 Am. R. 627; Sears v. Eastern &c. R. Co. 14 Allen (Mass.), 433; 92 Am. Dec. 780; Gordon v. Manchester &c. R. Co. 52 N. H. 596; 13 Am. R. 97; Rose v. Boston &c. R. Co. 58 N. Y. 217; Lewis v. Seifert, 116 Pa. St. 628; 11 Atl. 514; 2 Am. St. 631.

[116] Authorities preceding note.

[117] A conductor has been presumed to know a rule printed on the back of a time table. Frounfelker v. Delaware &c. R. Co. 74 App. Div. (N. Y.) 224; 77 N. Y. S. 470. See, also, generally as to the presumption of knowledge of rules. Brennan v. Mich. Cent. R. Co. 93

§ 1282. Violation of rules by employes.—It is the duty of the employes of a railroad company to obey the rules of the company, and a failure to obey such rules will defeat a recovery by the injured employe if his injury was the proximate result of a failure to obey the rules of the employer.[118] Courts generally hold that if it is customary to disobey the rules, then disobedience will not defeat a

Mich. 156; 53 N. W. 358; Oleson v. Chicago &c. R. Co. 38 Minn. 412; 38 N. W. 353. And where a rule on the time table covers the subject it is held that no other rule is necessary. Terre Haute &c. R. Co. v. Becker, 146 Ind. 202; 45 N. E. 96.

[118] Robertson v. Cornelson, 34 Fed. 716; New Jersey &c. R. Co. v. Young, 49 Fed. 723; Russell v. Richmond &c. R. Co. 47 Fed. 204; Kansas City &c. R. Co. v. Dye, 70 Fed. 24; Olson v. St. Paul &c. R. Co. 38 Minn. 117; 35 N. W. 866; Burris v. Minneapolis &c. R. Co. 95 Minn. 30; 103 N. W. 717; Atchison &c. R. Co. v. Reesman, 60 Fed. 370; 23 L. R. A. 768; 9 C. C. A. 20; Lake Erie &c. R. Co. v. Craig, 80 Fed. 488; Receivers of International &c. R. Co. v. Moore, 3 Tex. Civ. App. 416; 22 S. W. 272; Richmond &c. R. Co. v. Thomason, 99 Ala. 471; 12 So. 273; Richmond &c. R. Co. v. Free, 97 Ala. 231; 12 So. 294; Mischke v. Chicago &c. R Co. 56 Ill. App. 472; Louisville &c. R. Co. v. Stutts, 105 Ala. 368; 17 So. 29; 53 Am. St. 128; Smith v. New York &c. R. Co. 88 Hun (N. Y.), 468; 34 N. Y. S. 881; Richmond &c. R. Co. v. Dudley, 90 Va. 304; 18 S. E. 274; McGucken v. Western &c. R. Co. 77 Hun (N. Y.), 69; 28 N. Y. S. 298; East Tennessee &c. R. Co. v. Kane, 92 Ga. 187; 18 S. E. 18; 22 L. R. A. 315; Gulf &c. R. Co. v. Ryan, 69 Tex. 665; 7 S. W. 83; Pilkinton v. Gulf &c. R. Co. 70 Tex. 226; 7 S. W. 805; Louisville &c. R. Co. v. Wilson, 88 Tenn. 316; 12 S. W. 720; Abend v. Terre Haute &c. R. Co. 111 Ill. 202; 53 Am. R. 616, and note; Quick v. Indianapolis &c. R. Co. 130 Ill. 334; 22 N. E. 709; Cincinnati &c. R. Co. v. Lang, 118 Ind. 579; 21 N. E. 317; Matchett v. Cincinnati &c. R. Co. 132 Ind. 334; 31 N. E. 792; Darracott v. Chesapeake &c. R. Co. 83 Va. 288; 2 S. E. 511; 5 Am. St. 266; Sloan v. Georgia &c. R. Co. 86 Ga. 15; 12 S. E. 179; Schaub v. Hannibal &c. R. Co. 106 Mo. 74; 16 S. W. 924; Wilson v. Michigan Cent. R. Co. 94 Mich. 20; 53 N. W. 797; Karrer v. Detroit &c. R. Co. 76 Mich. 400; 43 N. W. 370; Davis v. Staten Island &c. R. Co. 1 App. Div. (N. Y.) 178; 37 N. Y. S. 157; Conners v. Burlington &c. R. Co. 74 Iowa, 383; 37 N. W. 966; Cumpston v. Texas &c. R. Co. (Tex. Civ. App.) 33 S. W. 737. See Cameron v. New York &c. R. Co. 145 N. Y. 400; 40 N. E. 1; Gordy v New York &c. R. Co. 75 Md. 297; 32 Am. St. 291; Green v. Brainerd &c. R. Co. 85 Minn. 318; 88 N. W. 974, 976 (citing text); post, § 1314. An agreement to obey the rules of the company and to release it from injuries caused by a violation of the rules, is not a contract exempting the company from liability for its own negligence. Runnell v. Richmond &c. R. Co. 47 Fed. 204.

recovery.[119] This doctrine, in the extent to which it is carried by some of the cases, seems to us to be unsound, for the safety of the public requires obedience to the rules, and so does the duty which an employe undertakes to perform to the public and to co-employes. It may be proper to hold that where there is frequent and long-continued failure to regard the rules, and such failure is known to the superior officers or agents of the company, the inference that they have been entirely abrogated may be just, and if so, then a violation of them will not necessarily bar a recovery;[120] but where the rules have not been abrogated, although often disobeyed, an employe who disobeys them should not, as we believe, be allowed to recover damages from his employer where the violation is the proximate cause of the injury. The question is, as it seems to us, to be determined by ascertaining whether the rules have been abrogated, and not simply by ascertaining whether or not they have been disobeyed in some instances. It has been held that the command of the conductor to go between the cars operates as a waiver of a rule forbidding such an act,[121] but we believe this doctrine to be unsound for the reason

[119] Northern Pacific R. Co. v. Nickels, 50 Fed. 718; Barry v. Hannibal &c. R. Co. 98 Mo. 62; 11 S. W. 308; 14 Am. St. 610; Smith v. Memphis &c. R. Co. 18 Fed. 304; Schaub v. Railway Co. 106 Mo. 74; 16 S. W. 924; Texas &c. R. Co. v. Leighty (Tex. Civ. App.), 32 S. W. 799; Fish v. Illinois &c. R. Co. 96 Ia. 702; 65 N. W. 995; Chicago &c. R. Co. v. Flynn, 154 Ill. 448; 40 N. E. 332; Strong v. Iowa, &c. R. Co. 94 Iowa, 380; 62 N. W. 799. See, also, White v. Louisville &c. R. Co. 72 Miss. 12; 16 So. 248; Eastman v. Lake Shore &c. R. Co. 101 Mich. 597; 60 N. W. 309; Galvin v. Old Colony R. Co. 162 Mass. 533; 39 N. E. 186; McNee v. Coburn &c. Co. 170 Mass. 283; 49 N. E. 437; Louisville &c. R. Co. v. Hiltner 22 Ky. L. 1141; 60 S. W. 2; Wright v. Southern Pac. R. Co. 14 Utah, 383; 46 Pac. 374; Merrill v. Oregon Short Line R. Co. 29 Utah, 264; 81 Pac. 85; Leduc v. Northern Pac. R. Co. 92 Minn. 287; 100 N. W. 108.

[120] Biles v. Seaboard Air Line R. Co. 139 N. Car. 528; 52 S. E. 129; 5 Thomp. Neg. § 5404.

[121] Mason v. Richmond &c. R. Co. 111 N. Car. 482; 53 Am. & Eng. R. Cas. 183; 18 L. R. A. 845; 16 S. E. 698; 32 Am. St. 814. The court held that the conductor was not a fellow-servant but the representative of the company, citing Patton v. Western &c. R. Co. 96 N. Car. 455; 1 S. E. 863; Central R. Co. v. De Bray, 71 Ga. 406; Boatwright v. Northeastern &c. R. Co. 25 S. Car. 128; Coleman v. Wilmington &c. R. Co. 25 S. Car. 446; 60 Am. R. 516; Louisville &c. R. Co. v. Brooks, 83 Ky. 129; 4 Am. St. 135. If it were granted that the conductor is not the fellow-servant of a brakeman, still, with deference to the able

that a conductor has no authority to waive or annul an established rule of the service. The true doctrine is that asserted by the cases which hold that rules established by the company cannot be waived or annulled by subordinate agents or servants,[122] at least where the master has no knowledge thereof. Where the injury is not caused by an act done in disobedience of the rules of the company, but is caused by a negligent breach of duty by the company, with which the violation of the rules has no proximate connection, the employe may recover, although he may have violated the rules.[123]

court that gave the decision upon which we are commenting, we venture to say the conclusion would not follow, for conductors have no authority to make or unmake the fundamental rules of the service. See Atchison &c. R. Co. v. Reesman, 60 Fed. 371; Richmond &c. R. Co. v. Finley, 63 Fed. 228; Richmond &c. R. Co. v. Rush, 71 Miss. 987; 15 So. 133; Port Royal &c. R. Co. v. Davis, 95 Ga. 292; 22 S. E. 833. In St. Louis &c. R. Co. v. Caraway, 77 Ark. 405; 91 S. W. 749, it is held that habitual violation by brakemen of a rule where such violation is known to the conductors is sufficient evidence of its abandonment, waiver or abrogation. Citing Cleveland &c. R. Co. v. Baker, 91 Fed. 224; Tullis v. Lake Erie &c. R. Co. 105 Fed. 554; Mason v. Richmond &c. R. Co. 111 N. Car. 482; 16 S. E. 698; 18 L. R. A. 845; 32 Am. St. 814, and some of the other cases cited in the second note to this section.

[122] Richmond &c. R. Co. v. Finley, 63 Fed. 228; Atchison &c. R. Co. v. Reesman, 60 Fed. 370; 23 L. R. A. 768; Penn. R. Co. v. Langdon, 92 Pa. St. 21; 37 Am. R. 651; Houston &c. R. Co. v. Moore, 49 Tex. 31; 30 Am. R. 98; Virginia &c. R. Co. v. Roach, 83 Va. 375; 5 S. E. 175; Shenandoah &c. R. Co. v. Lucado, 86 Va. 390; 10 S. E. 422; George &c. R. Co. v. Davis, 92 Ala. 300; 9 So. 252; 25 Am. St. 47; Richmond &c. R. Co. v. Rush, 71 Miss. 987; 15 So. 133. See, also, Gleason v. Detroit &c. R. Co. 73 Fed. 647; Central R. &c. Co. v. Kitchens, 83 Ga. 83; 9 S. E. 827; Loranges v. Lake Shore &c. R. Co. 104 Mich. 80; 62 N. W. 137; Port Royal &c. R. Co. v. Davis, 95 Ga. 292; 22 S. E. 833. But it is held that constructive as well as actual notice may be sufficient; Alabama &c. R. Co. v. Roach, 110 Ala. 266; 20 So. 132; Fish v. Illinois Cent. R. Co. 96 Ia. 702; 65 N. W. 995; Alexander v. Louisville &c. R. Co. 83 Ky. 590; Texas &c. R. Co. v. Leighty (Tex. Civ. App.), 32 S. W. 800; Lake Erie &c. R. Co. v. Craig, 80 Fed. 488; Barry v. Hannibal &c. R. Co. 98 Mo. 62; 11 S. W. 308; 14 Am. St. 610. Most of these cases hold habitual violation for a long time sufficient to charge the master with knowledge.

[123] Dickson v. Omaha &c. R. Co. 124 Mo. 140; 27 S. W. 478; 25 L. R. A. 320, and note; 46 Am. St. 429; Ford v. Fitchburg R. Co. 110 Mass. 240; 14 Am. R. 598; Clarke v. Holmes, 7 H. & N. 937. See, also, Richmond &c. R. Co. v. Jones, 92

§ 1283. Duty to warn employe of danger.—The general rule is that where the danger is an extraordinary one, that is, a danger not ordinarily incident to the service, and the employer has knowledge of such danger, he is guilty of negligence if he fails to warn the employe.[124] Where, however, the danger is obvious to a person of ordinary intelligence and one that can be known and appreciated by a person who exercises ordinary prudence and care,[125] or where

Ala. 218; 9 So. 276; Pollard v. Maine Cent. R. Co. 87 Me. 51; 32 Atl. 735; Reed v. Burlington &c R. Co. 72 Ia. 166; 33 N. W. 451; 2 Am. St. 243; Dickson v. Omaha &c. R. Co. 124 Mo. 140; 27 S. W. 476; 25 L. R. A. 320, and note; 46 Am. St. 429; Illinois Cent. R. Co. v. Stith, 27 Ky. L. 596; 85 S. W. 1173. The failure to obey rules is usually held to defeat a recovery upon the ground that it constitutes contributory negligence, but it seems to us that, in strictness, it is a positive breach of duty and not merely contributory negligence. Rules of service are part of the contract of employment, and the employe undertakes to obey them, so that if he disobeys them he is guilty of a breach of affirmative duty, assumed by him. Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 219; 12 N. E. 380.

[124] Bannon v. Lutz, 158 Pa. St. 166; 27 Atl. 890; Consolidated &c. R. Co. v. Haenni, 146 Ill. 614; 35 N. E. 162; Hunn v. Michigan &c. R. Co. 78 Mich. 513; 4 N. W. 502; 7 L. R. A. 500; Erickson v. St. Paul &c. R. Co. 41 Minn. 500; 43 N. W. 332; 5 L. R. A. 786; Louisville &c. R. Co. v. Wright, 115 Ind. 378, 387; 16 N. E. 145; 17 N. E. 584; 7 Am. St. 432; Lebbering v. Struthers, 157 Pa. St. 312; 27 Atl. 720; Brennan v. Gordon, 118 N. Y. 489; 23 N. E. 810; 8 L. R. A. 818; 16 Am. St. 775. See, generally, Wolski v. Knapp &c. Co. 90 Wis. 178; 63 N. W. 87; Williams v. Walton, 9 Houst. (Del.) 322; 32 Atl. 726; Mather v. Rillston, 156 U. S. 391; 15 Sup. Ct. 464; Salem Stone Co. v. Griffin, 139 Ind. 141; 38 N. E. 411; Burke v. Anderson, 69 Fed. 814; Fort Smith &c. Co. v. Slover, 58 Ark. 168; 24 S. W. 106; Elledge v. National &c. Co. 100 Cal. 282; 34 Pac. 852; 38 Am. St. 290; Northwestern &c. Co. v. Danielson, 57 Fed. 915; Barnes v. Rembarz, 150 Ill. 192; 37 N. E. 239; Missouri &c. R. Co. v. Walker (Tex.), 26 S. W. 513; Houston &c. R. Co. v. Rutland (Tex. Civ. App.), 101 S. W. 529; Craven v. Smith, 89 Wis. 119; 61 N. W. 317.

[125] Hathaway v. Illinois &c. R. Co. 92 Ia. 337; 60 N. W. 651; Junior v. Missouri &c. Co. 127 Mo. 79; 29 S. W. 988; Myers v. DePauw Co. 138 Ind. 590; 38 N. E. 37; Railsback v. Wayne &c. Co. 10 Ind. App. 622; 38 N. E. 221; Yeager v. Burlington &c. R. Co. 93 Ia. 1; 61 N. W. 215; Nugent v. Kauffman Co. 131 Mo. 241; 33 S. W. 428; Burns v. Washburn, 160 Mass. 457; 36 N. E. 199. See, generally, Siddall v. Pacific Mills Co. 162 Mass. 378; 38 N. E. 969; Western Union Tel. Co. v. McMullen, 58 N. J. L. 155; 33 Atl. 384; 32 L. R. A. 35, and note; Pratt v. Prouty, 153 Mass. 333; 26 N. E. 1002; Ciriack v. Merchants' &c. 146

it is not an extraordinary peril but is one incident to the service, there is no duty to give warning unless the person employed has not reached the years of discretion. Where the danger is open to the observation of a person of ordinary intelligence the general rule is that the employer is not guilty of negligence in failing to give the employe warning of such danger, since the risk is assumed by the employe.[126] The rule just stated has been held to apply to one who solicits and accepts employment as a brakeman, although he informs the company that he has had no experience in that capacity.[127] Where a danger arises from the use of the working place or appliances and is caused by changing their condition or character and the new or increased danger is known to the employer but not to the employe, and is not open to his observation, it is the duty of the employer to give the employe warning.[128] It has been held that where an employe is ordered from his usual position to one of more danger it is the duty of the employer to warn him of the dangers of the position to which he is ordered,[128a] but, as we believe, this doctrine can only apply where the employe is ordered into a position essen-

Mass. 182; 15 N. E. 579; 4 Am. St. 307; Ford v. Anderson, 139 Pa. St. 261; 21 Atl. 18; Rock v. Indian Orchard Mills Co. 142 Mass. 522; 8 N. E. 401; Meehan v. Holyoke St. R. Co. 186 Mass. 511; 72 N. E. 61; Bryant v. Great Northern Paper Co. 100 Me. 171; 60 Atl. 797; Paoline v. J. W. Bishop Co. 25 R. I. 298; 55 Atl. 752; Louisville &c. R. Co. v. Bouldin, 121 Ala. 197; 25 So. 903; Burns v. Pethcal, 75 Hun (N. Y.), 437; 27 N. Y. S. 499; Cleveland &c. R. Co. v. Haas, 35 Ind. App. 627; 74 N. E. 1003. But compare Chicago Term. &c. R. Co. v. O'Donnell, 114 Ill. App. 345, affirmed in 72 N. E. 1133; and see, generally, note in 44 L. R. A. 33.

[126] Findlay v. Russell Wheel &c. Co. 108 Mich. 286; 66 N. W. 50; Jennings v. Tacoma &c. R. Co. 7 Wash. 275; 34 Pac. 937; East &c. R. Co. v. Sims, 80 Ga. 807; 84 Ga. 152; 6 S. E. 595; 20 Am. St. 352; Patton v. Central Ia. R. Co. 73 Ia. 306; 35 N. W. 149.

[127] McDermott v. Atchison &c. R. Co. 56 Kan. 319; 43 Pac. 248. But see Illinois Cent. R. Co. v. Price, 72 Miss. 862; 18 So. 415.

[128] Bjbjian v. Woonsocket &c. Co. 164 Mass. 214; 41 N. E. 265. See, also, Galveston &c. R. Co. v. Manns (Tex. Civ. App.), 84 S. W. 254; Bradburn v. Wabash R. Co. 134 Mich. 575; 96 N. W. 929. The decision in Louisville &c. R. Co. v. Binion, 107 Ala. 645; 18 So. 75, in some respects goes further than the weight of authority warrants. See Michael v. Roanoke &c. Works, 90 Va. 492; 19 S. E. 261; 44 Am. St. 927; Seery v. Gulf &c. R. Co. 34 Tex. Civ. App. 89; 77 S. W. 950; Cincinnati &c. R. Co. v. Gray, 101 Fed. 623; 50 L. R. A. 47.

[128a] Quinn v. Johnson &c. Co. 9 Houst. (Del.) 338; 32 Atl. 858. See, also, Keller v. Gaskill, 20 Ind. App.

tially different from that to which he was assigned by his contract of service. The duty to give warning does not, as a rule, exist where the employe is old enough to comprehend the dangers of the service and is familiar with the appliances with which he is required to work,[129] but where there is a change in the condition of the working place or appliances augumenting the danger, and that fact is known to the employer and not to the employe, then it is the duty of the master, if there be reasonable opportunity to do so, to give notice to the employe of such danger.[130] If the servant obtains knowledge of the dangers from a fellow-servant or some other source he cannot recover against the master upon the sole ground that the master failed to instruct or warn him.[131] Some of the courts hold that it is the duty of the employer to warn the employe of latent dangers,[132]

502; 50 N. E. 363; Brazil Block Coal Co. v. Gaffney, 119 Ind. 455; 21 N. E. 1102; 12 Am. St. 422. And of dangers from other work or extraneous causes, Schroeder v. Chicago &c. R. Co. 108 Mo. 322; 18 S. W. 1094; 18 L. R. A. 827; Pullman's Palace Car Co. v. Harkins, 55 Fed. 932; Paterson v. Wallace, 28 Eng. L. & Eq. 51.

[129] Dougherty v. West Superior &c. Co. 88 Wis. 343; 60 N. W. 274; Bellows v. Pennsylvania &c. Co. 157 Pa. St. 51; 27 Atl. 685; Ogley v. Miles, 139 N. Y. 458; 34 N. E. 1059; Crown v. Orr. 140 N. Y. 450; 35 N. E. 648; Mackin v. Alaska &c. Co. 100 Mich. 276; 58 N. W. 999; Keats v. National &c. Co. 65 Fed. 940; Hoyle v. Excelsior &c. Co. 95 Ga. 34; 21 S. E. 1001. Compare Texas &c. R. Co. v. Sherman (Tex. Civ. App.), 87 S. W. 887 with Galveston &c. R. Co. v. Sherman (Tex. Civ. App.), 67 S. W. 776. See, also, San Antonio &c. Co. v. Noll (Tex. Civ. App.), 83 S. W. 900; Mueller v. La Prelle &c. Co. 109 Mo. App. 506; 84 S. W. 1010; Parish v. Missouri &c. R. Co. (Tex. Civ. App.) 76 S. W. 234; St. Louis &c. R. Co. v. Spivey, 97 Tex. 143; 76 S. W. 748.

[130] The duty to give notice in such cases is not an absolute duty, but is one requiring the exercise of reasonable care and diligence. If reasonable care and diligence are used then the master can not be deemed guilty of negligence. See for cases in which a railroad company was held not chargeable with notice and not bound to warn an employe of the viciousness of a Texas steer. Clark v. Missouri &c. R. Co. 179 Mo. 66; 77 S. W. 882.

[131] Truntle v. North Star &c. Co. 57 Minn. 52; 58 N. W. 832. See, also, Nye v. Dutton, 187 Mass. 549; 73 N. E. 654; Blair v. Heibel, 103 Mo. App. 621; 77 S. W. 1017; Jones v. Louisville &c. R. Co. 95 Ky. 576; 26 S. W. 590; Yeager v. Burlington &c. R. Co. 93 Ia. 1; 61 N. W. 215.

[132] Smith v. Peninsular Car Works, 60 Mich. 501; 27 N. W. 662; 1 Am. St. 542, and note; Holland v. Tennessee &c. R. Co. 91 Ala. 444; 8 So. 524; 12 L. R. A. 232; Crown Cotton Mills v. McNally, 123 Ga. 35; 51 S. E. 13; Louisville &c. R.

and some very broad statements are made in the opinions of the courts. The doctrine is one to be carefully qualified and limited, for it will not do to say that there is a duty to warn employes of all latent dangers, for in every line of business where complicated or powerful machinery is used there are latent dangers incident to the service, and there are some that the master could not discover by the exercise of ordinary care, and of such dangers it is not the duty of the employer to warn the employe; but if the latent danger is not incident to the service and is known to the employer and not to the employe it is the duty of the former to exercise reasonable care and diligence to give the latter notice. Children and adults do not stand upon the same footing, and the duty of the employer is not so narrow and limited where children of tender years are employed as it is where adults or persons who have reached the years of discretion are taken into his service. But even as to children the duty to warn and instruct is not an absolute one,[133] for if reasonable care and diligence are exercised the employer's duty is performed, but what is reasonable care and diligence depends in a great degree upon the age of the child, the dangers of the service and like matters. We cannot enter into a discussion of the general subject of the employer's duty to children whom he takes into his service, nor can we undertake to cite all of the cases upon the subject, but must content ourselves with citing a few of the great number.[134] One who studies the cases will find great confusion and hopeless conflict. So, there may be

Co. v. Binion, 107 Ala. 645; 18 So. 75; Louisville &c. R. Co. v. Graham, 124 Ind. 89; 24 N. E. 668; Stackman v. Chicago &c. R. Co. 80 Wis. 428; 50 N. W. 404.

[133] Pratt v. Prouty, 153 Mass. 333; 26 N. E. 1002; Tinkham v. Sawyer, 153 Mass. 485; 27 N. E. 6; Armstrong v. Forg, 162 Mass. 544; 39 N. E. 190; Stuart v. West End Co. 163 Mass. 391; 40 N. E. 180; Luebke v. Berlin &c. Works, 88 Wis. 442; 60 N. W. 711; 43 Am. St. 913; Schliermann v. Hammond &c. Co. 11 Misc. (N. Y.) 546; 32 N. Y. S. 748. See, also, Ford v. Bodcaw Lumber Co. 73 Ark. 49; 83 S. W. 346; Diehl v. Standard Oil Co. 70 N. J. L. 424; 57 Atl. 131.

[134] Wallace v. Standard Oil Co. 66 Fed. 260; DeGraff v. New York &c. R. Co. 76 N. Y. 125; Coullard v. Tecumseh &c. 151 Mass. 85; 23 N. E. 731; Union Pac. R. Co. v. Fort, 17 Wall. (U. S.) 553; Neilson v. Hillside &c. Co. 168 Pa. St. 256; 31 Atl. 1091; 47 Am. St. 886; Yeager v. Burlington &c. Co. 93 Ia. 1; 61 N. W. 215; Louisville &c. R. Co. v. Frawley, 110 Ind. 18; 9 N. E. 594; Evansville &c. R. Co. v. Maddux, 134 Ind. 571; 33 N. E. 345; 34 N. E. 511; McIntosh v. Missouri &c. R. Co. 58 Mo. App. 281; Casey

a duty to warn and instruct inexperienced servants,[135] when it is clear that they are incompetent to understand the work and danger, where no such duty would exist as to experienced employes. The duty to warn and instruct is a personal duty of the master, and he cannot escape the consequences of a failure to perform it by delegating it to an agent or servant.[136] It is not necessary that warning be given in express words for it may be conveyed in any mode which fairly and reasonably directs the employe's attention to the danger.[137]

§ 1284. Duty to employ competent servants.—It is the company's duty to employes to exercise ordinary care in securing the services of competent co-employes.[138] It is not bound, however, as is sometimes

v. Chicago &c. R. Co. 90 Wis. 113; 62 N. W. 624; Mullin v. California &c. Co. 105 Cal. 77; 38 Pac. 535; McGinnis v. Canada &c. R. Co. 49 Mich. 466; 13 N. W. 819; Cleveland &c. Co. v. Corrigan, 46 Ohio St. 283; 20 N. E. 466; 3 L. R. A. 385; 15 Am. St. 596; Ciriack v. Merchants' &c. Co. 151 Mass. 152; 23 N. E. 829; 6 L. R. A. 733; 21 Am. St. 438; Tagg v. McGeorge, 155 Pa. St. 368; 26 Atl. 671; Rummel v. Dilworth, 131 Pa. St. 509; 19 Atl. 345; 17 Am. St. 827; Chopin v. Badger &c. Co. 83 Wis. 192; 53 N. W. 452; Wynne v. Conklin, 86 Ga. 40; 12 S. E. 183; Gilbert v. Guild, 144 Mass. 601; 12 N. E. 368; Steiler v. Hart, 65 Mich. 644; 32 N. W. 875; Atlanta &c. R. Co. v. Smith, 94 Ga. 107; 20 S. E. 763; Ferguson v. Smith, 15 Misc. (N. Y.) 251; 36 N. Y. S. 415; Bibb &c. Co. v. Taylor, 95 Ga. 615; 23 S. E. 188; Turner v. Norfolk &c. R. Co. 40 W. Va. 675; 22 S. E. 83.

[135] Thompson v. Chicago &c. R. Co. 14 Fed. 564; Union Pac. R. Co. v. Fort, 17 Wall. (U. S.) 553; Fisk v. Central Pac. R. Co. 72 Cal. 38; 13 Pac. 144; 1 Am. St. 22; Atlanta &c. R. Co. v. Smith, 94 Ga. 107; 20 S. E. 763; Louisville &c. R. Co. v. Frawley, 110 Ind. 18; 9 N. E. 594; Hungerford v. Chicago &c. R. Co. 41 Minn. 444; 43 N. W. 324; Goins v. Chicago &c. R. Co. 37 Mo. App. 221.

[136] Pullman &c. Co. v. Laack, 143 Ill. 242; 32 N. E. 285; 18 L. R. A. 215.

[137] Louisville &c. R. Co. v. Boland, 96 Ala. 626; 11 So. 667; 18 L. R. A. 260; Shuster v. Philadelphia &c. R. Co. (Del.) 62 Atl. 689.

[138] Lawler v. Androscoggin &c. R. Co. 62 Me. 463; 16 Am. R. 492, and note; Hilton v. Fitchburg R. Co. 73 N. H. 116; 59 Atl. 625; Moss. v. Pacific R. Co. 49 Mo. 167; 8 Am. R. 126; Baulec v. New York &c. R. Co. 59 N. Y. 356; 17 Am. R. 325; Chicago &c. R. Co. v. Moranda, 108 Ill. 576; Huntingdon &c. R. Co. v. Decker, 84 Pa. St. 419; Chicago &c. R. Co. v. Harney, 28 Ind. 28; 92 Am. Dec. 282; Evansville &c. R. Co. v. Guyton, 115 Ind. 450; 17 N. E. 101; 7 Am. St. 458; Indianapolis &c. Co. v. Boyle, 18 Ind. App. 169; 47 N. E. 690; Keith v. New Haven &c. Ry. Co. 140 Mass. 175; 3 N. E. 28; Peaslee v. Fitchburg Ry. Co. 152 Mass. 155; 25 N. E. 71; Mad River &c. R. Co. v. Barber, 5 Ohio St. 541; Hughes v. Baltimore &c. R. Co.

said, to employ competent fellow servants, but it is bound to use reasonable care in employing fellow servants.[139] If reasonable care is exercised there is no breach of duty, although it may turn out that the fellow servant was in fact incompetent. Where special knowledge and skill are required in order to qualify an employe to properly discharge the duties of the position assigned him then it is the duty of the employer to exercise ordinary care to secure the services of persons reasonably well qualified in skill, knowledge or experience for the position, but where the duties of the position do not require special skill, experience or knowledge, the employer in employing unskilled or inexperienced persons is not necessarily guilty of negligence.[140]

§ 1285. Presumption of competency of employe.—The fact that a

164 Pa. St. 178; 30 Atl. 383; 44 Am. St. 597; Campbell v. Cook, 86 Tex. 630; 26 S. W. 486; 40 Am. St. 878; Baltimore &c. R. Co. v. Neal, 65 Md. 438; 5 Atl. 338; Baltimore &c. R. Co. v. Henthorne, 73 Fed. 634; Southern Pac. R. Co. v. Hetzer, 135 Fed. 272. In Gulf &c. R. Co. v. Hays (Tex. Civ. App.), 89 S. W. 29, this rule is applied and it is held that the general reputation of the employe as incompetent is admissible as tending to charge the company with notice. See, also, Norfolk &c. R. Co. v. Hoover, 79 Md. 253; 29 Atl. 994; 25 L. R. A. 710, and note; 47 Am. St. 392.

[139] Bertha &c. Co. v. Martin, 93 Va. 791; 22 S. E. 869. In Baulec v. New York &c. R. Co. 59 N. Y. 356; 17 Am. R. 325, it was said: "It is equally well settled that when reasonable precautions and efforts to procure safe and skillful servants are used and without fault, one is employed through whose incompetency damage occurs to a fellow servant, the master is not liable." Citing Laning v. New York &c. R. Co. 49 N. Y. 521; 10 Am. R. 417; Wright v. New York &c. R. Co. 25 N. Y. 562; Tarrant v. Webb, 18 C. B. 797; Ormond v. Holland, El. Bl. & El. 102. See, also, Mich. Cent. R. Co. v. Dolan, 32 Mich. 510; Conrad v. Gray, 109 Ala. 130; 19 So. 398; Reiser v. Penna. R. Co. 152 Pa. St. 38; 25 Atl. 175; 34 Am. St. 620; Wabash R. Co. v. McDaniels, 107 U. S. 454; 2 Sup. Ct. 932.

[140] Holland v. Tennessee &c. R. Co. 91 Ala. 444; 8 So. 524; 12 L. R. A. 232; Mobile &c. R. Co. v. Thomas, 42 Ala. 672; Smoot v. Mobile &c. R. Co. 67 Ala. 13; Tyson v. South &c. R. Co. 61 Ala. 554; 32 Am. R. 8; Mobile &c. R. Co. v. Smith, 59 Ala. 245; Tinne v. Mich. Cent. R. Co. 98 Mich. 226; 57 N. W. 116. In the first of the cases cited the rule that conformity to usage and custom repels the inference of negligence is recognized and upon that point the court cited, Louisville &c. R. Co. v. Allen, 78 Ala. 494; Georgia &c. R. Co. v. Propst, 83 Ala. 518; 3 So. 764; Alabama &c. R. Co. v. Arnold, 84 Ala. 159; 4 So. 359; 5 Am. St. 354.

person old enough to comprehend the dangers of the service in which he seeks to engage applies for employment authorizes the employer, so far as the rights of the employe himself are concerned, to assume that he is qualified to perform the duties of the position for which he makes application. The rule we have stated is, however, a general one. There may, perhaps, be positions of unusual danger which it would be negligence on the part of the master to permit a servant to occupy without some inquiry into his experience or competency. But in railroad service there are few positions of that nature and the general rule must be that which we have stated. We are speaking, we add to prevent misunderstanding of our meaning, of cases where the servant is seeking to fasten a liability upon the master, and not of cases where the master is sought to be held liable by third persons. A railroad company is under no obligation to examine an applicant for employment as to his fitness and qualification for the position he seeks, except perhaps where the applicant is a child of tender years.[141] The cases hold that unless the age of the applicant is such as to convey information of inexperience or incapacity the presumption is that he is competent to perform the duties of the position for which he applies.[142] It is held, and justly that one who represents that he is competent to discharge the duties of a brakeman cannot recover for injuries received by him in coupling cars, when such injury was attributable to his lack of skill and knowledge.[143]

§ 1286. Burden of proof where incompetency of fellow servant is alleged.—The presumption is that the employer exercised reasonable care in employing fellow servants, and that presumption until overthrown stands as a prima facie case.[144] Negligence is not pre-

[141] O'Neal v. Chicago &c. R. Co. 132 Ind. 110, 112; 31 N. E. 669; Pittsburgh &c. R. Co. v. Adams, 105 Ind. 151, 166; 5 N. E. 187.

[142] Dysinger v. Cincinnati &c. Ry. Co. 93 Mich. 646; 53 N. W. 825; Alexander v. Louisville &c. R. Co. 83 Ky. 589; Mayes v. Chicago &c. Ry. Co. 63 Iowa, 562; 14 N. W. 340; 19 N. W. 680. See Lyttle v. Chicago &c. R. Co. 84 Mich. 289; 47 N. W. 571.

[143] Stanley v. Chicago &c. R. Co. 101 Mich. 202; 59 N. W. 393. See, also, Arcade File Works v. Juteau, 15 Ind. App. 460; 40 N. E. 818; 44 N. E. 326.

[144] Louisville &c. R. Co. v. Thompson, 107 Ind. 442; 8 N. E. 818; 9 N. E. 357; 57 Am. R. 120; Bates v. Pickett, 5 Ind. 22; 61 Am. Dec. 73; Old National Bank v. Findley, 131 Ind. 225, 229; 31 N. E. 62.

sumed except in very rare instances and in cases of a peculiar character.[145] It follows from these well-known principles that the burden of proving negligence in employing fellow servants is upon the plaintiff and in the absence of such proof there can be no recovery.[146]

§ 1287. Trains to be provided with a sufficient crew.—It is the duty of a railroad company to exercise ordinary care and diligence to provide its trains with a sufficient number of persons to operate them with reasonable safety. The company by the contract of hir-

[145] Colorado &c. R. Co. v. Ogden, 3 Colo. 499; Mobile &c. R. Co. v. Thomas, 42 Ala. 672; State v. Philadelphia &c. R. Co. 60 Md. 555; Baltimore &c. R. Co. v. Bahrs, 28 Md. 647; Foy v. Philadelphia &c. R. Co. 47 Md. 76; Baltimore &c. R. Co. v. State, 54 Md. 648; Toledo &c. R. Co. v. Brannagan, 75 Ind. 490; Brazil &c. R. Co. v. Young, 117 Ind. 520, 524; 20 N. E. 423; 6 Thomp. Neg. (2d ed.) § 7634, et seq.; Wood Master and Servant (2d ed.), 768, § 382; Bailey Master's Liability for Injuries to Servants, 507, 508.

[146] In Hermann v. Port Blakely &c. Co. 71 Fed. 853, it was said: "No negligence on the part of the company in employing and selecting the particular individual was shown, and so far as that feature of the case is concerned, it may be taken as conceded that he was competent. The legal presumption is that he was competent, and that the master discharged the duty to the libelant in that respect, no proof to the contrary having been submitted." Beasley v. San Jose Fruit Packing Co. 92 Cal. 388; 28 Pac. 485; Drake v. New York &c. R. Co. 80 Hun (N. Y.), 490; 30 N. Y. S. 671; Potter v. New York &c. R. Co. 136 N. Y. 77; 32 N. E. 603; Ohio &c. R. Co. v. Dunn, 138 Ind. 18; 36 N. E. 702; Summerhays v. Kansas City &c. R. Co. 2 Colo. 484; Evansville &c. R. Co. v. Tohill, 143 Ind. 49; 41 N. E. 709; Louisville &c. R. Co. v. Breedlove, 10 Ind. App. 657; 38 N. E. 359; Davis v. Detroit &c. R. Co. 20 Mich. 105; 4 Am. R. 364; Wright v. New York &c. R. Co. 25 N. Y. 562; Gilman v. Eastern &c. R. Co. 10 Allen, 233; 87 Am. Dec. 635; Rose v. Boston &c. R. Co. 58 N. Y. 217; Geoghegan v. Atlas &c. Co. 146 N. Y. 369; 40 N. E. 507; 4 Thomp. Neg. (2d ed.) § 4906; Bailey Master's Liability for Injuries to Servants, 55, 56. See, also, O'Neil v. O'Leary, 164 Mass. 387; 41 N. E. 662; Mobile &c. R. Co. v. Vallowe, 214 Ill. 124; 73 N. E. 416 (citing text); Kindel v. Hall, 8 Colo. App. 63; 44 Pac. 781; Denver &c. R. Co. v. Driscoll, 12 Colo. 520; 21 Pac. 708; 13 Am. St. 243; Murray v. Denver &c. R. Co. 11 Colo. 124; 17 Pac. 484; Colorado &c. Iron Co. v. Lamb, 6 Colo. App. 255; 40 Pac. 251. And the plaintiff must show that he had no knowledge of the incompetency. Spencer v. Ohio &c. Ry. Co. 130 Ind. 181; 29 N. E. 915; Peterson v. New Pittsburg &c. Co. 149 Ind. 260; 49 N. E. 8; 63 Am. St. 289.

ing impliedly undertakes that it will exercise ordinary care to provide an adequate number of persons to prevent the employes engaged in running the train from being exposed to unusual or extraordinary hazards.[147] If ordinary care is exercised the company is not liable since negligence is the test of liability and if ordinary care is exercised there can be no negligence. Where the company conforms to the usages and customs that commonly prevail it discharges its duty for there is no negligence where an employer does what is generally done by others in the same line of business. There is not, as the language of some of the books seems to indicate, an absolute duty to provide an adequate force of train men, for the employer is not an insurer, nor is he held to a higher degree of care than ordinary or reasonable care.

§ 1288. Assumption of risks of service—General doctrine.—One who enters the service of a railroad company assumes all the ordinary risks of such service.[148] He assumes such risks as are ordinarily in-

[147] Johnson v. Ashland &c. R. Co. 71 Wis. 553; 37 N. W. 826; 5 Am. St. 243; Jones v. Old Dominion &c. R. Co. 82 Va. 140; 3 Am. St. 92; Flike v. Boston &c. R. Co. 53 N. Y. 549; 13 Am. R. 545; Pennsylvania &c. R. Co. v. McCaffrey, 139 Ind. 430, 439; 38 N. E. 67; 29 L. R. A. 104; Booth v. Boston &c. R. Co. 73 N. Y. 38; 29 Am. R. 97; Mad River &c. R. Co. v. Barber, 5 Ohio St. 541; 67 Am. Dec. 312; Bailey Master's Liability to Servants, 68; Patterson Railway Accident Law, § 297; Moak Underhill Torts, 47. See, also, Harty v. St. Louis &c. R. Co. 95 Mo. 368; Louisville &c. R. Co. v. Davis, 91 Ala. 487; 8 So. 552; Bonn v. Galveston &c. R. Co. (Tex. Civ. App.) 82 S. W. 808. But if the servant knows of the insufficiency and assumes the risk he can not recover. Mad River R. Co. v. Barber, 5 Ohio St. 541; 67 Am. Dec. 312; Skipp v. Eastern Counties R. Co. 9 Exch. 223. But see Galveston &c. R. Co. v. Bonn (Tex. Civ. App.), 99 S. W. 413.

[148] Gravelle v. Minneapolis &c. R. Co. 10 Fed. 711; Thompson v. Chicago &c. R. Co. 14 Fed. 564; Bohn &c. Co. v. Erickson, 55 Fed. 943; Woodworth v. St. Paul &c. R. Co. 18 Fed. 282; Southern Pacific R. Co. v. Seley, 152 U. S. 145; 14 Sup. Ct 530; Davidson v. Southern Pacific R. Co. 44 Fed. 476; Gulf &c. R. Co. v. Hohl (Texas), 29 S. W. 1131; International &c. R. Co. v. Arias, 10 Texas, 190; 30 S. W. 446; Paland v. Chicago &c. R. Co. 44 La. Ann. 1003; 11 So. 707; Kohn v. McNulta, 147 U. S. 238; 13 Sup. Ct. 298; Union &c. R. Co. v. Daniels, 152 U. S. 684; 14 Sup. Ct. 756; O'Neal v. Chicago &c. R. Co. 132 Ind. 110; 31 N. E. 609; Carlson v. Oregon &c. R. Co. 21 Ore. 450; 28 Pac. 497; Clark v. St. Paul &c. R. Co. 28 Minn. 128; 9 N. W. 581; Kelley v. Silver Spring &c. R. Co. 12 R. I. 112; 34 Am. R. 615, and note;

cident to the service, not merely such as are necessarily incident to the service he enters.[149] He does not assume extraordinary risks caused by a negligent breach of duty on the part of the employer.[150] He may, however, where he knows thereof and appreciates the danger, and voluntarily continues the work, be precluded from recovery.[151] He has a right to expect that the employer will exercise ordinary care, but no right to expect that the employer will use a higher degree of care.[152] He assumes, as a general rule, all risks from de-

Nashville &c. R. Co. v. Elliott, 1 Cold. (Tenn.) 611; 78 Am. Dec. 506; Noyes v. Smith, 28 Vt. 59; 65 Am. Dec. 222; Seymour v. Maddox, 16 Q. B. 326; Ryan v. Canada &c. R. Co. 10 Ont. R. 745; Easton v. Houston &c. R. Co. 39 Fed. 65; Tobey v. Burlington &c. R. Co. 94 Iowa, 256; 62 N. W. 761; 33 L. R. A. 496; McDonald v. Norfolk &c. R. Co. 95 Va. 98; 27 S. E. 821 (citing text).

[149] Texas &c. R. Co. v. Smith, 67 Fed. 524; 31 L. R. A. 321, and note; Missouri &c. R. Co. v. Wood (Tex.), 35 S. W. 879. Risks such as "commonly attend the business" are assumed. Gulf &c. R. Co. v. Kizziah, 86 Texas, 81; 23 S. W. 578. See, also, Houston &c. R. Co. v. Smith (Tex. Civ. App.), 38 S. W. 51.

[150] Dumas v. Stone, 65 Vt. 442; 25 Atl. 1097; Anglin v. Texas &c. R. Co. 60 Fed. 553; Warn v. New York &c. R. Co. 80 Hun (N. Y.), 71; 29 N. Y. S. 897; Southern &c. R. Co. v. Burke, 60 Fed. 704; Davis v. New York &c. R. Co. 159 Mass. 532; 34 N. E. 1070; Consolidated &c. R. Co. v. Haenni, 146 Ill. 614; 35 N. E. 162; Bannon v. Lutz, 158 Pa. St. 166; 27 Atl. 890; Hill v. Southern Pac. Co. 23 Utah, 94; 63 Pac. 814; Norfolk &c. R. Co. v. Jackson, 85 Va. 489; 8 S. E. 370; Choctaw &c. R. Co. v. McDade, 191 U. S. 64; 24 Sup. Ct. 24, 25; Baltimore &c. Ry. Co. v. Spaulding, 21 Ind. App. 323; 52 N. E. 410; Wright v. Chicago &c. R. Co. 160 Ind. 583; 66 N. E. 454.

[151] Martin v. Des Moines &c. Co. (Ia.) 106 N. W. 359. See, also, Gulf &c. R. Co. v. Williams (Tex. Civ. App.), 39 S. W. 967; Wabash R. Co. v. Ray, 152 Ind. 392; 51 N. E. 920, 922; McDonald v. Norfolk &c. R. Co. 95 Va. 98; 27 S. E. 821; Seldombridge v. Chesapeake &c. R. Co. 46 W. Va. 569; 33 S. E. 293; San Antonio &c. R. Co. v. Engelhorn, 24 Tex. Civ. App. 324; 62 S. W. 561; 65 S. W. 68. But see Richmond &c. R. Co. v. Norment, 84 Va. 167; 4 S. E. 211; 10 Am. St. 827.

[152] Buckley v. Gould &c. R. Co. 14 Fed. 833; Johnson v. Armour, 18 Fed. 490; Southern Pacific R. Co. v. Seley, 152 U. S. 145; 14 Sup. Ct. 530; Baltimore &c. R. Co. v. Mackey, 157 U. S. 72; 15 Sup. Ct. 491; Central &c. R. Co. v. Keegan, 160 U. S. 259; 16 Sup. Ct. 269; Potter v. New York &c. R. Co. 136 N. Y. 77; 32 N. E. 603; Nutt v. Southern &c. R. Co. 25 Ore. 291; 35 Pac. 653; La Pierre v. Chicago &c. R. Co. 99 Mich. 212; 58 N. W. 60; Atchison &c. R. Co. v. Alsdurf, 47 Ill. App. 200; Galveston &c. R. Co. v. Goodwin (Texas), 26 S. W. 1007; McNeil v. New York &c. R. Co. 71 Hun (N. Y.), 24; 24 N. Y. S. 616. Knowledge of employe as a

fects in premises or appliances which are known to him, or are open and obvious to observation.[153] Where the employe and employer stand on common ground, with equal means of knowledge, ordinary risks of the service are assumed by the employe.[154] But he is not, ordinarily, bound to inspect and search for defects and does not assume risks caused by the company's master's failure to perform its duty, unknown to him.[155] It has been justly said in speaking of the master's duty to furnish safe machinery and appliances that:

bar to recovery. Walsh v. Whiteley, L. R. 21 Q. B. Div. 371; Schroeder v. Michigan Car Co. 56 Mich. 132; 22 N. W. 220; Appel v. Buffalo &c. R. Co. 111 N. Y. 550; 19 N. E. 93; Tuttle v. Detroit &c. R. Co. 122 U. S. 189; 7 Sup. Ct. 1166; Randall v. Baltimore &c. R. Co. 109 U. S. 478; 3 Sup. Ct. 322; Washington &c. R. Co. v. McDade, 135 U. S. 554; 10 Sup. Ct. 1044. It is error to unqualifiedly instruct the jury that the employer contracts not to expose the employe to other risks than those necessarily incident to the service. Per Toulmen, J., in Texas &c. R. Co. v. Smith, 67 Fed. 524; 31 L. R. A. 321, and note, citing Texas &c. R. Co. v. Minnick, 57 Fed. 362.

[153] Batterson v. Chicago &c. R. Co. 53 Mich. 125; 18 N. W. 584; Pahlan v. Detroit &c. R. Co. 122 Mich. 232, 233; 81 N. W. 103; Carpenter v. Mexican &c. R. Co. 39 Fed. 315; Gulf &c. R. Co. v. Schwabbe, 1 Tex. Civ. App. 573; 21 S. W. 706; Wabash R. Co. v. Ray, 152 Ind. 392, 399, 400; 51 N. E. 920 (citing text); Pennsylvania R. Co. v. Ebaugh, 152 Ind. 531; 53 N. E. 36; Warmington v. Atchison &c. R. Co. 46 Mo. App. 159; Goff v. Norfolk &c. R. Co. 36 Fed. 299; Tuttle v. Detroit &c. R. Co. 122 U. S. 189; 7 Sup. Ct. 1166.

[154] Big Creek &c. Co. v. Wolf, 138 Ind. 496; 38 N. E. 52; Vincennes &c. Co. v. White, 124 Ind. 376; 24 N. E. 747; Swanson v. Lafayette, 134 Ind. 625; East St. Louis &c. R. Co. v. Shannon, 52 Ill. App. 420; Ames v. Lake Shore &c. R. Co. 135 Ind. 363; 35 N. E. 117; Johnson v. Chesapeake &c. R. Co. 36 W. Va. 73; 14 S. E. 432; Fisk v. Central Pac. R. Co. 72 Cal. 38; 13 Pac. 144; 1 Am. St. 22; Clark v. Missouri Pac. R. Co. 48 Kans. 654; 29 Pac. 1138; Wormell v. Maine Cent. R. Co. 79 Me. 397; 10 Atl. 49; 1 Am. St. 321; Quinn v. New York &c. R. Co. 175 Mass. 150; 55 N. E. 891; Fuller v. New York &c. R. Co. 175 Mass. 424; 56 N. E. 574; Smith v. St. Paul &c. R. Co. 51 Minn. 86; 52 N. W. 1068.

[155] Texas &c. R. Co. v. Archbold, 170 U. S. 665; 18 Sup. Ct. 777; Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439; 20 N. E. 287; 10 Am. St. 67; Baltimore &c. R. Co. v. Amos, 20 Ind. App. 378, 382; 49 N. E. 854; Pittsburg &c. R. Co. v. Parrish, 28 Ind. App. 189; 62 N. E. 514; 91 Am. St. 120; McDonald v. Chicago &c. R. Co. 41 Minn. 439; 43 N. W. 380, 382; 16 Am. St. 711, and note; Railway Co. v. Lehmberg, 75 Tex. 67; 12 S. W. 840; New York &c. R. Co. v. O'Leary, 93 Fed. 737. See, also, Southern Ry. Co. v. McGowan (Ala.), 43 So. 378.

"It is not the absolute duty of an employer to see that the instruments and machinery are safe. The limit of his duty is reasonable care and precaution in that respect."[156] Where the employe is excusably ignorant of the facts on which the risk depends, he does not, as a rule, assume it,[157] but it is generally otherwise where he has knowledge of all the material facts.[158] The employe cannot be held to assume a risk unless he has had time and opportunity to acquire knowledge of the defect which created the danger,[159] and many of the authorities hold that there must not only be knowledge of the situation or defect but also appreciation of the danger.[160] While the general rule is that the servant assumes the ordinary risks of the service into which he voluntarily enters, he does not necessarily assume the risks arising from a breach of the duty of the master. Negligence on the part of the master in the performance of the duty which he owes his employes creates, as a rule, an extraordinary risk and such a risk is not assumed by the employe,[161]

[156] Brewer, J., in Canter v. Colorado &c. R. Co. 35 Fed. 41.

[157] Breen v. Field, 157 Mass. 277; 31 N. E. 1075; Murphy v. Wabash &c. R. Co. 115 Mo. 111; 21 S. W. 862; Nichols v. Chrystal &c. Co. 126 Mo. 55; 28 S. W. 991; Soeder v. St. Louis &c. R. Co. 100 Mo. 673; 13 S. W. 714; 18 Am. St. 724; Bailey v. Rome &c. R. Co. 139 N. Y. 302; 34 N. E. 918; Salem Stone &c. Co. v. Tepps, 10 Ind. App. 519; 38 N. E. 229; Evansville &c. R. Co. v. Maddux, 134 Ind. 571; 33 N. E. 345. The case last cited goes very far; perhaps too far. See, also, Philadelphia &c. R. Co. v. Huber, 128 Pa. St. 63; 18 Atl. 334; 5 L. R. A. 439.

[158] King v. Ford River &c. Co. 93 Mich. 172; 53 N. W. 10; Craver v. Christian, 36 Minn. 413; 31 N. W. 457; 1 Am. St. 675.

[159] Sherman v. Chicago &c. R. Co. 34 Minn. 259; 25 N. W. 593. See Barbo v. Bassett, 35 Minn. 485; 29 N. W. 198; Wright v. Chicago &c. R. Co. 160 Ind. 583.

[160] Texas &c. R. Co. v. Swearingen, 196 U. S. 51; 25 Sup. Ct. 164; Wuotilla v. Duluth &c. Co. 37 Minn. 153; 33 N. W. 551; 5 Am. St. 832; Chicago &c. R. Co. v. Knapp, 176 Ill. 127; 52 N. E. 927; Avery v. Nordyke, 34 Ind. App. 541; 70 N. E. 888; Wright v. Chicago &c. R. Co. 160 Ind. 583, 591; 66 N. E. 454; Fitzgerald v. Connecticut &c. Co. 155 Mass. 155; 29 N. E. 464; 31 Am. St. 537; Burns v. Delaware &c. R. Co. 70 N. J. L. 745; 59 Atl. 220, 592; 67 L. R. A. 956, and numerous authorities cited in notes in 97 Am. St. 893, and 98 Am. St. 313, 314. But he ought to appreciate ordinary risks of such service, and can not well be heard to say that he did not appreciate the risk of an obvious defect or work, where such risk is so plain that every one ought to appreciate it.

[161] Union &c. R. Co. v. Daniels, 152 U. S. 684; 14 Sup. Ct. 756; Texas &c. R. Co. v. Archi-

except where with notice of the breach of duty and the attendant danger he remains in the service, or, with such knowledge, makes no complaint or objection.[162]

§ 1288a. Assumption of risks distinguished from contributory negligence—Basis of doctrine—Burden of proof.—The doctrine of assumption of risks is to be distinguished from that of contributory negligence.[163] This distinction is not always drawn and there is

bald, 170 U. S. 665; 18 Sup. Ct. 777; Mexican Cent. R. Co. v. Murray, 102 Fed. 264; Davis v. Central &c. R. Co. 55 Vt. 84; 45 Am. R. 590; 11 Am. & Eng. R. Cas. 173; Cumberland &c. R. Co. v. State, 44 Md. 283; Trask v. California &c. R. Co. 63 Cal. 96; Chicago &c. R. Co. v. Avery, 109 Ill. 314; Chicago &c. R. Co. v. Wagner, 17 Ind. App. 22; 45 N. E. 76, 1121; Union Pac. R. Co. v. Fort, 17 Wall. (U. S.) 553; Anderson v. Bennett, 16 Ore. 515; 19 Pac. 765; 8 Am. St. 311; Torians v. Richmond &c. R. Co. 84 Va. 192; 4 S. E. 339; Solomon R. Co. v. Jones, 30 Kan. 601; 15 Am. & Eng. R. Cas. 201; Dobbin v. Richmond &c. R. Co. 81 N. C. 446; 31 Am. R. 512; Ford v. Fitchburg &c. R. Co. 110 Mass. 240; 14 Am. R. 598; Brann v. Chicago &c. R. Co. 53 Iowa, 595; 6 N. W. 5; 36 Am. R. 243. See, also, Warren v. Chicago &c. R. Co. 113 Mo. App. 498; 87 S. W. 585; Mace v. H. A. Boelker Co. 127 Ia. 721; 104 N. W. 475; St. Louis &c. R. Co. v. Vestal (Tex. Civ. App.), 86 S. W. 790. The English cases assert a different doctrine. Wilson v. Merry, L. R. 1 H. L. Sc. App. 326; Waller v. Southeastern &c. R. Co. 2 H. & C. 102; Feltham v. England, L. R. 2 Q. B. 33; Wigmore v. Jay, 5 Exch. 354. See Johnson v. Boston &c. Co. 135 Mass. 209; 46 Am. R. 458.

[162] Anthony v. Leeret, 105 N. Y. 591; 12 N. E. 561; Cunningham v. Merrimac &c. Co. 163 Mass. 89; 39 N. E. 774; Birmingham v. Pettit (D. C.), 21 Wash. L. R. 115. See, also, Indianapolis &c. R. Co. v. Watson, 114 Ind. 20; 14 N. E. 721; 15 N. E. 824; 5 Am. St. 578; Patten v. Central Iowa R. Co. 73 Ia. 306; 35 N. W. 149; McPeck v. Central Vt. R. Co. 79 Fed. 590; Toledo &c. R. Co. v. Moore, 77 Ill. 217; Ragon v. Toledo &c. R. Co. 97 Mich. 265; 56 N. W. 612; 37 Am. St. 336; St. Louis &c. R. Co. v. Davis, 54 Ark. 389; 15 S. W. 895; 26 Am. St. 48; Lee v. St. Louis &c. R. Co. 112 Mo. App. 372; 87 S. W. 12.

[163] Dowd v. New York &c. R. Co. 170 N. Y. 459; 63 N. E. 541; Louisville &c. R. Co. v. Sandford, 117 Ind. 265; 19 N. E. 770; Hesse v. Columbus &c. Co. 58 Ohio St. 167; 50 N. E. 354, 355; Railway Co. v. O'Brien, 161 U. S. 451; 16 Sup. Ct. 618; St. Louis Cordage Co. v. Miller, 126 Fed. 495; 63 L. R. A. 551; Choctaw &c. R. Co. v. McDade, 191 U. S. 64; 24 Sup. Ct. 24, 25; Miner v. Connecticut River R. Co. 153 Mass. 398; 26 N. E. 994; Thomas v. Quartermaine, L. R. 18 Q. B. Div. 685, 697; 56 L. J. Q. B. N. S. 340; Chicago &c. R. Co. v. Heerey, 203 Ill. 492; 68 N. E. 74; Choctaw &c. R. Co. v. Jones, 77 Ark. 367; 92 S.

some confusion in the authorities, but the carefully considered decisions and most of the text books note the distinction and base the doctrine of assumption of risks upon implied contract or waiver.[164] This, we think is undoubtedly correct as applied to the ordinary risks of the service and such as are obvious and known, or ought to be known to the employe when he enters upon the employment; but it is not, perhaps, so clear as to risks caused by the negligence of the master and not existing at the time of entering upon the employment. In the latter class of cases, where the employe knows and appreciates the risk and yet continues the work without objection, the doctrine is sometimes based upon the maxim volenti fit non injuria[165] rather than that of contractual assumption of risks,

W. 244. See, also, Louisville &c. R. Co. v. Kemper, 147 Ind. 561, 567; 47 N. E. 214, and authorities cited; Bradburn v. Wabash R. Co. 134 Mich. 575; 96 N. W. 929. It is often said, however, that extraordinary perils are not assumed, unless they are known and voluntarily encountered, or are obvious, and expose the servant to danger such that an ordinarily prudent man would not encounter it or continue in the performance of the employment even upon order of the master. Chicago &c. Co. v. Mueller, 203 Ill. 558; 68 N. E. 51, 53; Chicago &c. R. Co v. Howe, 172 Ill. 601; 50 N. E. 151; Southern Pac. Co. v. Yeargin, 109 Fed. 436; Wood Master & Servt. § 387. See, also, the cases reviewed on both sides in the principal and dissenting opinions in St. Louis Cordage Co. v. Miller, 126 Fed. 495; 63 L. R. A. 551. There is conflict and confusion among the Missouri and Minnesota cases, but most of the later decisions seem to recognize the distinction. Smith v. Winona &c. R. Co. 42 Minn. 87; 43 N. W. 968; Steinhauser v. Spraul, 127 Mo. 541, 562; 28 S. W. 620; 30 S. W. 102; 27 L. R. A. 441; Roberts v. Missouri &c. Co. 166 Mo. 370, 379; 66 S. W. 155, and other cases cited in the Federal case above referred to.

[164] Dowd v. New York &c. R. Co. 170 N. Y. 459, 469-472; 63 N. E. 541; Davis Coal Co. v. Polland, 158 Ind. 607, 613, 615, 619; 62 N. E. 492; 92 Am. St. 319; Louisville &c. R. Co. v. Sandford, 117 Ind. 265, 266, 267; 19 N. E. 770; Narramore v. Cleveland &c. R. Co. 96 Fed. 298; 48 L. R. A. 68, and note; Choctaw &c. R. Co. v. Jones (Ark.), 92 S. W. 244; Chicago &c. R. Co. v. Geary, 110 Ill. 383; Dempsey v. Sawyer, 95 Me. 295; 49 Atl. 1035; note to Limberg v. Glenwood Lumber Co. (127 Cal. 598); 49 L. R. A. 33, 49; et seq.; 2 Thomp. Neg. 840.

[165] See O'Maley v. South Boston &c. Co. 158 Mass. 135; 32 N. E. 1119; 47 L. R. A. 161, and note; Davis v. Forbes, 171 Mass. 548; 51 N. E. 20; 47 L. R. A. 170, 176, 177, and note; Choctaw &c. R. Co. v. Jones, 77 Ark. 367; 92 S. W. 244. In Wagner v. Boston &c. R. Co. 188 Mass. 437; 74 N. E. 919, the doctrine of contractual assumption of

although it is difficult to distinguish between the two. This distinction, if it exists, may serve to reconcile some of the decisions upon the question of the burden of proof, but they seldom refer to any distinction, and courts adopting opposite theories have reached the same conclusion as to the burden of proof. Thus, in a recent case in New York, it is held that the doctrine of contractual assumption of risk applies not only to ordinary risks of the service but also to those caused by negligence of the defendant, known to the plaintiff before the injury, that it comes in as an implied waiver before both the negligent act and the injury, and is not like contributory negligence, which comes in between them, and that the burden is upon the master to show that the risk was assumed.[166] In a Wisconsin case, while the same result is reached, it is said that the assumption of an unusual risk is in the nature of contributory negligence, that there is no presumption that the employe assumed an unusual risk, and, the burden is therefore upon the defendant to show such assumption where the risk is unusual.[167] In Iowa it has been repeatedly held that assumption of risks must be pleaded and proved by the defendant,[168] but in a recent case the distinction is noted between risks voluntarily assumed by remaining in the service without objection and those inherent in the contract of employment, and it is held that the latter need not be pleaded as a defense.[169] There are

risks is held not to apply to concealed risks or subsequent negligence of the master. In St. Louis Cordage Co. v. Miller, 126 Fed. 495; 63 L. R. A. 551, it is said that the doctrine is placed by the authorities and sustained upon both grounds.

[166] Dowd v. New York &c. R. Co. 170 N. Y. 459; 63 N. E. 541.

[167] Nadau v. White River &c. Co. 76 Wis. 120; 43 N. W. 1135; 20 Am. St. 29.

[168] Shebek v. National Cracker Co. 120 Ia. 414; 94 N. W. 930; Sankey v. Railroad Co. 118 Ia. 39; 91 N. W. 820; Christy v. Railroad Co. 126 Ia. 428; 102 N. W. 194.

[169] Martin v. Des Moines &c. Co. (Ia.) 106 N. W. 359, 363, where it is said: "The very common use of this phrase with reference to two widely different legal propositions is doubtless responsible for the confusion here existing. When a servant enters the employment of a master, he is presumed to have taken into consideration such danger and exposure to injury as is naturally incident to or connected with such service, even when the master has exercised all reasonable care for his servant's safety. The risk thus arising, which involves no element of negligence on part of the master, the servant takes upon himself and his wages are considered to be his full compensation for the danger thus incurred as well as for the actual labor of his

other decisions that seem to lay down the rule generally that the burden of proving assumption of risks is upon the defendant,[170] while still others hold that the burden is upon the plaintiff to show that he did not assume the risk.[171]

§ 1289. Assumption of risks—Employer's methods of doing busi-

hands. This so-called "assumption of risk" inheres in the contract of employment or in the relation of master and servant and need never be pleaded as a defense. A simple denial of the charge of negligence raises the question of this assumption sufficiently for all purposes of the case. If the servant brings an action against his master, alleging negligence, and succeeds only in proving that the injury he has sustained was the result of some risk naturally incident to his employment, he fails to recover because he has failed to prove negligence. The very expression, "risks naturally incident to or inherent in the employment," exclude ex vi termini the idea of negligence; while "negligence," as applied to the master, conveys with equal certainty the idea of a risk not incident to or inherent in the employment, but arising from the failure of the master to exercise the degree of care which the law requires of him for the safety of the servant. Now, generally speaking, the law never holds the servant to take upon himself the risk of injury from such failure of duty on the master's part; but to this proposition there is a well-recognized exception. While the servant, in entering upon and exercising the employment, may rightfully take it for granted that the master's duty with reference to his safety has been and will continue to be performed, yet if he knows that the master is in fact negligent in any respect, or if such negligence is so patent or obvious that as a person of ordinary capacity he ought to know it and to appreciate the danger therefrom, and with such knowledge he continues in the service without any promise on part of the master to remedy or remove the defect, then he is said to have "assumed the risk" of the master's negligence and cannot recover for injury resulting to himself therefrom. . . . It is this assumption of risk, constituting, as we have already said, an exception to the general rule, which affords an affirmative defense to an action by the servant for personal injury and to be available to the master must be affirmatively pleaded and proved."

[170] Thompson v. Great Northern R. Co. 70 Minn. 219; 72 N. W. 962; Walker v. McNeill, 17 Wash. 582; 50 Pac. 518; Pennsylvania R. Co. v. Jones, 123 Fed. 753; McDonald v. Champion &c. Co. 140 Mich. 401; 103 N. W. 829 (where it is caused by the negligence of the master and is not an ordinary risk of the service).

[171] Louisville &c. R. Co. v. Quinn, 14 Ind. App. 554; 43 N. E. 240; Clark Co. Cement Co. v. Wright, 16 Ind. App. 630; 45 N. E. 817. See, also, Lloyd v. Hanes, 126 N. Car. 359; 35 S. E. 611; Chicago &c.

ness.—An employe cannot control the employer's business nor prescribe the methods of conducting it. The employer is not necessarily liable to the employe for personal injuries received by him although the employer might have adopted a safer method of conducting business.[172] The employe assumes the risks, "ordinarily incidental to his employer's business and to the employer's known manner of having it performed."[173] The rule stated charges the employe with risks arising from the mode of running trains,[174] of changing the time of trains, of moving locomotives, cars and the like.[175] An illustration of the rule is supplied by a case in which it was held that the company was not liable to a switchman who was injured because it failed to light the yard in which it required him to perform his duties.[176]

R. Co. v. Heerey, 203 Ill. 492; 68 N. E. 74. But see Louisville &c. R. Co. v. Orr, 84 Ind. 50; Davis Coal Co. v. Polland, 158 Ind. 607, 615; 62 N. E. 492; 92 Am. St. 319.

[172] Naylor v. Chicago &c. R. Co. 53 Wis. 661; 11 N. W. 24; 5 Am. & Eng. R. Cas. 460; Hewitt v. Flint &c. R. Co. 67 Mich. 61; 31 Am. & Eng. R. Cas. 249; 34 N. W. 659; Kelley v. Chicago &c. R. Co. 53 Wis. 74; 9 N. W. 81; 5 Am. & Eng. R. Cas. 469; Stephenson v. Duncan, 73 Wis. 404; 41 N. W. 337; 9 Am. St. 806; Hughes v. Winona &c. R. Co. 27 Minn. 137; 6 N. W. 553; Bengston v. Chicago &c. R. Co. 47 Minn. 486; 50 N. W. 531; Smith v. Wilmington &c. R. Co. 129 N. Car. 173; 39 S. E. 805; 85 Am. St. 740, 742 (citing text).

[173] Texas &c. R. Co. v. Minnick, 61 Fed. 635, 638. See, also, Ives v. Wisconsin Cent. R. Co. (Wis.) 107 N. W. 452; Ladd v. New Bedford R. Co. 119 Mass. 413; 20 Am. R. 331; Wormell v. Maine Cent. R. Co. 79 Me. 397; 10 Atl. 49; 1 Am. St. 321, 325. But it is held that he is not bound to pass judgment upon it or its adequacy. Texas &c. R. Co. v. Archibold, 170 U. S. 665; 18 Sup. Ct. 777, 779, 780.

[174] Southern Ind. R. Co. v. Messick, 35 Ind. App. 676; 74 N. E. 1097, 1099 (citing text). See, also, Ives v. Wisconsin Cent. R. Co. (Wis.) 107 N. W. 452.

[175] Kuhns v. Wisconsin &c. R. Co. 70 Iowa, 561; 31 N. W. 868; Kennedy v. Pennsylvania &c. R. Co. 1 Mon. (Pa.) 271; 17 Atl. 7; Larson v. St. Paul R. Co. 43 Minn. 423; 45 N. W. 722; Jolly v. Detroit &c. R. Co. 93 Mich. 370; 53 N. W. 526; Olson v. St. Paul R. Co. 38 Minn. 117; 35 N. W. 866; Whitmore v. Boston &c. R. Co. 150 Mass. 477; 23 N. E. 220; Jackson v. Missouri Pac. R. Co. 104 Mo. 448; 16 S. W. 413; Fordyce v. Lowman, 57 Ark. 160; 20 S. W. 1090; Naylor v. New York &c. R. Co. 33 Fed. 801; Caron v. Boston &c. R. Co. 164 Mass. 523; 42 N. E. 112. See, generally, Abbot v. McCadden, 81 Wis. 563; 51 N. W. 1079; 29 Am. St. 910.

[176] Grant v. Union Pacific R. Co. 45 Fed. 673. See, also, Southern Pac. R. Co. v. Gloyd, 138 Fed. 388.

§ 1290. Risks of service—Illustrative cases.—A watchman at a roundhouse, whose duty requires him to move or assist in moving into the roundhouse engines without steam or the power to move themselves, cannot recover for injuries sustained in moving into the roundhouse such an engine where the dangers of the work are open to observation.[177] A switchman who undertakes to couple cars, having knowledge of the defective condition of the track, assumes the risk and cannot hold the employer liable.[178] An employe who does work in the line of his duty upon a bridge which is obviously a temporary and insecure structure, assumes the risk as an incident of his service.[179] It has been held that if an employe engaged in assisting other employes to hoist timber on a bridge has knowledge that there is not a sufficient number of persons to do the work with reasonable safety, he cannot recover from the employer for injuries caused by the failure to provide a sufficient force of men to do the work.[180] A switchman injured by reason of a draw-head of a locomotive being so short as to leave too small a space between the locomotive and cars to enable him to perform his duty in coupling a locomotive to a car, cannot recover for injuries received in attempting to perform such duty if the insufficiency of the draw-bar was visible to him.[181] Employes who undertake to throw mail-bags onto

[177] Anglin v. Texas &c. R. Co. 60 Fed. 553. See Skidmore v. West Virginia &c. R. Co. 41 W. Va. 293; 23 S. E. 713.

[178] Little Rock &c. R. Co. v. Moseley, 56 Fed. 1009. See, also, Houston &c. R. Co. v. Smith (Tex. Civ. App.), 38 S. W. 51. If, however, he does not know or is not chargeable with knowledge of the effect, he does not assume the risk, but he must know if ordinary care and diligence would enable him to know. Secord v. Chicago &c. R. Co. 107 Mich. 540; 65 N. W. 550. Where a freight conductor while attempting to uncouple cars tripped over semaphore wires extending along the side and under the track, and there was evidence showing that he had previously walked on the side of the track where the wires were, and he testified that he knew generally where they were, but was accustomed to walk between the rails where the wires crossed under the track, it was held for the jury whether he was familiar with the location of the wires, or by ordinary prudence should have known of the danger resulting therefrom so as to have assumed the risk Chicago &c. R. Co. v. Snedaker, 223 Ill. 395; 79 N. E. 169.

[179] McGrath v. Texas &c. R. Co. 60 Fed. 555.

[180] Texas &c. R. Co. v. Rogers, 57 Fed. 378.

[181] Brooks v. Northern Pac. R. Co. 47 Fed. 687.

moving trains, assume the ordinary risks of such service,[182] and the same rule applies to persons employed to work at stations where mail-bags are thrown from trains.[183] A track-walker cannot maintain an action for an injury caused by coal falling from a passing locomotive.[184] Where a brakeman has knowledge of the manner in which a car is loaded, and that there is danger, he assumes the risk of injury.[185] A freight handler who knows that the fastenings of a car door are unsafe, assumes the risk of injury from such defect.[186] A trackman or sectionman assumes the risk of injury from wild trains.[187] Brakemen assume risks from jerking motions of the train, and the like,[188] but where the engineer of the train is incompetent, and known to the company to be incompetent, a different rule applies.[189] Where a workman engaged in repairing a

[182] Coolbroth v. Maine &c. R. Co. 77 Me. 165; 21 Am. & Eng. R. Cas. 599, citing Yeaton v. Boston &c. R. Co. 135 Mass. 418; 15 Am. & Eng. R. Cas. 253; Hathaway v. Michigan &c. R. Co. 51 Mich. 253; 47 Am. R. 569; 12 Am. & Eng. R. Cas. 249.

[183] Muster v. Chicago &c. R. Co 61 Wis. 325; 50 Am. R. 141; 18 Am. & Eng. R. Cas. 113, distinguishing Kirst v. Milwaukee &c. R. Co. 46 Wis. 489; Cummings v. National &c. Co. 60 Wis. 603; 18 N. W. 742; 20 N. W. 665; Scott v. London Docks Co. 3 Hurl. & C. 596.

[184] Schultz v. Chicago &c. R. Co. 67 Wis. 616; 58 Am. R. 881; 28 Am. & Eng. R. Cas. 404. But see Dean v. Kansas City &c. R. Co. (Mo.) 97 S. W. 910.

[185] Sisco v. Lehigh &c. R. Co. 145 N. Y. 296; 39 N. E. 958. But see Dewey v. Detroit &c. R. Co. 97 Mich. 329; 56 N. W. 756; 22 L. R. A. 292; 37 Am. St. 348; 38 Central L. J. 31; Atchison &c. R. Co. v. Seeley, 54 Kan. 21; 37 Pac. 104.

[186] Cassady v. Boston &c. R. Co. 164 Mass. 168; 41 N. E. 129.

[187] Shepard v. Boston &c. R. Co. 158 Mass. 174; 33 N. E. 508; Lynch v. Boston &c. R. Co. 159 Mass. 536; 34 N. E. 1072; Sullivan v. Fitchburg &c. R. Co. 161 Mass. 125; 36 N. E. 751; Hinz v. Chicago &c. R. Co. 93 Wis. 16; 66 N. W. 718; Pennsylvania R. Co. v. Wachter, 60 Md. 395. See Ring v. Missouri &c. R. Co. 112 Mo. 220; 20 S. W. 436.

[188] Davis v. Baltimore &c. R. Co. 152 Pa. St. 314; 25 Atl. 498; 53 Am. & Eng. R. Cas. 372; Fordyce v. Lowman, 57 Ark. 160; 20 S. W. 1090.

[189] Cincinnati &c. R. Co. v. Madden, 134 Ind. 462; 34 N. E. 227. The correct basis for the decision in the case cited is that the master was guilty of a negligent breach of duty in employing an incompetent engineer, for had the engineer been competent, risk from his negligence would have been assumed by the plaintiff. If the employe knew of an engineer's incompetency there could be no recovery. Gulf &c. Co. v. Schwabbe, 1 Tex. Civ. App. 573; 21 S. W. 706; Paland v. Chicago &c. R. Co. 44 La. Ann. 1003; 11 So. 707.

bridge is injured by a wedge flying out of a piece of timber, the employer is not liable.[190] The authorities require the conclusion that the employe assumes all of the risks of the service in which he voluntarily engages, except such as arise from negligence on the part of the employer, so that in whatever form the question may arise, the general rule must be that risks of the service shall not be increased or caused by the employer's negligence, but risks not increased or caused by the employer's negligence are risks of the service which the employe assumes.[191] The test is not danger but negligence on the part of the employer.[192]

§ 1291. Duty of employe to acquaint himself with employer's business methods.—The general rule is that an employe must exercise ordinary care and diligence to obtain knowledge of the business methods of the employer. Where there are means and opportunities of knowledge of the employer's methods and customs knowledge may be presumed. Where there is a duty to know and a negligent failure to perform that duty the employe cannot maintain an action against the employer for the recovery of damages for personal injuries except in very rare and unusual cases.[193] But the employe is not

[190] Bedford &c. R. Co. v. Brown, 142 Ind. 659; 42 N. E. 359. See Bonnet v. Galveston &c. R. Co. 89 Tex. 72; 33 S. W. 334.

[191] Bradbury v. Kingston &c. R. Co. 157 Pa. St. 231; 27 Atl. 400; Anglin v. Texas &c. R. Co. 60 Fed. 553; Chicago &c. Co. v. Sobkowiak, 45 Ill. App. 317; 148 Ill. 573; 36 N. E. 573; Day v. Cleveland &c. R. Co. 137 Ind. 206; 36 N. E. 854; McGrath v. Texas &c. R. Co. 60 Fed. 555; Rutherford v. Chicago &c. R. Co. 57 Minn. 237; 59 N. W. 302; Lynch v. Chicago &c. R. Co. 8 Ind. App. 516; 36 N. E. 44; Lawson v. Truesdale, 60 Minn. 410; 62 N. W. 546; Peterson v. Sherry &c. Co. 90 Wis. 83; 62 N. W. 948; Connelly v. Hamilton &c. R. Co. 163 Mass. 156; 39 N. E. 787; McPhee v. Scully, 163 Mass. 216; 39 N. E. 1007; Smart v. Louisiana &c. Co. 47 La. Ann. 869; 17 So. 346; Kerns v. Chicago &c. R. Co. 94 Iowa, 121; 62 N. W. 692; Craven v. Smith, 89 Wis. 119; 61 N. W. 317; Missouri &c. R. Co. v. Hamilton (Tex. Civ. App.), 30 S. W. 679; Grand Trunk &c. R. Co. v. Tennant, 66 Fed. 922; Allen v. Logan City, 10 Utah 279; 37 Pac. 496; Diamond &c. Co. v. De Hority, 143 Ind. 381; 40 N. E. 681; Louisville &c. R. Co. v. Stutts, 105 Ala. 368; 17 So. 29; 53 Am. St. 127.

[192] Phelps v. Chicago &c. Ry. Co. 122 Mich. 171; 81 N. W. 101, 102 (quoting text); Denver &c. R. Co. v. Burchard (Colo.), 86 Pac. 749, 753 (also quoting text).

[193] Hewitt v. Flint &c. R. Co. 67 Mich. 61; 34 N. W. 659; 31 Am. & Eng. R. Cas. 249. See, generally, as to duty of employe to se-

always bound to know of defects because he might have learned the master's method of carrying on the business and have inferred therefrom the existence of the defect.[194]

§ 1292. Duty of employe in regard to competency of co-employes.—Within reasonable limits an employe has a right to act upon the presumption that the employer has exercised reasonable care in selecting and employing competent co-employes,[195] but this right does not extend so far as to dispense with the exercise of reasonable care and diligence on the part of the employe. The duty of the employer is to use ordinary care to select and secure the services of competent co-employes, but the duty does not go so far as to make the employer absolutely answerable for the competency of co-employes. The presumption, therefore, upon which an employe has a right to act is that the employer exercised reasonable care in selecting co-employes, and he cannot absolutely assume that the co-employes are competent. If the injured employe cannot show

cure knowledge. Bohn Manufacturing Co. v. Erickson, 56 Fed. 943, 946; 5 C. C. A. 341; Northwestern Fuel Co. v. Danielson, 57 Fed. 915; Chicago &c. R. Co. v. Linney, 59 Fed. 45, 47; Johnson v. Oakes, 70 Fed. 566; Gulf &c. R. Co. v. Wittig (Tex.), 35 S. W. 859; Salem &c. Co. v. Hobbs, 144 Ind. 146; 42 N. E. 1022; Evansville &c. R. Co. v. Duel, 134 Ind. 539; 33 N. E. 355; Louisville &c. R. Co. v. Corps, 124 Ind. 427; 24 N. E. 1046; 8 L. R. A. 636, and note; Evansville &c. R. Co. v. Henderson, 142 Ind. 596; 42 N. E. 216.

[194] Texas &c. R. Co. v. Archibald, 170 U. S. 665; 18 Sup. Ct. 777, 780. See, also, Choctaw &c. R. Co. v. McDade, 191 U. S. 64; 24 Sup. Ct. 24, 26; Galveston &c. R. Co. v. Stoy (Tex. Civ. App.), 99 S. W. 135.

[195] Chicago &c. R. Co. v. Beatty, 13 Ind. App. 604; 40 N. E. 753, citing Indiana &c. R. v. Dailey, 110 Ind. 75; 10 N. E. 631; Lake Shore &c. R. Co. v. Stupak, 108 Ind. 1; 8 N. E. 630; Chicago &c. R. Co. v. Champion, 9 Ind. App. 510; 36 N. E. 221; 37 N. E. 21; 53 Am. St. 357, and note. See, also, Hall v. Bedford &c. Co. 156 Ind. 460; 60 N. E. 149; Chicago &c. R. Co. v. Beatty, 13 Ind. App. 604; 40 N. E. 753; Western Stone Co. v. Whalen, 151 Ill. 472; 42 Am. St. 244; Texas &c. R. Co. v. Johnson, 89 Tex. 519; 35 S. W. 1042. Some of the statements in the cases cited from the Indiana Appellate Court reports are, in many respects, very broad, and are opposed to the decisions of the Supreme Court of Indiana. Ohio &c. R. Co. v. Dunn, 138 Ind. 18; 36 N. E. 702. And see cases cited in dissenting opinion in Chicago &c. R. Co. v. Champion, 9 Ind. App. 510, 531; 53 Am. St. 357, and note.

that the employer did not exercise ordinary care in selecting and securing the services of competent co-employes, or that after he knew or ought to have known of incompetency the employer retained the incompetent person, there can be no recovery upon the ground of negligence in employing fellow-servants.[196] Nor can there be a recovery against the employer in such a case if the employe has knowledge of the incompetency of his fellow-servant and does not exercise the diligence and care which a person of ordinary prudence possessing such knowledge would exercise under like circumstances. It is, indeed, the general rule that where an employe has knowledge of the incompetency of a co-employe and still remains in the employer's service he assumes all risk of injury from the acts of such incompetent co-employe.[197] An employe owes his employer a duty

[196] Campbell v. Wing, 5 Tex. Civ. App. 431; 24 S. W. 360; Moss v. Pacific R. Co. 49 Mo. 167; 8 Am. R. 126; Davis v. Detroit &c. R. Co. 20 Mich. 105; 4 Am. R. 364; Whaalan v. Mad River &c. R. Co. 8 Ohio St. 249; Huffman v. Chicago &c. R. Co. 78 Mo. 50; Kersey v. Kansas City &c. R. Co. 79 Mo. 362; East Tennesee &c. R. Co. v. Gurley, 12 Lea (Tenn.), 46; Baulec v. New York &c. R. Co. 59 N. Y. 356; 17 Am. R. 325; Tarrant v. Webb, 18 C. B. 797; 86 E. C. L. 797. See, also, Gravelle v. Minneapolis &c. R. Co. 10 Fed. 711; Kansas &c. Co. v. Brownlee, 60 Ark. 582; 31 S. W. 453; Blake v. Maine Cent. R. Co. 70 Me. 60; 35 Am. R. 297; Lee v. Michigan Cent. R. Co. 87 Mich. 574; 49 N. W. 909; Cameron v. New York Cent. R. Co. 145 N. Y. 400; 40 N. E. 1; Norfolk &c. R. Co. v. Hoover, 79 Md. 253; 29 Atl. 994; 25 L. R. A. 710, and note; 47 Am. St. 392. But see as to when he is chargeable with notice, Baltimore &c. R. Co. v. Henthorne, 73 Fed. 634; Wabash R. Co. v. McDaniels, 107 U. S. 454; 2 Sup. Ct. 932; Texas &c. R. Co. v. Johnson, 89 Tex. 519; 35 S. W. 1042; Michigan Cent. R. Co. v. Gilbert, 46 Mich. 176; Gilman v. Eastern R. Co. 10 Allen (Mass.), 233; 87 Am. Dec. 635.

[197] Consolidated &c. Co. v. Clay, 51 Ohio St. 542; 38 N. E. 610; 25 L. R. A. 848, and note; St. Louis &c. Co. v. Kenyon, 57 Ill. App. 640; Hatt v. Nay, 144 Mass. 186; 10 N. E. 807; Assop v. Yates, 2 H. & N. 768; Hayden v. Smithville Manufacturing Co. 29 Conn. 548; Richmond &c. R. Co. v. Worley, 92 Ga. 84; 18 S. E. 361; Kansas Pac. R. Co. v. Peavey, 34 Kan. 472; United States &c. Co. v. Wilder, 116 Ill. 100; 5 N. E. 92; McCharles v. Horn &c. Co. 10 Utah, 470; 37 Pac. 733; Kroy v. Chicago &c. R. Co. 32 Ia. 357; Laning v. New York &c. R. Co. 49 N. Y. 521; 10 Am. R. 417; Latremouille v. Bennington &c. R. Co. 63 Vt. 336; 22 Atl. 656; Skip v. Eastern &c. R. Co. 24 Eng. L. & Eq. R. 396; Mad River &c. R. Co. v. Barber, 5 Ohio St. 541; Gulf &c. R. Co. v. Schwabbe, 1 Tex. Civ. App. 573; 21 S. W. 706; Bassett v. Norwich &c. R. Co. 9 Law Reporter (N. S.), 551; McQueen v. Central &c. R. Co. 30 Kan. 689; 1 Pac. 139;

in this regard, for the duty growing out of the contract of service is not solely on the part of the employer. The duty which the employe owes the employer requires that he should not pass unnoticed and without objection the incompetency of the co-employes in cases where he has knowledge of such incompetency.[198] In cases where the employer is a railroad company charged with the duty of carrying persons and property and where great care is exacted of the company it has been said that public policy demands of employes that they themselves should exercise reasonable care to ascertain the competency of co-employes, and, if they discover that such co-employes are incompetent, use reasonable care and diligence to make it known to the employer.[199]

§ 1293. Employe bound to use ordinary care to remedy defects.

Lake Shore &c. R. Co. v. Knittal, 33 Ohio St. 468; Jackson v. Kansas City &c. R. Co. 31 Kan. 761; 3 Pac. 501; Indianapolis &c. Transit Co. v. Foreman, 162 Ind. 85, 93; 69 N. E. 669; 102 Am. St. 185, citing other Indiana cases. See Long v. Coronado &c. R. Co. 96 Calf. 269; 31 Pac. 170; Williams v. Missouri Pac. R. Co. 109 Mo. 475; 18 S. W. 1098; Mexican &c. R. Co. v. Jackson (Tex. Civ. App.), 32 S. W. 320. But compare Northern Pac. R. Co. v. Mares, 123 U. S. 710; 8 Sup. Ct. 321. The principle is the same as that which rules in cases where employes have knowledge of defects in appliances, and in such cases it is settled that, ordinarily, knowledge will defeat a recovery by the employe. Victor &c. Co. v. Muir, 20 Colo. 320; 38 Pac. 378; 26 L. R. A. 435; 46 Am. St. 299; Breckenridge &c. Co. v. Hicks, 94 Ky. 362; 42 Am. St. 361; Harker v. Burlington &c. R. Co. 88 Iowa, 409; 55 N. W. 316; 45 Am. St. 242; Titus v. Bradford &c. R. Co. 136 Pa. St. 618; 20 Atl. 517; 20 Am. St. 944; Taylor &c. R. Co. v. Taylor, 79 Tex. 104; 14 S. W. 918; 23 Am. St. 316. The doctrine of assumption of risks by the employe is elsewhere considered, and the cases there cited show the effect of knowledge.

[198] St. Louis &c. Co. v. Kenyon, 57 Ill. App. 640; Hunt v. Lowell &c. Co. 1 Allen (Mass.), 343; 4 Thomp. Neg. (2d ed.) § 4712; Wharton Negligence (2d ed.) § 236, citing Indianapolis &c. R. Co. v. Carr, 35 Ind. 510; Baltimore &c. R. Co. v. State, 33 Md. 542; Brothers v. Cartter, 52 Mo. 372; McCharles v. Horn &c. Co. 10 Utah, 470; 37 Pac. 733. In Pennsylvania Co. v. McCaffrey, 139 Ind. 430; 38 N. E. 67; 29 L. R. A. 104, it is held that the employe is not bound to report matters of which the employer has knowledge. It is to be said of the case just cited that it is an extreme one upon several points and can not be regarded as sound upon some of the points decided. Truman v. Rudolph, 22 Ont. App. 250.

[199] Toledo &c. R. Co. v. Pennsylvania Co. 54 Fed. 746; 19 L. R. A. 395.

—It would seem that an employe who can readily and easily remedy a defect discovered by him in an appliance with which he is working ought to do so. He is not bound to exercise more than ordinary care, but that degree of care it is his duty to exercise. He must, in some instances, in order to successfully insist that the master has not performed his duty, affirmatively show that he has taken reasonable measures to remedy defects which are known to him, or that he has made a report and thus taken steps to have them remedied. The failure to take such measures is ordinarily regarded as contributory negligence, but we are inclined to think that it may be justly held that where the defect is a temporary one, easily remedied, the company cannot be regarded as guilty of negligence from the mere fact that such an appliance is furnished the employe.[200] Cases illustrating this doctrine are the so-called "simple tool" cases and the like,[1] and there are, of course, cases in which the servant is employed to repair, and in still others the duty of some inspection or repair may be cast upon him by rule or agreement express or implied.[2]

§ 1294. Duty of employe to acquaint himself with rules of employer.—The weight of authority, so far as the number of decisions can be regarded as constituting the weight, is that the employer in order to make a rule available must affirmatively show that it was brought to the employe's knowledge.[3] There is, however, conflict upon this question for well-reasoned cases affirm that it is the duty

[200] Meador v. Lake Shore &c. R. Co. 138 Ind. 290; 37 N. E. 721; 46 Am. St. 384.

[1] See ante, § 1278 a; also Denver &c. R. Co. v. Sporleder (Colo.), 89 Pac. 55.

[2] See Memphis &c. R. Co. v. Graham, 94 Ala. 545; 10 So. 283; Chicago &c. R. Co. v. Merriman, 95 Ill. App. 628; Chicago &c. R. Co. v. Bragonier, 119 Ill. 51; 7 N. E. 688; Illinois Cent. R. Co. v. Jewell, 46 Ill. 99; 92 Am. Dec. 240; Conway v. Chicago &c. R. Co. 103 Ia. 373; 72 N. W. 543.

[3] Louisville &c. R. Co. v. Utz, 133 Ind. 265; 32 N. E. 881; Atchison &c. R. Co. v. Plunkett, 25 Kan. 188; Conners v. Burlington &c. R. Co. 87 Iowa, 147; 53 N. W. 1092; LaCroy v. New York &c. R. Co. 57 Hun (N. Y.), 67; 10 N. Y. S. 382; Covey v. Hannibal &c. R. Co. 27 Mo. App. 170; Central &c. R. Co. v. Ryles, 84 Ga. 420; 11 S. E. 499; Carroll v. East Tennessee &c. R. Co. 82 Ga. 452. See, also, Indiana &c. R. Co. v. Bundy, 152 Ind. 590; 53 N. E. 175; Georgia Pac. R. Co. v. Davis, 92 Ala. 300; 9 So. 252; 25 Am. St. 47; McDermott v. Iowa Falls &c. R. Co. 85 Ia. 180; 52 N. W. 181; 10 S. E. 163; 6 L. R. A. 214, and note.

of the employe to acquaint himself with the rules established by the employer.[4] Our opinion is that the true doctrine is that the employe is under a duty to exercise ordinary care to ascertain the rules of the service in which he engages, where they are promulgated and he is given an opportunity to learn them. It is settled law that it is the duty of the employer to promulgate rules, and, this being true, it is the reciprocal duty of the employe to ascertain what those rules are, for he is bound to know what the law requires of the employer, and hence is put upon inquiry, and, according to elementary principles, is chargeable with a knowledge of the facts to which a reasonable inquiry would lead. The employe has, indeed, a right to rely upon the employer's using ordinary care and diligence to enforce the rules, and surely the employe ought to be held bound to make a reasonably diligent effort to ascertain the nature of the rules of the service. It is the employe's duty to exercise ordinary care to obtain knowledge of the employer's business methods, and the most important element of that duty is to ascertain what rules the employer has adopted for the conduct and control of his business. If the employe does not know what the rules are it is difficult to understand how he can have a right to rely on them, and it is not less difficult to understand why the duty as to rules is unilateral and not mutual. It seems quite clear to us, we say with all deference to the courts that hold a different doctrine, that the employe is bound to know that it is the employer's duty to adopt rules, and, knowing that, he is bound to make a reasonably careful and diligent inquiry to ascertain what rules have been adopted. The employer cannot, as we think, successfully insist that the employe must inform himself as to the rules unless the employer uses reasonable care to make the rules readily accessible to the employe, but if they are readily accessible the employe

[4] Pilkinton v. Gulf &c. R. Co. 70 Tex. 226; 7 S. W. 805; Alexander v. Louisville &c. R. Co. 83 Ky. 589; Agawam Bank v. Strever, 18 N. Y. 502; LaCroy v. New York &c. R. Co. 132 N. Y. 570; 30 N. E. 391; Wilson v. Michigan &c. R. Co. 94 Mich. 20; 53 N. W. 797; Slater v. Jewett, 85 N. Y. 61; 39 Am. R. 627. See Helm v. Louisville &c. R. Co. 17 Ky. L. 1004; 33 S. W. 396; Central &c. R. Co. v. Keegan, 160 U. S. 259; 16 Sup. Ct. 269; Parker v. Georgia &c. R. Co. 83 Ga. 539; 10 S. E. 233. At least if the employer furnished him an opportunity to learn the rules and he could have done so by the use of ordinary care. Little v. Southern R. Co. 120 Ga. 347; 47 S. E. 953; 66 L. R. A. 509; 102 Am. St. 104.

should be presumed to have knowledge of them.[5] It is held that where there is a conflict of evidence as to whether the employe had knowledge of the rules the question is one of fact for the jury.[6]

§ 1295. Promise to repair.—The general rule is that where the employer promises the employe to remedy a defect in the machinery or appliances, or to make safe an unsafe working place, the employe is not in fault in relying upon the promise and continuing in the service for a reasonable length of time, although he has full knowledge of defects.[7] We suppose, however, that if the danger from the defects is so great and so clearly apparent that no reasonable person would incur it, the employe who knowingly and voluntarily incurs

[5] Shenandoah &c. R. Co. v. Lucado, 86 Va. 390; 21 S. E. 422; Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21; 37 Am. R. 651; Alcorn v. Chicago &c. R. Co. 108 Mo. 81; 16 S. W. 229; Norfolk &c. R. Co. v. Williams, 89 Va. 165; 15 S. E. 522. See, also, Louisville &c. R. Co. v. Bowcock, 107 Ky. 223; 51 S. W. 580; 53 S. W. 262; LaCroy v. New York &c. R. Co. 132 N. Y. 570; 30 N. E. 391. Where there is no publication of the rule the employe is not affected by it, unless he had actual knowledge of its existence and contents. Fay v. Minneapolis &c. R. Co. 30 Minn. 231; 15 N. W. 241.

[6] Louisville &c. R. Co. v. Watson, 90 Ala. 68; 8 So. 249. See Wooden v. Western &c. R. Co. 43 N. Y. St. 218; 18 N. Y. S. 768; Byrnes v. New York &c. R. Co. 71 Hun (N. Y.), 209; 24 N. Y. S. 517.

[7] Homestake &c. Co. v. Fullerton, 69 Fed. 923, citing Hough v. Railway Co. 100 U. S. 213; Clarke v. Holmes, 7 Hurl. & N. 937; Gowen v. Harley, 56 Fed. 973; Laning v. New York &c. R. Co. 49 N. Y. 521; 10 Am. R. 417; Stephenson v. Duncan, 73 Wis. 404; 41 N. W. 337; 9 Am. St. 806; Patterson v. Pittsburgh &c. R. Co. 76 Pa. St. 389; 18 Am. R. 412; Greenleaf v. Dubuque &c. R. Co. 33 Iowa, 52; Indianapolis &c. R. Co. v. Watson, 114 Ind. 20; 14 N. E. 721; 5 Am. St. 578; Greene v. Minneapolis &c. R. Co. 31 Minn. 248; 17 N. W. 378; 47 Am. R. 785; New Jersey &c. R. Co. v. Young, 49 Fed. 723; 1 C. C. A. 428; Rothenberger v. Northwestern &c. Milling Co. 57 Minn. 461; 59 N. W. 531. See, also, Corcoran v. Milwaukee &c. R. Co. 81 Wis. 191; 51 N. W. 328; Lyttle v. Chicago &c. R. Co. 84 Mich. 289; 47 N. W. 571; Manufacturing Co. v. Morrissey, 40 Ohio St. 148; 48 Am. R. 669; Conroy v. Vulcan Iron Works, 62 Mo. 35; Kroy v. Chicago &c. R. Co. 32 Iowa, 357; LeClair v. First Div. &c. R. Co. 20 Minn. 9; Taylor v. Nevada &c. R. Co. 26 Nev. 415; 69 Pac. 858, 859; McFarlan Carriage Co. v. Potter, 153 Ind. 107; 53 N. E. 465; Illinois Cent. R. Co. v. North, 97 Ill. App. 124; Missouri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. R. 425; Donley v. Dougherty, 174 Ill. 582; 51 N. E. 714; Cincinnati &c. R. Co. v. Robertson, 139 Fed. 519.

it after time for deliberation cannot recover for injuries he may sustain because of such defects,[8] and most of the decisions cited in support of the last preceding proposition add this qualification. A distinction is made by the courts between cases where the implement or tool is one of which an ordinary person may have full knowledge and the use of which requires no peculiar skill or care and cases where the appliances are such as require peculiar skill and care in their use.[9] The cases affirm that, in order to make the employer liable, there must be a promise and the employe must have relied upon it.[10] But it is not necessary that a definite time for making the repairs be fixed, as a reasonable time will be implied if no time is expressly fixed, and what is a reasonable time is usually for the jury.[11]

§ 1296. Brakemen—Assumption of risks by.—A person who accepts service as a brakeman on a railroad train assumes the ordinary risks of the service into which he enters. He does not, ordinarily, assume extraordinary risks unless he has knowledge of them and

[8] 4 Thomp. Neg. (2d ed.) § 4667; Bailey Master's Liability for Injuries to Servants, 211, 212.

[9] Marsh v. Chickering, 101 N. Y. 396; 5 N. E. 56; Corcoran v. Milwaukee &c. R. Co. 81 Wis. 191; 51 N. W. 328; Gowen v. Harley, 56 Fed. 973, 982. See ante, § 1278a. In the case last cited it was said, speaking of the rule that a promise to repair relieves the employe, that: "It has no application to a case where the service required is simple manual labor, without tools or machinery, and where no such tools or appliances are necessary to the performance of the work with reasonable safety." Citing among other cases, Tuttle v. Detroit &c. R. Co. 122 U. S. 189; 7 Sup. Ct. 1166; Richards v. Rough, 53 Mich. 212, 216; 18 N. W. 785.

[10] Sweeney v. Berlin &c. R. Co. 101 N. Y. 520; 5 N. E. 358; 54 Am. R. 722, and note; Eureka Co. v. Bass, 81 Ala. 200; 8 So. 216; 60 Am. R. 152; Daugherty v. Midland Steel Co. 23 Ind. App. 78; 53 N. E. 844; Atchison &c. R. Co. v. Midgett. 1 Kans. App. 138; 74 Pac. 995. See, generally, Prentiss v. Kent &c. R. Co. 63 Mich. 478; 30 N. W. 109; Fort Wayne &c. R. Co. v. Gildersleeve, 33 Mich. 133; Manufacturing Co. v. Morrissey, 40 Ohio St. 148; 48 Am. R. 669. But it is held that it need not be in direct words. Nash v. Dowling, 93 Mo. App. 156; Detroit Crude Oil Co. v. Grable, 94 Fed. 73; Gulf &c. R. Co. v. Brentford, 79 Tex. 619; 15 S. W. 561; 23 Am. St. 377.

[11] Cincinnati &c. R. Co. v. Robertson, 139 Fed. 519; Burch v. Southern Pac. Co. 140 Fed. 270; Swift &c. Co. v. Madden, 165 Ill. 41; 45 N. E. 979; Daugherty v. Midland Steel Co. 23 Ind. App. 78; 53 N. E. 844. But see McPeck v. Central Vt. R. Co. 79 Fed. 591.

after knowledge continues in the service of the company. The general rule governing the assumption of risks apply to brakemen on railroad trains and in this place we shall not restate those rules, but will refer to cases illustrating their application. Where a brakeman has knowledge of the location and existence of a cattle-guard, it has been held that danger arising from it is assumed as a risk of the service.[12] It is also held that where a brakeman has knowledge that a track has not been ballasted and he voluntarily continues in the service after acquiring such knowledge he cannot recover for injuries caused by a failure to ballast the track.[13] So, in a recent case, where a brakeman knew and was accustomed to the road, and it and all others in the same region used open culverts, the risk of falling through a culvert while cutting cars at night was held to be a risk assumed by him.[14] The rule that where an employe without objection continues in the service after he has full knowledge of danger applies to brakemen as well as the other employes.[15]

[12] Peoria &c. R. Co. v. Puckett, 52 Ill. App. 222; McKee v. Chicago &c. R. Co. 83 Iowa, 616; 50 N. W. 209; 13 L. R. A. 817. See, generally, Watts v. Hart, 7 Wash. 178; 34 Pac. 423, 771; Mobile &c. R. Co. v. Vallone, 214 Ill. 124; 73 N. E. 416; Missouri Pac. R. Co. v. Somers. 71 Tex. 700; 9 S. W. 741; Content v. New York &c. R. Co. 165 Mass. 267; 43 N. E. 941; Lovejoy &c. R Co. v. Boston &c. R. 125 Mass. 79; 28 Am. R. 206; Cole v. Rome &c. R. Co. 72 Hun (N. Y.), 467; 25 N. Y. S. 276; Sullivan v. Fitchburg &c. R. Co. 161 Mass. 125; 36 N. E. 751; Rock v. Retsoff &c. Co. 15 N. Y. S. 872. See San Antonio &c. R. Co. v. Parr (Tex. Civ. App.), 26 S. W. 861. The general rule asserted by the weight of authority is that a brakeman assumes risks from dangers of the service open to observation. Howey v. Lake Shore &c. R. Co. 13 Misc. (N. Y.) 641; 34 N. Y. S. 1089; Albert v. New York &c. R. Co. 80 Hun (N. Y.), 152; 29 N. Y. S. 1126; McDugan v. New York &c. R. Co. 31 N. Y. S. 135; Manning v. Chicago &c. R. Co. 105 Mich. 260; 63 N. W. 312; Gulf &c. R. Co. v. Jackson, 65 Fed. 48; Indianapolis &c. R. Co. v. Ott, 11 Ind. App. 564; 35 N. E. 517; Lynch v. Chicago &c. R. Co. 8 Ind. App. 516; 36 N. E. 44; Burnell v. West Side &c. R. Co. 87 Wis. 387; 58 N. W. 772.

[13] O'Neal v. Chicago &c. R. Co. 132 Ind. 110; 31 N. E. 669. See, also, Finnell v. Delaware &c. R. Co. 129 N. Y. 669; 42 N. Y. St. 354; 29 N. E. 825; Pennsylvania Co. v. Hankey, 93 Ill. 580.

[14] Southern R. Co. v. Gloyd, 138 Fed. 388. See, also, Miller v. Detroit &c. R. Co. 133 Mich. 564; 95 N. W. 718.

[15] Gulf &c. R. Co. v. Jackson, 65 Fed. 48; Little Rock R. Co. v. Moseley, 56 Fed. 1009, 1012, 6 C. C. A. 225; Southern &c. R. Co. v. Drake, 53 Kan. 1; 35 Pac. 825; Atchison R. Co. v. Schroeder, 47 Kan. 315;

Thus where a brakeman knows that it is the custom of the engineers to leave the engine in charge of firemen when switching is done, he is presumed to assume the risk arising from that method of conducting business, unless he proves that the fireman was incompetent and his incompetency was known to the employer.[16] The rule that where defects are known to the employe it is his duty to give notice or make complaint to the employer applies to brakemen as well as to other employes[17] engaged in running or making up trains.[18] In accordance with the general rule, it has been held that one who undertakes to couple cars, with knowledge of the fact that

27 Pac. 965; Wabash R. Co. v. Ray, 152 Ind. 392; 51 N. E. 920.

[16] Louisville &c. R. Co. v. Kelly, 63 Fed. 407; 11 C. C. A. 260. It was said by Woods, J., that: "Railroad companies are certainly not required to employ skilled engineers as firemen, and, if it is the prevailing custom of engineers to leave the firemen in charge of their engines when switching or similar work is to be done, then it is to be presumed that brakemen, when they engage or continue in their employment with the knowledge of the custom, assume the additional hazard which the custom involves, and can be entitled to compensation from the company for injury caused by a fireman's incompetent management of an engine only, when his fitness was below what ought to be required of firemen, and when the fact of unfitness was known, or ought reasonably to have been known, to the master mechanic, or other like representative, of the company." This ruling is in harmony with the general rule that an employe assumes the risks of the master's business methods. Ante, §§ 1291, 1294. See, also, Chicago &c. R. Co. v. Voelker, 129 Fed. 522; 70 L. R. A. 264. But compare Chicago &c. R. Co. v. White, 209 Ill. 124; 70 N. E. 588.

[17] Southern &c. R. Co. v. Seley, 152 U. S. 145; 14 Sup. Ct. 530; Galveston &c. R. Co. v. Eckols, 7 Tex. Civ. App. 429; 26 S. W. 1117; Richmond &c. R. Co. v. Worley, 92 Ga. 84; 8 S. E. 361; South Florida &c. R. Co. v. Weese, 32 Fla. 212; 13 So. 436. See, Nicholaus v. Chicago &c. R. Co. 90 Iowa, 85; 57 N. W. 694.

[18] The duty to make complaint rests upon employes generally. Coal and Mining Co. v. Clay, 51 Ohio, 542; 38 N. E. 610; 25 L. R. A. 848; Coal and Car Co. v. Norman, 49 Ohio. St. 598; McCharles v. Horn &c. Co. 10 Utah, 470; 37 Pac. 733; Jungnitsch v. Michigan &c. R. Co. 105 Mich. 270; 63 N. W. 296; Cunningham v. Merrimac &c. Co. 163 Mass. 89; 39 N. E. 774; Lineoski v. Susquehanna &c. Co. 157 Pa. St. 153; 27 Atl. 577; Goodridge v. Washington &c. Co. 160 Mass. 234; 35 N. E. 484; Kaare v. Troy &c. Co. 139 N. Y. 369; 34 N. E. 901; ante, § 1292. But see Northern &c. R. Co. v. Babcock, 154 U. S. 190; 14 Sup. Ct. 978. Where the employer knows of the defect it is not, under the statutory rule in some jurisdictions, incumbent on

the train is not manned by a sufficient crew, assumes the risks.[19] And so where an experienced brakeman in violation of a rule of the company unnecessarily goes between moving cars.[20] As upon many other questions the authorities are in conflict upon the question whether brakemen assume the risks of injury from the sudden starting or jerking of trains.[21] We can see no substantial reason why the risk from this cause, at least from the ordinary jolting or jerking of a train, should not generally be regarded as an ordinary risk of the service. As elsewhere shown, it is the duty of the railroad company to use ordinary care to keep its road-bed and track in a reasonably safe condition, and this duty is owing to brakemen as well as to other trainmen, but even if defects do exist and do cause an injury the company is not liable unless it is affirmatively shown that it was guilty of negligence.[22] And a brakeman on a construc-

the employe to make complaint. Truman v. Rudolph, 22 Ont. App. 250.

[19] Richmond &c. R. Co. v. Mitchell, 92 Ga. 77; 18 S. E. 290. See 4 Thomp. Neg. §§ 4767, 4768.

[20] Moore v. St. Louis &c. R. Co. 115 La. Ann. 86; 38 So. 913. This would ordinarily seem to be contributory negligence. See, also, Huggins v. Southern R. Co. (Ala.) 41 So. 856; Whalin v. Illinois Cent. R. Co. 212 Ill. App. 428. But see Pierson v. Chicago &c. R. Co. 127 Ia. 13; 102 N. W. 149.

[21] Davis v. Baltimore &c. R. Co. 152 Pa. St. 314; 25 Atl. 498; 53 Am. & Eng. R. Cas. 372; Rutledge v. Missouri &c. R. Co. 110 Mo. 312; 11 S. W. 38; Kansas City &c. R. Co. v. Murray, 55 Kan. 336; 40 Pac. 646; Louisville &c. R. Co. v. Woods, 105 Ala. 561; 17 So. 41. Where the brakeman has a right to assume the contrary and the negligence is that of a vice-principal or one for whose negligence the statute makes the company responsible the brakeman does not necessarily assume the risk. Strong v. Iowa &c. R. Co. 94 Ia. 380; 62 N. W. 799; Kansas City &c. R. Co. v. Murray, 55 Kans. 336; 40 Pac. 646; Missouri &c. R. Co. v. Crane, 13 Tex. Civ. App. 126; 35 S. W. 797. See, also, Pittsburgh &c. R. Co. v. Nicholas, 165 Ind. 679; 76 N. E. 522; Bowes v. New York &c. R. Co. 181 Mass. 89; 62 N. E. 949; Canada &c. R. Co. v. Hurdman, 25 Can. S. C. 205; St. Louis &c. R. Co. v. Pope (Tex. Civ. App.), 97 S. W. 534. For other decisions respecting liability to brakemen, see Fordyce v. Culver, 2 Tex. Civ. App. 569; 22 S. W. 237; Carey v. Boston &c. R. Co. 158 Mass. 228; 33 N. E. 512; Knox v. New York &c. R. Co. 69 Hun, 93; 23 N. Y. S. 198; Ashman v. Flint &c. R. Co. 90 Mich. 567; 51 N. W. 645; Irvine v. Flint &c. R. Co. 89 Mich. 416; 50 N. W. 1008; Kansas City &c. R. Co. v. Murray, 55 Kan. 336; 40 Pac. 646; McNeil v. New York &c. R. Co. 71 Hun (N. Y.), 24; 24 N. Y. S. 616; Peoria &c. R. Co. v. Puckett, 42 Ill. App. 642.

[22] McGowan v. Chicago &c. R. Co. 91 Wis. 147; 64 N. W. 891.

tion train, knowing that the road is not completed, assumes the risks incident thereto.[23] Where brakemen are required to get on and off trains at stations it is the duty of the company to exercise ordinary care to keep platforms in a reasonably safe condition, and risks from defective platforms are not assumed unless the defects are known to the employe.[24] Many other illustrative cases showing risks assumed are cited below.[25] But it is held in a recent case that a brakeman, who had been employed but a few days and had passed over a certain trestle but six times, usually in the night, and who was not shown to have had any knowledge of the condition about such trestle, did not assume the risk arising from combustible material allowed to accumulate about the trestle, and which became ignited and set fire to the trestle.[26]

[23] Baltimore &c. R. Co. v. Welsh, 17 Ind. App. 505; 47 N. E. 182. See, also, Evansville &c. R. Co. v. Henderson, 134 Ind. 636; 33 N. E. 1021; Manning v. Chicago &c. R. Co. 105 Mich. 260; 63 N. W. 312. But compare Gulf &c. R. Co. v. Redeker, 67 Tex. 181; 2 S. W. 513.

[24] Brown v. Ohio River &c. R. Co. 138 Ind. 648; 37 N. E. R. 717. But an employe may be held to have assumed the risk of the slippery condition of a car platform. Adkins v. Atlanta &c. R. Co. 27 S. Car. 71; 2 S. E. 849.

[25] Draw bar too low and other defects therein: Karrer v. Detroit &c. R. Co. 76 Mich. 400; 43 N. W. 370; Secord v. Chicago &c. R. Co. 107 Mich. 540; 65 N. W. 550; Atchison &c. R. Co. v. Wagner, 33 Kans. 660; 7 Pac. 204; Houston &c. R. Co. v. Banager (Tex.), 14 S. W. 242. Cars of unequal heights or the like: St. Louis &c. R. Co. v. Higgins, 44 Ark. 293; Botsford v. Mich. Cent. R. Co. 33 Mich. 256; Williams v. Central R. Co. 43 Ia. 396; Chicago &c. R. Co. v. Wagner, 17 Ind. App. 22; 45 N. E. 76, 1121; Woodworth v. St. Paul &c. R. Co. 18 Fed. 282; Projecting loads: Ely v. San Antonio &c. R. Co. 15 Tex. Civ. App. 511; 40 S. W. 174; McIntosh v. Missouri Pac. R. Co. 58 Mo. App. 281; Day v. Toledo &c. R. Co. 42 Mich. 523; 4 N. W. 203; Brice v. Louisville &c. R. Co. 10 Ky. L. 526; 9 S. W. 288; Northern Cent. R. Co. v. Husson, 101 Pa. St. 1; 47 Am. R. 690; Scott v. Oregon R. Co. 14 Oreg. 211; 13 Pac. 98. See as to negligence of the company in regard to hand holds, grab irons, and ladders on cars, and assumption of risks or contributory negligence, Dooner v. Delaware &c. R. Co. 171 Pa. St. 581; 33 Atl. 415; Gulf &c. R. Co. v. Williams, 72 Tex. 159; 12 S. W. 172; Galveston &c. R. Co. v. Perry, 36 Tex. Civ. App. 414; 82 S. W. 343; Chicago &c. R. Co. v. Barr, 204 Ill. 163; 68 N. E. 543; Kane v. Northern Cent. R. Co. 128 U. S. 91; 9 Sup. Ct. 16; Bell v. New York &c. R. Co. 168 Mass. 443; 47 N. E. 119; Settle v. St. Louis &c. R. Co. 127 Mo. 336; 30 S. W. 125; 48 Am. St. 633.

[26] Root v. Kansas City Southern R. Co. (Mo.) 92 S. W. 621.

§ 1296a. Couplers, bumpers and brakes.—There is some conflict of opinion as to how far the duty of the employer extends in the matter of keeping coupling, bumpers, and the like, in a reasonably safe condition for use. There is, however, little or no conflict as to the duty of the employer to exercise reasonable care to provide reasonably safe couplings and bumpers and to keep them in a reasonably safe condition for use by brakemen and other employes whose duty it is to couple cars, nor is there substantial or well-founded disagreement as to the rule, that brakemen assume the risks of defects in such appliances where they have knowledge of the defects.[27] We can see no reason why the general rules do not apply in full force and vigor to such cases. There may possibly be cases to which the general rules do not apply,[28] but they are very rare and of a peculiar and exceptional character. There is much conflict as to the application of the general rules to bumpers and couplings of cars and as to how far the master's duty to brakemen in respect to such appliances extends. So far as we have discovered, no well-reasoned case denies the general rule as to the degree of care required of the employer in regard to the appliances, nor the general rule respecting the assumption of the risks of service by employes. Some of the cases, however, while

[27] Northern &c. R. Co. v. Blake, 63 Fed. 45; 11 C. C. A. 93; Van Winkle v. Chicago &c. R. Co. 93 Iowa, 509; 61 N. W. 929; Goodes v. Boston &c. R. Co. 162 Mass. 287; 38 N. E. 500. See, Illinois &c. R. Co. v. Harris, 53 Ill. App. 592; Bennett v. Greenwich &c. R. Co. 84 Hun (N. Y.), 216; 32 N. Y. S. 457; Lucco v. New York &c. R. Co. 87 Hun, 612; 34 N. Y. S. 277; Shadd v. Georgia &c. R. Co. 116 N. C. 968; 21 S. E. 554; Truman v. Rudolph, 22 Ont. App. 250; Missouri &c. R. Co. v. Baxter, 42 Neb. 793; 60 N. W. 1044. Or where he is employed to handle "crippled" cars, Yeaton v. Boston &c. R. Co. 135 Mass. 418; Kelley v. Chicago &c. R. Co. 35 Minn. 490; 29 N. W. 173; Arnold v. Delaware &c. Co. 125 N. Y. 15; 25 N. E. 1064; Flannagan v. Chicago &c. R. Co. 50 Wis. 462; 7 N. W. 337; Watson v. Houston &c. R. Co. 58 Tex. 434.

[28] Strong v. Iowa &c. R. Co. 94 Iowa, 380; 62 N. W. 799. See, also, Bryce v. Burlington &c. Ry. Co. 128 Ia. 483; 104 N. W. 483. In Baltimore &c. R. Co. v. Leathers, 12 Ind. App. 544; 40 N. E. 1094, it was held that the question was for the jury where an exigency suddenly called a brakeman to the brakes and he did not know and his attention was so diverted that he may not have seen that the brake staff and wheel projected near the center of the running board. See, also, Youngblood v. South Carolina &c. R. Co. 60 S. Car. 9; 38 S. E. 232; 85 Am. St. 824, and note.

not in terms denying the general rules extend the obligation of the employer beyond just limits and erroneously limit the rule regarding the assumption of risks. We cannot undertake to comment upon the cases, nor, indeed, to enter into a full discussion of the subject. We refer to some of the very great number of cases upon the subject[29] and leave the subject with the statement that in our opinion the employer's duty is to use ordinary care in providing reasonably safe bumpers and coupling appliances, and

[29] Hatter v. Illinois &c. R. Co. 69 Miss. 642; 13 So. 827; Ellis v. New York &c. R. Co. 95 N. Y. 546; 17 Am. & Eng. R. Cas. 641; St. Louis &c. R. Co. v. Higgins, 44 Ark. 293; Toledo &c. R. Co. v. Black, 88 Ill. 112; Hulett v. St. Louis &c. R. Co. 67 Mo. 239; Brewer v. Flint &c. R. Co. 56 Mich. 620; 23 N. W. 440; Houston &c. R. Co. v. Barrager (Tex.), 14 S. W. 242; Lake Erie &c. R. Co. v. Everett, 86 Ind. 229; 11 Am. & Eng. R. Cas. 221; Louisville &c. R. Co. v. Foley, 94 Ky. 220; 21 S. W. 866; Indianapolis &c. R. Co. v. Flanigan, 77 Ill. 365; Muldowney v. Illinois &c. R. Co. 36 Iowa, 462; Williams v. Central R. Co. 43 Iowa, 396; Toledo &c. R. Co. v. Asbury, 84 Ill. 429; Russell v. Minneapolis &c. R. Co. 32 Minn. 230; 20 N. W. 147; LeClair v. First Div. &c. R. Co. 20 Minn. 9; Hawk v. Pennsylvania R. Co. (Pa. St.) 11 Atl. 459; Goltz v. Milwaukee &c. R. Co. 76 Wis. 136; 44 N. W. 752; Denver &c. R. Co. v. Simpson, 16 Col. 55; 26 Pac. 339; 25 Am. St. 242; Donohue v. Brooklyn &c. R. Co. 14 N. Y. S. 639; Whitwam v. Wisconsin &c. Ry. Co. 58 Wis. 408; 17 N. W. 124; Fort Wayne &c. R. Co. v. Gildersleeve, 33 Mich. 133; Mason v. Richmond &c. R. Co. 111 N. Car. 482; 16 S. E. 698; 18 L. R. A. 845; 32 Am. St. 814; 53 Am. & Eng. R. Cas. 183; Fordyce v. Yarborough, 1 Tex. Civ. App. 260; 21 S. W. 421; Kohn v. McNulta, 147 U. S. 238; 13 Sup. Ct. 298; Crutchfield v. Richmond Railway Co. 78 N. C. 300; Lawless v. Connecticut &c. R. Co. 136 Mass. 1; Pennsylvania C. v. Long, 94 Ind. 250; Welch v. New York &c. R. Co. 17 N. Y. S. 342; 63 Hun (N. Y.), 625; Russell v. Minneapolis &c. R. Co. 32 Minn. 230; 20 N. W. 147. See, Browne v. New York &c. R. Co. 158 Mass. 247; 33 N. E. 650; Muirhead v. Hannibal &c. R. Co. 103 Mo. 251; 15 S. W. 530; Sabine &c. R. Co. v. Ewing, 1 Tex. Civ. App. 531; 21 S. W. 700; Louisville &c. R. Co. v. Law, 14 Ky. L. 850; 21 S. W. 648; East Tennessee &c. R. Co. v. Turvaville, 97 Ala. 122; 12 So. 63; Illinois &c. R. Co. v. Bowles, 71 Miss. 994, 1003; 15 So. 138; McLaren v. Williston, 48 Minn. 299; 51 N. W. 373; Gibson v. Pacific R. Co. 46 Mo. 163; 2 Am. R. 497; Hathaway v. Michigan &c. R. Co. 51 Mich. 253; 47 Am. R. 569; Brooks v. Northern Pac. Railway Co. 47 Fed. 687; Bennett v. Northern Pac. R. Co. 2 N. Dak. 112; 49 N. W. 408; 13 L. R. A. 465; Day v. Toledo &c. R. Co. 42 Mich. 523; 4 N. W. 203. See, also, Morris v. Duluth &c. R. Co. 108 Fed. 747; Gilbert v. Burlington &c. R. Co. 128 Fed. 529.

in keeping them in a reasonably safe condition and that the general rules as to the assumption of risks, the effect of knowledge on the part of the employe, the knowledge or absence of knowledge on the part of the employer, and the failure of the employe to make complaint apply to such appliances as bumpers and couplings.[30] We may say in passing that we do not here speak of the distinction made by many of the authorities between foreign cars and cars owned by the employer. The employer owes to brakemen on its trains the duty of exercising ordinary care in providing and keeping in a reasonably safe condition brakes and similar appliances, but the rule as to the assumption of risks, knowledge of defects, and like general rules apply to brakes and similar appliances with which trains are equipped, and with which brakemen are required to work.[30a] The mere fact

[30] It is settled law that an employe assumes the risks of the customs and methods of business and the hazards incident to it (ante, § 1292), and it seems to us that he must be held to know that couplings are different, cars are of unequal height and the like, and to contract with reference to such matters. If, as is well settled, an employer is not bound to discard machinery and appliances, the employe must be held to enter service knowing this, and hence to impliedly agree that difference in cars, couplers and similar equipment exist and that dangers therefrom are incident to railroad service. See Northern Pac. R. Co. v. Blake, 63 Fed. 45; Kohn v. McNulta, 147 U. S. 238; 13 Sup. Ct. 298; Southern R. Co. v. Arnold, 114 Ala. 183; 21 So. 954; Louisville &c. R. Co. v. Boland, 96 Ala. 626; 11 So. 667; 18 L. R. A. 260; Brewer v. Flint &c. R. Co. 56 Mich. 620; 23 N. W. 440; Indianapolis &c. R. Co. v. Flanigan, 77 Ill. 365; Van Winkle v. Chicago &c. R. Co. 93 Ia. 509; 61 N. W. 929; Pittsburgh &c. R. Co. v. Henly, 48 Ohio St. 608; 29 N. E. 575; 15 L. R. A. 384; Simms v. South Carolina R. Co. 26 S. Car. 490; 2 S. E. 486; Whitman v. Wisconsin Cent. R. Co. 58 Wis. 408; 17 N. W. 124; Kelly v. Abbott, 63 Wis. 307; 23 N. W. 890; 53 Am. R. 292, and note.

[30a] Chicago &c. R. Co. v. Bragonier, 119 Ill. 51; 7 N. E. 688; Illinois Cent. R. Co. v. Jewell, 46 Ill. 99; 92 Am. Dec. 240; Bailey v. Rome &c. R. Co. 139 N. Y. 302; 34 N. E. 918; Beard v. Chesapeake &c. R. Co. 90 Va. 351; 18 S. E. 559; Galveston &c. R. Co. v. Templeton, 87 Tex. 42; 25 S. W. 135; 26 S. W. 1066; Northern Pacific R. Co. v. Charless, 51 Fed. 562; Hayden v. Platt, 84 Hun (N. Y.), 487; 32 N. Y. S. 1144; Eddy v. Prentice, 8 Tex. Civ. App. 58, 27 S. W. 1063. See Rehm v. Pennsylvania &c. R. Co. 164 Pa. St. 91; 30 Atl. 356; Louisville &c. R. Co. v. Binion, 98 Ala 570; 14 So. 619. See, also, Chicago &c. R. Co. v. Tackett, 33 Ind. App. 379; 71 N. E. 524; Gerstner v. New York Cent. R. Co. 81 App. Div. (N. Y.) 562; 80 N. Y. S. 1063, affirmed

that a brake is defective or out of repair is not sufficient to charge the employer with liability,[31] for the general rule that the test of liability is negligence and that the occurrence of an accident does not of itself establish negligence applies to such cases. The rule that an employer is not liable for latent defects not discoverable by the exercise of ordinary care applies to such equipments as brakes.[32]

§ 1296b. Brakes, couplers and other safety appliances—Act of Congress.—An act of Congress requires power or train brakes, automatic couplers and grab-irons or hand holds on cars used in the territories and the District of Columbia, and in interstate commerce.[33] The word "car" in this act includes all kinds of cars running on the rails, and a locomotive is such a car.[34] But it is held that the act in question was not intended to put a premium on carelessness or to grant immunity from negligence, and that the employe cannot recover if he is guilty of contributory negligence.[35]

in 178 N. Y. 627; 71 N. E. 1131. In Chicago &c. R. Co. v. Kneirim, 152 Ill. 458; 39 N. E. 324; 43 Am. St. 259, it is held that a switchman in a yard is not chargeable with knowledge of defects in the brakes of a car. The court cited Chicago &c. R. Co. v. Jackson, 55 Ill. 492; 8 Am. R. 661. See, generally, Paine v. Eastern &c. R. Co. 91 Wis. 340; 64 N. W. 1005; Brinkmeier v. Missouri Pac. R. Co. 69 Kans. 738; 77 Pac. 586; Rogers v. Louisville &c. R. Co. 88 Fed. 462.

[31] Mixter v. Imperial &c. R. Co. 152 Pa. St. 395; 25 Atl. 587; Haskins v. New York &c. R. Co. 79 Hun, 159; 29 N. Y. S. 274; McCray v. Galveston &c. R. Co. (Tex. Civ. App.) 32 S. W. 548.

[32] Louisville &c. R. Co. v. Campbell, 97 Ala. 147; 12 So. 574. See, also, Carpenter v. Mexican &c. R. Co. 39 Fed. 315; Louisville &c. R. Co. v. Bates, 146 Ind. 564; 45 N. E. 108. So where the defect is caused by a sudden injury and the company has neither actual nor constructive notice. Indianapolis &c. R. Co. v. Flanigan, 77 Ill. 365; Mensch v. Pennsylvania R. Co. 150 Pa. St. 598; 25 Atl. 31; 17 L. R. A. 450; Fenderson v. Atlantic City R. Co. 56 N. J. L. 708; 31 Atl. 767; Louisville &c. R. Co. v. Law, 14 Ky. L. 850; 21 S. W. 648.

[33] U. S. Stat. at Large, XXVII, 531; XXIX, 85; XXXII, 943.

[34] Johnson v. Southern Pac. Co. 196 U. S. 1; 25 Sup. Ct. 158. But see Larabee v. New York &c. R. Co. 182 Mass. 348; 66 N. E. 1032. As to what is not sufficient to comply with the act, and for cases in which the company has been held negligent, see Chicago &c. R. Co. v. Voelker, 129 Fed. 522; 70 L. R. A. 264; Philadelphia &c. Ry. Co. v. Winkler, 4 Pen. (Del.) 387; 56 Atl. 112. See, also, Greenlee v. Southern R. Co. 122 N. Car. 977; 30 S. E. 115; 41 L. R. A. 699; 65 Am. St. 734. See, also, post, § 1315a.

[35] Arrighi v. Denver &c. R. Co.

§ 1297. Engineers and firemen—Assumption of risks.—The established principle that the test of an employer's liability is not danger, but negligence, applies to enginemen, and so does the general rule of the assumption of risks by employes. The rule that requires reasonably careful inspections, made at reasonable intervals and with ordinary care, applies to the class above named as well as to other employes. The fact that an engine requires, in the exercise of reasonable care, that inspection be made oftener than inspections of some other appliances, does not change the rule that ordinary care is the standard of duty, nor does the danger of the service change the rule as to the employe's assumption of all the ordinary risks of the service. It is true that the danger from the use of engines may make a higher degree of care necessary than is necessary in regard to some other appliances, but it is not true, as has been sometimes loosely said, that more than ordinary care is required in keeping engines safe for use, although it is true that in order to constitute ordinary care the care must be reasonably proportionate to the known danger. It may be said, generally, that enginemen assume the ordinary risks of the service, including risks from defects in road-beds and tracks and in engines and appliances, as well as dangers of the service of which they have knowledge in cases where they continue in the service after the acquisition of such knowledge.[36] Enginemen do not, however, as-

129 Fed. 347; Gilbert v. Burlington &c. Ry. Co. 128 Fed. 529; Norfolk &c. R. Co. v. Cheatwood, 103 Va. 356; 49 S. E. 489; Chicago &c. R. Co. v. Voelker, 129 Fed. 522; 70 L. R. A. 264. But it is held in the last case cited that he did not assume the risk caused by the company's violation of the statute. And see Greenlee v. Southern Ry. Co. 122 N. Car. 977; 30 S. E. 115; 41 L. R. A. 699; 65 Am. St. 734; Kansas City &c. R. Co. v. Flippo, 138 Ala. 487; 35 So. 457. See, also, as to the duty of the employe to still use reasonable care, Cleveland &c. R. Co. v. Baker, 91 Fed. 224; Sprague v. Southern R. Co. 92 Fed. 59. But compare Missouri &c. R. Co. v. Keefe (Tex. Civ. App.), 84 S. W. 679.

[36] Gulf &c. Co. v. Harriett, 80 Tex 73; 15 S. W. 556; Drake v. Union Pacific R. Co. 2 Ida. 453; 21 Pac. 560; Texas &c. R. Co. v. McKee, 9 Tex. Civ. App. 100; 29 S. W. 544; Fordyce v. Edwards, 60 Ark. 438; 30 S. W. 758; Thain v. Old Colony &c. R. Co. 161 Mass. 353; 37 N. E. 309; Texas &c. R. Co. v. Minnick, 61 Fed. 635; Scott v. Darby &c. Co. 90 Iowa, 689; 57 N. W. 619; Derr v. Lehigh &c. R. Co. 158 Pa. St. 365; 27 Atl. 1002; 38 Am. St. 848; East Tennessee &c. R. Co. v. Head, 92 Ga. 723; 18 S. E. 976;

sume the risks of extraordinary dangers attributed to a breach of duty on the part of the company,[37] nor are they chargeable as with the risks of service where they do not know and could not, in the exercise of ordinary care, know of the danger caused by the employer's negligence.[38] Thus, in a recent case where a fireman was injured in consequence of defects in the apron bridging the space between the engine and tender, it appeared that he had not fired on the engine before, that when he boarded the engine the apron was covered with coal, and he did not learn of the defects until after he had cleared up the coal during the progress of the trip, and that he did not know the cause of the defects, nor of the danger incident to the use of the apron in that condition, it was held that he did not assume the risk and that he was not guilty of contributory negligence

Southern &c. R. Co. v. Leash, 2 Tex. Civ. App. 68; 21 S. W. 563; Manson v. Eddy, 3 Tex. Civ. App. 148; 22 S. W. 66; Bellows v. Pennsylvania &c. R. Co. 157 Pa. St. 51; 27 Atl. 685; Helfrich v. Ogden City R. Co. 7 Utah, 186; 26 Pac. 295; Nelson v. Central &c. R. Co. 88 Ga. 225; 14 S. E. 210; Kuhns v. Wisconsin &c. R. Co. 70 Iowa, 561; 31 N. W. 868. See, generally, Sweeney v. Minneapolis &c. R. Co. 33 Minn. 153; 22 N. W. 289; 22 Am. & Eng. R. Cas. 302; Rodgers v. Central &c. R. Co. 67 Cal. 607; 8 Pac. 377; 22 Am. & Eng. R. Cas. 305, and note; Memphis &c. R. Co. v. Thomas, 51 Miss. 637; Illinois &c. R. Co. v. Patterson, 69 Ill. 650; 93 Ill. 290; Norfolk &c. R. Co. v. Williams, 89 Va. 165; 15 S. E. 522; Johnson v. Galveston &c. R. Co. (Tex. Civ. App.) 30 S. W. 95; Denver &c. R. Co. v. Scott, 34 Colo. 99; 81 Pac. 763; Bridges v. Tennessee &c. R. Co. 109 Ala. 287; 19 So. 495.

[37] Union Pac. R. Co. v. O'Brien, 49 Fed. 538; Town v. Michigan &c. R. Co. 84 Mich. 214; 47 N. W. 665; Missouri &c. R. Co. v. Henry, 75 Tex. 220; 12 S. W. 828. See, generally, Texas &c. R. Co. v. Johnson, 76 Tex. 421; 13 S. W. 463; 18 Am. St. 60, and note; 42 Am. & Eng. R. Cas. 7; McFee v. Vicksburg &c. R. Co. 42 La. Ann. 790; 7 So. 720; Henry v. Wabash &c. R. Co. 109 Mo. 488; 19 S. W. 239; Western &c. R. Co. v. Russell, 144 Ala. 142; 39 So. 311. It has been held that negligence can not be imputed to a fireman for a failure to secure compliance with the company's rules by the engineer. New Jersey &c. R. Co. v. Young, 49 Fed. 723. In International &c. R. Co. v. Moynahan, 33 Tex. Civ. App. 302; 76 S. W. 803, an engineer was held not to have assumed the risk from a misplaced switch, though he used a defective headlight without objection and might have avoided the injury if the headlight had been perfect.

[38] St. Louis &c. R. Co. v. McLain, 80 Tex. 85; 15 S. W. 789. If there was knowledge of the defect, the rule stated in text would not apply. Green v. Cross, 79 Tex. 130; 15 S. W. 220; Fancher v. New York &c. R. Co. 75 Hun (N. Y.), 350; 27 N. Y. S. 62.

in failing to abandon the engine after the discovery of the defects.[39] So, it has been held that an engineer does not assume, as an ordinary risk of the service, the danger of cars escaping from a siding and running loose and unattended on the main track where they are liable to be run into by a regular train.[40] The general rule is that enginemen assume the risks incident to the employer's methods of business;[41] and there is, indeed, no valid reason why they should be excepted from that rule. It has been held that where a railroad company sends one of its locomotives and its engineer in charge of it to do work on the track of another company, it is not liable for injuries to the engineer caused by the defects in the track of the company for which the work is done.[42] The fact that an accident happened is not, of itself, sufficient to charge the employer, for negligence must also be shown.[43] Thus, where an employe working on an engine was injured in an accident caused by a defective rail, and the track had been inspected about two weeks prior to the accident, it was held that the employer was not liable, because not guilty of negligence.[44] Where there is evidence that the risk was one assumed by

[39] Missouri &c. R. Co. v. Dumas (Tex. Civ. App.), 93 S. W. 493; Galveston &c. R. Co. v. Fitzpatrick (Tex. Civ. App.), 83 S. W. 406.

[40] Jones v. Kansas City &c. R. Co. 178 Mo. 528; 77 S. W. 890; 101 Am. St. 434.

[41] Illinois Cent. R. Co. v. Neer, 31 Ill. App. 126; Sutherland v. Troy &c. R. Co. 125 N. Y. 737; 26 N. E. 609; France v. Rome &c. R. Co. 88 Hun (N. Y.), 318; 34 N. Y. S. 408.

[42] Dunlap v. Richmond &c. R. Co. 81 Ga. 136; 7 S. E. 283. But see Story v. Concord &c. R. Co. 70 N. H. 364; 48 Atl. 288; 4 Thomp. Neg. §§ 3730, 3735, 4483. As to competency of an engineer, see Holland v. Southern &c. R. Co. 100 Cal. 240; 34 Pac. 616; Mexican &c. R. Co. v. Mussette, 86 Tex. 708; 26 S. W. 1075; 24 L. R. A. 642; Missouri &c. R. Co. v. Patton (Tex. Civ. App.), 25 S. W. 339; Galveston &c. R. Co. v. Eckols, 7 Tex. Civ. App 429; 26 S. W. 1117.

[43] Mire v. East Louisiana R. Co. 42 La. Ann. 385; 7 So. 473; Chicago &c. R. Co. v. Dunn, 23 Ill. App. 148; Gulf &c. R. Co. v. Pettis, 69 Tex. 689; 7 S. W. 93; Galveston &c. R. Co. v. Goodwin (Tex. Civ. App.), 26 S. W. 1007. See, also, Yarnell v. Kansas City &c. R. 113 Mo. 570; 21 S. W. 1; 18 L. R. A. 599, but compare Stoker v. St. Louis &c. R. Co. 105 Mo. 192; 16 S. W. 591; Jones v. Kansas City &c. R. Co. 178 Mo. 528; 77 S. W. 890; 101 Am. St. 434.

[44] Burrell v. Gowen, 134 Pa. St. 527; 19 Atl. 678. See, also, Illinois &c. R. Co. v. Quirk, 51 Ill. App. 607; Ragon v. Toledo &c. R. Co. 97 Mich. 265; 56 N. W. 612; 37 Am. St. 336. If an injury to an engineman results from the act of a fel-

an engineman and there is no conflict, it is the duty of the court to direct a verdict for the defendant.[45] Enginemen who remain at their posts in order to protect persons on their trains are not guilty of a breach of duty.[46]

low-servant, the company is not liable. Illinois &c. R. Co. v. Jones (Miss.), 16 So. 300. But if negligence of employer is the proximate cause, the employe may recover, although a fellow-servant was also negligent. Clyde v. Richmond &c. R. Co. 59 Fed. 394. See Texas &c. R. Co. v. Patton, 61 Fed. 259; Campbell v. Wing, 5 Tex. Civ. App. 431; 24 S. W. 360; Englehardt v. Delaware &c. R. Co. 78 Hun (N. Y.), 588; 29 N. Y. Supp. 425; Cole v. Rome &c. R. Co. 72 Hun (N. Y.), 467; 25 N. Y. S. 276. In Norfolk &c. R. Co. v. Houchins, 95 Va. 398; 28 S. E. 578; 46 L. R. A. 359; 64 Am. St. 791, 799, the court says that the duties of the company to its trainmen may be stated as follows: "1. To provide reasonably safe and suitable machinery and appliances for the business. This includes the exercise of reasonable care in furnishing such appliances, and the exercise of like care in keeping the same in order, and making proper inspections and tests. 2. To exercise like care in providing and retaining sufficient and suitable servants for the conduct of the business. 3. To establish proper rules and regulations for the service, and, having adopted such, to conform to them."

[45] Southern &c. R. Co. v. Johnson, 69 Fed. 559, citing many cases upon the question of the duty of the court to direct a verdict, and upon the question of the assumption of risks, among them Buzzell v. Loconia Manuf. Co. 48 Me. 113; 77 Am. Dec. 212, and note; Fitzgerald v. Connecticut &c. Paper Co. 155 Mass. 155; 29 N. E. 464; 31 Am. St. 537; Mundle v. Hill Manuf. Co. 86 Me. 400, 403; 30 Atl. 16; Judkins v. Maine &c. R. Co. 80 Me. 417; 14 Atl. 735; Crown v. Orr, 140 N. Y. 450; 35 N. E. 648; Sweeney v. Central &c. R. Co. 57 Cal. 15. The court also quoted with approval from Short v. New Orleans &c. R. Co. 69 Miss. 848; 13 So. 826, the following: "The deceased was killed, and no one knows how. That is not enough to subject the railroad company to liability. Negligence must be shown." See, also, Chandler v. New York &c. R. Co. 159 Mass. 589; 35 N. E. 89; Redmond v. Delta Lumber Co. 96 Mich. 545; 55 N. W. 1004.

[46] Pennsylvania R. Co. v. Roney, 89 Ind. 453; 46 Am. R. 173; Cottrill v. Chicago &c. R. Co. 47 Wis. 634; 3 N. W. 376; 32 Am. R. 796. See, also, Smith v. Wrightsville &c. R. Co. 83 Ga. 671; 10 S. E. 361. And compare Flynn v. Kansas City &c. R. Co. 78 Mo. 195; 47 Am. R. 99. As to contributory negligence of enginemen, see Illinois Cent. R. Co. v. Murphy, 52 Ill. App. 65; Illinois &c. R. Co. v. Patterson, 93 Ill. 290; Lake Shore &c. R. Co. v. Wilson, 11 Ind. App. 488; 38 N. E. 343; Pennsylvania Co. v. Hammond, 1 Ohio Dec. 298; Chicago &c. R. Co. v. Flynn, 54 Ill. App. 387; Fritz v.

§ 1298. Dangers from running of trains—Section men, trackmen and the like.—Ordinarily section men or trackmen assume the risk incident to the running of trains, whether extra trains or trains running on schedule time.[47] Such employes are bound to know that regular trains may be delayed and pass at uncertain intervals and that wild or extra trains may be sent over the road and they assume the risks of danger therefrom,[48] except in cases where by some act

Missouri &c. R. Co. (Tex. Civ. App.) 30 S. W. 85; International &c. R. Co. v. Culpepper, 19 Tex. Civ. App. 182; 46 S. W. 922; Hulien v. Chicago &c. R. Co. 107 Wis. 122; 82 N. W. 710; Barry v. Hannibal &c. R. Co. 98 Mo. 62; 11 S. W. 308; 14 Am. St. 610; Sweeney v. Minneapolis &c. R. Co. 33 Minn. 153; 22 N. W. 289; Merritt v. Great Northern R. Co. 81 Minn. 496; 84 N. W. 321; Norfolk &c. R. Co. v. Williams, 89 Va. 165; 15 S. E. 522; Illinois &c. R. Co. v. Guess, 74 Miss. 170; 21 So. 50; Whitcomb v. McNulty, 105 Fed. 863; Patton v. Texas &c. R. Co. 179 U. S. 658; 21 Sup. Ct. 275; Robinson v. West Va. &c. R. Co. 40 W. Va. 583; 21 S. E. 727; Haas v. Chicago &c. R. Co. 90 Iowa, 259; 57 N. W. 894; Devine v. Savannah &c. R. Co. 89 Ga. 541; 15 S. E. 781; Nattress v. Philadelphia &c. R. Co. 150 Pa. St. 527; 24 Atl. 753; Louisville &c. R. Co. v. Hurt, 101 Ala. 34; 13 So. 130.

[47] Pennsylvania Co. v. Wachter, 60 Md. 395; Railway Co. v. Leech, 41 Ohio St. 388; Baltimore &c. Co. v. Stricker, 51 Md. 47; 34 Am. R. 291; Olson v. St. Paul &c. R. Co. 38 Minn. 117; 35 N. W. 866; 33 Am. & Eng. R. Cas. 386; Woodley v. Metropolitan R. Co. L. R. 2 Exch Div. 384; McGrath v. New York &c. R. Co. 14 R. I. 357; 18 Am. & Eng. R. Cas. 5; International &c. R. Co. v. Hester, 64 Tex. 401; Larson v. St. Paul &c. R. Co. 43 Minn. 423; 45 N. W. 722; McGrath v. York &c. R. Co. 14 R. I. 357; Northern &c. R. Co. v. Hambly, 154 U. S. 349; 14 Sup. Ct. 983; Kansas &c. R. Co. v. Dye, 70 Fed. 24; Kansas &c. R. Co. v. Waters, 70 Fed. 28. See, generally, Cooney v. Great Northern &c. R. Co. 9 Wash. 292; 37 Pac. 438; International &c. R. Co. v. Arias, 10 Tex. Civ. App. 190; 30 S. W. 446; Gulf &c. R. Co. v. Jackson, 65 Fed. 48; Elliot v. Chicago &c. R. Co. 5 Dak. 523; 41 N. W. 758; 3 L. R. A. 363. See, also, Appel v. Buffalo &c. R. Co. 111 N. Y. 550; 19 N. E. 93; Couch v. Charlotte &c. R. Co. 22 S. Car. 557; Rush v. Missouri Pac. R. Co. 36 Kan. 129; 12 Pac. 582. See, also, Hoffard v. Illinois Cent. R. Co. (Iowa) 110 N. W. 446; Keefe v. Chicago &c. R. Co. 92 Iowa, 182; 60 N. W. 503; 54 Am. St. 542. Some of the statements in Pennsylvania Co. v. McCaffrey, 139 Ind. 430; 38 N. E. 67; 29 L. R. A. 104, are erroneous because the court lost sight of the distinction between the assumption of risks and contributory negligence.

[48] Hinz v. Chicago &c. R. Co. 93 Wis. 16; 66 N. W. 718; Pennsylvania R. Co. v. Wachter, 60 Md. 395; Chicago &c. R. Co. v. Yost, 56 Neb. 439; 76 N. W. 901. See, also, Shepard v. Boston &c. R. Co. 158 Mass. 174; 33 N. E. 508; Olson v. St.

or conduct the employer has impliedly or expressly represented that no wild or extra trains shall imperil the safety of such employes. It has also been held that the fact that the train was running at an unusual rate of speed at the place of injury and in violation of a city ordinance does not relieve a section man from the rule that such employes assume the risk of wild as well as regular trains running over the tracks at all times at any rate of speed, without warning except from the noise of the train, and by the customary signals.[49] Where, by special order, an employe is assigned to special work at a particular place the employer is bound to exercise ordinary care to prevent injury to the employe, and ordinary care under such circumstances requires that the employer should take precautions to prevent injury to the employe at the particular place. Thus, where an employe is by special order required to do work outside of his ordinary line of employment at a particular place on the track it is incumbent on the employer not to run wild or extra trains over such place without some warning to the employe, but this duty does not extend to a place not designated in the special order.[50] It has been held that the trackmen on a hand-car have a right to act upon the assumption that the employes in control of an approaching train will heed a signal to stop,[51] but the case referred to is based principally

Paul &c. R. Co. 38 Minn. 117; 35 N. W. 866. But compare Cincinnati &c. R. Co. v. Lang, 118 Ind. 579; 21 N. E. 317.

[49] Ives v. Wisconsin Cent. R. Co. 128 Wis. 357; 107 N. W. 452. See, also, Vaundry v. Chicago &c. R. Co. (Wis.) 109 N. W. 926; Bengtson v. Chicago &c. R. Co. 47 Minn. 486; 50 N. W. 531. But compare Camp v. Chicago &c. R. Co. 124 Iowa, 238; 99 N. W. 735; Hoffard v. Illinois Cent. R. Co. (Iowa) 110 N. W. 446; Chicago &c. R. Co. v. Lawrence (Ind. App.), 79 N. E. 363.

[50] Cincinnati &c. R. Co. v. Long, 112 Ind. 166; 13 N. E. 659; 31 Am. & Eng. R. Cas. 138. The liability of the employer in such a case as that cited does not rest upon the mere fact of assignment to a special duty by a special order, but upon the fact that having assigned the employe to a special duty at a particular place the employer impliedly undertook that the place should not be made unsafe by wild trains. See North Chicago &c. Co. v. Johnson, 114 Ill. 57; 29 N. E. 186; Abbitt v. Lake Erie &c. R. Co. (Ind.) 40 N. E. 40; Hawley v. Chicago &c. R. Co. 71 Iowa, 717; 29 N. W. 787.

[51] Howard v. Delaware &c. R. Co. 40 Fed. 195; 6 L. R. A. 75, and note. See Davis v. Central &c. R. Co. 55 Vt. 84; 45 Am. R. 590; Hard v. Vermont &c. R. Co. 32 Vt. 473. See, also, Texas &c. R. Co. v. Higgins (Tex. Civ. App.), 99 S. W. 200.

upon a case[52] that has been virtually overruled,[53] on the point as to fellow servants and vice principals. In a recent case it is held that a young and inexperienced switch tender did not assume the risk of having his foot caught in the angle of an unblocked frog and being injured by the negligent operation of the defendant's train.[54] In another recent case it is held that while a flagman supplied with a watch box assumes the risks incident to the use of such a box properly located, and such other risks as he knows or should know exist, he does not assume the risk that the box has been placed, without his knowledge, so near the track as to be struck by a passing train.[55] But a flagman at a street crossing, with the company's tracks on either side of him, has been held to necessarily assume the risk incident to the crossing of the tracks in going to and from his work, and to be guilty of contributory negligence in so crossing without looking and listening.[56]

§ 1298a. Car inspectors, repairers and cleaners.—Railroad companies have often been held liable to car inspectors and repairers where they have negligently failed to provide means for protecting them and have negligently injured them.[57] And it has been held that such employes have a right to rely on the performance of this duty by the company.[58] But such employes assume the risk where

[52] Chicago &c. R. Co. v. Ross, 112 U. S. 377; 5 Sup. Ct. 184.

[53] Baltimore &c. R. Co. v. Baugh, 149 U. S. 368; 13 Sup. Ct. 914; Northern &c. R. Co. v. Hambly, 154 U. S. 349; 14 Sup. Ct. 983; Deavers v. Spencer, 70 Fed. 480; Thom v. Pittard, 62 Fed. 232; 10 C. C. A. 352; Texas &c. R. Co. v. Rogers, 57 Fed. 378.

[54] Mace v. H. A. Boedeker & Co. 127 Iowa, 721; 104 N. W. 475.

[55] Philadelphia &c. R. Co. v. Devers, 101 Md. 341; 61 Atl. 418.

[56] O'Neil v. Pittsburg &c. R. Co. 130 Fed. 204. See, also, Olsen v. Andrews, 168 Mass. 261; 47 N. E. 90; Dyerson v. Union Pac. R. Co. (Kans.) 87 Pac. 680.

[57] Pool v. Southern Pac. Co. 20 Utah, 210; 58 Pac. 326; Louisville &c. R. Co. v. Lowe (Ky.), 66 S. W. 736; Streets' Western &c. Line v. Bonander, 196 Ill. 15; 63 N. E. 688; Chicago &c. R. Co. v. McGraw, 22 Colo. 363; 45 Pac. 383; Texas &c. R. Co. v. Cumpson, 15 Tex. Civ. App. 493; 40 S. W. 546; Abel v. Delaware &c. R. Co. 103 N. Y. 581; 9 N. E. 325; 57 Am. R. 773. But compare Besel v. New York &c. R. Co. 70 N. Y. 171; Atchison &c. R. Co. v. Carruthers, 56 Kans. 309; 43 Pac. 230.

[58] St. Louis &c. R. Co. v. Triplett, 54 Ark. 289; 15 S. W. 831; 16 S. W. 266; 11 L. R. A. 773; Louisville &c. R. Co. v. Davis, 91 Ala. 487;

they have knowledge of the facts and method of the company and continue in the service without objection,[59] and they are guilty of contributory negligence if they negligently fail to take proper steps and obey proper rules for their own protection and thus proximately cause the injury complained of.[60] They do not, however, assume unknown risks or risks with knowledge of which they are not chargeable, caused by the negligence of the company.[61] Railway track repairers and the like assume the risk of injury from the running of trains, especially where they are run in accordance with the known custom, or they may be held guilty of contributory negligence where they are injured by their failure to keep a lookout for trains.[62] Yet they

8 So. 552; Louisville &c. R. Co. v. Hanning, 131 Ind. 528; 31 N. E. 187; 31 Am. St. 443. But see Peterson v. Chicago &c. R. Co. 67 Mich. 102; 34 N. W. 260. This is true where it is the established custom. Meadowcroft v. New York &c. R. Co. (Mass.) 79 N. E. 266. See, also, Southern R. Co. v. Simmons (Va.), 55 S. E. 459.

[59] Chicago &c. R. Co. v. McGraw, 22 Colo. 363; 45 Pac. 383; Unfried v. Baltimore &c. R. Co. 34 W. Va. 260; 12 S. E. 512; O'Rorke v. Union &c. R. Co. 22 Fed. 189; Clay v. Chicago &c. R. Co. 56 Ill. App 235; Keenan v. New York &c. R. Co. 21 N. Y. S. 445, affirmed in 145 N. Y. 190; 39 N. E. 711; 45 Am. St. 604. See, also, Alabama &c. R. Co. v. Roach, 116 Ala. 360; 23 So. 52; Norfolk &c. R. Co. v. Graham, 96 Va. 430; 31 S. E. 604; Seldomridge v. Chesapeake &c. R. Co. 46 W. Va. 569; 33 S. E. 293; McCain v. Chicago &c. R. Co. 76 Fed. 125; St. Louis &c. R. Co. v. Rea (Tex.), 87 S. W. 324.

[60] Cypher v. Huntingdon &c. Co. 149 Pa. St. 359; 24 Atl. 225; Southern Pac. R. Co. v. Pool, 160 U. S. 438; 16 Sup. Ct. 338; Chicago &c. R. Co. v. McGraw, 22 Colo. 363; 45 Pac. 383. See, also, Canadian Pac. R. Co. v. Elliott, 137 Fed. 904; Sherman v. Delaware &c. R. Co. 71 Vt. 325; 45 Atl. 227; Spencer v. Ohio &c. R. Co. 130 Ind. 181; 29 N. E. 915. But see Murphy v. New York Cent. R. Co. 118 N. Y. 527; 23 N. E. 812; Pool v. Southern R. Co. 20 Utah, 210; 58 Pac. 326; Texas &c. R. Co. v. Wynne (Tex.), 22 S. W. 1064; Berry v. Central Ia. R. Co. 40 Iowa, 564.

[61] Chicago &c. R. Co. v. Bingenheimer, 116 Ill. 226; 4 N. E. 840; Smith v. Fordyce, 190 Mo. 1; 88 S. W. 679; Hammond Co. v. Mason, 12 Ind. App. 469; 40 N. E. 642; Southern R. Co. v. Hart, 23 Ky. L. 1054; 64 S. W. 650; Atchison &c. R. Co. v. Holt, 29 Kans. 149. See, also, Promer v. Michigan &c. R. Co. 90 Wis. 215; 63 N. W. 90; 48 Am. St. 905. But compare Potter v. New York &c. R. Co. 136 N. Y. 77; 32 N. E. 603; Central R. Co. v. Keegan, 160 U. S. 259; 16 Sup. Ct. 269.

[62] Bengtson v. Chicago &c. R. Co. 47 Minn. 486; 50 N. W. 531; Brady v. New York &c. R. Co. 20 R. I. 338; 39 Atl. 186; Coyne v. Union &c. R. Co. 133 U. S. 370; 10 Sup. Ct. 382; Aerkfetg v. Humphreys,

cannot reasonably be expected to constantly keep a perfect lookout and at the same time properly attend to their work, and there are cases in which the question as to whether they exercised reasonable care under the circumstances has been properly left to the jury.[63]

§ 1299. Injuries from explosions.—It is incumbent upon an injured employe who seeks to recover for an injury caused by the explosion of the boiler of a locomotive engine to affirmatively show that the explosion was the proximate result of negligence on the part of the employer. It is not presumed from the mere fact that there was an explosion that the employer was guilty of negligence.[64] There

145 U. S. 418; 12 Sup. Ct. 835; Lynch v. Boston &c. R. Co. 159 Mass. 536; 34 N. E. 1072; Fisher v. Louisville &c. R. Co. 146 Ind. 558; 45 N. E. 689; Keefe v. Chicago &c. R. Co. 92 Iowa, 182; 60 N. W. 503; 54 Am. St. 542; McPeck v. Central Vt. R. Co. 79 Fed. 590; Carlston v. Cincinnati &c. R. Co. 120 Mich. 48; 79 N. W. 688. See, also, Grand Trunk R. Co. v. Baird, 94 Fed. 946; Gulf &c. R. Co. v. Jackson, 65 Fed. 48; Corlette v. Southern Pac. Co. 136 Cal. 642; 69 Pac. 422; Foster v. Chicago &c. R. Co. 127 Iowa, 84; 102 N. W. 422; Dishon v. Cincinnati &c. R. Co. 133 Fed. 471, for other instances.

[63] See Baltimore &c. R. Co. v. Peterson, 156 Ind. 364; 59 N. E. 1044; St. Louis &c. R. Co. v. Jackson (Ark.), 93 S. W. 746; Erickson v. St. Paul &c. R. Co. 41 Minn. 500; 43 N. W. 332; 5 L. R. A. 786; Chicago &c. R. Co. v. Goebel, 20 Ill. App. 163, affirmed in 119 Ill. 515; 10 N. E. 369; Chicago &c. R. Co. v. Sharmon, 43 Ill. App. 540; International &c. R. Co. v. Villareal 36 Tex. Civ. App. 532; 82 S. W. 1063, 1064; St. Louis &c. Ry. Co. v. Jackson (Ark.), 93 S. W. 746; Ominger v. New York &c. R. Co. 4 Hun (N. Y.), 159. And for cases in which it was held that the risk was not assumed and the employe not guilty of contributory negligence, see Missouri &c. R. Co. v. Lehmberg, 75 Tex. 61; 12 S. W. 838; Gulf &c. R. Co. v. Wood (Tex. Civ. App.), 63 S. W. 164; Croll v. Atchison &c. R. Co. 57 Kans. 548; 46 Pac. 972; Conlon v. Oregon &c. R. Co. 23 Oreg. 499; 32 Pac. 397; Swartz v. Great Northern R. Co. 93 Minn. 339; 101 N. W. 504; Chicago &c. R. Co. v. Cullen, 187 Ill. 523; 58 N. E. 455; Card v. Eddy, 129 Mo. 510; 28 S. W. 979; 36 L. R. A. 806; Southern R. Co. v. Pugh, 97 Tenn. 624; 37 S. W. 555; Lake Shore &c. R. Co. v. Murphy, 50 Ohio St. 135; 33 N. E. 403; Tobey v. Burlington &c. R. Co. 94 Iowa, 256; 62 N. W. 761; 33 L. R. A. 496. But compare Fisk v. Chicago &c. R. Co. 111 Iowa, 392; 82 N. W. 931; Roskoyek v. St. Paul &c. R. Co. 76 Minn. 28; 78 N. W. 872; Tomko v. Central R. Co. 1 App. Div. (N. Y.) 298; 37 N. Y. S. 144; Louisville &c. R. Co. v. Markee, 103 Ala. 160; 15 So. 511; 49 Am. St. 21.

[64] Racine v. New York &c. R. Co. 70 Hun (N. Y.), 453; 24 N. Y. S. 388. See, also, Texas &c. R. Co.

must be a substantive evidence of negligence, for negligence cannot be presumed nor can the existence of negligence be left to conjecture.[65] It is not necessary to establish negligence by direct or positive evidence,[66] but there must be evidence of such facts or circumstances as by fair and reasonable inference authorizes the conclusion that the employer was negligent.[67] The existence of negligence cannot, however, be established by forced, unnatural or unreasonable inferences. The general rule is that negligence must be proved by the plaintiff as part of his case, for it cannot be presumed,[68] and there is no reason why this rule should not apply to

v. Barrett, 166 U. S. 617; 17 Sup. Ct. 707; Huff v. Austin, 46 Ohio St. 386; 21 N. E. 864; 15 Am. St. 613; Hanley v. West Virginia &c. R. Co. (W. Va.) 53 S. E. 625, 629 (citing text); Marshall v. Wellwood, 38 N. J. L. 399; John Morris Co. v. Southworth, 154 Ill. 118; 39 N. E. 1099. The text is also cited, but the case distinguished in Louisville &c. R. Co. v. Lynch, 147 Ind. 165, 175; 46 N. E. 471, 472. Discovery of a defect after the occurrence of an accident is not sufficient evidence of negligence. Indianapolis &c. R. Co. v. Toy, 91 Ill. 474; 33 Am. R. 57; Perry v. Michigan &c. R. Co. 108 Mich. 130; 65 N. W. 608; Robinson v. Charles Wright Co. 94 Mich. 283; 53 N. W. 938; Toomey v. Eureka &c. Steel Works, 89 Mich. 249; 50 N. W. 850. See, generally, Fuller v. Jewett, 80 N. Y. 46; 36 Am. R. 575; Kirkpatrick v. New York &c. R. Co. 79 N. Y. 240; Stevenson v. Jewett, 16 Hun (N. Y.), 210. It may be that where defects found after the occurrence show clearly that they existed before the accident and were such that a reasonably careful inspection would have revealed them the employer is liable, but the fact that defects did exist will not establish a liability, for much more is required to make the employer liable.

[65] Brunner v. Blaisdell, 170 Pa. St. 25; 32 Atl. 607; Hudson v. Rome &c. R. Co. 145 N. Y. 408; 40 N. E. 8. The text is also cited in Powers v. Pere Marquette R. Co. 143 Mich. 379; 106 N. W. 1117, 1118. See, also, Losee v. Buchanan, 51 N. Y. 476; 10 Am. R. 623; Cosulich v. Standard Oil Co. 122 N. Y. 118; 25 N. E. 259; 19 Am. St. 475; Veith v. Hope Salt Co. 51 W. Va. 96; 41 S. E. 187; 57 L. R. A. 410.

[66] See Kirkpatrick v. New York &c. R. Co. 79 N. Y. 240; California &c. Co. Re, 110 Fed. 678; Chicago &c. R. Co. v. Sharmon, 43 Ill. 338.

[67] See Southern Ind. R. Co. v. Messick, 35 Ind. App. 676; 74 N. E. 1097, 1099, citing text.

[68] Ford v. Anderson, 139 Pa. St. 261; 21 Atl. 18; Fenderson v. Atlantic City R. Co. 56 N. J. L. 708; 31 Atl. 767; Bahr v. Lombard, 53 N. J. L. 233; 21 Atl. 190; 23 Atl. 167; Sherman v. Menominee &c. Co. 77 Wis. 14; 45 N. W. 1079; Lehman v. Brooklyn, 29 Barb. (N. Y.) 234; Trapnell v. Red Oak Junction, 76 Iowa, 744; 39 N. W. 884; Sorenson v. Menasha &c. R. Co. 56 Wis. 338; 14 N. W. 446; Payne v. Forty-

cases of injury resulting from the explosion of locomotive boilers. Where the explosion is the proximate result of the employer's failure to exercise ordinary care in procuring a reasonably safe locomotive, or the failure to exercise ordinary care in keeping it in a reasonably safe condition, an action may be maintained by an employe who is free from contributory fault, and who did not know of the unsafe condition of the locomotive.[69] The duty of the employer so far as regards inspection is to use ordinary care and to employ the mode of inspection ordinarily and generally in use by railroad companies, but this duty does not require the employer to dismantle the engine or to take it apart.[70]

§ 1300. Injuries from collisions.—We think that principle and authority warrant the conclusion that a railroad company is not liable at common law for injuries resulting to its employes engaged in operating its trains caused by its trains coming into collision through the fault of the employes in charge of one or both of the trains.[71] If, however, the collision is caused by a negligent breach

second St. &c. R. Co. 40 N. Y. Super. Ct. 8; Stager v. Ridge Avenue &c. R. Co. 119 Pa. St. 70; 12 Atl. 821; Perry v. Michigan &c. R. Co. 108 Mich. 130; 65 N. W. 608; ante, § 1286; post, § 1309.

[69] Pennsylvania &c. R. Co. v. Mason, 109 Pa. St. 296; 58 Am. R. 722; Ford v. Fitchburg &c. R. Co. 110 Mass. 240; 14 Am. R. 598; Noyes v. Smith, 28 Vt. 59; 65 Am. Dec. 222; Keegan v. Western &c. R. Co. 8 N. Y. 175; 59 Am. Dec. 476. See, generally, Chicago &c. R. Co. v. Rung, 104 Ill. 641; 11 Am. & Eng. R. Cas. 218; Atchison &c. R. Co. v. Holt, 29 Kan. 149; 11 Am. & Eng. R. Cas. 206; Greene v. Minneapolis &c. R. Co. 31 Minn. 248; 47 Am. R. 785. For cases of injuries from defective engines, Cone v. Delaware &c. R. Co. 81 N. Y. 206; 37 Am. R. 491; Ford v. Fitchburg R. Co. 110 Mass. 240; 14 Am. R. 598.

[70] Clyde v. Richmond &c. R. Co. 65 Fed. 482; Richmond &c. R. Co. v. Elliott, 149 U. S. 266; 13 Sup. Ct. 837; Texas &c. R. Co. v. Barrett, 166 U. S. 617; 17 Sup. Ct. 707; Chicago &c. R. Co. v. Dubois, 65 Ill. App. 142; Louisville &c. R. Co. v. Allen, 78 Ala. 494; 28 Am. & Eng. R. Cas. 514.

[71] Van Avery v. Union Pac. R. Co. 35 Fed. 40; Easton v. Houston &c. R. Co. 32 Fed. 893; Fowler v. Chicago &c. R. Co. 61 Wis. 159; 21 N. W. 40; 17 Am. & Eng. R. Cas. 536; Pease v. Chicago &c. R. Co. 61 Wis. 163; 20 N. W. 908; 17 Am. & Eng. R. Cas. 327; Brown v. Southern R. Co. 126 N. Car. 458; 36 S. E. 19; Jordan v. Wells, 3 Woods (U. S.), 527; Nashville &c. R. Co. v. Handman, 13 Lea (Tenn.), 423; Ragsdale v. Memphis &c. R. Co. 3 Baxter (Tenn.), 426; Bull v. Mobile &c. R. Co. 67 Ala. 206; Mur-

of duty resting on the company and not assumed by the injured employes then the company is liable to injured employes who are free from contributory fault. Whether the company is liable depends upon whether the negligence is that of the company or that of a fellow servant. If the negligence is that of the employer, or, which in legal contemplation is the same thing, that of a vice principal, the employe if not guilty of contributory negligence may recover damages for the injuries sustained.[72] It is held in accord-

ray v. South Carolina R. Co. 1 McMullen (S. Car.), 385; 36 Am. Dec. 268, and note; Gulf &c. R. Co. v. Blohn, 73 Tex. 637; 11 S. W. 867; Henry v. Lake Shore &c. R. Co. 49 Mich. 495; 13 N. W. 832; Paulmier v. Erie &c. R. Co. 34 N. J. L. 157; Terre Haute &c. R. Co. v. Becker, 146 Ind. 202; 45 N. E. 96; Hutchinson v. York &c. R. Co. 5 Exch. 343; Relyea v. Kansas City &c. R. Co. 112 Mo. 86; 20 S. W. 480; 18 L. R. A. 817, and note; 53 Am. & Eng. R. Cas. 578. See Manville v. Cleveland &c. R. Co. 11 Ohio St. 417; Kentucky &c. R. Co. v. Ackley, 87 Ky. 278; 8 S. W. 691; 12 Am. St. 480. See, also, for cases in which it was held that the risk was assumed: Illinois Cent. R. Co. v. Neer, 26 Ill. App. 356; Hewitt v. Flint &c. R. Co. 67 Mich. 61; 34 N. W. 659; Rumsey v. Delaware &c. R. Co. 151 Pa. St. 74; 25 Atl. 37; Bancroft v. Boston &c. R. Co. 67 N. H. 466; 30 Atl. 409; Gulf &c. R. Co. v. Harriett, 80 Tex. 73; 15 S. W. 556. In Birmingham &c. R. Co. v. Jacobs, 101 Ala. 149; 13 So. 408; 55 Am. & Eng. R. Cas. 299, it was held that an engineer of a train injured because of the failure of the engineer of another train to stop as the statute requires before crossing could recover. See Chicago &c. R. Co. v. McLallen, 84 Ill. 109. We do not here consider the question of concurrent negligence, but we may say that if the negligence is what has been called "the promoting cause of the injury," namely that of a fellow-servant, there can be no recovery. Memphis &c. R. Co. v. Thomas, 51 Miss. 637; Gilman v. Eastern &c. R. Co. 10 Allen (Mass.), 233; 87 Am. Dec. 635; King v. Boston &c. R. Co. 9 Cush. (Mass.) 112; Hayes v. Western &c. R. Co. 3 Cush. (Mass.) 270; New Orleans &c. R. Co. v. Hughes, 49 Miss. 258.

[72] Nary v. New York &c. R. Co. 55 Hun, 612; 125 N. Y. 759; 9 N. Y. S. 153; Lowery v. Manhattan &c. R. Co. 99 N. Y. 158; 1 N. E. 608; 52 Am. R. 12; Bossout v. Rome &c. R. Co. 126 N. Y. 646; 27 N. E. 853; 57 Hun. (N. Y.) 589; 10 N. Y. S. 602; North Chicago &c. R. Co. v. Johnson, 114 Ill. 57; 29 N. E. 186. In Vose v. Lancashire &c. R. Co., 2 Hurlst. & N. 728, it was held that the employer was liable because it had neglected to provide proper rules. See Ryan v. New York &c. R. Co. 35 N. Y. 210; 91 Am. Dec. 49; Whittaker v. Delaware &c. R. Co. 126 N. Y. 544; 27 N. E. 1042; Lake Shore &c. R. Co. v. Hundt, 140 Ill. 525; 30 N. E. 458. See, also, generally, McGraw v.

ance with the general rule that there is no presumption of negligence, and that the fact that a collision occurs is not prima facie evidence that the company was negligent.[73] Where a collision is the result of an accident and not of negligence there can be no recovery.[74] If the plaintiff is guilty of contributory negligence there can be no recovery.[75] In a recent case the court in a well-reasoned opinion applied the doctrine of proximate cause to the case of a collision and held that although the company was guilty of negligence in failing to supply one of the engines with a proper headlight there was no liability for the reason that the defect in the headlight was not the proximate cause of the injury.[76]

§ 1301. Cars negligently loaded.—There is a diversity of opinion upon the question whether a railroad company is liable to employes for injuries resulting from the negligent loading of cars. Some of the cases hold that there is a liability upon the ground that it is the duty of the employer to furnish a safe working place and appliances.[77] It seems to us that this doctrine cannot

Texas &c. R. Co. 50 La. Ann. 466; 23 So. 461; 69 Am. St. 450; Felton v. Harbeson, 104 Fed. 737.

[73] Smith v. Missouri &c. R. Co. 113 Mo. 70; 20 S. W. 896; Northern Pac. R. Co. v. Dixon, 139 Fed. 737, 740. There is some conflict.

[74] Toner v. Chicago &c. R. Co. 69 Wis. 188; 31 N. W. 104; 33 N. W. 433; 31 Am. & Eng. R. Cas. 320. See Hulehan v. Green Bay &c. R. Co. 68 Wis. 520; 32 N. W. 529.

[75] Hall v. Chicago &c. R. Co. 46 Minn. 439; 49 N. W. 239; Kansas City &c. R. Co. v. McDonald, 51 Fed. 178; Cottrill v. Chicago &c. R. Co. 47 Wis. 634; 3 N. W. 376; 32 Am. R. 796. In Holland v. Seaboard &c. R. Co. (N. Car.) 55 S. E 835, it is held that a brakeman whose duty it was under the rules of the company and the instructions of its conductor, when his train went onto a siding, to lock a switch and remain within ten feet of it, having violated such duty by going into the caboose without locking the switch so that another train ran onto the siding and into the caboose, killing the brakeman, was guilty of contributory negligence which was the proximate cause of his own injury.

[76] New York &c. R. Co. v. Perriguey, 138 Ind. 414; 34 N. E. 233; 37 N. E. 976. See, also, Pennsylvania &c. R. Co. v. Congdon, 134 Ind. 226; 33 N. E. 795; 39 Am. St. 251.

[77] Houston &c. R. Co. v. Kelley, 13 Tex. Civ. App. 1; 34 S. W. 809; Haugh v. Chicago &c. R. Co. 73 Iowa, 66; 35 N. W. 116. See, also, Atchison &c. R. Co. v. Seeley, 54 Kans. 21; 37 Pac. 104; Irvine v. Flint &c. R. Co. 89 Mich. 416; 50 N. W. 1008; Jacksonville &c. R. Co. v. Galvin, 29 Fla. 636; 11 So. 231; 16 L. R. A. 337; Hosic v. Chicago &c. R. Co. 75 Ia. 683; 37 N. W. 963; 9

be defended. The improper or insecure loading of a car is not a defect in the working place, machinery or appliances, but is the improper use of machinery and appliances. There is a difference between the careless or negligent use of machinery and appliances and defects in the machinery or appliances themselves, and the general rule is that where the injury is caused by the careless or improper use of machinery or appliances the employer is not liable.[78] It is a departure from principle to hold that the loading of cars is the furnishing of a working place, or that the manner of loading is to be regarded as a defect in the machinery or appliances. In our opinion the manner of loading a car pertains to the operation of the road, and not to the working place or to the machinery or appliances, and that the employer is not liable unless it be affirmatively proved that there was negligence on his part in employing servants or agents. We believe that the cases which deny that the employer is liable assert the true doctrine.[79] It cannot be justly

Am. St. 518; Louisville &c. R. Co. v. Hicks, 11 Ind. App. 588; 37 N. E. 43; 39 N. E. 767. See Dewey v. Detroit &c. R. Co. 97 Mich. 329; 52 N. W. 942; 56 N. W. 756; 22 L. R. A. 292; 37 Am. St. 348. The dissenting opinion of McGrath, J., in Dewey v. Detroit &c. R. Co. 97 Mich. 329; 52 N. W. 942; 22 L. R. A. 292; 37 Am. St. 348, seems to us to be against principle and authority, but it clearly states the grounds upon which at the original hearing, the company was held liable. See Dewey v. Detroit &c. R. Co. 97 Mich. 329; 52 N. W. 942; 56 N. W. 756; 16 L. R. A. 342; 37 Am. St. 348.

[78] In Pease v. Chicago &c. R. Co. 61 Wis. 163; 20 N. W. 908; the distinction between the different classes of cases is well drawn. A clear discrimination is made in Duffy v. Upton, 113 Mass. 544. See, also, Reading Iron Works v. Devine, 109 Pa. St. 246; Bergstrom v. Staples, 82 Mich. 654; 46 N. W. 1035; Ell v. Northern &c. R. Co. 1 N. Dak. 336; 48 N. W. 222; 12 L. R. A. 97; 26 Am. St. 621; Spencer v. Ohio &c. R. Co. 130 Ind. 181; 29 N. E. 915, 916; New York &c. R. Co. v. Perriguey, 138 Ind. 414; 34 N. E. 233; 37 N. E. 976. See, generally, Howard v. Denver &c. R. Co. 26 Fed. 837; Lindvall v. Woods, 41 Minn. 212; 42 N. W. 1020; 4 L. R. A. 793; Quinn v. New Jersey &c. Co. 23 Fed. 363; Mealman v. Union Pac. R. Co. 37 Fed. 189; 2 L. R. A. 192, and note. It seems quite clear that where the appliances are safe and the use of them causes the accident the proximate cause is the act of a co-employe and not that of the employer. See Thyng v. Fitchburg R. Co. 156 Mass. 13; 30 N. E. 169; 32 Am. St. 425; Daves v. Southern Pac. Co. 98 Cal. 19; 32 Pac. 708; 35 Am. St. 133.

[79] Callaway v. Allen, 64 Fed. 297; 12 C. C. A. 114; Jacksonville &c. R. Co. v. Galvin, 29 Fla. 636; 11 So.

said that the improper loading of a car is a defect in the working place or machinery, inasmuch as the loading is the use of a place or of machinery and is not in any sense the omission or failure to provide against danger in the machinery or working place. If those employed to load the car exercise care no accident can occur because of negligence in that regard, but if there is negligence on the part of employes an accident may result although the car and all appliances may be sound and free from defects. It is obvious, therefore, that the cause of an injury where it results from improper loading is solely attributable to the act of persons in the service of the company in making use of machinery and appliances furnished them. We believe the true rule to be that where the negligence is in the use of appliances and not in the appliances themselves the employer is not liable.[80]

§ 1301a. Other risks generally.—It has been held that trainmen do not assume the risk of defects in a track of which they have no

231; 16 L. R. A. 337; Toledo &c. R. Co. v. Black, 88 Ill. 112; Northern &c. R. Co. v. Husson, 101 Pa. St. 1; 47 Am. R. 690; Dewey v. Detroit &c. R. Co. 97 Mich. 329; 56 N. W. 756; 22 L. R. A. 292; 37 Am. St. 348; Brice v. Railway Co. 10 Ky. L. 526; 9 S. W. 288; Scott v. Oregon &c. Navigation Co. 14 Ore. 211; 13 Pac. 98; Mexican &c. R. Co. v. Shean (Tex.), 18 S. W. 151. See, also, Jackson v. Missouri Pac. &c. R. Co. 104 Mo. 448; 16 S. W. 413; Louisville &c. R. Co. v. Brice, 84 Ky. 298; 1 S. W. 483; Louisville &c. R. Co. v. Gower, 85 Tenn. 465; 3 S. W. 824. See, generally, Atchison &c. R. Co. v. Plunkett, 25 Kan. 188; Brown v. Atchison &c. R. Co. 31 Kan. 1; 1 Pac. 605; Day v. Toledo &c. R. Co. 42 Mich. 523; 4 N. W. 203. See, generally, Soderman v. Kemp, 145 N. Y. 427; 40 N. E. 212; Geoghegan v. Atlas &c. R. Co. 146 N. Y. 369; 40 N. E. 507; Hartman v. Kloeppinger, 9 Ohio C. C. 433; Beesley v. Wheeler, 103 Mich. 196; 61 N. W. 648; 27 L. R. A. 266. So, the risk of injury from projecting loads and the like may be assumed and a recovery thus prevented. Ely v. San Antonio &c. R. Co. 15 Tex. Civ. App. 511; 40 S. W. 174; Atchison &c. R. Co. v. Plunkett, 25 Kans. 188; Northern Cent. R. Co. v. Husson, 101 Pa. St. 1; 47 Am. R. 690.

[80] Callaway v. Allen, 64 Fed. 297; Pease v. Chicago &c. R. Co. 61 Wis. 163; 20 N. W. 908; Duffy v. Upton, 113 Mass. 544; Reading Iron Works v. Devine, 109 Pa. St. 246; Bergstrom v. Staples, 82 Mich. 654; 46 N. W. 1035; Kehoe v. Allen, 92 Mich. 464; 52 N. W. 740; 31 Am. St. 608. But there may be a liability under the statute of the particular jurisdiction or under the peculiar circumstances of the particular case. See Pollard v. Maine &c. R. Co. 87 Me. 51; 32 Atl. 735; Corbin v. Winona &c. R. Co. 64 Minn. 185;

knowledge and with which they have nothing to do.[81] But a conductor who continues in the service knowing that his cars are defective, or that the company has failed to furnish a sufficient number to accommodate the business, assumes the risks incident to such service.[82] Risks from the ordinary use of snow plows and the like are assumed.[83] Where the defendant company had maintained a large number of spring rail frogs with necessary excavations thereunder in the yards in which the plaintiff, a switchman, had been working for six months it was held that it was the plaintiff's duty to take notice thereof and that he assumed the risk of having his foot caught in one of the excavations.[84] So, it has been held that a section hand, knowing that trains were run at a high rate of speed at a certain place, assumed the risk incident thereto;[85] that a brakeman takes the risk of increased strain on the couplings by reason of a freight train being drawn by two engines;[86] that a brakeman takes the risk of inclement weather conditions and liability to slip or fall, under such conditions,[87] or

66 N. W. 271; McCray v. Galveston &c. R. Co. 89 Tex. 168; 34 S. W. 95; Devore v. St. Louis &c. R. Co. 86 Mo. App. 429; Ryan v. New York &c. R. Co. 88 Hun (N. Y.), 269; 34 N. Y. S. 665.

[81] Northern Alabama R. Co. v. Shea, 142 Ala. 119; 37 So. 796. See, also, Union Pac. R. Co. v. O'Brien, 161 U. S. 451; 16 Sup. Ct. 618; Knapp v. Sioux City &c. R. Co. 71 Ia. 41; 32 N. W. 18; Evansville &c. R. Co. v. Maddux, 134 Ind. 571; 33 N. E. 345; 34 N. E. 511. See, also, Copeland v. Wabash R. Co. 175 Mo. 650; 75 S. W. 106; Montgomery v. Chicago &c. R. Co. 109 Mo. App. 88; 83 S. W. 66.

[82] Shaw v. Manchester St. R. Co. 73 N. H. 65; 58 Atl. 1073. See, also, for other risks assumed by conductor. Murphy v. Grand Trunk R. Co. 73 N. H. 18; 58 Atl. 835; Central &c. R. Co. v. McWhorter, 115 Ga. 476; 42 S. E. 82; Ladd v. Brockton St. R. Co. 180 Mass. 454; 62 N. E. 730; Roberts v. Indianapolis St. R. Co. 158 Ind. 634; 64 N. E. 217.

[83] Brown v. Chicago &c. R. Co. 69 Iowa, 161; 28 N. W. 487; Derr v. Lehigh &c. R. Co. 158 Pa. St. 365; 27 Atl. 1022; 38 Am. St. 848; Lawson v. Truesdale, 60 Minn. 410; 62 N. W. 546; Morse v. Minneapolis &c. R. Co. 30 Minn. 465; 16 N. W. 358. But see Fisher v. Oregon &c. R. Co. 22 Oreg. 533; 30 Pac. 425; 16 L. R. A. 519.

[84] Riley v. Louisville &c. R. Co. 133 Fed. 904.

[85] Schulz v. Chicago &c. R. Co. 57 Minn. 271; 59 N. W. 192. But not the risk of the failure of the engineer to give him a required signal.

[86] Hawk v. Pennsylvania R. Co. (Pa.) 11 Atl. 459.

[87] Martin v. Chicago &c. R. Co. (Ia.) 87 N. W. 654; 118 Iowa, 148; 91 N. W. 1034; 59 L. R. A. 698; 96 Am. St. 371.

the liability of a piece of ore to turn under his foot while passing over it in the course of his employment,[88] and that such an employe, or others, generally assume the risks of known or obvious dangers such as they ought to know.[89]

§ 1302. Dangerous service.—Although the service may be dangerous the employe assumes all the ordinary hazards of such service.[90] The right of an employe to recover damages from the employer for personal injuries does not depend upon the dangerous character of the service he enters but depends upon the failure of the employer to exercise ordinary care.[91] No matter how hazardous the nature of the service all risk from the perils ordinarily incident to it are assumed by the person who voluntarily enters it.[92] An

[88] East Tenn. &c. R. Co. v. Sudderth, 86 Ga. 388; 12 S. E. 682.

[89] McQuigan v. Delaware &c. R. Co. 122 N. Y. 618; 26 N. E. 13 (defect in manhole cover); Titus v. Bradford &c. R. Co. 136 Pa. St. 618; 20 Atl. 517; 20 Am. St. 944; Mellott v. Louisville &c. R. Co. 101 Ky. 212; 40 S. W. 696; Olsen v. Andrews, 168 Mass. 261; 47 N. E. 90; Moore v. St. Louis &c. R. Co. 115 La. Ann. 86; 38 So. 913; Florence &c. R. Co. v. Whipps, 138 Fed. 13; Osborne v. Lehigh &c. Co. 97 Wis. 27; 71 N. W. 814; Cassaday v. Boston &c. R. Co. 164 Mass. 168; 41 N. E. 129; Thompson v. Citizens' St. R. Co. 152 Ind. 461; 53 N. E. 462; Coyle v. Pittsburgh &c. R. Co. 155 Ind. 429; 58 N. E. 545; Bohn v. Chicago &c. R. Co. 106 Mo. 429; 17 S. W. 580; Baltimore &c. R. Co. v. State, 75 Md. 152; 23 Atl. 310; 32 Am. St. 372 (risk of suffocation in passing through tunnel); Ryan v. Third Ave. R. Co. 92 App. Div. (N. Y.) 306; 86 N. Y. S. 1070; Dunn v. Oregon Short Line R. Co. 28 Utah, 478; 80 Pac. 311; Crane v. Chicago &c. R. Co. 124 Iowa, 81; 99 N. W. 169. For risks held not assumed, see Chicago &c. R. Co. v. White, 209 Ill. 124; 70 N. E. 588; Texas &c. R. Co. v. Kelly, 98 Tex. 123; 80 S. W. 79; Hailey v. Texas &c. R. Co. 113 La. Ann. 533; 37 So. 131; San Antonio &c. R. Co. v. Brock, 35 Tex. Civ. App. 155; 80 S. W. 422; Cole v. St. Louis Transit Co. 183 Mo. 81; 81 S. W. 1138; Gulf &c. R. Co. v. Whisenhunt (Tex. Civ. App.), 81 S. W. 332; Leach v. Oregon Short Line R. Co. 29 Utah, 285; 81 Pac. 90; Indianapolis v. Cauley, 164 Ind. 304; 73 N. E. 691; Wagner v. Boston Elevated R. Co. 188 Mass. 437; 74 N. E. 919.

[90] Connelly v. Hamilton &c. R. Co. 163 Mass. 156; 39 N. E. 787; Finalyson v. Utica &c. R. Co. 67 Fed 507; Clark v. Liston, 54 Ill. App. 578; Chicago &c. R. Co. v. Wild, 109 Ill. App. 38; Watson v. Kansas &c. Co. 52 Mo. App. 366; King v. Morgan, 109 Fed. 446.

[91] See Weed v. Chicago &c. R. Co. (Neb.) 99 N. W. 827.

[92] Northern &c. R. Co. v. Husson, 101 Pa. St. 1; 47 Am. R. 690; Sweet v. Ohio &c. Co. 78 Wis. 127; 47 N. W. 182; 9 L. R. A. 861; Coombs

employe who has knowledge of the appliances in use by the employer assumes the risk ordinarily incident to their use and cannot rightfully ask that the employer shall change them although their use may subject the employe to danger.[93] Where the nature of the work upon which the employe is engaged is such as of itself makes the working place unsafe the employe assumes the risk.[94] The test of duty is not the hazardous nature of the service in which the servant engages, for as we have said, the servant assumes all ordinary risks incident to the service no matter how hazardous it may be. If the care exercised by the employer is ordinary care, considering the nature of the service, then the duty of the master is performed although the service may be one of the most hazardous nature.[95]

v. New Bedford &c. R. Co. 102 Mass. 572; 3 Am. R. 506; Swoboda v. Ward, 40 Mich. 420.

[93] Hodgkins v. Railroad Co. 119 Mass. 419 (quoted from in Southern Pacific R. Co. v. Seley, 152 U. S. 145; 14 Sup. Ct. 530); Sweeney v. Berlin &c. Envelope Co. 101 N. Y. 520; 5 N. E. 358; 54 Am. R. 722, and note; Walsh v. Whiteley, 21 Q. B. Div. 371; Gilbert v. Gould, 144 Mass. 601; 12 N. E. 368; Sullivan v. India &c. Co. 113 Mass. 398.

[94] Gulf &c. R. Co. v. Jackson, 65 Fed. 48. In the case cited it was said: "It frequently happens that men are employed to tear down buildings or other structures or to repair them after they have become insecure, or it may be that the work undertaken by the employe is of a kind that is calculated to render the premises or place of performance for the time being to some extent insecure. In cases such as these the servant undoubtedly assumes the increased hazard growing out of the defective or insecure condition of the place where he is required to exercise his calling." The court cited Carlson v. Oregon &c. R. Co. 21 Ore. 450; 28 Pac. 497; Armour v. Hahn, 111 U. S. 313; 4 Sup. Ct. 433. In the case last above cited the court said: "The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them of keeping a building, which they are employed in erecting in a safe condition at every moment of their work, so far as its safety depends upon the performance of that work by them and their fellows." See, also, Broderick v. St. Paul City R. Co. 74 Minn. 163; 77 N. W. 28; Gulf &c. R. Co. v. Jackson, 65 Fed. 48; Stroble v. Chicago &c. R. Co. 70 Iowa, 555; 31 N. W. 63; 59 Am. R. 456; Baltimore &c. R. Co. v. Hunsucker, 33 Ind. App. 27; 70 N. E. 556. In Kellyville Coal Co. v. Bruzas, 223 Ill. 595; 79 N. E. 309, it is held that the rule requiring the master to use reasonable care to furnish a reasonably safe place to work does not apply as to those whose duty it is to make dangerous places safe.

[95] Stewart v. Ohio River &c. R. Co. 40 W. Va. 188; 20 S. E. 922. But it is held to be the duty of the

§ 1303. Performing work outside of scope of the contract of employment.—Permissive privilege.—In order to make a party liable in the capacity of an employer for injuries resulting from negligence the plaintiff must affirmatively prove that at the time of the injury he was acting within the line of his duty as an employe.[96] If the time when and place where the injury is received are not within the scope of the contract of employment the relation of master and servant cannot be justly said to exist, and no recovery can be had against a defendant in the character or capacity of a master or employer. We do not say that where there is negligence on one side and freedom from negligence on the other there may not be a recovery if legal grounds for a recovery exist, but we do say that even though there may be negligence on the one side and none on the other there can in no event be a recovery upon the theory that there was a breach of the specific duty which an employer owes to the employe unless it is affirmatively shown that the injury was received while the plaintiff was performing service for the master under the contract of employment. That there is a breach of some duty does not warrant a finding against a party in the capacity of an employer. Where one employed to do a designated kind of work or to work at a particular place voluntarily undertakes to do some other work or goes to a place different from that assigned him by the contract of employment he cannot successfully insist that he is within the protection of the rule that the master must exercise ordinary care to protect him against injury.[97] The

employer to adopt reasonable precautions under the circumstances for the safety of the employes. St. Louis &c. R. Co. v. Inman (Ark.), 99 S. W. 832; 1 Labbatt Master & Servant, §§ 14–17; 4 Thomp. Neg. (2d ed.) § 4615.

[96] Ante, § 1267. The rule is that one who enjoys a permissive privilege does so with all the concomitant perils. The text is cited in Louisville &c. R. Co. v. Gillen (Ind.), 76 N. E. 1058, 1059, where, however, the question was as to whether the master was liable for the acts of a servant not shown to be in the line of his duty. The rule in the text is also stated, and the text cited, in Green v. Brainerd &c. R. Co. 85 Minn. 318; 88 N. W. 974, 976.

[97] Kentucky &c. R. Co. v. Jamison, 14 Ky. L. 345; 20 S. W. 258; Wise v. Ackerman, 76 Md. 375; 25 Atl. 424; Baltimore &c. Co. v. Baugh, 149 U. S. 368; 13 Sup. Ct. 914; Knox v. Pioneer &c. Co. 90 Tenn. 546; 18 S. W. 255. See, also, Young v. Boston &c. R. Co. 69 N. H. 634; 41 Atl. 268; Central R. &c. Co. v. Chapman, 96 Ga. 769; 22 S. E. 273; Seers v.

fact that the plaintiff is at some times and some places the employe of a railroad company does not entitle him to hold the company liable in the capacity of an employer when he goes into a place to which the duties of his service do not require him to go.[98] If he goes into a place on the master's premises when he has no duty whatever at such a place he enjoys a mere permissive privilege and, at best, is a mere licensee, and if there be any liability to him it is only for a breach of the duty which an owner of premises owes to a licensee.[99] Upon the principle that an employer is not liable to an employe who voluntarily does work outside of the duties of the service required of him by his contract of service it is held that there is no liability to an employe who works with a machine which he was not required to use, or uses a machine for a purpose for which it was not intended by the employer.[100] If the employe is, at the time of the injury, reasonably within the line of his duty he

Central R. &c. Co. 53 Ga. 630; Alabama &c. R. Co. v. Hall, 105 Ala. 599; 17 So. 176; East St. Louis &c. R. Co. v. Craven, 52 Ill. App. 415; Bequette v. St. Louis &c. R. Co. 86 Mo. App. 601; Texas &c. R. Co. v. Skinner, 4 Tex. Civ. App. 661; 23 S. W. 1001; Chattanooga &c. R. Co. v. Myers, 112 Ga. 237; 37 S. E. 439 (citing text). But compare Terre Haute &c. R. Co. v. Fowler, 154 Ind. 682; 56 N. E. 228; 48 L. R. A. 531.

[98] Green v. Brainerd &c. Ry. Co. 85 Minn. 18; 88 N. W. 974, 976 (citing text); Brown v. Byroads, 47 Ind. 435; Pittsburgh &c. R. Co. v. Adams, 105 Ind. 151; 5 N. E. 187; Baird v. Pettit, 70 Pa. St. 477; Washburn v. Nashville &c. R. Co. 3 Head (Tenn.), 638; 75 Am. Dec. 784; Cowhill v. Roberts, 71 Hun (N. Y.), 127; 24 N. Y. Supp. 533; Evans v. American &c. Co. 42 Fed. 519; Baltimore &c. R. Co. v. State, 33 Md. 542; Church v. Chicago &c. R. Co. 50 Minn. 218; 52 N. W. 647; 16 L. R. A. 861, and note; Sullivan v. Waters, 14 Irish N. C. L. R. 460; Robert's Duty and Liability of Employers, 448.

[99] Wright v. Rawson, 52 Iowa, 329; 35 Am. R. 275; Gilshannon v. Stony Brook &c. R. Co. 10 Cush. (Mass.) 228. See, also, Baker v. Chicago &c. R. Co. 95 Iowa, 163; 63 N. W. 667; Chattanooga &c. R. Co. v. Myers, 112 Ga. 237; 37 S. E. 439, 440 (citing text).

[100] Jayne v. Sebewaing &c. Co. 108 Mich. 242; 65 N. W. 972; Teetsil v. Summons, 88 Hun (N. Y.), 621; 34 N. Y. S. 972; Central &c. R. Co. v. Chapman, 96 Ga. 769; 22 S. E. 273; White v. Wittemann &c. Co. 131 N. Y. 631; 30 N. E. 236; Guenther v. Lockhart, 61 Hun (N. Y.), 624; 16 N. Y. S. 717; Leistritz v. American &c. Co. 154 Mass. 382; 28 N. E. 294; Felch v. Allen, 98 Mass. 572. See Houston &c. R. Co. v. Myers, 55 Tex. 110; White v. Sharp, 27 Hun (N. Y.), 94. The case of Graham v. Chicago &c. R. Co. 62 Fed. 896, illustrates the general rule that where the employe makes

is within the rule that the employer is bound to exercise ordinary care to prevent injury to him because of defects in the working place or appliances,[101] but he cannot be justly said to be within the line of his duty when he is doing an act solely for his own convenience.[102] Some of the cases rest the rule that the master is not liable for injuries to a servant where the servant voluntarily goes into a place of danger into which his contract of service does not require him to go upon the ground of contributory negligence,[103] but it seems to us that the rule rests upon the principle that the master's specific duty does not embrace places into which the employe goes solely for his own convenience.

§ 1303a. Employes going to and from work.—It has been held that an employe who crosses tracks or the like on the company's

use of an appliance for a purpose different from that for which it was intended he can not hold the employer responsible.

[101] Walbert v. Trexler, 156 Pa. St 112; 27 Atl. 65; Evansville &c. R. Co. v. Maddux, 134 Ind. 571; 33 N. E. 345; McCloherty v. Gale &c. Co. 19 Ont. App. 117. See Parkinson Sugar Co. v. Riley, 50 Kan. 401; 31 Pac. 1090; 34 Am. St. 123; Ryan v. Fowler, 24 N. Y. 410; 82 Am. Dec. 315. See McElligott v. Randolph, 61 Conn. 157; 22 Atl. 1094; 29 Am. St. 181; Ewald v. Chicago &c. R. Co. 70 Wis. 420; 36 N. W. 12 and 591; 5 Am. St. 178. See Patnode v. Warren &c. Mills, 157 Mass. 283; 32 N. E. 161; 34 Am. St. 275; Cleveland &c. R. Co. v. Martin, 13 Ind. App. 485; 41 N. E. 1051. The opinion in the case last cited contains some statements that are clearly erroneous, for where an employe voluntarily and for his own convenience goes into a place of danger he is not in the line of his duty, for to such a place the contract of employment does not extend.

[102] Kauffman v. Maier, 94 Cal. 269; 29 Pac. 481; 18 L. R. A. 124, and note; Knox v. Pioneer &c. Co. 90 Tenn. 546; 18 S. W. 255; Wink v. Weiler, 41 Ill. App. 336; Hurst v. Chicago &c. R. Co. 49 Ia. 76; Cleveland &c. R. Co. v. Workman, 66 Ohio St. 509; 64 N. E. 582; 90 Am. St. 602. See, also, Louisville &c. R. Co. v. Jolly's Adm'x, 28 Ky. L. 989; 90 S. W. 977. See Baird v. Pettit, 70 Pa. St. 477, and authorities note; also, Olson v. Minneapolis &c. R. Co. 76 Minn. 149; 78 N. W. 975; 48 L. R. A. 796, and note.

[103] Cahill v. Hilton, 106 N. Y. 512; 13 N. E. 339; Sammon v. New York &c. Co. 38 N. Y. Sup. Ct. 414; Bunt v. Sierra &c. Co. 24 Fed. 847; Sears v. Central &c. R. Co. 53 Ga. 630; Pittsburgh &c. R. Co. v. Sentmeier, 92 Pa. St. 276; 37 Am. R. 684; Rains v. St. Louis &c. R. Co. 71 Mo. 164; 36 Am. R. 459; Pennsylvania Co. v. Lynch, 90 Ill. 333; Union Pac. R. Co. v. Estes, 37 Kan. 715; 16 Pac. 131. It is doubtless true that where an employe unnecessarily goes into a place of danger he is guilty of negligence, but

premises in going to and from his work where he has full knowledge assumes the risk.[104] There is some conflict as to whether an employe carried to and from his work on a car or the like is a passenger and as to the duty of the company to him on the one hand and the risk assumed by him, if any, on the other. The weight of authority, however, as well as the better reason, is clearly to the effect that where he is so carried he is not a passenger but is, ordinarily, to be considered as an employe and a fellow servant of the employes upon the car transporting him.[105] But it may be otherwise if he is being carried in pursuance of his own business, and some authorities seem to hold that he is not to be treated as an employe, in any event, before or after working hours and when not engaged at the time in the master's business.[106] In a recent case an employe who had boarded a car, after cleaning a switch,

even if the place into which he goes for his own convenience and not to serve his employer is not dangerous he can not recover for he is not there as an employe, so that the specific duty of an employer to an employe is not owing to him.

[104] O'Neil v. Pittsburg &c. R. Co. 130 Fed. 204; Olsen v. Andrews, 168 Mass. 261; 47 N. E. 90. And is a fellow servant. Ewald v. Chicago &c. R. Co. 70 Wis. 420; 36 N. W. 12; 5 Am. St. 178.

[105] Indianapolis &c. R. Co. v. Foreman, 162 Ind. 85; 69 N. E. 669; 102 Am. St. 185; Bowles v. Indiana R. Co. 27 Ind. App. 672; 62 N. E. 94; 87 Am. St. 279, and cases cited; Indianapolis &c. Transit Co. v. Andio, 33 Ind. App. 625; 72 N. E. 145; Vick v. New York &c. R. Co. 95 N. Y. 267; 47 Am. R. 36; Ionnone v. New York &c. R. Co. 21 R. I. 452; 44 Atl. 592; 46 L. R. A. 730; 79 Am. St. 812; Gilshannon v. Stony Brook &c. R. Corp. 10 Cush. (Mass.) 228; Ryan v. Cumberland &c. R. Co. 23 Pa. 384; Sanderson v. Panther Lumber Co. 50 W. Va. 42; 40 S. E. 368; 55 L. R. A. 908, 910; 88 Am St. 841; St. Clair v. St. Louis &c. R. Co. (Mo. App.) 99 S. W. 775, 777 (citing § 1578, post); Tomlinson v. Chicago &c. R. Co. 97 Fed. 252; Louisville &c. R. Co. v. Stuber, 108 Fed. 934; 54 L. R. A. 696. See, also, McQueen v. Central Branch &c. R. Co. 30 Kans. 689; 1 Pac. 139; Abend v. Terre Haute R. Co. 111 Ill. 203; Kumler v. Railroad Co. 33 Ohio St. 150; Wabash R. Co. v. Erb, 36 Ind. App. 650; 73 N. E. 939; Chicago &c. R. Co. v. Artery, 137 U. S. 507; 11 Sup. Ct. 129; International &c. R. Co. v. Ryan, 82 Tex. 565; 18 S. W. 219; O'Brien v. Boston &c. R. Co. 138 Mass. 387; 52 Am. R. 279; Arkadelphia Lumber Co. v. Smith (Ark.), 95 S. W. 800.

[106] See McNulty v. Pennsylvania R. Co. 182 Pa. St. 479; 38 Atl. 524; 38 L. R. A. 376; 61 Am. St. 721; Dickinson v. West End St. R. Co. 177 Mass. 365; 59 N. E. 60; 52 L. R. A. 326; 83 Am. St. 284; State v. Western Md. R. Co. 63 Md. 433; Doyle v. Fitchburg

to proceed to another switch to perform a similar task, and had given the conductor an employe's ticket, furnished by the company, was injured by a collision between the car on which he was riding and another car of the defendant company. He was nonsuited below on the ground that the negligence complained of was that of a fellow servant. The court, on appeal, held that this was correct, and that he was an employe of the defendant company and could not recover notwithstanding he was not at the time actually engaged in work, and notwithstanding it was Sunday and the statute made it an offense to do any such work or labor on Sunday.[107]

§ 1304. Work outside of the ordinary line of duty—Special orders.—There is much conflict upon the question of the liability of the employer in cases where the employe is required by the employer to perform work outside of the line of duty which he was engaged to perform. Courts of high authority hold that the fact that a servant is required to perform service outside of his line of duty does not, of itself, make the employer liable to the employe for injuries received while engaged in such work, for the reason that he is held to assume the risks of such service.[108] Other courts hold that if the employer requires the servant to do work outside the scope of his employment, and the servant is injured while engaged in such work, the master is liable.[109] Still other

&c. R. Co. 162 Mass. 66; 37 N. E. 770; 25 L. R. A. 157; 44 Am. St. 335; Albion Lumber Co. v. De Nobra, 72 Fed. 739.

[107] Shannon v. Union R. Co. (R. I.) 63 Atl. 488.

[108] Hogan v. Northern Pac. R. Co. 53 Fed. 519 (distinguishing Miller v. Union Pac. R. Co. 17 Fed. 67; Gilmore v. Northern Pac. R. Co. 18 Fed. 866; Chicago &c. R. Co. v. Bayfield, 37 Mich. 205; Jones v. Lake Shore R. Co. 49 Mich. 573; 14 N. W. 551); Leary v. Boston R. Co. 139 Mass. 580; 2 N. E. 115; 52 Am. R. 733, and note; Cole v. Chicago &c. R. Co. 71 Wis. 114; 37 N. W. 84; 5 Am. St. 201; Alabama &c. R. Co. v. Hall, 105 Ala. 599; 17 So. 176; Millar v. Madison Co. 130 Mo. 517; 31 S. W. 574; Brown v. Oregon &c. R. Co. 24 Ore. 315; 33 Pac. 557; Cole v. Chicago &c. R. 71 Wis. 114; 37 N. W. 84; 5 Am. St. 201. See Dougherty v. West Superior &c. R. Co. 88 Wis. 343; 60 N. W. 274.

[109] Gilmore v. Union Pac. R. Co. 18 Fed. 866, 870; Cincinnati &c. R. Co. v. Madden, 134 Ind. 462; 34 N. E. 227. See Strong v. Iowa &c. R. Co. 14 Ia. 380; 62 N. W. 799. See, also, Republic &c. Co. v. Ohler, 161 Ind. 393; 68 N. E. 901; North Chicago St. R. Co. v. Dudgeon, 184 Ill. 477; 56 N. E. 196; McGowan v. St.

cases hold that where there is a special order the employe assumes only such risks of the position to which he is ordered as are obvious.[110] It seems to us that the employer cannot justly be held liable upon the mere fact that he orders the servant to do work outside of the scope of his employment, but that if the employer knows, or is bound to know, that such work is of a different nature and of a more dangerous character than that which the servant was engaged to perform, and that the servant has not such knowledge, experience or skill as enables him to safely perform the work, he, the employer, is liable to the servant for injuries sustained if there is no contributory negligence.[111] If, however, the servant undertakes such service and has knowledge of its dangers, or is chargeable with knowledge of such dangers, and there is no negligence on the part of the employer as to giving warning, or the like, we cannot perceive upon what principle he can be held liable,

Louis &c. R. Co. 61 Mo. 528. But this rule is not applicable in all cases. Morewood Co. v. Smith, 25 Ind. App. 264; 57 N. E. 199; Stuart v. New Albany &c. Co. 15 Ind. App. 184; 43 N. E. 961.

[110] Walker v. Lake Shore &c. R. Co. 104 Mich. 606; 62 N. W. 1032; Halliburton v. Wabash R. Co. 58 Mo. App. 27; Lebanon v. McCoy, 12 Ind. App. 500; 40 N. E. 700; Fox v. Chicago &c. R. Co. 86 Iowa, 368; 53 N. W. 259; 17 L. R. A. 289; 53 Am. & Eng. R. Cas. 430. A statement frequently found is that the employe does not assume the additional risk in such cases unless the danger is so obvious that an ordinarily prudent man would not encounter it. Nall v. Louisville &c. R. Co. 129 Ind. 260; 28 N. E. 183; Offut v. Columbia Exposition, 175 Ill. 472; 51 N. E. 651; Slack v. Harris, 200 Ill. 96; 65 N. E. 669; Gundlach v. Scott, 192 Ill. 509; 61 N. E. 332; 85 Am. St. 348; Stephens v. Hannibal &c. R. Co. 86 Mo. 221; 96 Mo. 207; 9 S. W. 589; 9 Am. St. 336; Faulkner v. Mammoth Min. Co. 23 Utah, 437; 66 Pac. 799. See Christianson v. Pacific &c. Co. 27 Wash. 582; 63 Pac. 191; Illinois Cent. R. Co. v. Langan, 116 Ky. 318; 76 S. W. 32; English v. Chicago &c. R. Co. 24 Fed. 906; Worthington v. Goforth, 124 Ala. 656; 26 So. 531; Southern R. Co. v. Shields, 121 Ala. 460; 25 So. 811; 77 Am. St. 66; note in 99 Am. St. 896, et seq.

[111] Ryan v. Los Angeles &c. Co. 112 Cal. 244; 44 Pac. 471; 32 L. R. A. 524; Cincinnati &c. R. Co. v. Madden, 132 Ind. 462; 34 N. E. 227; Stucke v. Orleans R. Co. 50 La. Ann. 172; 23 So. 342; Chicago &c. R. Co. v. McCarty, 49 Neb. 475; 68 N. W. 633; Fort Worth &c. R. Co. v. Wrenn, 20 Tex. Civ. App. 628; 50 S. W. 210; Flickner v. Lambert, 36 Ind. App. 524; 74 N. E. 263; Hass v. Chicago &c. R. Co. 97 Ill. App. 624; Eichholz v. Niagara Falls &c. Co. 68 App. Div. (N. Y.) 441; 73 N. Y. S. 842, affirmed in 174 N. Y. 519; 66 N. E. 1107.

although he gave a special order.[112] It is held by some of the courts that although the danger of obeying an order is obvious, yet if the employe is compelled to obey by fear of losing his place, it will not preclude a recovery,[113] but other cases with better reason hold a contrary doctrine.[114] The fact that an employe is acting under a positive order does not absolve him from the duty to exercise ordinary care,[115] but we suppose that the nature of the order may, of itself, be important in determining whether there was or was not contributory negligence.

§ 1305. Volunteers.—A person cannot make himself the employe of a railroad company by his own act, for the relation of master and servant cannot exist in such a sense as to create the duty of employer to employe without the express or implied assent of both

[112] Baltimore &c. R. Co. v. Stricker, 51 Md. 47; 34 Am. R. 291; Mary Lee &c. Co. v. Chambliss, 97 Ala. 171; 11 So. 897; 53 Am. & Eng. R. Cas. 254; Paule v. Florence &c. Co. 80 Wis. 350; 50 N. W. 189; Cole v. Chicago &c. R. Co. 71 Wis. 114; 37 N. W. 84; 5 Am. St. 201; Thompson v. Chicago &c. Co. 14 Fed. 564; Southern R. Co. v. Logan, 138 Fed. 725; O'Hare v. Cocheco &c. Co. 71 N. H. 105; 51 Atl. 257; 93 Am. St. 499; Leary v. Boston &c. R. Co. 139 Mass. 580; 2 N. E. 115; 52 Am. R. 733, and note; Hanson v. Hammiel, 107 Ia. 171; 77 N. W. 839. See Bradshaw v. Louisville &c. R. Co. (Ky.) 14 Ky. L. 688; 21 S. W. 346; Mann v. Oriental &c. Works, 11 R. I. 152; Crown v. Orr, 140 N. Y. 450; 35 N. E. 648; Colorado &c. R. Co. v. O'Brien, 16 Colo. 219; 27 Pac. 701.

[113] Fogus v. Chicago &c. R. Co. 50 Mo. App. 250. See, also, East Tenn. &c. R. Co. v. Duffield, 12 Lea (Tenn.), 63; 47 Am. R. 319; Citizens' Gas &c. Co. v. O'Brien, 118 Ill. 174; 8 N. E. 310.

[114] Leary v. Boston &c. R. Co. 139 Mass. 580; 2 N. E. 115; 52 Am. R. 733, and note; Atchison v. Schroeder, 47 Kan. 315; 27 Pac. 965; Prentiss v. Kent &c. Co. 63 Mich. 478; 30 N. W. 109; Sweeney v. Berlin &c. R. Co. 101 N. Y. 520; 5 N. E. 358; 54 Am. R. 722, and note. See Wiggins Ferry Co. v. Heilig, 43 Ill. App. 238; Cole v. Chicago &c. R. Co. 71 Wis. 114; 37 N. W. 84; 5 Am. St. 201; Dougherty v. West Superior Iron Co. 88 Wis. 343; 60 N. W. 274; Dickenson v. Vernon, 77 Conn. 537; 60 Atl. 270; Lee v. Northern Pac. R. Co. 39 Wash. 388; 81 Pac. 834; Worlds v. Georgia R. Co. 99 Ga. 283; 25 S. E. 646; Lamson v. Am. Axe &c. Co. 177 Mass. 144; 58 N. E. 585; 83 Am. St. 267; Southern Kans. R. Co. v. Moore, 49 Kans. 616; 31 Pac. 138; Wormell v. Maine Cent. R. Co. 79 Me. 397; 10 Atl. 49; 1 Am. St. 321; Woodley v. Metropolitan R. Co. 46 L. J. Exch. 521.

[115] Smith v. St. Paul &c. R. Co. 51 Minn. 86; 52 N. W. 1068.

parties. No one can intrude himself into the service of another person independently of the latter person's consent or acquiesence. It follows from this that one who without any employment, or any request, express or implied, from a railroad company assumes to enter the service of the company cannot create the relation of master and servant. If that relation does not exist one who assumes to perform service for the company must be regarded as a mere volunteer without any right whatever to insist that the company owes him a duty as master or employer. Duty cannot exist where there is no relation between the parties creating it. The overwhelming weight of authority sustains the doctrine that a volunteer cannot charge a railroad company with the duty of an employer.[116] If there is authority to employ the persons who undertake to render

[116] Flower v. Pennsylvania R. Co. 69 Pa. St. 210; 8 Am. R. 251; New Orleans &c. R. Co. v. Harrison, 48 Miss. 112; 12 Am. R. 356; Church v. Chicago &c. R. Co. 50 Minn. 218; 52 N. W. 647; 16 L. R. A. 861, and note; Evarts v. St. Paul &c. R. Co. 56 Minn. 141; 57 N. W. 459; 22 L. R. A. 663; 45 Am. St. 460; Wagen v. Minneapolis &c. R. Co. 80 Minn. 92; 82 N. W. 1107; Osborne v. Knox &c. R. Co. 68 Me. 49; 28 Am R. 16; New Orleans &c. R. Co. v. Harrison, 48 Miss. 112; 12 Am. R. 356; Wischam v. Richards, 136 Pa. St. 109; 20 Atl. 532; 10 L. R. A. 97; 20 Am. St. 900; Sherman v. Hannibal & St. Joseph &c. R. Co. 72 Mo. 62; 37 Am. R. 423; Everhart v. Terre Haute &c. R. Co. 78 Ind. 292; 41 Am. R. 567; McDaniel v. Highland &c. R. Co. 90 Ala. 64; 8 So. 41; Sparks v. East Tennessee R. Co. 82 Ga. 156; 8 S. E. 424; Atlanta &c. R. Co. v. West. 121 Ga. 641; 49 S. E. 711; 67 L. R. A. 701; 104 Am. St. 179; Atchison &c. R. Co. v. Lindley, 42 Kan. 714; 22 Pac. 703; 6 L. R. A. 646; 16 Am. St. 515; Texas &c. R. Co. v. Skinner, 4 Tex. 661; 23 S. W. 1001; Keating v. Michigan &c. R. Co. 97 Mich. 154; 56 N. W. 346; 37 Am. St. 328; Mayton v. Texas &c. R. Co. 63 Tex. 77; 51 Am. R. 637; Gulf &c. R. Co. v. Dawkins, 77 Tex. 288; 13 S. W. 982; 3 Am. R. & Corp. 75; Mickelsen v. New East &c. R. Co. 23 Utah, 42; 64 Pac. 463. But see Althorf v. Wolfe, 22 N. Y. 355; Street R. Co. v. Bolton, 43 Ohio St. 224; 54 Am. R. 803; Bonner v. Bryant, 79 Tex. 540; 15 S. W. 491; 23 Am. St. 361; Johnson v. Ashland &c. Co. 71 Wis. 553; 37 N. W. 823; 5 Am. St. 243. In Rhodes v. Georgia &c. R. Co. 84 Ga. 320; 10 S. E. 922; 20 Am. St. 362, the general rule is recognized but held, erroneously as we think, not to apply to a lad thirteen years of age. In a more recent case this section is cited by the same court and it is said that our criticism upon the case last above cited is just. Atlanta &c. R. Co. v. West, 121 Ga. 641; 49 S. E. 711, 713; 67 L. R. A. 701, 704; 104 Am. St. 179, 184.

service then the general rule will not apply.[117] Ordinarily, trainmen have no authority to employ servants for the company.[118] There may be cases where the circumstances are such as to confer authority but such cases are exceedingly rare. Some of the cases hold that where there is mutuality, that is, where the persons who assumes to act for another has business with the person for whom he assumes to act, the rule in regard to volunteers does not apply.[119] We very much incline to doubt the soundness of the cases referred to; at all events we do not believe it possible for one person to make himself the servant of another, nor do we believe that it can be held that a railroad company invites one for whom it undertakes to transport goods to assume the hazards of performing service for it.[120] Certainly it is going to great lengths to hold that a

[117] Central &c. R. Co. v. Texas &c. R. Co. 32 Fed. 448; Sloan v. Central &c. R. Co. 62 Iowa, 728; 16 N. W. 331; Georgia &c. R. Co. v. Propst, 83 Ala. 518; 3 So. 764; Fox v. Chicago &c. R. Co. 86 Iowa, 368; 53 N. W. 259; 17 L. R. A. 289; Bradley v. New York &c. R. Co. 62 N. Y. 99.

[118] In Vassor v. Atlantic &c. R. Co. (N. Car.) 54 S. E. 849, the plaintiff boarded the defendant's local freight train, and asked the conductor in charge if he could come back with him the next day on his train, and the conductor replied that he could, and that he was to help unload and load freight. Plaintiff boarded the train on the next day, was discovered by some of the trainmen, and was injured by the explosion of the engine shortly thereafter. It was held that the conductor had no authority to employ plaintiff as a servant or permit him to work his passage on the train, and hence the carrier owed plaintiff neither the duty owing to a passenger or employe, and the plaintiff could not recover as there was no evidence of wanton or wilful injury. It was also held that the fact that the company several months afterwards gave the plaintiff a pass to return to his home and designated him in such pass as an "injured employe" was inadmissible to show a ratification of the alleged employment by the conductor. See, also, Cooper v. Lake Erie &c. R. Co. 136 Ind. 366; 36 N. E. 272; Powers v. Boston &c. R. Co. 153 Mass. 188; 26 N. E. 446; Eaton v. Delaware &c. R. Co. 57 N. Y. 382; 15 Am. R. 513. But see in case of emergency, Sloan v. Railway, 62 Ia. 736; 16 N. W. 331; Georgia Pac. R. Co. v. Probst, 83 Ala. 525; 3 So. 764.

[119] Wright v. London &c. R. Co. L. R. I. Q. B. Div. 252; Holmes v. North Eastern &c. R. Co. L. R. 4 Exch. 254; L. R. 6 Exch. 123; Street Railway v. Bolton, 43 Ohio 224; 54 Am. R. 803; Welch v. Maine Central &c. R. Co. 86 Me. 552; 30 Atl. 116; 25 L. R. A. 658; 10 Am. R. & Corp. 293.

[120] Potter v. Faulkner, 1 Best & S. 800; Degg v. Midland R. Co. 1

person without knowledge or experience may intrude himself into a position of danger such as are all positions which are connected with the movement of railroad trains and the like and thus create a duty to protect him in the position of danger. Such a person cannot be presumed to have knowledge of the meaning of signals, the mode of shunting cars or like matters, and it is putting an unjust and unreasonable burden on the company to hold that it owes him a duty as an employer. We do not say, nor mean to say, that under such circumstances no duty at all is owing from the company; on the contrary, we say that there is a duty, but that it is not that of an employer. The duty and the only duty, as a rule, is to refrain from doing the intruder any wilful injury.[121] But in a recent case it was held that where the wife of a defendant's station agent was accustomed to assist her husband with the work in the station office, and this was known to the officers of the company in charge of the division, and not objected to by them, she was a licensee, and the defendant was liable for injuries to her while so in the office caused by the derailment of a train while running at a dangerous speed over a defective track.[122]

§ 1306. Concurrent negligence.—Where a railroad company is guilty of a negligent breach of the duty of an employer and such breach of duty is the proximate cause of an injury to an employe the company is not exonerated from liability, although the negligence of a coemploye may have concurred with that of the company in producing the injury.[123] If the employer is negligent the injured em-

H. & N. 773; Cleveland &c. R. Co. v. Stephenson, 139 Ind. 641; 37 N. E. 720; Welch v. Maine &c. R. Co. 86 Me. 552; 30 Atl. 116; 25 L. R. A. 658.

[121] Evarts v. St. Paul &c. R. Co. 56 Minn. 141; 57 N. W. 459; 22 L. R. A. 663, and note; 45 Am. St. 460.

[122] Croft v. Chicago &c. R. Co. (Ia.) 108 N. W. 1053.

[123] Terre Haute &c. R. Co. v. Mansberger, 65 Fed. 196; 12 C. C. A. 574; Ohio &c. R. Co. v. Stein, 140 Ind. 61; 39 N. E. 246; Louisville &c. R. Co. v. Heck, 151 Ind. 292; 50 N. E. 988; Cayzer v. Taylor 10 Gray (Mass.), 274; 69 Am. Dec. 317; Farmers' &c. Co. v. Toledo &c. R. Co. 67 Fed. 73; Cincinnati &c. R. Co. v. Clark, 57 Fed. 125; 6 C. C. A. 281; Norfolk &c. R. Co. v. Phelps, 90 Va. 665; 19 S. E. 652; Norfolk &c. R. Co. v. Ampey, 93 Va. 108; 25 S. E. 226; Mexican &c. R. Co. v. Glover, 107 Fed. 356; Shugart v. Atlanta &c. R. Co. 133 Fed. 505; Grand Trunk &c. R. Co. v. Cummings, 106 U. S. 700; 1 Sup. Ct. 493; Pittsburgh &c. R. Co. v.

ploye cannot recover unless the negligence of the employer was a proximate cause of the injury, for if the negligence of another employe was the cause of the injury there is not concurring negligence in such a sense as to impose a liability upon the employer.[124] The general rule is affirmed with substantial agreement by the adjudged cases, but in applying it there is some conflict and much confusion owing to the fact that the courts have in some instances failed to discriminate between proximate and remote causes, but we cannot go into this phase of the subject for it would carry us too far afield.

§ 1307. The rule as to the master's knowledge of defects.—The rule sustained by the weight of authority is that the master is not liable to the employe unless he had knowledge or was chargeable with knowledge of the defects which were the proximate cause of the employe's injury.[125] It is not necessary that it should be affirma-

Henderson, 37 Ohio St. 549; Harriman v. Railway Co. 45 Ohio St. 11; 12 N. E. 451; 4 Am. St. 507; Pugh v. Chesapeake &c. R. Co. 101 Ky. 77; 39 S. W. 695; 72 Am. St. 392; Paulmier v. Erie R. Co. 34 N. J. L. 151; Chicago &c. R. Co. v. Gillison, 173 Ill. 264; 50 N. E. 657; 64 Am. St. 117; Cowan v. Chicago &c. R. Co. 80 Wis. 284; 50 N. W. 180; Bryant v. New York &c. R. Co. 81 Hun (N. Y.), 164; 30 N. Y. S. 737; Howe v. St. Clair, 8 Tex. Civ. App. 101; 27 S. W. 800; Missouri &c. R. Co. v. Ferch, 18 Tex. Civ. App. 46; 44 S. W. 317, 319 (citing text); International &c. R. Co. v. Sipole (Tex. Civ. App.), 29 S. W. 686; Gulf &c. R. Co. v. Warner (Tex. Civ. App.), 36 S. W. 118; Southern Pac. R. Co. v. Lasch, 2 Tex. Civ. App. 68; 21 S. W. 563; Merrill v. Oregon Short Line R. Co. 29 Utah, 264; 81 Pac. 85.

[124] New York &c. R. Co. v. Perriguey, 138 Ind. 414; 37 N. E. 976; Harvey v. New York &c. R. Co. 57 Hun (N. Y.), 589; 10 N. Y. S. 645. See, also, Gila Valley R. Co. v. Lyon (Ariz.), 80 Pac. 337.

[125] Griffiths v. London &c. Co. L. R. 13 Q. B. D. 259; Laning v. New York &c. R. Co. 49 N. Y. 521; 10 Am. R. 417; Riley v. State Line &c. Co. 29 La. Ann. 791; 29 Am. R. 349; Erskine v. Chino &c. Co. 71 Fed. 270; Mixter v. Imperial &c. Co. 152 Pa. St. 395; 25 Atl. 587; Louisville &c. R. Co. v. Campbell, 97 Ala. 147; 12 So. 574; Richardson v. Cooper, 88 Ill. 270; Evansville &c. R. Co. v. Duel, 134 Ind. 156; 33 N. E. 355; Pennsylvania R. Co. v. Congdon, 134 Ind. 226; 33 N. E. 795; 39 Am. St. 251; Carruthers v. Chicago &c. R. Co. 55 Kans. 600; 40 Pac. 915; Elliott v. St. Louis &c. R. Co. 67 Mo. 272; Montgomery Coal Co. v. Barringer, 218 Ill. 327; 75 N. E. 900; note in 98 Am. St. 321; Nashville &c. R. Co. v. Hayes (Tenn.), 99 S. W. 362, 364 (citing text). In Buzzell v. Laconia &c. Co. 48 Me. 113; 77 Am. Dec. 212, it was said: "The declaration should allege that the insufficiency of the

tively shown that the employer had actual knowledge of defects. If the facts are such as make it his duty to have knowledge, then he will be held to possess it.[126] But in order to charge the employer with knowledge the evidence must show, in cases where actual knowledge is not proved, that he was guilty of negligence in not securing knowledge. Here, as elsewhere in the law of master and servant, the liability of the former exists only where he is guilty of negligence.

§ 1308. Test of the employer's liability.—The mere fact that after the occurrence of an accident defects are discovered in the machinery or appliances is not sufficient to fasten a liability upon the employer.[127] The duty of the employer is to exercise ordinary and reasonable care to provide and keep reasonably safe machinery

bridge was unknown to the plaintiff and that it was known to the defendant." See post, § 1311. Hart v. Naumburg, 123 N. Y. 641; 25 N. E. 385; Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 625; 72 N. E. 145.

[126] Clarke v. Holmes, 7 H. & N. 937; Bean v. Oceanic Co. 24 Fed. 124; Noyes v. Smith, 28 Vt. 59, 63; Hutchinson v. York &c. R. Co. 5 Exch. 343; Schooner "Norway" v. Jensen, 52 Ill. 373; Wabash &c. R. Co. v. Moran, 13 Ill. App. 72; Chicago &c. R. Co. v. Merriman, 95 Ill. App. 628; Gutridge v. Missouri &c Co. 105 Mo. 520; 16 S. W. 943; Hayden v. Smithville &c. Co. 29 Conn. 548; Carruthers v. Chicago &c. R. Co. 55 Kan. 600; 40 Pac. 915; Romona &c. Co. v. Phillips, 11 Ind App. 118; 39 N. E. 96; Baltimore &c. R. Co. v. Spaulding, 21 Ind. App. 323, 328; 52 N. E. 410, 411 (citing text); Lake Erie &c. R. Co. v. McHenry, 10 Ind. App. 525; 37 N. E. 186; Fluhrer v. Lake Shore &c. R. Co. 121 Mich. 212; 80 N. W. 23; Honts v. St. Louis Transit Co. 108 Mo. App. 686; 84 S. W. 161. See, also, 4 Thomp. Neg. § 3797, et seq., as to what is notice to the master.

[127] Indianapolis &c. R. Co. v. Toy, 91 Ill. 474; 33 Am. R. 57; Racine v. New York &c. R. Co. 70 Hun (N. Y.), 453; 24 N. Y. S. 388. The general rule is that no presumption of negligence arises from the occurrence of an accident. Colorado &c. Co. v. Ogden, 3 Colo. 499; Mobile &c. R. Co. v. Thomas, 42 Ala. 672; State v. Philadelphia &c. Co. 60 Md. 555; Baltimore &c. R. Co. v. Bahrs, 28 Md. 647; State v. Phila. &c. R. Co. 47 Md. 76; Baltimore &c. R. Co. v. State, 54 Md. 648; Toledo &c. R. Co. v. Brannagan, 75 Ind. 490; Indiana &c. R. Co. v. Greene, 106 Ind. 279; 6 N. E. 603; 55 Am. R. 736; Gilman v. Eastern &c. R. Co. 10 Allen (Mass.), 233; 87 Am. Dec. 635. See, also, Oglesby v. Missouri Pac. R. Co. 177 Mo. 272; 76 S. W. 623. As to the effect of the Ohio statute, see Shankweiler v. Baltimore &c. R. Co. 148 Fed. 195.

and appliances, but he is not an insurer, so that he cannot be held liable unless it is affirmatively shown that he was guilty of negligence. The test of liability, therefore, is the presence or absence of negligence. If there is no negligence there can be no liability, although there may be defects and the defects may be the proximate cause of the injury.[128] Where reasonable care is exercised in buying machinery and appliances and inspections are made by competent inspectors in a reasonably careful and skillful manner there is no liability, although defects may in fact exist, unless there is, after knowledge, a failure to repair.[129] It is settled law that an employer is not liable unless the defects were known to him or were such as in the exercise of ordinary care he was bound to know, and it necessarily results from this settled rule that there can be no liability where there is reasonable care and skill exercised in providing, inspecting and repairing machinery and appliances.

§ 1309. Evidence of employer's negligence.—The employe who seeks a recovery for personal injury has the burden of proving a negligent breach of duty on the part of the employer. The evidence must establish negligence and show a breach of the "limited and specific duty of an employer to the employe."[130] It is not necessary,

[128] See Mobile &c. R. Co. v. Vallowe, 214 Ill. 124; 73 N. E. 416, 417 (citing text).

[129] Chicago &c. R. Co. v. DuBois, 56 Ill. App. 181; East St. Louis Provision Co. v. Hightower, 92 Ill. 139 See Jones v. Malvern &c. Co. 58 Ark. 125; 23 S. W. 679; Hawley v. Northern &c. R. Co. 82 N. Y. 370: Mehan v. Syracuse &c. R. Co. 73 N. Y. 585.

[130] Erie &c. R. Co. v. Smith, 125 Pa. St. 259; 17 Atl. 443; 11 Am. St. 895; Louisville &c. R. Co. v. Bates, 146 Ind. 561; 45 N. E. 108; Elliott v. St. Louis &c. R. Co. 67 Mo. 272; Welch v. New York &c. R. Co. 63 Hun (N. Y.), 625; 17 N. Y. S. 342; Mensch v. Pennsylvania &c. R. Co. 150 Pa. St. 598; 25 Atl. 31; 17 L. R. A. 450; Pittston &c. Co. v. McNulty, 120 Pa. St. 414; 14 Atl. 387; Pennsylvania &c. Co. v. Mason, 109 Pa. St. 296; 58 Am. R. 722; Philadelphia &c. R. Co. v. Hughes, 119 Pa. St. 301; 13 Atl. 286; Conrad v. Gray, 109 Ala. 130; 19 So. 398; Bruner v. Blaisdell, 170 Pa. St. 25; 32 Atl. 607; Perry v. Michigan Central R. Co. 108 Mich. 130; 65 N. W. 608; Fenderson v. Atlantic &c. R. Co. 56 N. J. L. 708; 31 Atl. 767; Bahr v. Lombard, 53 N. J. L. 233; 21 Atl. 190; 23 Atl. 167; Titus v. Bradford &c. R. Co. 136 Pa. St. 618; 20 Atl. 517; 20 Am. St. 944; Georgia &c. R. v. Nelms, 83 Ga. 70; 9 S. E. 1049; 20 Am. St. 308; Chicago &c. R. Co. v. DuBois, 56 Ill. App. 181. See, generally, Ross v. Pearson &c. Co. 164

of course, that the evidence should be direct or positive for negligence may be inferred from circumstances properly proved, but the inference must be a natural and reasonable one, and be more than a mere conjecture.[131] Where the complaint or declaration specifies the defects the plaintiff's evidence must conform to the allegations of the pleading and he cannot recover upon evidence of entirely different defects from those specified in the pleading.[132]

§ 1310. Employer not liable to employe unless the negligence was the proximate cause of the injury.—It is not sufficient to entitle an employe to recover damages for a personal injury to show a negligent breach of the employer's duty, for to entitle the employe to a recovery it must be shown that the breach of duty was the proximate cause of the injury.[133] The general rule is that negligence will not

Mass. 257; 41 N. E. 284; 49 Am. St. 459; Warner v. New York &c. R. Co. 44 N. Y. 465; Cordell v. New York &c. R. Co. 75 N. Y. 330; Toledo &c. R. Co. v. Brannagan, 75 Ind. 490; Nitro Glycerine Case, 15 Wall. (U. S.) 524, 537; Hermann v. Port Blakely &c. Co. 71 Fed. 853; Jones v. Alabama &c. R. Co. 107 Ala. 400; 18 So. 30; Wormell v. Maine Cent. R. Co. 79 Me. 397; 1 Am. St. 321; Nashville &c. R. Co. v. Hayes (Tenn.), 99 S. W. 362. But see under Arkansas statute where a trackman was run down and killed, St. Louis &c. R. Co. v. Standifer (Ark.), 99 S. W. 81.

[131] Gores v. Graff, 77 Wis. 174; 46 N. W. 48; Sorenson v. Menasha. 56 Wis. 338; 14 N. W. 446; Trapnell v. Red Oak Junction, 76 Iowa, 744; 39 N. W. 884; Stager v. Ridge Ave. R. Co. 119 Pa. St. 70; 12 Atl. 821; Dunbar v. McGill, 64 Mich. 676; 31 N. W. 578; Walker v. Chicago &c. R. Co. 71 Iowa, 658; 33 N. W. 224; Case v. Chicago &c. R. Co. 64 Iowa, 762; 21 N. W. 30; Brymer v. Southern R. Co. 90 Cal. 496; 27 Pac. 371; Wormell v. Maine &c R. Co. 79 Me. 397; 10 Atl. 49; 1 Am. St. 321; Griffin v. Boston &c. R. Co. 148 Mass. 143; 19 N. E. 166; 1 L. R. A. 698, and note; 12 Am. St. 526.

[132] Arcade File Works v. Juteau, 15 Ind. App. 460; 44 N. E. 818. See Cleveland &c. R. Co. v. Wynant, 100 Ind. 160; Chicago &c. R. Co. v. Burger, 124 Ind. 275; 24 N. E. 981; Louisville &c. R. Co. v. Renicker, 8 Ind. App. 404; 35 N. E. 1047. See, also, Moyer v. Ramsay &c. Co. 119 Ga. 734; 46 S. E. 844.

[133] Abbott v. McCadden, 81 Wis. 563; 51 N. W. 1079; 29 Am. St. 910; Whitwam v. Wisconsin &c. R. Co. 58 Wis. 408; 17 N. W. 124; Bajus v. Syracuse &c. R. Co. 103 N. Y. 312; 8 N. E. 529; 57 Am. R. 723, and note; Waldhier v. Hannibal &c. R. Co. 87 Mo. 37; Pease v. Chicago &c. R. Co. 61 Wis. 163; 20 N. W. 908; Fowler v. Chicago &c. R. Co. 61 Wis. 159; 21 N. W. 40; Hoffnagle v. New York &c. R. Co. 55 N. Y. 608; Loring v. Kansas City &c. R. Co. 128 Mo. 349; 31 S. W. 6; Galves-

create a right of action unless it was the proximate cause of the injury,[134] and this general rule applies to actions by an employe against the employer. It is upon the general principle stated that it has been held that a violation of a municipal ordinance requiring a flagman to be stationed at a street crossing will not entitle an employe to recover.[134a] The rule is illustrated by a case where a switchman was injured by stumbling over a piece of coke and falling in front of a train and it was held that as the stumbling over the piece of coke was the proximate cause of the accident evidence that the drawbars of the car which the switchman was running to couple were defective was immaterial.[135] Another case involving the same general principle is one in which it was held that a brakeman could not recover upon the ground that the engineer failed to give the signals at highway crossings required by the statute.[136] Where an engineer is incompetent and his incompetency is known to the company, still, a brakeman who is injured in attempting to couple the cars of a train running at an obviously dangerous rate of speed cannot recover damages from the company.[137]

ton &c. R. Co. v. Herring (Tex. Civ. App.), 36 S. W. 129. See, also, Nickey v. Stender, 164 Ind. 189; 73 N. E. 117; Baltimore &c. R. Co. v. Henderson, 31 Ind. App. 441; 68 N. E. 308; Jones v. Kansas City &c. R. Co. 178 Mo. 628; 77 S. W. 890; Thompson v. Citizens' St. R. Co. 152 Ind. 461; 53 N. E. 462; Western &c. R. Co. v. Esslinger, 95 Ga. 734; 22 S. E. 580.

[134] Sutton v. Wauwatosa, 29 Wis. 21; 9 Am. R. 534; Pennsylvania Co. v. Horton, 132 Ind. 189, 192; 31 N. E. 45; Leavitt v. Terre Haute &c. R. Co. 5 Ind. App. 513; 31 N. E. 860; 32 N. E. 866; Metropolitan &c. R. Co. v. Jackson, L. R. 3 App. Cas. 193; Hoag v. Lake Shore &c. R. Co. 85 Pa. St. 293; 27 Am. R. 653; Henry v. Southern &c. R. Co. 50 Cal. 176; Billman v. Indianapolis &c. R. Co. 76 Ind. 166; 40 Am. R. 230; Hoadly v. Northern &c. Co. 115 Mass. 304; 15 Am. R. 106.

[134a] Kansas City &c. R. Co. v. Kirksey, 60 Fed. 999. Nor will the violation of a municipal ordinance entitle a third person to recover unless it was the proximate cause of his injury. Pennsylvania Co. v. Hensil, 70 Ind. 569; 36 Am. R. 188; State v. Manchester &c. R. Co. 52 N. H. 528.

[135] Cincinnati &c. R. Co. v. Mealer, 50 Fed. 725, citing Milwaukee &c. R. Co. v. Kellogg, 94 U. S. 469. See, also, Hunt v. Kane, 100 Fed. 256; St. Louis &c. R. Co. v. Nelson, 20 Tex. Civ. App. 536; 49 S. W. 710.

[136] Randall v. Baltimore &c. R. Co. 109 U. S. 478; 3 Sup. Ct. 322, affirming the doctrine of O'Donnell v. Providence &c. R. Co. 6 R. I. 211; Harty v. Central &c. R. Co. 42 N. Y. 468, that statutes requiring signals at crossings are not intended for the protection of employes.

[137] Sheets v. Chicago &c. R. Co. 139 Ind. 682; 39 N. E. 154. The de-

§ 1311. Knowledge of defects on part of employe—Averment and proof.—It is a well-settled general rule, as we have seen, that the employe cannot recover for injuries caused by defects of which he has knowledge and the risks of which he appreciates.[138] The employe is generally required to aver in his complaint or declaration that he did not have knowledge of the defects and that the employer did have knowledge.[139] There is, we know, some conflict of author-

cision in the case cited was put upon the ground of contributory negligence, but it is clear that the incompetency of the engineer was not the proximate cause of the injury. There is often difficulty in discriminating between cases where recovery is defeated upon the ground of contributory negligence and where it is defeated upon the ground that the negligence of the defendant was not the proximate injury. In Chicago &c. R. Co. v. Kennedy, 2 Kan. App. 693; 43 Pac. 802, the question of proximate cause is considered and it was held that although the violation of a municipal ordinance is negligence, yet there could be no recovery unless the violation of the ordinance was the proximate cause of the injury. The court cited among other cases, Atchison &c. R. Co. v. Morgan, 31 Kan. 77; 1 Pac. 298; Quincy R. Co. v. Wellhoener, 72 Ill. 60; Stoneman v. Atlantic &c. R. Co. 58 Mo. 503.

[138] Missouri &c. R. Co. v. Spellman (Tex.), 34 S. W. 268; Gann v. Railroad, 101 Tenn. 380; 47 S. W. 493; 70 Am. St. 687; Odell v. New York &c. R. Co. 120 N. Y. 323; 24 N. E. 478; 17 Am. St. 650. But see Swadley v. Missouri Pac. R. Co. 118 Mo. 268; 24 S. W. 140; 40 Am. St. 366. It has been held that he must have sufficient time and opportunity to make objection. In Wright v. Chicago &c. R. Co. 160 Ind. 583; 66 N. E. 454; Louisville &c. R. Co. v. Kelly, 63 Fed. 407, 409.

[139] Griffiths v. London &c. Co. L. R. 13 Q. B. D. 259; Buzzell v. Laconia &c. Co. 48 Me. 113; 77 Am. Dec. 212; New Kentucky &c. R. Co. v. Abbani, 12 Ind. App. 497; 40 N. E. 702; Matchett v. Cincinnati &c. R. Co. 132 Ind. 334; 31 N. E. 792; Louisville &c. R. Co. v. Corps. 124 Ind. 427; 24 N. E. 1046; 8 L. R. A. 636, and note; Peerless Stone Co. v. Wray, 143 Ind. 574; 42 N. E. 927; Louisville &c. R. Co. v. Quinn, 14 Ind. App. 554; 43 N. E. 240. See, also, Montgomery Coal Co. v. Barriger, 218 Ill. 327; 75 N. E. 900; Chicago &c. R. Co. v. Scanlan, 170 Ill. 106; 48 N. E. 826. It has been held that an allegation that he had no knowledge of the defect or danger repels implied as well as actual knowledge, but that the evidence must show not only that he had no actual knowledge but also that he could not have known thereof by the exercise of ordinary care. Consolidated Stone Co. v. Summit, 152 Ind. 297, 300; 53 N. E. 235. See, also, Evansville &c. R. Co. v. Duel, 134 Ind. 156; 33 N. E. 355; Peerless Stone Co. v. Wray, 143 Ind. 574; 42 N. E. 927; Pennsylvania Co. v. Ebaugh, 152 Ind. 531, 535; 53 N. E. 763. Equal knowledge on the part of the employer and employe imposes upon the employed the risks

ity upon this question but we think the rule stated is the correct one for of defects of which the employe has notice he takes the risk, and in order to constitute a cause of action it is necessary to show that the defect is one for which the employer is responsible and for defects known to the employe he is not responsible.[140] The fact that the employe has notice of defects does not defeat him simply upon the ground of contributory negligence, but defeats him because he assumes the risks of injury from such defects. The question is not one of contributory negligence but of risks assumed.[141]

§ 1312. Knowledge of defects on part of employe—Evidence of. —It is not necessary to prove by direct or positive evidence that an employe has knowledge of the dangers of the place in which he is required to work, or of defects in appliances or machinery. If facts are shown legitimately authorizing the inference of knowledge it will be sufficient. If defects are shown to be open and obvious to observation it is generally sufficient to charge the employe with knowledge, and knowledge may be inferred from evidence of familiarity with the working place or the machinery with which he is required to work.[142] Where the defect is in an appliance not open to observa-

Indianapolis &c. R. Co. v. Love, 10 Ind. 554; Missouri &c. R. Co. v. Spellman (Tex.), 34 S. W. 298.

[140] Chicago &c. R. Co. v. Heerey, 203 Ill. 492; 68 N. E. 74, 76 (quoting text).

[141] Louisville &c. R. Co. v. Sandford, 117 Ind. 265, 267; 19 N. E. 770; Evansville &c. R. Co. v. Duel, 134 Ind. 156, 159; 33 N. E. 355; Beach Contributory Neg. (1st ed.) § 140; 4 Thomp. Neg. (2d ed.) 464, et seq. See, generally, Owen v. Louisville &c. R. Co. 87 Ky. 626; 9 S. W. 698; Henderson v. Kentucky &c. R. Co. 86 Ky. 389; 5 S. W. 875; Chicago &c. R. Co. v. Heerey, 203 Ill. 492; 68 N. E. 74, 77 (citing text).

[142] Leary v. Boston &c. R. Co. 139 Mass. 580; 2 N. E. 115; 52 Am. R. 733; Fuller v. New York &c. R. Co. 175 Mass. 425; 56 N. E. 574; New York &c. R. Co. v. Powers, 98 N. Y. 274; 21 Am. & Eng. R. Cas. 609; Walsh v. St. Paul &c. R. Co. 27 Minn. 367; 8 N. W. 145; 2 Am. & Eng. R. Cas. 144; Berger v. St. Paul &c. R. Co. 39 Minn. 78; 38 N. W. 814; Rains v. St. Louis &c. R. Co. 71 Mo. 164; 36 Am. R. 459; 5 Am. & Eng. R. Cas. 610; Kelly v. Baltimore &c. R. Co. (Pa. St.) 11 Atl. 659; Gaffney v. New York &c. R. Co. 15 R. I. 456; 7 Atl. 284; 31 Am. & Eng. R. Cas. 265; Lovejoy v. Boston &c. R. Co. 125 Mass. 79; 28 Am. R. 206; Clark v. St. Paul &c. R. Co. 28 Minn. 128; 9 N. W. 581; Baylor v. Delaware &c. R. Co. 40 N. J. L. 23; 29 Am. R. 208; Gibson v. Erie &c. R. Co. 63 N. Y. 449; 20 Am. R. 552; Norfolk &c. R. Co. v. Jackson, 85 Va.

tion it cannot be inferred from the mere fact that the employe used the appliances that he was aware of the defect, nor can it be inferred that there was knowledge of such a defect unless the time during which the employe used it was reasonably sufficient to enable the employe to discover it.[143]

§ 1313. Contributory negligence of employes.—It is quite well agreed that contributory negligence on the part of an employe will defeat an action for the recovery of damages for injuries caused by the negligence of the employer.[144] There is much diversity of opinion upon the question as to which party has the burden. Some of the courts hold that the burden is on the plaintiff to prove that he was not guilty of contributory negligence,[145] but the majority of

489; 8 S. E. 370; Morris v. Gleason, 1 Ill. App. 510; Atchison &c. R. Co. v. Alsdurf, 47 Ill. App. 200; Lake Erie &c. R. Co. v. Wilson, 189 Ill. 89; 59 N. E. 573; Quinn v. Chicago &c. R. Co. 107 Ia. 710; 77 N. W. 464; Gorman v. Minneapolis &c. R. Co. 78 Ia. 509; 43 N. W. 303; Goltz v. Milwaukee &c. R. Co. 76 Wis. 136; 44 N. W. 752; Lindsay v. New York &c. R. Co. 112 Fed. 384; Chesapeake &c. R. Co. v. Hennessey, 96 Fed. 713; Grandin v. Southern Pac. Co. (Utah), 85 Pac. 357. But see Sioux City &c. R. Co. v. Finlayson, 16 Neb. 578; 20 N. W. 860; 49 Am. R. 724, and note; 18 Am. & Eng. R. Cas. 68; Georgia Pac. R. Co. v. Davis, 92 Ala. 300; 9 So. 252; 25 Am. St. 47; Colorado &c. R. Co. v. O'Brien, 16 Colo. 219; 27 Pac. 701; Central R. Co. v. Haslett, 74 Ga. 59; Illinois &c. R. Co. v. Sanders, 166 Ill. 270; 46 N. E. 799; 4 Thomp. Neg. §§ 4645, 4646.

[143] Northern Pac. &c. R. Co. v. Herbert, 116 U. S. 642; 6 Sup. Ct. 590; Smith v. Peninsular Car Works, 60 Mich. 501; 27 N. W. 662; 1 Am. St. 542, and note. See, also, Illinois &c. R. Co. v. Sanders, 166 Ill. 240; 46 N. E. 799; Wright v. Chicago &c. R. Co. 160 Ind. 583; 66 N. E. 454.

[144] Beach Contributory Negligence (2d ed.), § 299; Bomar v. Louisiana &c. R. Co. 42 La. Ann. 983; 8 So. 478; Bunt v. Sierra &c. Co. 138 U. S. 438; 11 Sup. Ct. 464; Quibell v. Union &c. R. Co. 7 Utah, 122; 25 Pac. 734; Jersey City, The, 46 Fed. 134; East Tennessee &c. R. Co. v. Lewis, 89 Tenn. 235; 14 S. W. 603; Moore v. Norfolk &c. R. Co. 87 Va. 489; 12 S. E. 968; Roddy v. Missouri &c. R. Co. 10 Mo. 234; 15 S. W. 1112; 43 Alb. L. J. 479; Helfrich v. Ogden &c. R. Co. 7 Utah, 186; 26 Pac. 295; Magee v. Chicago &c. R. Co. 83 Iowa, 249; 48 N. W. 92; Mayfield v. Savannah &c. R. Co. 87 Ga. 374; 13 S. E. 459; 5 Thomp. Neg. § 5325.

[145] Murphy v. Deane, 101 Mass. 455; Terre Haute &c. R. Co. v. Graham, 95 Ind. 291; Park v. O'Brien, 23 Conn. 339; Lesan v. Maine &c. R. Co. 77 Me. 85; Mississippi Central &c. R. Co. v. Mason, 51 Miss. 234; Prather v. Richmond &c. R. Co. 80 Ga. 427; 9 S. E. 530; 12 Am. St. 263; Ludd v. Wilkins, 118 Ga. 525;

the courts hold that it is on the defendant.[146] Railroad employes may be guilty of contributory negligence in cases where they disobey rules or orders, where they voluntarily leave their post and go to one of greater danger, or where they fail to exercise ordinary care to guard against dangers known to them, or which, in the exercise of ordinary prudence and caution, they ought to have known.[147] Some

45 S. E. 429; Owens v. Richmond &c. R. Co. 88 N. C. 502; Mynning v. Detroit &c. R. Co. 67 Mich. 677; 35 N. W. 811; Mitchell v. Chicago &c. R. Co. 51 Mich. 236; 16 N. W. 388; 47 Am. R. 566; Galena &c. R. Co. v. Fay, 16 Ill. 558; 63 Am. Dec. 323; Greenleaf v. Illinois &c. R. Co. 29 Iowa, 14; 4 Am. R. 181; Waite v. Northeastern &c. R. Co. El. Bl. & E. 719. See, also, McHugh v. Manhattan R. Co. 88 App. Div. (N. Y.) 554; 85 N. Y. S. 184; 1 Thomp. Neg. § 365, and cases there cited.

[146] Hough v. Railway Co. 100 U. S. 213; Amato v. Northern &c. R. Co. 46 Fed. 561; Texas &c. R. Co. v. Volk, 151 U. S. 73; 14 Sup. Ct. 239; Pennsylvania Co. v. Roy, 102 U. S. 451; Freer v. Cameron, 4 Rich. L. (S. C.) 228; Grand Trunk &c. R. Co. v. Ives, 144 U. S. 408; 12 Sup. Ct. 679; Finn v. Vallejo &c. Co. 7 Cal. 253; Thompson v. Central &c. Co. 54 Ga. 509; St. Louis &c. R. Co. v. Weaver, 35 Kan. 412; 11 Pac. 408; 57 Am. R. 176, and note; Northern &c. R. Co. v. State, 31 Md. 357; Hocum v. Weitherick, 22 Minn. 152; Hicks v. Pacific R. Co. 65 Mo. 34; Nord v. Boston &c. Co. 30 Mont. 48; 75 Pac. 681; Mobile &c. R. Co. v. Bromberg, 141 Ala. 258; 37 So. 395; White v. Concord &c. R. Co. 30 N. H. 188; Moore v. Central &c. R. Co. 24 N. J. L. 268; Cassidy v. Angell, 12 R. I. 447; 34 Am. R. 690; Danner v. South Carolina R. Co. 4 Rich. L. (S. C.) 329; 55 Am. Dec. 678; San Antonio &c. R. Co. v. Bennett, 76 Tex. 151; 13 S. W. 319; Prideaux v. Mineral Point, 43 Wis. 513; 28 Am. R. 558; Sanderson v. Frazier, 8 Colo. 79; 5 Pac. 632; 54 Am. R. 544; Paducah &c. R. Co. v. Hoehl, 12 Bush (Ky.), 41; Northern Pac. R. Co. v. O'Brien, 1 Wash. 599; 21 Pac. 32; Holden v. Liverpool &c. Co. 3 C. B. 1; Davey v. London &c. R. Co. 11 L. R. Q. B. Div. 213; Bridge v. Grand Junction R. Co. 3 M. & W. 244; Martin v. Great Northern &c. R. Co. 16 C. B. 179; 1 Thomp. Neg. § 366, and authorities there cited. It is now on the defendant, by statute, in Indiana. Southern Indiana R. Co. v. Peyton, 157 Ind. 690; 61 N. E. 722; Indianapolis St. R. Co. v. Robinson, 157 Ind. 233; 61 N. E. 197. But the statute provides that it may be shown under the general denial, and it is available to the defendant if shown by the plaintiff's own evidence. Pittsburgh &c. R. Co. v. Lightheiser 163 Ind. 247; 71 N. E. 218; Pittsburgh &c. R. Co. v. Collins, 163 Ind. 569; 71 N. E. 661; Indianapolis St. R. Co. v. Taylor, 158 Ind. 274; 63 N. E. 456; Evansville &c. R. Co. v. Mills (Ind. App.), 77 N. E. 609.

[147] The text is cited with approval in Robertson v. Ford, 164 Ind. 538; 74 N. E. 1, 4. Where there is a safe mode of performing a duty and the employe, instead of per-

of the cases hold that where an employe uses an appliance for a purpose for which it is not intended, or goes to a place different from that which the contract of service requires him to occupy, he is guilty of contributory negligence, and, for that reason, cannot hold the employer liable, but we are of the opinion, as elsewhere indicated, that in such cases the true ground upon which the rule that the employer is not liable rests is that the duty of the employer does not extend over such cases. We think that there may be no negligence on the part of the employe and still a recovery cannot be had because he goes to a place, or does an act, not embraced by the contract of service, and, while there, is not within the duty created by the contract of service. If the evidence, whether adduced by the plaintiff or the defendant, shows contributory negligence, it will defeat a recovery,[148] and if it is clearly shown without substantial conflict, although there may be a scintilla of the evidence to the contrary, the court may direct a verdict.[149] It is not always sufficient to defeat a recovery that there be evidence of negligence on the part of the employe for

forming the duty in that mode adopts an unsafe one, the general rule is that he is guilty of contributory negligence. Pennsylvania Co. v. O'Shaughnessy, 122 Ind. 588; 23 N. E. 675; Erskine v. Chino &c. Co. 71 Fed. 270; Morris v. Duluth &c. R. Co. 108 Fed. 747; Gilbert v. Burlington &c. R. Co. 128 Fed. 529; Newport News Pub. Co. v. Beaumeister, 102 Va. 677; 47 N. E. 821; Central of Ga. R. Co. v. Mosley, 112 Ga. 914; 38 S. E. 350; Hurst v. Kansas City &c. R. Co. 163 Mo. 309; 63 S. W. 695; 85 Am. St. 539; note in 97 Am. St. 895. But see Brinkmeier v. Missouri Pac. R. Co. 69 Kans. 738; 77 Pac. 586; Florida Cent. &c. R. Co. v. Mooney, 40 Fla. 17; 24 So. 148; 33 So. 1010; Kilpatrick v. Grand Trunk R. Co. 74 Vt. 288; 52 Atl. 531; 93 Am. St. 887. See, generally, Spencer v. Ohio &c. R. Co. 130 Ind. 181; 29 N. E. 915; Bresnahan v. Michigan &c. R. Co. 49 Mich. 410; 13 N. W. 797. The duty of employes is not to assume unnecessary risks, and this duty requires them to take the safe course when work can be done in one of two methods, the one safe and the other unsafe. St. Louis &c. Co. v. Brennan, 20 Ill. App. 555; St. Louis &c. Co. v. Burke, 12 Ill. App. 369.

[148] Horn v. Baltimore &c. R. Co. 54 Fed. 301; 4 C. C. A. 346; Smith v. Chicago &c. R. Co. 4 S. Dak. 30, 71; 55 N. W. 717; McMurtry v. Louisville &c. Co. 67 Miss. 601; 7 So. 401; Pittsburgh &c. R. Co. v. Lightheiser, 163 Ind. 247; 71 N. E. 218; Pittsburgh &c. R. Co. v. Collins, 163 Ind. 569; 71 N. E. 661; 1 Thomp. Neg. § 369.

[149] Johnson v. Hudson R. Co. 20 N. Y. 65; post, § 1702. See, also, Brown v. Northern Pac. R. Co. (Wash.) 86 Pac. 1053; 75 Am. Dec. 375, and note.

it must also appear that such negligence proximately contributed to the injury.[150]

§ 1314. Contributory negligence of employes—Illustrative instances.—The cases applying the doctrine of contributory negligence to railroad employes are very numerous, and we shall not undertake to cite a very great number of them, but shall refer to some of them which seem to most clearly illustrate the application of the general doctrine. It is very generally held that disobedience of the rules and orders of the employer when a proximate cause of the injury constitutes contributory negligence.[151] There may be circumstances which

[150] Tuff v. Warman, 5 C. B. (N. S.) 573, 586; McGonigle v. Kane, 20 Colo. 292; 38 Pac. 367; White v. Louisville &c. R. Co. 72 Miss. 12; 16 So. 248; Terre Haute &c. R. Co. v. Mansberger, 65 Fed. 196; 12 C. C. A. 574; Phillips v. Chicago &c. R. Co. 64 Wis. 475; 25 N. W. 544. See, also, Chicago &c. R. Co. v. Howell, 208 Ill. 155; 70 N. E. 15; Houston &c. R. Co. v. Turner, 34 Tex. Civ. App. 397; 78 S. W. 712.

[151] Robinson v. West Virginia &c. R. Co. 40 W. Va. 583; 21 S. E. 727; Chicago &c. R. Co. v. Maney, 55 Ill. App. 588; Fritz v. Missouri &c. R. Co. (Tex. Civ. App.) 30 S. W. 85; Chicago &c. R. Co. v. Flynn, 154 Ill. 448; 40 N. E. 332; Bryant v. New York &c. R. Co. 84 Hun (N. Y.), 164; 30 N. Y. S. 737; Louisville &c. R. Co. v. Stutts, 105 Ala. 368; 17 So. 29; 53 Am. St. 127; Smith v. New York &c. R. Co. 88 Hun (N. Y.), 468; 34 N. Y. S. 881; Louisville &c. R. Co. v. Woods, 105 Ala. 561; 17 So. 41; LeBahn v. New York &c. R. Co. 80 Hun (N. Y.), 116; 30 N. Y. S. 7; Davis v. Nuttalisburg &c. Co. 34 W. Va. 500; 12 S. E. 539. See, also, Keenan v. Railroad Co. 145 N. Y. 190; 39 N. E. 711; 45 Am. St. 604; Bennett v. Northern Pac. R. Co. 2 N. Dak. 112; 49 N. W. 408; 13 L. R. A. 465, and cases cited; note in 98 Am. St. 319; Green v. Brainerd &c. R. Co. 85 Minn. 318; 88 N. W. 974, 976 (citing text); Nordquist v. Great Northern R. Co. 89 Minn. 485; 95 N. W. 322; Scott v. Eastern R. Co. 90 Minn. 135; 95 N. W. 892; Texas &c. R. Co. v. Fields, 32 Tex. Civ. App. 414; 74 S. W. 930; ante, § 1282. As to the kind of rule to which this doctrine applies, see St. Louis &c. R. Co. v. Caraway 77 Ark. 405; 91 S. W. 749. Where a violation of the time table regulations or of other rules brings on a collision, the employes who disobey the rules can not recover. Sutherland v. Troy &c. R. Co. 125 N. Y. 737; 26 N. E. 609. Coupling cars in disobedience of rules. Schaub v. Hannibal &c. R. Co. 106 Mo. 74; 16 S. W. 924; East Tennessee &c. R. Co. v. Smith, 89 Tenn. 114; 14 S. W. 1077; Sloan v. Georgia &c. R. Co. 86 Ga. 15; 12 S. E. 179; 44 Am. & Eng. R. Cas. 553; Pryor v. Louisville &c. R. Co. 90 Ala. 32; 8 So. 55; Grand v. Michigan &c. R. Co. 83 Mich. 564; 47 S. W. 837; 11 L. R. A. 402; Pennsylvania Co. v. Whitcomb, 111 Ind. 212; 12 N. E. 380.

will excuse disregard of orders or rules,[152] but, prima facie, disobedience is always negligence, and it is only in clear cases that disobedience should be held to be excused. The assent of other employes will not release from the consequences of a disobedience of established rules.[153] Some of the cases hold that where an employe voluntarily encounters a danger against which he is warned, he is guilty of contributory negligence,[154] but we think that he assumes the risk from such danger as one of the risks of his service, and for that reason cannot recover.[155] An employe, where there is no emergency, who knowingly or carelessly assumes an unnecessary risk, is often said to be guilty of contributory negligence.[156] But a sudden

[152] Hannah v. Connecticut &c. R. Co. 154 Mass. 529; 28 N. E. 682; Memphis &c. R. Co. v. Graham, 94 Ala. 545; 10 So. 283; Illinois Cent. R. Co. v. Person, 63 Miss. 319; 3 So. 375. See Illinois &c. R. Co. v. Gilbert, 157 Ill. 354; 41 N. E. 724; Light v. Chicago &c. R. Co. 93 Ia. 83; 61 N. W. 380. See, also, Carson v. Southern R. Co. 194 U. S. 136; 24 Sup. Ct. 609; Union Pac. R. Co. v. Springsteen, 41 Kans. 724; 21 Pac. 774; Hurlbut v. Railroad Co. 130 Mo. 657; 31 S. W. 1051.

[153] Ante, § 1282; Port Royal &c R. Co. v. Davis, 95 Ga. 292; 22 S. E. 833; Atchison &c. R. Co. v. Reesman, 60 Fed. 370; 9 C. C. A. 20; 23 L. R. A. 768; Richmond &c. R. Co. v. Rush, 71 Miss. 987; 15 So. 133; Lehigh &c. R. Co. v. Snyder, 56 N. J. L. 326; 28 Atl. 376; Westcott v. New York &c. R. Co. 153 Mass. 460; 27 N. E. 10. But see Illinois &c. R. Co. v. Neer, 31 Ill. App. 126. Effect of inconsistent orders. Hall v. Chicago &c. R. Co. 46 Minn. 439; 49 N. W. 239. Effect of an order of a superior where no emergency. Davis v. Western &c. R. Co. 107 Ala. 626; 18 So. 173.

[154] Williams v. Walton &c. Co. 9 Houst. (Del.) 322; 32 Atl. 726; Saner v. Lake Shore &c. R. Co. 108 Mich. 31; 65 N. W. 624.

[155] Knight v. Cooper, 36 W. Va. 232; 14 S. E. 999; Paland v. Chicago &c. R. Co. 44 La. Ann. 1003; 11 So. 707; Haley v. Jump River Lumber Co. 81 Wis. 412; 51 N. W. 321; Lasky v. Canadian &c. R. Co. 83 Me. 461; 22 Atl. 367. See Niles v. Minneapolis &c. R. Co. 107 Mich. 238; 65 N. W. 103.

[156] Wilson v. Michigan &c. R. Co. 94 Mich. 20; 53 N. W. 797; Browne v. New York &c. R. Co. 158 Mass. 247; 33 N. E. 650; Hudson v. Charleston &c. R. Co. 55 Fed. 248; Dowell v. Vicksburg &c. R. Co. 61 Miss. 519; Chambers v. Western R. Co. 91 N. Car. 471; Novock v. Michigan &c. R. Co. 63 Mich. 121; 29 N. W. 525; Burgin v. Louisville &c. R. Co. 97 Ala. 274; 12 So. 395; Wilson v. Michigan &c. R. Co. 94 Mich. 20; 53 N. W. 797; Lyttle v. Chicago &c. R. Co. 84 Mich. 289; 47 N. W. 571; Alabama &c. R. Co. v. Richie, 99 Ala. 346; 12 So. 612; Finnell v. Delaware &c. R. Co. 129 N. Y. 669; 29 N. E. 825. See, also, Alabama &c. R. Co. v. Roach, 110 Ala. 266; 20 So. 132; Johnson v. Chesapeake &c. R. Co. 38 W. Va.

emergency, and an act in attempting to save life or the employer's property, may be such that the employe may be held free from contributory negligence under the circumstances, although such act might, under other circumstances, defeat him on the ground of contributory negligence.[157] It is the duty of all employes to exercise ordinary care to avoid injury,[158] to take reasonable precautions[159] against known dan-

206; 18 S. E. 573; Sheets v. Chicago &c. R. Co. 139 Ind. 682; 35 N. E. 154; Martensen v. Chicago &c. R. Co. 60 Ia. 705; 15 N. W. 569; Cowles v. Chicago &c. R. Co. 102 Ia. 507; 71 N. W. 580; Jean v. Boston &c. R. Co. 181 Mass. 197; 63 N. E. 399; State v. Western &c. R. Co. (Md.) 65 Atl. 435.

[157] See Whitworth v. Shreveport Belt R. Co. 112 La. Ann. 363; 36 So. 414; 65 L. R. A. 129; Corbin v. Philadelphia, 195 Pa. St. 461; 45 Atl. 1070; 49 L. R. A. 715; 78 Am. St. 825; Fisher v. Chesapeake &c. R. Co. 104 Va. 635; 52 S. E. 373; 2 L. R. A. (N. S.) 954; Pennsylvania Co. v. McCaffrey, 139 Ind. 430; 38 N. E. 67; 29 L. R. A. 104; Dailey v. Burlington &c. R. Co. 58 Neb. 396; 78 N. W. 722. But compare Rawlston v. East Tenn. &c. R. Co. 94 Ga. 536; 20 S. E. 183; Condiff v. Kansas City &c. R. Co. 45 Kans. 256; 25 Pac. 562; Morris v. Lake Shore &c. R. Co. 148 N. Y. 186; 42 N. E. 579; Chattanooga &c. Co. v. Hodges, 109 Tenn. 331; 70 N. W. 616; 60 L. R. A. 459; 97 Am. St. 844. Several of these, and other authorities on both sides, are reviewed in the note in 2 L. R. A. 954. And see, also, as to compliance with sudden command in emergency. Illinois Cent. R. Co. v. Atwell, 198 Ill. 200; 64 N. E. 1095; Allison v. Southern R. Co. 129 N. Car. 336; 40 S. E. 91; Greenleaf v. Iowa Cent. R. Co. 29 Ia. 14; 4 Am. R. 181.

[158] Pieart v. Chicago &c. R. Co. 82 Iowa, 148; 47 N. W. 1017; Louisville &c. R. Co. v. Crawford, 89 Ala. 240; 8 So. 243; 44 Am. & Eng. R. Cas. 568; St. Louis &c. R. Co. v. Mara (Ark.), 16 S. W. 196; Tomko v. Central &c. R. Co. 1 App. Div. (N. Y.) 289; 37 N. Y. S. 144; Southern &c. v. Pool, 160 U. S. 438; 16 Sup. Ct. 338; Dooner v. Delaware &c. R. Co. 171 Pa. St. 581; 33 Atl. 415; Chicago &c. R. Co. v. Davis, 53 Fed. 61; 53 Am. & Eng. R. Cas. 461; Hickey v. Boston &c. R. Co. 14 Allen (Mass.), 429; Lehigh &c. R. Co. v. Greiner, 113 Pa. St. 600; 6 Atl. 246; Erickson v. Monson &c. Co. 100 Me. 107; 60 Atl. 708. They must use their senses and not remain blind as to their surroundings and danger. Day v. Cleveland &c. R. Co. 137 Ind. 206; 36 N. E. 854; Prothero v. Citizens' St. R. Co. 134 Ind. 431; 33 N. E. 765; Williams v. Choctaw &c. R. Co. 149 Fed. 104, 106, and cases there cited.

[159] Haden v. Sioux City &c. R. Co. (Iowa), 48 N. W. 733; Houston &c. R. Co. v. Crawford (Tex. Civ. App.), 32 S. W. 155; St. Louis &c. R. Co. v. Bloyd, 60 Ark. 637; 31 S. W. 457; Stewart v. Ohio &c. R. Co. 40 W. Va. 188; 20 S. E. 922; Nelling v. Chicago &c. R. Co. 98 Ia. 554; 63 N. W. 568; Loring v. Kansas City &c. R. Co. 128 Mo. 349; 31 S. W. 6; Baker v. Chicago &c. R. Co. 95 Ia. 163; 63 N. W. 667; Illinois

gers, and not to expose themselves to extraordinary dangers.[160] It is held by some of the courts that where the employer assures the employe that there is no danger, and the employe acts upon such assurance, he is not guilty of contributory negligence,[161] but we suppose that this rule would not prevail if the employe had full knowledge of the danger, especially if it were such that an ordinarily prudent man would not encounter it. An employe may, within limits, act upon the assumption that the employer's duty to exercise ordinary care has been performed,[162] but the fact that the employe may act upon such assumption does not relieve him from the duty of exercising ordinary care to avoid injury.[163] The presumption that the duties of the employer to the employe have been performed does not authorize the employe to carelessly or heedlessly venture into danger, nor does it relieve him from the duty of taking knowledge of and

&c. R. Co. v. Winslow, 56 Ill. App. 462; Beuhring v. Chesapeake &c. R. Co. 37 W. Va. 502; 16 S. W. 435.

[160] York v. Kansas City &c. R. Co. 117 Mo. 405; 22 S. W. 1081; Georgia &c. R. Co. v. Hallman, 97 Ga. 317; 23 S. E. 73; Walker v. Redington &c. Co. 86 Me. 191; 29 Atl. 979; Rawlston v. East Tennessee &c. R. Co. 94 Ga. 536; 20 S. E. 123; Cooney v. Great Northern &c. R. Co. 9 Wash. 292; 37 Pac. 438; Andrews v. Birmingham &c. R. Co. 99 Ala. 436; 12 So. 432. See Northern Pac. R. Co. v. Egeland, 56 Fed. 200. Where an employe voluntarily makes use of an engine, unsafe unless proper precautions are used, he is guilty of contributory negligence unless he uses such precautions. Thompson v. Montana &c. R. Co. 17 Mont. 426; 43 Pac. 496. See Erskine v. Chino &c. Co. 71 Fed. 270.

[161] Warner v. Chicago &c. R. Co. 1 Mo. App. R. 490. See, also, Chicago Anderson &c. Co. v. Sobkowiak, 148 Ill. 573; 36 N. E. 572; McKee v. Tourtellotte, 167 Mass. 69; 44 N. E. 1071; St. Louis &c. R. Co. v. Mathis, 76 Ark. 184; 91 S. W. 763; 48 L. R. A. 542, and note. But compare Rohrbacher v. Woodward, 124 Mich. 125; 82 N. W. 797.

[162] Michigan &c. R. Co. v. Dolan, 32 Mich. 510; Bradbury v. Goodwin, 108 Ind. 286; 9 N. E. 302; Cook v. St. Paul &c. R. Co. 34 Minn. 45; 24 N. W. 311; Gibson v. Pacific Ry. Co. 46 Mo. 163; 2 Am. R. 497; Russell v. Minneapolis &c. R. 32 Minn. 230; 20 N. W. 147; Wallace v. Central &c. R. Co. 138 N. Y. 302; 59 Am. & Eng. R. Cas. 264. See Central &c. R. Co. v. Brantley, 93 Ga. 259; 20 S. E. 98; Abbitt v. Lake Erie &c. R. Co. 150 Ind. 498; 50 N. E. 720; Wilder v. Great Western R. Co. 130 Ia. 263; 104 N. W. 434; Gulf &c. R. Co. v. Boyce (Tex. Civ. App.), 87 S. W. 395; Hynson v. St. Louis &c. R. Co. (Tex. Civ. App.) 86 S. W. 928; note in 98 Am. St. 310.

[163] Long v. Coronado &c. R. Co. 96 Cal. 269; 31 Pac. 170. See Devine v. Savannah &c. R. Co. 89 Ga. 541; 15 S. E. 781.

guarding against dangers plainly and fully open to observation.[164] The duties of employer and employe as to discovering defects and dangers are not the same, for the duty of the employer is greater than that of the employe, and what would be negligence on the part of the employer is not always or necessarily negligence on the part of the employe. In the majority of cases the question of contributory negligence is one of fact for the jury, but, as is evident from the great number of cases with which the books abound, it is very frequently a question of law for the court. There is much conflict of opinion as to when the question is one of law for the court and when it is one of fact for the jury. We shall not enter this field of conflict, for an adequate consideration of the subject would require far more space than we can yield it.[165]

§ 1315. Contributory negligence—Violation of statutory duty.—There are many modern statutes requiring the performance of specified acts and denouncing a penalty against persons who fail or refuse to perform the designated acts. In some of the books it is sug-

[164] Rogers v. Leyden, 127 Ind. 50, 58; 26 N. E. 210; Wormell v. Maine &c. R. Co. 79 Me. 397; 10 Atl. 49; 1 Am. St. 321; Skipp v. Eastern Counties &c. R. Co. 9 Exch. 223. See, also, Southern R. Co. v. Simmons (Va.), 55 S. E. 459.

[165] For recent cases holding railroad employes guilty of contributory negligence, see Wagnon v. Houston &c. R. Co. (Tex. Civ. App.) 89 S. W. 1112; Brown v. Northern Pac. R. Co. (Wash.) 86 Pac. 1053; Goff v. Chippewa &c. R. Co. 86 Wis. 237; 56 N. W. 465; State Trust Co. v. Kansas City &c. R. Co. 111 Fed. 769; Stewart v. Ohio River R. Co. 40 W. Va. 188; 20 S. E. 922; Devine v. Savannah &c. R. Co. 89 Ga. 541; 15 S. E. 781; Merritt v. Great Northern R. Co. 81 Minn. 496; 84 N. W. 321; Guthrie v. Great Northern R. Co. 76 Minn. 277; 79 N. W. 107; Warden v. Louisville &c. R. Co. 94 Ala. 277; 10 So. 276; 14 L. R. A. 552, and note; Richmond &c. R. Co. v. Thomason, 99 Ala. 471; 12 So. 273. For recent cases holding them not guilty of contributory negligence as matter of law, see Dunphy v. St. Joseph &c. Co., 118 Mo. App. 506; 95 S. W. 301; Choctaw &c. R. Co. v. Jones, 77 Ark. 367; 92 S. W. 244; Phippin v. Missouri Pac. R. Co. 196 Mo. 321; 93 S. W. 410; St. Louis &c. R. Co. v. Jackson (Ark.), 93 S. W. 746; Doyle v. Great Northern R. Co. (Wash.) 86 Pac. 861; Philadelphia &c. R. Co. v. Huber, 128 Pa. St. 63; 18 Atl. 334; 5 L. R. A. 439; Brookhaven Lumber Co. v. Illinois &c. R. Co. 68 Miss. 432; 10 So. 66; Baltimore &c. R. Co. v. Elliott, 9 App. (D. C.) 341; Central R. &c. Co. v. Dickson, 82 Ga. 629; 10 S. E. 203; Paine v. Eastern R. Co. 91 Wis. 340; 64 N. W. 1005; St Louis &c. R. Co. v. Miles, 79 Fed. 257.

gested that the doctrine of contributory negligence does not apply where the injury is caused by a violation of a statute. The overwhelming weight of authority is, however, that the doctrine does apply, unless the statute explicitly abrogates the rule of the common law.[166] Principle and authority, as we believe, require the conclusion that, although the violation of a statute may give a right of action to one who is injured thereby, it does not, unless expressly or by necessary implication, so declared, give a right of action to one who is himself guilty of contributory negligence.[167]

§ 1315a. Contributory negligence of engineer and fireman.— Locomotive engineers and firemen, like other employes, are held

[166] The general doctrine stated in the text is not confined to cases between employe and employer as the cases cited in the note to this section show, but applies to almost all classes of cases where the issue is negligence.

[167] Krause v. Morgan, 52 Ohio St. 662; 44 N. E. 1140; Spivay v. Osage &c. Mining Co. 88 Mo. 68; Linton &c. Co. v. Persons, 11 Ind. App. 264; 39 N. E. 214; Whitcomb v. Standard Oil Co. 153 Ind. 513; 55 N. E. 440; Reynolds v. Hindman, 32 Iowa, 146; Wabash &c. R. Co. v. Cooper, 10 Ill. App. 271; Taylor v. Carew Manf. Co. 143 Mass. 470; 10 N. E. 308; Durant v. Lexington &c. Mining Co. 97 Mo. 62; Grand v. Michigan &c. R. Co. 83 Mich. 564; 47 N. W. 837; 11 L. R. A. 402; Holum v. Chicago &c. R. Co. 80 Wis. 299; 50 N. W. 99; Victor Coal Co. v. Muir, 20 Col. 320; 38 Pac. 378; 26 L. R. A. 435; 46 Am. St. 299; Mullhern v. Lehigh Coal Co. 161 Pa. St. 270; 28 Atl. 1087; Thompson v. Edward P. Allis Co. 89 Wis. 523; 2 N. W. 527; Helmke v. Thilmany, 107 Wis. 216, 225; 83 N. W. 360; Curry v. Chicago &c. R. Co. 43 Wis. 665; Cassady v. Boston &c. R. Co. 164 Mass. 168; 40 N. E. 129; Shea v. Boston &c. R. Co. 154 Mass. 31; 27 N. E. 672; Kilpatrick v. Grand Trunk R. Co. 72 Vt. 263; 47 Atl. 827; 82 Am. St. 939; Queen v. Dayton &c. R. Co. 95 Tenn. 458; 32 S. W. 460; 30 L. R. A. 82; 49 Am. St. 935; Holum v. Chicago &c. R. Co. 80 Wis. 299; 50 N. W. 99; Johnson v. Chicago &c. R. Co. 29 Minn. 425; 13 N. W. 673; Swanson v. Osgood &c. Co. 91 Minn. 509; 98 N. W. 645. See, also, Denver &c. R. Co. v. Norgate, 141 Fed. 247, 259 (citing text and reviewing many authorities and announcing the same doctrine as to assumption of risks). Contra, Bartlett &c. Mining Co. v. Roach, 68 Ill. 174; Litchfield &c. Coal Co. v. Taylor, 81 Ill. 590. See, generally, Carle v. Bangor &c. R. Co. 43 Me. 269; Sullivan v. Mississippi &c. R. Co. 11 Iowa, 421. But it may prevent the doctrine of assumption of risks from applying. Chicago &c. R. Co. v. Lawrence (Ind.), 79 N. E. 363 (authorized ordinance); Chicago &c. R. Co. v. Voelker, 129 Fed. 522; 70 L. R. A. 264; Pittsburgh &c. R. Co. v. Leightheiser (Ind.), 78 N. E. 1033.

only to the exercise of ordinary care and prudence, under the circumstances, for their safety.[168] An engineer can not recover for injuries from an obstruction on the track which he could have seen if he had kept a vigilant and proper outlook.[169] On the question whether such vigilance was exercised the jury may take into consideration the other duties the engineer was required to perform at the time and which interfered with his keeping a lookout.[170] These employes have a right to assume that the track is in good condition unless they have actual knowledge to the contrary,[171] and that the locomotive and tender furnished are reasonably safe, and they are not required to subject them to a close and critical examination to find defects.[172] The railroad company carries the burden of proof that the engineer or fireman knew of the existence of the defects.[173] The engineer may be adjudged guilty of contributory negligence where he surrenders control of his engine to a fireman, not shown to be competent to run it.[174] It can not be said as a matter of law that the engineer is guilty of negligence amounting to a want of ordinary care in following the direction of the conductor in charge of his train,[175] unless, as held in one case, the rules of the company make the conductor and engineer equally accountable where orders conflict with the rules or involve risk or hazard.[176] Since the fireman has no authority over the engineer or conductor he is not imputable with negligence in failing to object to the disobedience of orders by the engineer and conductor, and it seems that the principle is not affected by the fact that the rules of the company require the engineer to show his orders to the fireman, if they do not allow the fireman to disobey the orders of these superiors.[177] It

[168] Gulf &c. R. Co. v. Boyce (Tex. Civ. App.), 87 S. W. 395; Hall v. Chicago &c. R. Co. 46 Minn. 439; 49 N. W. 239.

[169] Williams v. Norfolk &c. R. Co. 89 Va. 165; 15 S. E. 522.

[170] Central R. &c. Co. v. Kent, 87 Ga. 402; 13 S. E. 502.

[171] Southern R. Co. v. Sittasen (Ind. App.), 74 N. E. 898; Southern Kansas R. Co. v. Sage, 98 Tex. 438; 80 S. W. 1038, reversed in 98 Tex. 438; 84 S. W. 814, but on other grounds.

[172] Texas &c. R. Co. v. Hartnett, 33 Tex. Civ. App. 103; 75 S. W. 809.

[173] Jackson Lumber Co. v. Cunningham, 141 Ala. 206; 37 So. 445.

[174] Louisville &c. R. Co. v. Scanlon, 22 Ky. L. 1400; 60 S. W. 643.

[175] Sprague v. New York &c. R. Co. 68 Conn. 345; 36 Atl. 791.

[176] York v. Chicago &c. R. Co. 98 Ia. 544; 67 N. W. 574.

[177] Haas v. Chicago &c. R. Co. 90 Ia. 259; 57 N. W. 894.

has been held that a fireman was not to be imputed with contributory negligence, as a matter of law, in going under his engine to clean out the ash-pan without putting out warning signals.[178] An engineer or fireman can not hold a railroad company liable for his injuries caused by sleeping at his post, when worn out by working an excessive number of hours without sleep where he was not required by the company to run overtime, but did so because of the extra pay.[179] It is not generally considered an act of contributory negligence, as a matter of law, for an engineer to remain on his locomotive after reversing his engine, though he could have escaped without injury by jumping before the collision occurred.[180]

§ 1315b. Contributory negligence of conductor.—It may be said that a conductor fully acquainted with the operation of his train, and the dangers of a particular method of operation, and the means of avoiding dangers therefrom, will be charged with contributory negligence where he fails to adopt such means.[181] It is the duty of the conductor to see that rules and orders for the government of other employes under his control are obeyed.[182] He can not recover for injuries received as the result of the disobedience of orders, though given by a superior, when he knows that such superior has no special information authorizing him to sanction the violation of the order.[183] He is plainly guilty of contributory negligence defeating a recovery for injuries the result of disregarding signals and acting on information given him by other persons.[184] He will not be charged with contributory negligence as a matter of law in failing to make an inspection of the cars composing his train, where the railroad company has provided an inspector to perform this duty and such in-

[178] Chicago &c. R. Co. Stephenson, 33 Ind. App. 95; 69 N. E. 270.

[179] Smith v. Atchison &c. R. Co. (Tex. Civ. App.) 87 S. W. 1052; Nattress v. Philadelphia &c. R. Co. 150 Pa. St. 527.

[180] Cottrill v. Chicago &c. R. Co. 47 Wis. 634; Pennsylvania Co. v. Roney, 89 Ind. 453; 46 Am. R. 173; Smith v. Wrightsville &c. R. Co. 83 Ga. 671; 10 S. E. 361.

[181] Moules v. Delaware &c. R. Co. 141 Pa. St. 632; 21 Atl. 733.

[182] Frounfelker v. Delaware &c. R. Co. 48 App. Div. (N. Y.) 206; 62 N. Y. S. 840; Missouri &c. R. Co. v. Pawkett, 28 Tex. Civ. App. 583; 68 S. W. 323.

[183] Wescott v. New York &c. R. Co. 153 Mass. 460; 27 N. E. 10.

[184] Hannibal &c. R. Co. v. Kanaley, 39 Kan. 1; 17 Pac. 324.

spector actually inspected the train before it was turned over to the conductor.[185]

§ 1315c. Contributory negligence of section men and track laborers.—Section men are required to exercise, for their own safety, that degree of care which ordinarily prudent men would exercise under like circumstances.[186] The nature of their work renders it impossible for them to keep a constant lookout for approaching trains.[187] This degree of vigilance is not required, and it is held that such laborers have a right to become engrossed in their labor to such an extent that they may be oblivious of the approach of trains.[188] The law charges the railroad company with the duty of active vigilance towards such persons, and they have a right to rely to some extent upon the warnings from their foremen and the engineers of approaching trains.[189] But it is their duty when not engaged in work demanding their close attention, to look and listen for appoaching trains,[190] and where nothing obstructs the view of a track laborer, for a long distance, and the bell of the approaching engine is ringing, his failure to look out for trains on a track, known by him to be in constant use, has been held to amount to such negligence as to prevent a recovery.[191] Furthermore, he may be charged with negligence where he voluntarily disables himself from hearing by bundling up his head and making no use of his sight.[192] It is likewise his duty to withdraw to a reasonable distance from the track, when a train is passing, so as to avoid injuries from coal or other articles likely to fall from the cars.[193]

[185] Barksdale v. Charleston R. Co. 66 S. C. 204; 44 S. E. 743.

[186] Britton v. Northern Pac. R. Co. 47 Minn. 340; 50 N. W. 231; Harrison v. Texas &c. R. Co. (Tex. Civ. App.) 31 S. W. 242.

[187] Noonan v. New York &c. R. Co. 16 N. Y. S. 678; 62 Hun (N. Y.), 1618; Baltimore &c. R. Co. v. Peterson, 156 Ind. 364; 59 N. E. 1044.

[188] Chicago &c. R. Co. v. Goebel, 20 Ill. App. 163, affirmed in 119 Ill. 515; 10 N. E. 369.

[189] Comstock v. Union Pac. R. Co. 56 Kan. 228; 42 Pac. 724; Kelly v. Union R. Co. 18 Mo. App. 151, affirmed in 95 Mo. 279; 8 S. W. 420.

[190] Pittsburgh &c. R. Co. v. Seivers, 162 Ind. 234; 67 N. E. 680; 70 N. E. 133.

[191] Columbus &c. R. Co. v. Burns, 9 Ohio C. C. 276.

[192] McCarty v. Baltimore &c. R. Co. 20 Ohio C. C. 536; 11 Ohio C. D. 229.

[193] Gulf &c. R. Co. v. Wood (Tex.), 63 S. W. 164; Illinois &c. R. Co. v. Stassen, 56 Ill. App. 221. See, also, Card v. Eddy, 129 Mo. 510;

§ 1315d. Contributory negligence in mounting or alighting from moving cars.—The courts do not impute contributory negligence, as a matter of law, to the act of a trainman in mounting or alighting from moving cars, though they recognize the danger involved in the act.[194] What the law requires of the trainman is the exercise of a degree of care commensurate with the danger. Contributory negligence has been imputed to an employe who attempted to board a moving train by the side ladder when he had an opportunity to board it by an end ladder while standing, and as a result of his want of care he suffered injuries by coming in contact with a car on another track;[195] to a brakeman who seized a grip-iron on the end of a flat-car, designed for use in making couplings, and attempted to step on a swinging brake-beam in order to ride to another car, and was killed by the grip-iron giving away and it was shown that there was a hand-hold on the side of the box-car next to the flat-car which he could have used without risk;[196] to a trainman who attempted, at night, to board a car, running at a speed of eight miles an hour, while he was encumbered with a lantern.[197] But contributory negligence will not generally be charged to an employe injured, while mounting cars, by reason of some latent defect in the appliances.[198] A brakeman is certainly wanting in reasonable care for his safety where he unnecessarily jumps from a moving train at a time when he cannot see where he will alight and he has knowledge of the existence of obstructions rendering his act dangerous.[159] So a brakeman will be held guilty of negligence where he steps from a moving car without noticing the direction in which it is moving and is injured in consequence of his carelessness.[200] Generally where the act of alighting is dangerous for any reason to the knowledge of an employe doing so, his negligence will defeat a recovery for injuries received by him notwithstanding he acted in obedience to the command of a superior.[1]

28 S. W. 979; Foster v. Missouri Pac. R. Co. 115 Mo. 165; 21 S. W. 916; Chicago &c. R. Co. v. Cullen, 187 Ill. 523; 58 N. E. 455.

[194] Kansas City &c. R. Co. v. Billingslea, 116 Fed. 335.

[195] McDugan v. New York &c. R. Co. 155 N. Y. 631, affirming 31 N. Y. S. 135; 10 Misc. 336.

[196] Dawson v. Chicago &c. R. Co. 114 Fed. 870.

[197] Lawson v. Truesdale, 60 Minn. 410; 62 N. W. 546.

[198] Thompson v. Boston &c. R. Co. 153 Mass. 391; 26 N. E. 1070.

[199] Magee v. Chicago &c. R. Co. 89 Ia. 752; 56 N. W. 681.

[200] Kilpatrick v. Grand Trunk R. Co. 72 Vt. 263; 47 Atl. 827.

[1] McArthur Bros. Co. v. Troutt, 88 Ill. App. 638. But see Northern Pacific R. Co. v. Egeland, 56 Fed. 200.

§ 1315e. Contributory negligence in walking upon tracks.— Railroad men above other men know that a railroad track is a highly dangerous place for foot passengers, and it is their duty while so using the track to maintain a careful lookout for moving trains and particularly for trains that they know are scheduled to approach at these times.[2] They have no right to depend wholly on signals from approaching trains[3] or on persons in charge of such trains[4] to prevent accident. This duty of vigilance is particularly strong on switch-yard employes who know that switching is in actual progress at the time they are using the tracks.[5] But there is authority that yardmen have a right to rely on the custom of the railroad company as to the movement of its trains and engines in the yard,[6] and that the operatives of such trains will observe speed laws and ordinances.[7]

§ 1315f. Contributory negligence in making "flying switches".— It has been held that a brakeman injured while assisting in the making of a "flying switch" was not to be charged with contributory negligence in participating in this dangerous act where the necessities of the case demanded that the switch should be made that way,[8] though he violated the rules of the company in doing so.[9] But the railroad company was absolved from liability for the death of a section

[2] Pennsylvania Co. v. O'Shaugnessy, 122 Ind. 588; 23 N. E. 675; Bennett v. St. Louis &c. R. Co. 36 Tex. Civ. App. 459; 82 S. W. 333; Lewis v. Vicksburg &c. R. Co. 114 La. 161; 38 So. 92; O'Neil v. Pittsburgh &c. R. Co. 130 Fed. 204; Black v. Missouri Pacific R. Co. 172 Mo. 177; 72 S. W. 559.

[3] Sours v. Great Northern R. Co. 84 Minn. 230; 87 N. W. 766.

[4] Keefe v. Chicago &c. R. Co. 92 Ia. 182; 60 N. W. 503; Clark v. New York &c. R. Co. 80 Hun (N. Y.), 320; 30 N. Y. S. 126; Missouri &c. R. Co. v. Faber, 7 Kan. App. 481; 54 Pac. 136; Collins v. Burlington &c. R. Co. 83 Ia. 346; 49 N. W. 848.

[5] Wilber v. Wisconsin &c. R. Co. 86 Wis. 535; 57 N. W. 356.

[6] Graham v. Minneapolis &c. R. Co. 95 Minn. 49; 103 N. W. 714.

[7] Camp v. Chicago Great Western R. Co. 124 Ia. 238; 99 N. W. 735.

[8] Dooner v. Delaware &c. Canal Co. 164 Pa. St. 17; 30 Atl. 269; St. Louis &c. R. Co. v. French, 56 Kan. 584; 44 Pac. 12.

[9] Union Pacific R. Co. v. Springsteen, 41 Kan. 724; 21 Pac. 774; Louisville &c. R. Co. v. Tucker, 105 Ky. 492; 20 Ky. L. 1303; 49 S. W. 314. But see, Williams v. Illinois Central R. Co. 114 La. 13; 37 So. 992, where contributory negligence was imputed to one injured by his own carelessness in making a "flying switch" which was forbidden by the rules of the company when avoidable.

hand on the ground of contributory negligence where it was shown that he stood on the track with his back toward the engine, when he knew that a car was about to be sent along the track on which he was standing, by this method.[10] In another case it was held that a night watchman was not chargeable with contributory negligence in failing to anticipate the throwing of cars onto a repair track by means of a flying switch where there was no light on the cars and no notice was given of their approach, and the switch was made by an engine which was pushing as well as drawing cars.[11] Yard employes acquainted with a custom in the yard to "kick" cars backward without a brakeman or lookout, are generally charged with negligence in failing to keep a lookout for cars switched in this way.[12] It has been held that a general order from a conductor to a flagman to catch a car about to be kicked, did not justify the flagman in doing so when the car was moving at an obviously dangerous rate of speed, and this especially where the conductor at the time of giving the order did not know that the speed would be unusual, and he was not present when the flagman attempted to obey the order.[13]

§ 1315g. Injuries to street railway employes.—The general principles of the law of master and servant adapt themselves to the operation of street railways. These principles call for no restatement at this time and we shall content ourselves by collecting some recent holdings which apply and illustrate these principles. It is held, for example, that it is the duty of a street railway company to sand its tracks on steep grades and that it is guilty of negligence where it fails to do so;[14] that it is negligence to equip a car with a brake so defective that the speed of the car cannot be controlled at places where the grade is heavy;[15] that knowledge of a defective brake is presumed where the condition has existed for a considerable length of time—in this instance more than a month;[16] that it is negligence to place a pole so near the track that it endangers the safety of a conductor

[10] Union Pacific R. Co. v. Clark, 51 Neb. 220; 70 N. W. 923.

[11] Galveston &c. R. Co. v. Hynes, 21 Tex. Civ. App. 34; 50 S. W. 624.

[12] Schaible v. Lake Shore &c. R. Co. 97 Mich. 318; 56 N. W. 565; 21 L. R. A. 660.

[13] Whatley v. Macon &c. R. Co. 104 Ga. 764; 30 S. E. 1003.

[14] Union Trac. Co. v. Buckland, 34 Ind. App. 420; 72 N. E. 158.

[15] Terre Haute Elec Co. v. Kiely, 35 Ind. App. 180; 72 N. E. 658.

[16] Houts v. St. Louis Transit Co. 108 Mo. App. 686; 84 S. W. 161.

passing along the running board to collect fares;[17] that it is negligence to construct double tracks so close together that when cars pass, the conductor, standing on the running board of a car in the performance of his duties, will be struck by a car coming from the opposite direction on the adjoining track;[18] that a street railway company is chargeable with negligence where it furnishes its employes a car that starts with a lunge when the current is turned on so that the employes have to brace themselves to avoid being hurt when it starts.[19] But a street railway company rests under no duty to a conductor to equip a trailer with a fender or life guard to guard against injuries to him from being thrown under the car in case he should fall between the cars in passing from one car to another—an application of the rule that the master is only bound to see that the machinery which he employs is reasonably safe and suitable, and while the want of a fender may have enhanced the risk, it did not constitute a defect in the construction of the car rendering it unsafe or unsuitable for the purpose in which it was employed.[20] Neither is a street railway company required to keep a light burning at a curve in the track to warn motormen to reduce the speed of their cars before turning the curve. "It is a matter of common knowledge," says the court, "that headlights are the means provided to enable motormen and engineers to detect curves and other obstacles on railway tracks."[21]

§ 1315h. Contributory negligence of street railway employes.—A motorman is bound to keep a lookout for other street cars at crossings and he will be charged with contributory negligence where he fails to do so and as a result thereof he is injured by a collision of his car with another on the crossing.[22] He is likewise required to take the same precaution at railroad crossings, though the conductor has gone ahead, and he will be charged with contributory negligence where a collision with a railroad train could have been avoided had he looked, and this more particularly where there is no rule of the street railway

[17] Withee v. Somerset Traction Co. 98 Me. 61; 56 Atl. 204.

[18] True v. Niagara Gorge R. Co. 70 App. Div. 383; 75 N. Y. S. 216, affirmed in 175 N. Y. 487; 67 N. E. 1090.

[19] Murdock v. Oakland, 128 Cal. 22; 60 Pac. 469.

[20] Relyea v. Kansas City &c. R. Co. 112 Mo. 86; 20 S. W. 480; 18 L. R. A. 817.

[21] Godfrey v. St. Louis Transit Co. 107 Mo. App. 193; 81 S. W. 1230.

[22] Bobb v. Union Trac. Co. 206 Pa. St. 265; 55 Atl. 972.

company requiring a motorman to rely solely on the conductor's signal at railroad crossings.[23] So he will be charged with contributory negligence where he drives his car at such a rate that he cannot stop in time to prevent collision with a vehicle in plain view and going in the same direction.[24] In running his car backward to meet another car, it is his duty to run slowly and watch constantly, and a failure to do so may amount to negligence defeating a recovery for injuries received by him in a collision with the rear car.[25] A conductor may be charged with contributory negligence where he stands on the running board of an open car on the side next to the trolley posts without looking to see whether this can be done with safety.[26] In a recent case where a motorman was injured by the negligent act of his foreman in moving the car while he was away from it, it was held a question for the jury whether the motorman was guilty of contributory negligence in not carrying his controller handle with him, which he had removed from the socket, as required by the rules of the company, instead of leaving it lying on the controller to be picked up and used by any person coming aboard.[27]

§ 1315i. Safety appliances—Act of Congress.—Since the preceding portion of this chapter was written, several additional cases have been decided involving the Act of Congress in regard to safety appliances.[28] The scope of the original act has also been somewhat en-

[23] McLeod v. Chicago &c. R. Co. 125 Ia. 270; 101 N. W. 77.

[24] La Pontney v. Shedden Cartage Co. 116 Mich. 514; 74 N. W. 712. See, also, Savage v. Nassau Elec. R. Co. 42 App. Div. (N. Y.), 241; 59 N. Y. S. 225; Rittenhouse v. Wilmington St. R. Co. 120 N. Car. 544; 26 S. E. 922. (Car running at excessive speed over bridge in violation of rules of company.)

[25] Hudson v. Peoples St. R. Co. 175 Mass. 23; 55 N. E. 464.

[26] Ladd v. Brockton St. R. Co. 180 Mass. 454; 62 N. E. 730. See, also, Sundy v. Savannah St. R. Co. 96 Ga. 819; 23 S. E. 841; but see True v. Niagara Gorge R. Co. 70 App. Div. (N. Y.) 383; 75 N. Y. S. 216, where it is held that a conductor engrossed in the duty of collecting fares on the running board and struck by another car at the only point in the line where the tracks were too close to allow one with safety to so stand, was not guilty of contributory negligence as a matter of law, it appearing that he was not warned of the danger at this point or the approach of the other car.

[27] Bein v. St. Louis Transit Co. 108 Mo. App. 399; 83 S. W. 986.

[28] The substance of the act in question is stated in § 1296b, ante, where the earlier decisions are cited.

larged, or at least some points in regard to which there was doubt, have been made plain by amendment.[29] In a recent case it is said that the undoubted purpose of Congress in enacting such laws was humanitarian; that two of the objects of the amendment of March 2, 1903, were to include certain vehicles omitted by the former statute, and to include cars used by an interstate carrier on any part of its line, and that the original statute was broadened and not restricted by substitution of the word "use" for the words "haul and use."[30] It is also held in the same case that a carrier operating its own construction train, and hauling its own rails and products from a point in one state to a point in another, is engaged in interstate commerce; that if it receives and hauls a defectively equipped foreign car which it can not be required to haul it violates the safety appliance act; that if it hauls cars badly damaged by derailment, so that the coupling devices are gone, for several hundred miles past several places where repairing is done, and at which it could have made repairs, in order to make repairs at larger and better equipped shops, it violates such act; and that where a coupler couples by impact but can not be uncoupled except by a brakeman or switchman going between the cars, such coupling is defective within the meaning of the law. Much the same view was taken in a still more recent case[31] in which it is said that the "purposes of the act fall within the rule applicable to statutes to prevent fraud upon the revenue and for the collection of customs, where the intent does not inhere in their violation." The court also said: "The argument is that the car was properly equipped, but was temporarily out of repair, and the case will be first considered from that standpoint. The object of the act, as expressed in the title, is 'to promote the safety of employes and travelers,' and, in so far as it applies to employes engaged as brakemen on trains, it was intended

[29] See amendments of April 1, 1896, and of March 2, 1903, 32 Statutes at Large, 943. And see as to authority of commission to employ safety-appliance inspectors, and make investigations, 32 Statutes at Large, 444, and Act of June 30, 1906.

[30] United States v. Chicago &c. R. Co. 149 Fed. 486. In Schlemmer v. Buffalo &c. R. Co. (U. S.) 27 Sup. Ct. 407, 408, it is said that the later act "indicates the intent of the original act," and that under the original act the words "used in moving interstate traffic" should not be taken in a narrow sense.

[31] United States v. Great Northern R. Co. 150 Fed. 229. See, also, United States v. Southern R. Co. 135 Fed. 122.

to protect them from the danger of entering between cars in order to couple them up. If a common carrier can excuse itself because a particular equipment is out of repair, without even explaining why, then it could equip all of its cars, leaving the equipment disconnected, which would require brakemen to enter between them for the purpose of coupling the same, thereby defeating the purposes of the law altogether. Employes can only be protected from danger by the safety appliances being kept in repair." In still another case, decided under the original act, however, it is held that a railroad company which hauls over its own line within a state a car of another company employed in moving interstate traffic consigned to a point in another state, which car is not equipped with the appliances required by the act in question, is liable for the penalty imposed by such act; and that in an action against two or more companies to recover such penalty there may be a recovery against all or any of the defendants according as the proof may warrant.[32] But it has also been held that the mere fact that a railroad company's inspectors on first inspecting a car before delivering it to a connecting carrier failed to discover that the chain attached to the lever by which the automatic coupler was operated was broken, where this was discovered and repaired on a subsequent inspection before delivery to the connecting carrier, did not constitute a violation of such act.[33] These cases were all actions to recover penalties under the safety appliance acts, and not actions by employes, but some of them at least are important in this connection as showing or tending to show the construction given to such acts in regard to some of the matters or questions that may be involved or arise in actions for injuries to employes. A very recent decision of the Supreme Court of the United States, however, directly involved the construction and effect of the original safety appliance act as between the company and an employe, and it was held that a shovel car was within the meaning of the act requiring an automatic coupler; that the burden was upon the company to bring itself within the exception in favor of four wheeled cars made by the proviso in section six of such act; and that the provision that an employe shall not be deemed to have assumed the risk caused by the failure to have such a coupler, prevented a court from holding, as a matter of law, that an employe could not recover because of contributory negligence when the matter

[32] United States v. Chicago &c. R. Co. 143 Fed. 353.

[33] United States v. Atchison &c. R. Co. 150 Fed. 442.

constituting such alleged contributory negligence was really a part of the risk which the employe could not be deemed to assume under the statute.[34]

[34] Schlemmer v. Buffalo &c. R. Co. (U. S.) 27 Sup. Ct. 407, reversing 207 Pa. St. 198; 56 Atl. 417. Four members of the court, however, dissented as to the last proposition or its application.

CHAPTER LIV.

FELLOW SERVANTS.

§ 1316. Survey of the fellow-servant rule—General doctrine.—The English courts for many years gave almost unlimited effect to the doctrine of respondeat superior and held the common master liable to a servant for the negligence of a fellow servant. The decision in one case wrought a radical and far-sweeping change.[1] As often happens, the courts, in swinging from one extreme, swung to the other. The English case to which we have referred carried the doctrine beyond the limits of right reason, but it was for a time very generally followed in all its scope, both in England and America,[2]

[1] Priestley v. Fowler, 3 Mees. & W. 1.

[2] Hutchinson v. York &c. R. Co. 5 Exch. 343; 19 L. J. R. Exch. 296; Murray v. South Carolina R. Co. 1 McMullen (S. Car.), 385; 36 Am. Dec. 268, and note; Farwell v. Boston &c. R. Co. 4 Metc. (Mass.) 49; 38 Am. Dec. 339, and note; McEniry v. Waterford &c. R. Co. 8 Ir.

and its doctrine yet prevails, not, however, in its full force and extent, for it has been greatly limited and modified by the modern decisions. It is still the rule of the common law that if the employer exercises ordinary care to select competent servants he is not liable to a servant for injuries caused by the negligence of a fellow servant.[3] The Supreme Court of the United States for a time[4] departed to some extent from the fellow-servant rule, but the later cases have

C. L. R. 312; Bartonshill &c. Co. v. Reid, 3 Macq. 266; King v. Ohio &c. R. Co. 14 Fed. 277; Carle v. Bangor &c. R. Co. 43 Me. 269; Russell v. Hudson River &c. R. Co. 17 N. Y. 134; Kenney v. Central R. Co. 61 Ga. 590; Robinson v. Houston &c. R. Co. 46 Tex. 540; Crispin v. Babbitt, 81 N. Y. 516; 37 Am. R. 521; Adams v. Iron Cliffs Co. 78 Mich. 271; 44 N. W. 270; 18 Am. St. 441, and note; Hard v. Vermont &c. Ry. Co. 32 Vt. 473; Yates v. McCullough &c. R. Co. 69 Md. 370; 16 Atl. 280; Memphis &c. R. Co. v. Thomas, 51 Miss. 637; Schultz v. Chicago &c. R. Co. 67 Wis. 616; 31 N. W. 321; 58 Am. R. 881; Columbus &c. R. Co. v. Arnold, 31 Ind. 174; 99 Am. Dec. 615, and note.

[3] Keystone Bridge Co. v. Newberry, 69 Pa. St. 246; 42 Am. R. 543; Nashville &c. R. Co. v. Wheless, 10 Lea (Tenn.), 741; 43 Am. R. 317; Indianapolis &c. R. Co. v. Johnson, 102 Ind. 352; 26 N. E. 200; Gibson v. Pacific &c. R. Co. 46 Mo. 163; 2 Am. R. 497; Brown v. Winona &c. R. Co. 27 Minn. 162; 6 N. W. 484; 38 Am. R. 285; Joslin v. Grand Rapids &c. R. Co. 50 Mich. 516; 15 N. W. 887; 45 Am. R. 54; McGee v. Boston &c. Co. 139 Mass. 445; 1 N. E. 745; Blake v. Maine &c. R. Co. 70 Me. 60; 35 Am. R. 297; Crusselle v. Pugh, 67 Ga. 430; 44 Am. R. 724; Johnson v. Boston &c. R. Co. 135 Mass. 209; 46 Am. R. 458; Louisville &c. R. Co. v. Cavens, 9 Bush. (Ky.) 559; Murphy v. Boston &c. R. Co. 88 N. Y. 146; 42 Am. R. 240; Peschel v. Chicago &c. R. Co. 62 Wis. 338; 21 N. W. 269; 17 Am. & Eng. R. Cas. 545; Hanrathy v. Northern &c. R. Co. 46 Md. 280; Riley v. West Va. &c. R. Co. 27 W. Va. 145; Davis v. Central &c. R. Co. 55 Vt. 84; 11 Am. & Eng. R. Cas. 173; Moon v. Richmond &c. R. Co. 78 Va. 745; 49 Am. R. 401, and note; 17 Am. & Eng. R. Cas. 531; Lawler v. Androscoggin &c. R. Co. 62 Me. 463; 16 Am. R. 492, and note; Hannibal &c. R. Co. v. Fox, 31 Kan. 587; 3 Pac. 320; 15 Am. & Eng. R. Cas. 325; Willis v. Oregon &c. R. Co. 11 Ore. 257; 4 Pac. 121; Brown v. Sennett, 68 Cal. 225; 9 Pac. 74; 58 Am. R. 8; Berea &c. Co. v. Kraft, 31 Ohio St. 287; 27 Am. R. 510; Hobson v. New Mexico &c. R. Co. (Ariz.) 11 Pac. 545; 28 Am. & Eng. R. Cas. 360; Burlington &c. R. Co. v. Crockett, 19 Neb. 138; 26 N. W. 921; Ewan v. Lippincott, 47 N. J. L. 192; 54 Am. R. 148, and note; Palmer v. Utah &c. R. Co. 2 Idaho, 290; 13 Pac. 425; 4 Thomp. Neg. § 4846. But statutes in many jurisdictions and a recent act of congress have changed the rule in many respects as will be shown in the next chapter.

[4] Chicago &c. R. Co. v. Ross, 112 U. S. 377; 5 Sup. Ct. 184.

practically asserted and enforced it.[5] The principal point of difference between the doctrine of non-liability for the negligence of fellow servants, as originally declared, and the rule now generally accepted, is that the latter rule recognizes the doctrine of superior agents and subordinate employes, which the original rule practically denied.[6] The great weight of modern authority is that an employe entrusted with duties resting upon the master may be a vice-principal and as such impose a liability upon the common master to an employe injured by his negligence. If the employes or servants are co-employes or fellow servants, engaged in the same general undertaking to accomplish the same general purpose, and not subordinates and superiors, then the fellow-servant rule is still the rule in the absence of legislative enactment.[7] There is, however, a wide diversity

[5] Baltimore &c. R. Co. v. Baugh, 149 U. S. 368; 13 Sup. Ct. 914; New England R. Co. v. Convoy, 175 U. S. 323; 20 Sup. Ct. 85; Northern Pac. R. Co. v. Peterson, 162 U. S. 346; 16 Sup. Ct. 843; Northern Pac. R. Co. v. Dixon, 194 U. S. 338; 24 Sup. Ct. 683.

[6] We do not mean simply a difference in rank, by the term "superior agent," but we mean to denote by the term "superior agent" one who is entrusted with the performance of the duties of the master. There are, however, well-reasoned cases which hold that a bare difference in rank breaks the force of the fellow-servant rule. Cleveland &c. R. Co. v. Keary, 3 Ohio St. 201; Kentucky Central &c. R. Co. v. Ackley, 87 Ky. 278; 8 S. W. 691; 12 Am. St. 480; Chicago &c. R. Co. v. May, 108 Ill. 288; Missouri &c. R. Co. v. Peregoy, 36 Kan. 424; 14 Pac. 7; Chicago &c. R. Co. v. Lundstrom, 16 Neb. 254; 20 N. W. 198; 49 Am. R. 718; Patton v. Western &c. R. Co. 96 N. Car. 455; 1 S. E. 8633; 31 Am. & Eng. R. Cas. 298; Louisville &c. R. Co. v. Bowler, 9 Heisk. (Tenn.) 866. See, also, East Tenn. &c. Co. v. Collins, 85 Tenn. 227; 1 S. W. 883; Consolidated Coal Co. v. Wombacher, 134 Ill. 57; 24 N. E. 627; Stephens v. Hannibal &c. R. Co. 86 Mo. 221; Sullivan v. Hannibal &c. R. Co. 107 Mo. 66; 17 S. W. 748; 28 Am. St. 388; Cook v. Hannibal &c. R. Co. 63 Mo. 397; Highland Ave. R. Co. v. Dusenberry, 98 Ala. 239; 13 So. 308; Slette v. Great Northern R. Co. 53 Minn. 341; 55 N. W. 137; Nix v. Texas &c. R. Co. 82 Tex. 473; 18 S. W. 571; 27 Am. St. 897; Louisville &c. R. Co. v. Lowe (Ky.), 66 S. W. 736; Volz v. Chesapeake &c. R. Co. 95 Ky. 188; 24 S. W. 119. But we think that the weight of authority at present is that the bare fact that one employe is superior in rank to another does not break the force of the fellow-servant rule, and that it is only where the employe is entrusted with some duty resting upon the master that the weight of authority justifies the conclusion that he is not a co-employe but a superior agent.

[7] Keenan v. New York &c. R. Co. 145 N. Y. 190; 39 N. E. 711; 45 Am.

of opinion as to who are fellow servants, but there is little, if any, substantial conflict as to the rule where the relation is that of fellow servants. The dispute falls upon the question who are and who are not to be regarded as fellow servants rather than upon the rule that governs where the relation of fellow servants exists. It is impossible to reconcile the conflict upon the question as to who are and who are not to be regarded as fellow servants, or to say what is the true test for determining who is or is not a vice-principal. It is, however, now pretty generally agreed that the rank of the employe does not determine the question, for, if an employe is charged with the performance of a duty that the law imposes on the master, as to that particular duty the employe is a vice-principal.[8] But in apply-

St. 604; New Pittsburg &c. Co. v. Peterson, 136 Ind. 398; 35 N. E. 7; 43 Am. St. 327; Heine v. Chicago &c. R. Co. 58 Wis. 525; 17 N. W. 420; Ell v. Northern Pac. R. Co. 1 N. Dak. 336; 48 N. W. 222; 26 Am. St. 621; 12 L. R. A. 91; Colorado &c. R. Co. v. Naylon, 17 Colo. 501; 30 Pac. 249; 31 Am. St. 335; Hankins v. New York &c. R. Co. 142 N. Y. 416; 37 N. E. 466; 25 L. R. A. 396; 40 Am. St. 616; Schroeder v. Flint &c. R. Co. 103 Mich. 213; 61 N. W. 663; 29 L. R. A. 321; 50 Am. St. 354; Dixon v. Chicago &c. R. Co. 109 Mo. 413; 19 S. W. 412; 18 L. R. A. 792; Baltimore &c. R. Co. v. Andrews, 50 Fed. 728; 17 L. R. A. 190; Anderson v. Bennett, 16 Ore. 515; 19 Pac. 765; 8 Am. St. 311; Darrigan v. New York &c. R. Co. 52 Conn. 285; 52 Am. R. 590; Chicago &c. R. Co. v. May, 108 Ill. 288; Flike v. Boston &c. R. Co. 53 N. Y. 549; 13 Am. R. 545; Borgman v. Omaha &c. R. Co. 41 Fed. 667; Alabama &c. R. Co. v. Waller, 48 Ala. 459; Allegheny &c. R. Co. v. Rohan, 118 Pa. St. 223; 11 Atl. 789; Stevens v. Chamberlin, 100 Fed. 378; 51 L. R. A. 513, and elaborate note; Louisville &c. R. Co. v. Dillard, 114 Tenn. 240; 86 S. W. 313; Northern Pac. R. Co. v. Dixon, 194 U. S. 338; 24 Sup. Ct. 683, 684; New England R. Co. v. Conroy, 175 U. S. 323; 20 Sup. Ct. 85. But the master can not escape liability by attempting to delegate a non-delegable or non-assignable duty.

[8] Ford v. Fitchburg &c. R. Co. 110 Mass. 240; 14 Am. R. 598; Atchison &c. R. Co. v. Moore, 29 Kan. 632; Indiana Car Co. v. Parker, 100 Ind. 181; Indiana &c. R. Co. v. Snyder, 140 Ind. 647; 39 N. E. 912; Mullan v. Philadelphia &c. R. Co. 78 Pa. St. 25; 21 Am. R. 2; McCosker v. Long Island R. Co. 84 N. Y. 77; Brothers v. Cartter, 52 Mo. 373; 14 Am. R. 424; Hough v. Texas &c. R. Co. 100 U. S. 213, 218; Hannibal &c. R. Co. v. Fox, 31 Kan. 587; 3 Pac. 320; 15 Am. & Eng. R. Cas. 325; Mason v. Richmond &c. R. Co. 111 N. Car. 482; 16 S. E. 698; 18 L. R. A. 845; 32 Am. St. 814; Norfolk &c. R. Co. v. Donnelly, 88 Va. 853; 14 S. E. 692; Wells v. Coe, 9 Colo. 159; 11 Pac. 50; Schultz v. Chicago &c. R. Co. 48 Wis. 375; 4 N. W. 399; An-

ing this doctrine there is a conflict of authority that leads to hopeless confusion. The confusion deepens as the adjudged cases are studied, for there are a variety of opinions as to what are or are not the master's duties in such a sense as to make the person to whom their performance is entrusted a superior agent; so there is upon the question of the necessity of consociation in service to create the relation of fellow servants, and so there is in relation to what is called the departmental theory. We cannot hope to do much towards clearing away the obscurity that clouds the subject, nor can we do more in view of the multitude of cases than refer to some of them which seem to us to best illustrate the important phases of the subject and bring into clear light its principal features.

§ 1317. Vice-principal—Superior agent.—The term "vice-principal" is generally used to denote an employe to whom the employer has entrusted the performance of a duty which the law requires the employer himself to perform. We think that an employe who is entrusted generally with the performance of the master's duties, or is entrusted with the performance of some of the master's duties, such as cannot be delegated so as to relieve the master from responsibility, although such employe may not be entrusted with all the duties of

derson v. Bennett, 16 Ore. 515; 19 Pac. 765; 8 Am. St. 311; Gunter v. Graniteville &c. R. Co. 18 S. Car. 262; 44 Am. R. 573; Calvo v. Railroad Co. 23 S. Car. 526; 55 Am. R. 28; 28 Am. & Eng. R. Cas. 327; Fones v. Phillips, 39 Ark. 17; 43 Am. R. 264, and note; Louisville &c. R. Co. v. Cavens, 9 Bush. (Ky.) 559; McBride v. Union Pac. R. Co. 3 Wyo. 247; 21 Pac. 687; Towns v. Vicksburg &c. R. Co. 37 La. Ann. 630; 55 Am. R. 508; Brodeur v. Valley Falls &c. R. Co. 16 R. I. 448; 17 Atl. 54; Foster v. Pusey, 8 Houst. (Del.) 168; 14 Atl. 545; Wilson v. Merry, L. R. 1 H. L. Sc. 326; Nashville &c. R. Co. v. Handman, 13 Lea (Tenn.), 423; Gann v. Nashville &c. R. Co. 101 Tenn. 380; 47 S. W. 493; 70 Am. St. 687; Smoot v. Mobile &c. R. Co. 67 Ala. 13; Sayward v. Carlson, 1 Wash. St. 29; 23 Pac. 830; Kansas City &c. R. Co. v. Becker, 67 Ark. 1; 53 S. W. 406; 77 Am. St. 78; 46 L. R. A. 814; Lafayette Bridge Co. v. Olsen, 108 Fed. 335; 54 L. R. A. 33, and elaborate note; Denver &c. R Co. v. Sipes, 26 Colo. 17; 55 Pac. 1093; D'Agostino v. Pennsylvania R. Co. 72 N. J. L. 358; 60 Atl. 1113; Merrill v. Oregon Short Line R. Co. 29 Utah, 264; 81 Pac. 85; Philadelphia &c. R. Co. v. Devers, 101 Md. 341; 61 Atl. 418; McLean v. Pere Marquette R. Co. 137 Mich. 482; 100 N. W. 748; Alabama Great So. R. Co. v. Vail, 142 Ala. 134; 38 So. 124; note in 51 L. R. A. 513, 588, et seq.; 4 Thomp. Neg. § 4924.

the employer, is as to such matters a superior agent or vice-principal, and that superiority in rank, on the one hand, does not necessarily make one a vice-principal, nor does the fact that employes are in a sense engaged in a common employment, on the other hand, necessarily prevent one of them from being a vice-principal.[9] We believe that where the duty which the law imposes upon the employer is entrusted to an employe the employe is a vice-principal as to that duty, although the matter to which it relates may not be in the strict sense a general one. But we venture to express our opinion with much hesitation, for the difference among authors and judges

[9] See, generally, Harley v. Louisville &c. R. Co. 57 Fed. 144; Baltimore and Ohio R. Co. v. Baugh, 149 U. S. 368; 13 Sup. Ct. 914; Findlay v. Russell &c. 108 Mich. 286; 66 N. W. 50; Wooden v. Western &c. R. Co. 147 N. Y. 508; 42 N. E. 199; Ross v. Walker, 139 Pa. St. 42; 21 Atl. 157; 23 Am. St. 160; Ell v. Northern &c. R. Co. 1 N. Dak. 336; 48 N. W. 222; 12 L. R. A. 97; 26 Am. St. 621; 43 Alb. L. J. 414; Kelley v. Cable Co. 7 Mont. 70; 14 Pac. 633; New Pittsburgh &c. R. Co. v. Peterson, 136 Ind. 398; 35 N. E. 7; 43 Am. St. 327; Hofnagle v. New York &c. R. Co. 55 N. Y. 688; Sullivan v. Railway Co. 62 Conn. 208; 25 Atl. 711; McCosker v. Long Island &c. R. Co. 84 N. Y. 77; Davis v. New York &c. R. Co. 159 Mass. 532; 34 N. E. 1070; Northern &c. R. Co. v. Peterson, 51 Fed. 182; Clowes v. The Frank &c. 45 Fed. 494; Coyne v. Union Pac. R. Co. 133 U. S. 370; 10 Sup. Ct. 382; Halversen v. Nisen, 3 Sawy. (U. S.) 562; Anderson v. Winston, 31 Fed. 528; Quinn v. Lighterage Co. 23 Fed. 363; Thom v. Pittard, 62 Fed. 232; Deavers v. Spencer, 70 Fed. 480; Central &c. R. Co. v. Keegan, 160 U. S. 259; 16 Sup. Ct. 269; Bedford &c. R. Co. v. Brown, 142 Ind. 659; 42 N. E. 359; Allen v. Goodwin 92 Tenn. 385; 21 S. W. 760; Coal Creek &c. M. Co. v. Davis, 90 Tenn. 711; 18 S. W. 387; Jones v. Old Dominion &c. Mills, 82 Va. 140; 3 Am. St. 92; Lindvall v. Woods, 41 Minn. 212; 42 N. W. 1020; 4 L. R. A. 793. See Calvo v. Charlotte &c. R. Co. 23 S. Car. 526; 55 Am. R. 28; Tierney v. Minneapolis &c. R. Co. 33 Minn. 311; 23 N. W. 229; 53 Am. R. 35; Davis v. Central &c. R. Co. 55 Vt. 84; 45 Am. R. 590; Moon v. Richmond &c. R. Co. 78 Va. 745; 49 Am. R. 401; Gilmore v. Northern &c. R. Co. 18 Fed. 866; 15 Am. & Eng. R. Cas. 304; Packet Co. v. McCue, 17 Wall. (U. S.) 508; Railway Co. v. Fort, 17 Wall. (U. S.) 553; Lalor v. Chicago &c. R. Co. 52 Ill. 401; 4 Am. R. 616; Brickner v. New York &c. R. Co. 2 Lans. (N. Y.) 506; 49 N. Y. 672; Mullen v. Steamship Co. 78 Pa. St. 25; 21 Am. R. 2; Atchison &c. R. Co. v. Moore, 31 Kan. 197; 15 Am. & Eng. R. Cas. 312; Anderson v. Bennett, 16 Ore. 515; 19 Pac. 765; 8 Am. St. 311; Johnson v. Union Pac. &c. Co. 28 Utah, 46; 76 Pac. 1089; 67 L. R. A. 506. The text is cited in Peirce v. Oliver, 18 Ind. App. 87; 47 N. E. 485, 489.

is so wide that one is not safe in assuming to express his judgment. We believe that the rule we have ventured to state is the true one, although the employe may be, in conjunction with other employes, engaged in "a common employment under a common employer," for all persons engaged in a general line of business under a common employer, from general manager or general superintendent to a laborer, are in a common employment under a common master, but it does not follow from that fact that the superintendent or manager may not be a vice-principal. The test of common employment recognized in many of the cases[10] is not a just one, nor is the test founded upon the bare fact that one employe is in some respects the superior of another.

§ 1318. Vice-principal—Superior agent—Illustrative cases.—An employe entrusted with the duty of instructing a young and inexperienced servant has been held to be a vice-principal upon the ground that the duty to instruct is that of the master.[11] The duty

[10] Howells v. Steel Co. L. R. 10 Q. B. 62; Wilson v. Merry, L. R. 1 H. L. Cas. App. 326; Conway v. Belfast R. Co. Ir. 9 C. L. 498; Waller v. South Eastern &c. R. Co. 2 H. & C. 102; Mobile &c. R. Co. v. Smith, 59 Ala. 245; Buckley v. Gould, 14 Fed. 833; Harrison v. Central &c. R. Co. 31 N. J. L. 293; Pollock Torts, 86, 88. See, also, Chicago &c. R. Co. v. Leach, 208 Ill. 198; 70 N. E. 222; 100 Am. St. 216. We think, however, that the test of common employment may be a true one when qualified by the statement that where the employe is entrusted with a duty which the master is himself required to perform the employe is a superior agent. See Mollhoff v. Chicago &c. R. Co. 15 Okla. 540; 82 Pac. 733; Northern Pac. R. Co. v. Peterson, 162 U. S. 346; 16 Sup. Ct. 843; Central R. Co. v. Keegan, 160 U. S. 259; 16 Sup. Ct. 269. The department theory, especially when one is given entire control over a separate and distinct department, is recognized in some cases of high authority, and under this theory the one in control is deemed a vice-principal as to those under him or, when coupled with the consociation theory, those in different departments are not regarded as fellow-servants. See Baltimore &c. R. Co. v. Bangla, 149 U. S. 368; 13 Sup. Ct. 914, 919; Northern Pac. R. Co. v. Hambly, 154 U. S. 349; 14 Sup. Ct. 983; Louisville &c. R. Co. v. Dillard, 114 Tenn. 240; 86 S. W. 313; 108 Am. St. 894, 896, reviewing other Tennessee cases, some of which make an extreme application of the doctrine, Louisville &c. R. Co. v. Edmunds, 23 Ky. L. 1049; 64 S. W. 727 (also extreme).

[11] Wallace v. Standard Oil Co. 66 Fed. 260; Lebbering v. Struthers, 157 Pa. St. 312; 27 Atl. 720; Ingerman v. Moore, 90 Cal. 410; 27 Pac. 306; 25 Am. St. 138; Newbury v.

of opening and closing a switch is not a duty of the employer, but it is a duty relating to the operation of the road, and the person to whom it is entrusted is not a superior agent or vice-principal.[12] An employe entrusted with the duty of providing and keeping safe the place where employes are required to work, by their contract of employment, is a superior agent and not a fellow servant, inasmuch as the duty of providing a safe working place is that of the master.[13] Where an employe works with another employe he has been held as to such work a fellow servant, although as to the duty of making the

Getchel &c. Co. 100 Iowa, 441; 69 N. W. 743; 62 Am. St. 582. See Minneapolis v. Lundin, 58 Fed. 525.

[12] St. Louis &c. R. Co. v. Needham, 63 Fed. 107; 25 L. R. A. 833, citing Naylor v. Railroad Co. 33 Fed. 801; Roberts v. Chicago &c. R. Co. 33 Minn. 218; 22 N. W. 389; Harvey v. New York &c. R. Co. 88 N. Y. 481, 484; Slattery v. Toledo &c. R. Co. 23 Ind. 81; Chicago R Co. v. Henry, 7 Bradw. (Ill. App.) 322; Walker v. Boston &c. R. Co. 128 Mass. 8; Miller v. Southern Pac. R. Co. 20 Ore. 285; 26 Pac. 70; Gilman v. Eastern &c. R. Co. 10 Allen (Mass.), 233; 87 Am. Dec. 635; Railway Co. v. Troesch, 68 Ill. 545; 18 Am. R. 578; Quebec Steamship Co. v. Merchant, 133 U. S. 375; 10 Sup. Ct. 397; Railroad Co. v. Andrews, 50 Fed. 728; 17 L. R. A. 190; Baltimore &c. R. Co. v. Baugh, 149 U. S. 368; 13 Sup. Ct. R. 914; Northern Pac. R. Co. v. Hambly, 154 U. S. 349; 14 Sup. Ct. 983 (distinguishing the cases of Chicago &c. R. Co. v. Ross, 112 U. S. 377; 5 Sup. Ct. 184; Railway Co. v. Callahan, 56 Fed. 988; Garrahy v. Kansas City &c. R. Co. 25 Fed. 258; Ragsdale v. Northern Pac. R. Co. 42 Fed. 383, and Mase v. Northern Pac. R. Co. 57 Fed. 283; Clarke v. Pennsylvania &c. R. Co. 132 Ind. 199; 31 N. E. 808; 17 L. R. A. 811; Ling v. St. Paul &c. R. Co. 50 Minn. 160; 52 N. W. 378; Miller v. Southern &c. R. Co. 20 Ore. 285; 26 Pac. 70; 43 Alb. L. J. 354. See, also, Shuster v. Philadelphia &c. R. Co. (Dela.) 62 Atl. 689, 690 (citing text). But compare Coleman v. Wilmington &c. R. Co. 25 S. Car. 446; 60 Am. R. 516.

[13] Roux v. Blodgett &c. Co. 94 Mich. 607; 54 N. W. 492; Zintek v. Stimson &c. Co. 6 Wash. 178; 32 Pac. 997; 33 Pac. 1055; Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 353; 16 Sup. Ct. 843; Flannegan v. Chesapeake &c. R. Co. 40 W. Va. 436; 21 S. E. 1028; 52 Am. St. 896; Louisville &c. R. Co. v. Graham, 124 Ind. 89; 24 N. E. 668; Bradley v. Chicago &c. R. Co. 138 Mo. 293; 39 S. W. 763; Dayharsh v. Hannibal &c. R. Co. 103 Mo. 570; 15 S. W. 554; 23 Am. St. 900; Hannibal &c. R. Co. v. Fox, 31 Kans. 586; 3 Pac. 320. But see Gilmore v. Oxford &c. Co. 55 N. J. L. 39; 25 Atl. 707. See, generally, Palmer v. Michigan &c. R. Co. 93 Mich. 363; 53 N. W. 397; 17 L. R. A. 636; 32 Am. St. 507; Sadowski v. Michigan &c. R. Co. 84 Mich. 100; 47 N. W. 598; Galveston &c. R. Co. v. Smith, 76 Tex. 611; 13 S. W. 562; 18 Am. St. 78.

working place safe he may be a superior agent.[14] An employe charged with the duty of keeping machinery and appliances in repair usually acts in discharging such duty in the master's place, and is not a mere fellow servant.[15] It has been held that a trainmaster, in directing a car to be removed from a train, is a fellow servant of the brakemen of that train.[15a] But the master owes a positive duty to his employes not only to use reasonable care to provide and keep a reasonably safe place to work, but also to provide and keep in repair reasonably safe tools and appliances, and to employ reasonably competent men, and these are positive duties that cannot be delegated by the master so as to relieve him from responsibility.[16] And there are other duties of a similar nature, such, for instance, in many jurisdictions, at least, as the duty to promulgate rules where the busi-

[14] Stockmeyer v. Reed, 55 Fed. 259; 47 Alb. L. J. 488; Lindvall v. Woods, 44 Fed. 855; Railway Co. v. Torry, 58 Ark. 217; 24 S. W. 244. See Stutz v. Armour, 84 Wis. 623; 54 N. W. 1000; Kliegel v. Wiesel, 84 Wis. 148; 53 N. W. 1119; Northern &c. R. Co. v. Petersen, 51 Fed. 182; 32 Am. Law Reg. 340; McGinley v. Levering, 152 Pa. St. 366; 25 Atl. 824. See Nall v. Louisville &c. R. Co. 129 Ind. 260; 28 N. E. 611; 48 Am. & Eng. R. Cas. 309; Malcom v. Fuller, 152 Mass. 160; 25 N. E. 83; Telander v. Sunlin, 44 Fed. 564; Cullen v. Norton, 126 N. Y. 1; 26 N. E. 905; Babcock v. Old Colony R. Co. 150 Mass. 467; 23 N. E. 325; Louisville &c. R. Co. v. Graham, 124 Ind. 89; 24 N. E. 668; Hussey v. Coger, 112 N. Y. 614; 20 N. E. 556; 8 Am. St. 787; 3 L. R. A. 559. See, also, next following section and authorities cited.

[15] Fox v. Spring Lake &c. Co. 89 Mich. 387; 50 N. W. 872.

[15a] Martin v. Chicago &c. R. Co. 65 Fed. 384. But it has been held, erroneously, as we think, that a section man in placing cars upon a side-track is not a fellow-servant of the trainmen. See Northern &c. R. Co. v. Hogan, 63 Fed. 102; Parker v. New York &c. R. Co. 18 R. I. 773; 30 Atl. 849; Clay v. Chicago &c. R. Co. 56 Ill. App. 235. If, however, the employe is charged with the master's duty of furnishing and selecting safe cars or appliances, he is in effect a vice-principal as to such matter. Chicago Union Trac. Co. v. Sawusch, 218 Ill. 130; 75 N. E. 797; 1 L. R. A. (N. S.) 670. See, also, Griffin v. Boston &c. R. Co. 148 Mass. 143; 19 N. E. 166; 12 Am. St. 526; 1 L. R. A. 698; Pennsylvania R. Co. v. La Rue, 81 Fed. 148.

[16] Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 353; 16 Sup. Ct. 843; Flannegan v. Chesapeake &c. R. Co. 40 W. Va. 436; 21 S. E. 1028; 52 Am. St. 896; Norfolk &c. R. Co. v. Houchins, 95 Va. 398; 28 S. E. 578; 46 L. R. A. 359, and note; 64 Am. St. 791; Harrison v. Detroit &c. R. Co. 79 Mich. 409; 44 N. W. 1034; 7 L. R. A. 623; 19 Am. St. 180.

ness requires it, and to warn inexperienced employes, or even experienced employes, in certain instances, or the like, to which the same rule applies.[17]

§ 1318a. Vice-principal—The true test.—Something may be said in favor of each and all of the tests suggested by the different courts in various cases, when properly limited and applied. But it seems to us that tests other than the nature of the duty and character of the act are subordinate, rather than ultimate tests, and that, while sometimes helpful, they have been the cause of much confusion and some error in the decisions. The most satisfactory test, in our opinion, as already intimated, is that of the character of the act, or, in other words, the nature of the duty and the capacity in which the alleged negligent employe is acting at the time. This doctrine, as at present understood and applied, is of comparatively recent date, but it seems to be steadily gaining ground, and, although there is some difference of opinion as to its proper application in particular cases, it is approved as the most satisfactory general test, both by a majority of the courts and by most of the recent writers upon the subject.[19]

[17] See Miller v. Southern Pac. Co. 20 Oreg. 285; 26 Pac. 70; Pullman Palace Car Co. v. Laack, 143 Ill. 242; 32 N. E. 285; 18 L. R. A. 215; Bushby v. New York &c. R. Co. 107 N. Y. 374; 1 Am. St. 844; Madden v. Chesapeake &c. R. Co. 28 W. Va. 610; 57 Am. St. 695; Daniel v. Chesapeake &c. R. Co. 36 W. Va. 397; 15 S. E. 162; 16 L. R. A. 383; 32 Am. St. 870; Richmond &c. R. Co. v. Burnett, 88 Va. 538; 14 S. E. 372; Chicago &c. R. Co. v. Kneirim, 152 Ill. 458; 39 N. E. 324; 43 Am. St. 259; Chapman v. Southern Pac. Co. 12 Utah, 30; 41 Pac. 551; and numerous authorities cited and reviewed in the note in 75 Am. St. 591–606. For a review of numerous cases as to what is not a positive duty of the master, see the opinion in American Bridge Co. v. Seeds, 144 Fed. 605.

[19] It is approved by Judge Thompson, in 4 Thomp. Neg. §§ 4918, 4923, 4924, 4939, by Mr. Freeman in an elaborate note in 75 Am. St. 584, et seq. and by Mr. McKinney in McKinney Fellow Servants, § 23. Mr. Labatt criticises it to some extent, but, upon the whole, seems to approve it as being, perhaps, the best test that has been suggested. 2 Labatt Master & Servant, § 508, et seq., and also see his chapters XXX-XXXII, for a full consideration of the subject. See, also, ante, §§ 1316, 1317, and in addition to authorities there cited, see, also, Norfolk &c. R. Co. v. Houchins, 95 Va. 398; 28 S. E. 578; 46 L. R. A. 359, and note; 64 Am. St. 791; Hankins v. New York &c. R. Co. 142 N. Y. 416; 37 N. E. 466; 25 L. R. A. 396; 40 Am. St. 616; Harrison v. Detroit &c. R. Co. 79

§ 1319. Vice-principal as to particular subjects.—There are well-reasoned cases which hold that an employe may be a fellow servant as to some duties and a vice-principal as to others.[20] In several of the cases it has been held that the foreman of a gang of section hands, with authority to employ and discharge men, although a vice-principal as to that duty, is a fellow servant with the section men in doing work on the track.[21] The question as to what duties the employe is a fellow servant and as to what duties he is a superior agent is to be determined by ascertaining to what extent he acts in the master's place, for to that extent and no further he is, according

Mich. 409; 44 N. W. 1034; 7 L. R. A. 623; 19 Am. St. 180; Colorado &c. R. Co. v. Naylen, 17 Colo. 501; 30 Pac. 249; 31 Am. St. 335; Davis v. Central Vt. R. Co. 55 Vt. 84; 45 Am. St. 590; O'Neil v. Great Northern R. Co. 80 Minn. 27; 82 N. W. 1086; 51 L. R. A. 532; Kerner v. Baltimore &c. R. Co. 149 Ind. 21, 24; 48 N. E. 364; Robertson v. Chicago &c. R. Co. 146 Ind. 486; 45 N. E. 655; New Pittsburgh &c. Co. v. Peterson, 136 Ind. 398; 35 N. E. 7; 43 Am. St. 327; Schroeder v. Flint &c. R. Co. 103 Mich. 213; 61 N. W. 663; 29 L. R. A. 321; 50 Am. St. 354; Neagle v. Syracuse &c. R. Co. 185 N. Y. 270; 77 N. E. 1064; Newbury v. Getchel &c. Co. 100 Iowa, 441; 69 N. W. 743; 62 Am. St. 582; Alabama Gt. So. R. Co. v. Vail, 38 Ala. 124; 38 So. 124; Ricker v. Central R. Co. (N. J.) 64 Atl. 1068; Schillinger &c. Co. v. Smith (Ill.), 80 N. E. 65, 67; Chicago &c. R. Co. v. Maroney, 170 Ill. 520; 48 N. E. 953; 62 Am. St. 396.

[20] Brick v. Rochester &c. R. Co. 98 N. Y. 211; 21 Am. & Eng. R. Cas. 605; Borgman v. Omaha &c. R. Co. 41 Fed. 667; Criswell v. Railway Co. 30 W. Va. 798; 6 S. E. 31; Quinn v. New Jersey &c. Co. 23 Fed. 363; Gann v. Nashville &c. R. Co. 101 Tenn. 380; 47 S. W. 493; 70 Am. St. 687; Reed v. Stockmeyer, 74 Fed. 186; Holtz v. Great Northern R. Co. 69 Minn. 524; 72 N. W. 805; Brunell v. Southern Pac. Co. 34 Oreg. 256, 259; 56 Pac. 129; Hussey v. Coger, 112 N. Y. 614; 20 N. E. 556; 3 L. R. A. 559, and note; 8 Am. St. 787; Crispin v. Babbitt, 81 N. Y. 516; 37 Am. R. 521. See, also, Illinois &c. R. Co. v. Marshall, 210 Ill. 562; 71 N. E. 597; 66 L. R. A. 297; Metropolitan &c. R. Co. v. Skola, 183 Ill. 434; 56 N. E. 171; 75 Am. St. 120; Klockinski v. Shores Lumber Co. 93 Wis. 417; 67 N. W. 934. But compare Purcell v. Southern R. Co. 119 N. Car. 728; 26 S. E. 161; Hutson v. Missouri Pac. R. Co. 50 Mo. App. 300; Sweeney v. Gulf &c. R. Co. 84 Tex. 433; 19 S. W. 555; 31 Am. St. 71.

[21] Justice v. Pennsylvania Co. 130 Ind. 321; 30 N. E. 303; Kerner v. Baltimore &c. R. Co. 149 Ind. 21; 48 N. E. 364; Louisville &c. R. Co. v. Isom, 10 Ind. App. 691; 38 N. E. 423. See, also, Klockinski v. Shores Lumber Co. 93 Wis. 417; 67 N. W. 934. See Hardy v. Minneapolis &c. R. Co. 36 Fed. 657; Milherck v. E. Jenckes Mfg. Co. 24 R. I. 131; 52 Atl. 687.

to what seems to us the better opinion, to be regarded as a superior agent.

§ 1320. What constitutes a common employment.—The modern decisions do not recognize the rule of the earlier English and American cases upon the question of what constitutes a common employment, but, while there can be no doubt that there is a change in the current of decisions there is very great doubt as to what the law is. The federal decisions are in conflict and the state courts have taken widely different views of the question. The cases agree that, in order to constitute a common employment, there must be a common master, and the servants must be engaged in the same general line of service,[22] but as to what is the same general line of service there is very great conflict. Some of the courts affirm the department theory, others the consociation doctrine, while others deny both the department and consociation theories. We shall not attempt to analyze the cases nor to comment upon them, but in treating of the different classes of railroad employes we shall refer to cases which illustrate the different lines of decision.[23] It has been held that the porter in the service of a palace car company is not the fellow servant of the trainmen of the train to which the palace car is attached,[24] but we

[22] Hardy v. Delaware &c. R. Co. 57 N. J. L. 505; 31 Atl. 281. See, also, Pittsburgh &c. R. Co. v. Bovard, 223 Ill. 176; 79 N. E. 128; Baker v. Philadelphia &c. R. Co. 149 Fed. 882, 884.

[23] See Underhill Torts, 52; notes in 51 L. R. A. 513, et seq.; 54 L. R. A. 33, et seq.; 75 Am. St. 580, 584, et seq.

[24] Jones v. St. Louis &c. R. Co. 125 Mo. 666; 28 S. W. 883; 26 L. R. A. 718; 46 Am. St. 514, citing Mound City &c. Co. v. Conlon, 92 Mo. 221; 4 S. W. 922; Rourke v. White Moss &c. Co. L. R. 1 C. P. Div. 556; Morgan v. Smith, 159 Mass. 570; 35 N. E. 101; Brown v. Smith, 86 Ga. 274; 12 S. E. 411; 33 N. E. 381; Wyllie v. Palmer, 137 N. Y. 248; 19 L. R. A. 285; Pennsylvania Co. v. Roy, 102 U. S. 451; Railway Co. v. Walrath, 38 Ohio St. 461; 43 Am. R. 433; Thorpe v. New York &c. R. Co. 76 N. Y. 402; 32 Am. R. 325; Dwinelle v. New York &c. R. Co. 120 N. Y. 117; 24 N. E. 319; 8 L. R. A. 224; 17 Am. St. 611; Louisville &c. R. Co. v. Katzenberger, 16 Lea (Tenn.), 380; 57 Am. R. 232. The court cited the cases of Mellor v. Missouri &c. R. Co. 105 Mo. 455; 16 S. W. 849; 10 L. R. A. 36; Graham v. Pacific R. Co. 66 Mo. 536; Tibby v. Missouri &c. R. Co. 82 Mo. 292; Carroll v. Missouri &c. R. Co. 88 Mo. 239; 57 Am. R. 382, and held that under the doctrine of those cases the porter was a passenger. Under ordinary arrangements, where the porter is employed and

think the case referred to in many respects goes entirely too far. It has also been held that a porter of a sleeping-car is not the fellow-servant of the employes of a railroad company engaged in operating a different train from the one to which the sleeping-car was attached.[25] A porter of a railroad train, although employed by the railroad company, and the engineer have been held not to be fellow servants,[26] but it seems to us that this doctrine is unsound, for in such a case there is a common service in all that the term implies, and the case is not that of servant of different masters, nor is the duty of either the engineer or of the porter that of the master. Persons cannot well be fellow servants, however, unless they have a common master,[27] and employes of one company are not fellow servants of the employes of another merely because one company operates its cars over the track of the other.[28]

controlled by the sleeping car company and is not the servant of the railroad company, it is probably true that he is not a fellow-servant of the railroad men, but neither is he a passenger of the railroad company. McDermon v. Southern Pac. Co. 122 Fed. 669; Chicago &c. R. Co. v. Hamler, 215 Ill. 525; 74 N. E. 705; 106 Am. St. 187. See, also, Russell v. Pittsburgh &c. R. Co. 157 Ind. 305; 61 N. E. 678; 55 L. R. A. 253; 87 Am. St. 214; and compare Baltimore &c. R. Co. v. Voight, 176 U. S. 498; 20 Sup. Ct. 385.

[25] Hughson v. Richmond &c. R. Co. 2 App. (D. C.) 98. See Union &c. R. Co. Kelly, 4 Colo. App. 325; 35 Pac. 923.

[26] Cincinnati &c. R. Co. v. Palmer, 98 Ky. 382; 33 S. W. 199. It seems to us that the case cited carries even the erroneous "doctrine of subordination" much too far.

[27] Swainson v. Northeastern R. Co. 3 Exch. Div. 341; Vannatta v. Central R. Co. 154 Pa. St. 262; 26 Atl. 384; 35 Am. St. 823; Noll v. Phila. &c. R. Co. 163 Pa. St. 504; 30 Atl. 157; Noonan v. New York Cent. &c. R. Co. 62 Hun (N. Y.), 618; 16 N. Y. S. 678, affirmed in 131 N. Y. 594; 30 N. E. 67; Sullivan v. Tioga &c. R. Co. 112 N. Y. 643; 20 N. E. 569; 8 Am. St. 793; Wagner v. Boston &c. R. Co. 188 Mass. 437; 74 N. E. 919; Louisville &c. R. Co. v. Martin, 113 Tenn. 266; 87 S. W. 418; Chicago &c. R. Co. v. Raidy, 203 Ill. 310; 67 N. E. 783; Carroll v. Minnesota &c. R. Co. 13 Minn. 30; 97 Am. Dec. 221; Gray v. Phila. &c. R. Co. 24 Fed. 168; Texas &c. R. Co. v. Easton, 2 Tex. Civ. App. 378; 21 S. W. 575.

[28] Chicago Terminal &c. Co. v. Vandenberg, 164 Ind. 470; 73 N. E. 990; Robertson v. Boston &c. R. Co. 160 Mass. 191; 35 N. E. 775; Baker v. Philadelphia &c. Ry. Co. 149 Fed. 882; Martin v. Louisville &c. R. Co. 95 Ky. 612; 26 S. W. 801; Philadelphia &c. R. Co. v. State, 58 Md. 372. But see Stetler v. Chicago &c. R. Co. 46 Wis. 497; 1 N. W. 112; Clark v. Chicago &c. R. Co. 92 Ill. 43.

§ 1321. General managers — Superintendents. —Where general charge and control of the operation of a railroad is given to a general manager or general superintendent such an agent or officer is a vice-principal.[29] The doctrine that the company is liable only in cases where the board of directors is guilty of negligence is not supported by the modern authorities. A subordinate manager or superintendent may or may not be a vice-principal, for, whether he is or not, depends upon whether duties resting upon the employer have been entrusted to him.[30]

[29] Pennsylvania &c. R. Co. v. Mason, 109 Pa. St. 296; 58 Am. R. 722; Frazier v. Pennsylvania &c. R. Co. 38 Pa. St. 104; 80 Am. Dec. 467; Washburn v. Nashville &c. R. Co. 3 Head (Tenn.), 638; 75 Am. Dec. 784; Savannah &c. R. Co. v. Goss, 80 Ga. 524; 5 S. E. 777; Patterson v. Pittsburg &c. R. Co. 76 Pa. St. 389; 18 Am. R. 412; Lasky v. Canadian &c. R. Co. 83 Me. 461; 22 Atl. 367; Krogg v. Atlanta &c. R. Co. 77 Ga. 202; 4 Am. St. 79; Wilson v. Willimantic Linen Co. 50 Conn. 433; 47 Am. R. 653; Galveston &c. R. Co. v. Smith, 76 Tex. 611; 13 S. W. 562; 18 Am. St. 78; Stephens v. Hannibal &c. R. Co. 86 Mo. 221; Chicago &c. Brick Co. v. Sobkowiak, 148 Ill. 573; 36 N. E. 572; Schroeder v. Flint &c. R. Co. 103 Mich. 213; 61 N. W. 663; 29 L. R. A. 321; 50 Am. St. 354; Shumway v. Walworth &c. Co. 98 Mich. 411; 57 N. W. 251; Hughlett v. Ozark &c. Co. 53 Mo. App. 87; Gerrish v. New Haven Ice Co. 63 Conn. 9; 27 Atl. 235; Indiana Car Co. v. Parker, 100 Ind. 181; Phillips v. Chicago &c. R. Co. 64 Wis. 475; 25 N. W. 544; 23 Am. & Eng. R. Cas. 453; Hoover Stone Co. v. McCain, 133 Ind. 231; 31 N. E. 956; Cumberland &c. R. Co. v. State, 44 Md. 283; Gunter v. Graniteville Manufacturing Co. 18 S. Car. 262; 44 Am. R. 573; note in 51 L. R. A. 556, 559, et seq.; 4 Thomp. Neg. §§ 4946, 4951. See, generally, Kain v. Smith, 89 N. Y. 375; What Cheer Coal Co. v. Johnson, 56 Fed. 810; Cheeney v. Ocean Steamship Co. 95 Ga. 381; 19 S. E. 33; Quinn v. New Jersey &c. Co. 23 Fed. 363. The decision in Mobile &c. R. Co. v. Smith, 59 Ala. 245, seems to deny the doctrine stated in the text, but so far as it can be regarded as doing so it is in conflict with the decision in Krogg v. Atlanta &c. R. Co. 77 Ga. 202; 4 Am. St. 79. See, also, Georgia Pac. R. Co. v. Davis, 92 Ala. 300; 9 So. 252. The old English rule is strikingly illustrated by the case of Conway v. Belfast &c. R. Co. 11 Ir. R. C. L. 345.

[30] Beilfus v. New York &c. R. Co. 29 Hun (N. Y.), 556; Corcoran v. Holbrook, 59 N. Y. 517; 17 Am. R. 369; Webber v. Piper, 109 N. Y. 496; 16 N. E. 358; Malone v. Hathaway, 64 N. Y. 38; Texas &c. R. Co. v. Tatman, 10 Tex. Civ. App. 434; 31 S. W. 333; Ellington v. Beaver &c. Co. 93 Ga. 53; 19 S. E. 21; Rogers &c. Co. v. Hand, 21 Vroom (N. J.), 464. See, generally, Hathaway v. Illinois Cent. R. Co. 92 Iowa, 337; 60 N. W. 651; McAndrews v. Burns, 39 N. J. L. 117. See, also, Baldwin

§ 1322. Train dispatcher.—As is true of very many phases of the law of master and servant there is conflict upon the question whether a train dispatcher is the fellow servant of employes engaged in operating the trains of the company, but by no means so great as upon other phases of the law of master and servant. The decided weight of authority is that a train dispatcher is not a fellow servant,[31] but there is some authority upon the opposite side of the question.[32] It

v. St. Louis &c. R. Co. 75 Iowa, 297; 39 N. W. 507; 9 Am. St. 479; Taylor v. Evansville &c. R. Co. 121 Ind. 124; 22 N. E. 876; 6 L. R. A. 584; 4 Thomp. Neg. § 4963; Mast v. Kern, 34 Oreg. 247; 34 Pac. 950; 75 Am. St. 580. That is, the liability of the master generally depends, as already shown, upon the character of the act causing the injury and not merely upon the grade or rank of the negligent employe.

[31] Little Rock &c. R. Co. v. Barry, 58 Ark. 198; 23 S. W. 1097; 25 L. R. A. 386; Hankins v. New York &c. R. Co. 142 N. Y. 416; 37 N. E. 466; 25 L. R. A. 396; 40 Am. St. 616; McKune v. California &c. R. Co. 66 Cal. 302; 5 Pac. 482; Haynes v. East Tennessee &c. R. Co. 3 Coldw. (Tenn.) 222; Darrigan v. New York &c. R. Co. 52 Conn. 285; 52 Am. R. 590; Chicago &c. R. Co. v. Young, 26 Ill. App. 115; Chicago &c. R. Co. v. McLallen, 84 Ill. 109; Louisville &c. R. Co. v. Heck, 151 Ind. 292; 50 N. E. 988; Missouri &c. R. Co. v. Elliott, 2 Ind. Ter. 407; 51 S. W. 1067; Hannibal &c. R. Co. v. Kanaley, 39 Kans. 1; 17 Pac. 324; McLeod v. Ginther, 80 Ky. 399; Lasky v. Canadian &c. R. Co. 83 Me. 461; 22 Atl. 367; Smith v. Wabash &c. R. Co. 92 Mo. 359; 4 S. W. 129; 1 Am. St. 729; Ricker v. Central R. Co. (N. J.) 64 Atl. 1068; Wallace v. Boston &c. R. Co. 72 N. H. 504; 57 Atl. 913; Hunn v. Michigan &c. R. Co. 78 Mich. 513; 44 N. W. 502; 7 L. R. A. 500; Smith v. Wabash &c. R. Co. 92 Mo. 359; 4 S. W. 129; 1 Am. St. 729; McChesney v. Panama R. Co. 49 N. Y. S. R. 148; Lewis v. Seifert, 116 Pa. St. 628; 11 Atl. 514; 2 Am. St. 631; Washburn v. Nashville &c. R. Co. 3 Head (Tenn.), 638; 75 Am. Dec. 784; Galveston &c. R. Co. v. Arispe, 5 Tex. Civ. App. 611; 23 S. W. 928; 24 S. W. 33; Galveston &c. R. Co. v. Fitzpatrick (Tex. Civ. App.), 83 S. W. 406; Cincinnati &c. R. Co. v. Clarke, 57 Fed. 125; Sheehan v. New York &c. R. Co. 91 N. Y. 332; Dana v. New York &c. R. Co. 92 N. Y. 639; Phillips v. Chicago &c. R. Co. 64 Wis. 475; 23 Am. & Eng. R. Cas. 453; Baltimore &c. R. Co. v. Camp, 65 Fed. 952; Santa Fe &c. R. Co. v. Holmes, 136 Fed. 66, affirmed in 202 U. S. 438; 26 Sup. Ct. 676.

[32] Norfolk &c. R. Co. v. Hoover, 79 Md. 253; 29 Atl. 994; 25 L. R. A. 710; 47 Am. St. 392; Robertson v. Terre Haute &c. R. Co. 78 Ind. 77; 41 Am. R. 552; Chicago &c. R. Co. v. Doyle, 60 Miss. 977; Millsaps v. Louisville &c. R. Co. 69 Miss. 423; 13 So. 696. See Blessing v. St. Louis &c. R. Co. 77 Mo. 410; Rose v. Boston &c. R. Co. 58 N. Y. 217. Notice to the train dispatcher of the incompetency of a station agent and telegraph operator has been held not to be notice to the com-

seems to us that where the matter of moving trains and giving orders is entrusted to a train dispatcher generally he should be regarded as a superior agent, and not as a mere fellow servant, but that, as to a signal man, telegraph operator, or the like, whose duties concern mere details in the operation of a railroad, the rule is different.[33] The general duty of providing for the movement of trains may, as we believe, be justly regarded as the duty of the employer, while matters of detail, such as giving signals, telegraphing orders, and the like, cannot be so considered. It is not to be expected, as is quite well agreed, that the master will act in matters of detail connected with the operation of the road, but as to the general movement of trains it is otherwise.

§ 1323. Master mechanic.—Where a railroad company entrusts to a master mechanic the duty of providing and keeping in safe condition for use the machinery and appliances with which employes are required to work the company is liable to an employe who, without contributory fault, and while acting within the scope of his duties, is injured by the negligence of the master mechanic. There is conflict upon this question, and the older authorities are opposed to the doctrine we have stated,[34] but it is fully sustained by the modern cases.[35] The rule does not rest upon the doctrine of subordination,

pany. Reiser v. Pennsylvania Co. 152 Pa. St. 38; 25 Atl. 175; 34 Am. St. 620. As to the officers to whom notice of the incompetency of servants may be effectively given, see Missouri &c. R. Co. v. Patton (Tex. Civ. App.), 25 S. W. 339; McDermott v. Hannibal &c. R. Co. 87 Mo. 285; Sutton v. New York &c. R. Co. 50 N. Y. S. R. 514; Davis v. Detroit &c. R. Co. 20 Mich. 105; 4 Am. R. 364.

[33] Northern Pac. R. Co. v. Dixon, 194 U. S. 338; 24 Sup. Ct. 683, and see post, § 1328.

[34] Columbus &c. R. Co. v. Arnold, 31 Ind. 174; 99 Am. Dec. 615, and note; Hard v. Vermont &c. R. Co. 32 Vt. 473. But see, contra, Davis v. Central &c. R. Co. 55 Vt. 84; 45 Am. R. 590; 11 Am. & Eng. R Cas. 173.

[35] Krueger v. Louisville &c. R. Co. 111 Ind. 51; 11 N. E. 957; 31 Am. & Eng. R. Cas. 329; Gottlieb v. New York &c. R. Co. 100 N. Y. 462; 3 N. E. 344; 24 Am. & Eng. R. Cas. 421; Cooper v. Pittsburgh. &c. R. Co. 24 W. Va. 37; Hough v. Texas &c. R. Co. 100 U. S. 213; Ford v. Fitchburg R. Co. 110 Mass. 240; 14 Am. R. 598; Douglas v. Texas, &c. R. Co. 63 Tex. 564; St. Louis &c. R. Co. v. Harper, 44 Ark. 524. See Ballard v. Hitchcock, &c. Co. 71 Hun (N. Y.) 582; 24 N. Y. S. 1101; Hughlett v. Ozark &c. Co. 53 Mo. App. 87; Taylor v. Evansville &c. R. Co. 121 Ind. 124; 22 N. E. 876; 6 L. R.

but upon the principle that it is the master's duty to provide safe machinery and appliances, and in performing that duty the master mechanic occupies the master's place. The question whether a master mechanic is a superior agent or a fellow servant is not determined from the name or title, but from the duties entrusted to him. As in other cases where the question is as to the nature and scope of an employe's authority, the party who affirms that he is a superior agent must prove, as a fact, that the master mechanic was entrusted with the performance of a duty imposed by law upon the employer, for it is only as to such a duty that he can be regarded as a vice-principal.

§ **1324. Road masters.**—Where a road master is placed in charge of the roadbed or track he is in relation to that duty a vice-principal.[36] It has been held that where a train is in charge of a road-master the trainmen and laborers and section-men are all fellow servants.[37] It seems to us that such employes as those just named would be fellow servants, although the train was not under the

A. 584 and notes; 16 Am. St. 372; Missouri Pac. R. Co. v. Sasse (Tex. Civ. App.), 22 S. W. 187; Tabler v. Hannibal, &c. R. Co. 93 Mo. 79; 5 S. W. 810; Cooper v. Pittsburgh, &c. R. Co. 24 W. Va. 37. But see Kidwell v. Houston, &c. R. Co. 3 Woods (U. S.) 313, where it is held that notice to a master mechanic of the incompetency of employes is not notice to the company unless it is shown that the master mechanic had authority to hire and discharge such employes. We suppose, however, that if the employes are in the line of service over which the master mechanic has control that notice to him would be notice to the company, but if the employes were in some other line of service a different rule would apply. See, also, What Cheer, &c. Co. v. Johnson, 56 Fed. 810. Contra, Ohio, &c R. Co. v. Collard, 73 Ind. 261; 38 Am. R. 134; 5 Am. & Eng. R. Cas. 554.

[36] Harrison v. Detroit, &c. R. Co. 79 Mich. 409; 44 N. W. 1034; 7 L. R. A. 623; 19 Am. St. 180; 41 Am. & Eng. R. Cas. 398; Atchison &c. R. Co. v. Moore, 31 Kans. 197; 1 Pac. 644; Hoke v. St. Louis &c. R. Co. 88 Mo. 360. See Kansas City &c. R. Co. v. Kier, 41 Kan. 661; 21 Pac. 770; 13 Am. St. 311; Browning v. Wabash &c. R. Co. 124 Mo. 55; 27 S. W. 644; Palmer v. Michigan &c. R. Co. 93 Mich. 363; 53 N. W. 397; 17 L. R. A. 636; 32 Am. St. 507. But compare Walker v. Boston &c. R. Co. 128 Mass. 8; Brown v. Winona &c. R. Co. 27 Minn. 162; 6 N. W. 484; 38 Am. R. 285; Galveston &c. R. Co. v. Smith, 76 Tex. 611; 13 S. W. 562; 18 Am. St. 78.

[37] Northern Pac. R. Co. v. Smith, 59 Fed. 993.

charge of the road master.[38] In another case it was held that a road master was a fellow servant with the trainmen of the train on which he was riding in such a sense as to preclude him from recovering for injuries caused by the negligence of the trainmen.[39]

§ 1325. Train masters.—Where the employer entrusts to a train master the general duty of making up and moving trains, the train master is, according to what seems to us the better opinion, so far as that duty is concerned, a vice-principal.[40] The test as to the position of such employes as trainmasters is the same as that in other cases where employes are serving a common master in a common employment. That is supplied by the answer to the question, were they entrusted with any of the duties imposed by law upon the employer?

§ 1326. Station masters.—Where a station agent is entrusted with duties imposed by law upon the master, then, so far as those specific duties are concerned, there is reason for regarding him as a vice-principal, but unless he is entrusted with such duties he is, as we believe, a fellow servant of section-men, trainmen, and all employes engaged in the common service of loading, switching, running trains, and the like. Whether the station agent or station master is entrusted with the duties resting on the employer is ordinarily a question of fact, and it must, as we think, be shown that he was entrusted with the performance of such duties by a party who seeks to establish the relation of vice-principal. The courts generally hold that a station agent or station master is not ordinarily a vice-principal.[41] Trainmen are held to be fellow servants with employes

[38] Carney v. Caraquet R. Co. 29 N. B. 425; Evansville &c. R. Co. v. Henderson, 134 Ind. 636; 33 N. E. 1021; Hoover v. Beech Creek &c. R. Co. 154 Pa. St. 362; 26 Atl. 315.

[39] Gulf &c. R. Co. v. Ryan, 69 Tex. 665; 7 S. W. 83. See, also, Galveston &c. R. Co. v. Smith, 76 Tex. 611; 13 S. W. 562; 18 Am. St. 78.

[40] Goodman v. Delaware &c. R. Co. 167 Pa. St. 332; 31 Atl. 670; International &c. R. Co. v. Prince, 77 Tex. 560; 14 S. W. 171; 19 Am. St. 795.

[41] Brown v. Minneapolis &c. R. Co. 31 Minn. 553; 18 N. W. 834; 15 Am. & Eng. R. Cas. 333; Evans v. Atlantic &c. R. Co. 62 Mo. 49; Byrnes v. New York &c. R. Co. 113 N. Y. 251; 21 N. E. 50; 4 L. R. A. 151; Galveston &c. R. Co. v. Farmer, 73 Tex. 85; 11 S. W. 156; Mexican &c. R. Co. v. Shean (Tex.), 18 S. W. 151; Gaffney v. New York

whose duty it is to take the number of the cars or the like,[42] and we can see no reason why the same rule should not apply to station agents.

§ 1326a. Yard masters.—A yard master is ordinarily a fellow servant of those working in the yard.[43] He is not usually a vice-principal. There are, however, some decisions that treat him as such, and if he is entrusted with a positive duty which the master owes to his employes his negligence in regard to such a non-delegable duty may render the master liable under the rule already stated.[44] The conflict of opinion is generally as to whether the act in question is of such a character, although there are a few jurisdictions in which the question may be made to turn upon the superior servant doctrine.

§ 1327. Inspectors.—There is a conflict upon the question whether inspectors are to be regarded as fellow servants. The weight of

&c. R. Co. 15 R. I. 456; 7 Atl. 284; 31 Am. & Eng. R. Cas. 265; Toner v. Chicago &c. R. Co. 69 Wis. 188; 33 N. W. 433; Miller v. Michigan &c. R. Co. 123 Mich. 374; 82 N. W. 58; Henry v. Ann Arbor R. Co. 140 Mich. 446; 103 N. W. 846; Hodgkins v. Eastern R. Co. 119 Mass. 419; Dealey v. Philadelphia &c. R. Co. (Pa. St.) 4 Alt. 170. See Palmer v. Utah &c. R. Co. 2 Idaho, 350; 13 Pac. 425; Brown v. Winona &c. R. Co. 27 Minn. 162; 38 Am. R. 285. But that he is not always a fellow-servant. See Atchison &c. R. Co. v. Seeley, 54 Kans. 21; 37 Pac. 104; Louisville &c. R. Co. v. Jackson, 106 Tenn. 438; 61 S. W. 771; St. Louis &c. R. Co. v. Biggs, 53 Ill. App. 550.

[42] New York &c. R. Co. v. Hyde, 56 Fed. 188; Beuhring v. Chesapeake &c. R. Co. 37 W. Va. 502; 16 S. E. 435.

[43] Thomas v. Cincinnati &c. R. Co. 97 Fed. 245; Cincinnati &c. R. Co. v. Gray, 101 Fed. 623; 50 L. R. A. 47; McCosker v. Long Island R. Co. 84 N. Y. 77; Besel v. New York &c. R. Co. 70 N. Y. 171; Kirk v. Atlanta &c. R. Co. 94 N. Car. 625; 55 Am. R. 621; Farquhar v. Alabama &c. R. Co. 78 Miss. 193; 28 So. 850; Moody v. Hamilton &c. Co. 159 Mass. 70; 34 N. E. 185. See also, Parker v. New York &c. R. Co. 18 R. I. 773; 30 Atl. 849.

[44] Lyttle v. Chicago &c. R. Co. 84 Mich. 289; 47 N. W. 571; Taylor v. Missouri Pac. R. Co. (Mo.) 16 S. W. 206; Louisville &c. R. Co. v. Davis, 91 Ala. 487; 8 So. 552. See, also, Armstrong v. Oregon &c. R. Co. 8 Utah, 420; 32 Pac. 693; Driscoll v. Chicago &c. R. Co. 97 Ill. App. 668; Texas &c. R. Co. v. Tatman, 10 Tex. Civ. App. 434; 31 S. W. 333; St. Louis &c. R. Co. v. Triplett, 54 Ark. 289; 15 S. W. 831; 16 S. W. 266; 11 L. R. A. 773; Daniel v. Chesapeake &c. R. Co. 36 W. Va. 397; 15 S. E. 162; 32 Am. St. 870.

authority is that they are not fellow servants, but superior agents.[45] There are, however, many cases holding that inspectors are fellow servants.[46] We think that inspectors are superior agents, for the

[45] Terre Haute &c. R. Co. v. Mansberger, 65 Fed. 196; Atchison &c. R. Co. v. Mulligan, 67 Fed. 569; Louisville &c. R. Co. v. Ward, 61 Fed. 927; Louisville &c. R. Co. v. Kelly, 63 Fed. 407; Little Rock &c. R. Co. v. Mosely, 56 Fed. 1009; Carpenter v. Mexican &c. R. Co. 39 Fed. 315; Colorado &c. R. Co. v. Naylon, 17 Colo. 501; 30 Pac. 249; 31 Am. St. 335; Missouri &c. R. Co. v. Dwyer, 36 Kan. 58; 12 Pac. 352; Illinois &c. R. Co. v. Hilliard, 99 Ky. 684; 37 S. W. 75; McDonald v. Michigan Cent. R. Co. 132 Mich. 372; 93 N. W. 1041; 102 Am. St. 426; Condon v. Missouri &c. R. Co. 78 Mo. 567; 17 Am. & Eng. R. Cas. 583; Chicago &c. R. Co. v. Hoyt, 122 Ill. 369; 12 N. E. 225; 31 Am. & Eng. R. Cas. 309; Macy v. St. Paul &c. R. Co. 35 Minn. 200; 28 N. W. 249; Cincinnati &c. R. Co. v. McMullen, 117 Ind 439; 20 N. E. 287; 10 Am. St. 67; Louisville &c. R. Co. v. Miller, 141 Ind. 533; 40 N. E. 116; Browning v. Wabash &c. R. Co. 124 Mo. 55; 27 S. W. 644; Chicago &c. R. Co. v. Kneirim, 48 Ill. App. 243; Railway Co. v. Erick, 51 Ohio St. 146; 37 N. E. 128; Coontz v. Missouri &c. R. Co. 121 Mo. 652; 26 S. W. 661; St. Louis &c. R. Co. v. Putnam, 1 Tex. Civ. App. 142; 20 S. W. 1002; Daniels v. Union &c. R. Co. 6 Utah, 357; 23 Pac. 762; Cameron v. Great Northern R. Co. 8 N. Dak. 124, 128, 131; 77 N. W. 1016; Carpenter v. Mexican &c. R. Co. 39 Fed. 315; Indiana &c. R. Co. v. Snyder, 140 Ind. 647; 39 N. E. 912; King v. Ohio &c. R. Co. 14 Fed. 277; 8 Am. & Eng. R. Cas. 119; Fay v. Minneapolis &c. R. Co. 30 Minn. 231; 15 N. W. 241; 11 Am. & Eng. R. Cas. 193; Brann v. Chicago &c. R. Co. 53 Iowa, 595; 6 N. W. 5; 36 Am. R. 243; Ballard v. Hitchcock &c. Co. 71 Hun (N. Y.), 582; 24 N. Y. S. 1101. See, also, Kastl v. Wabash R. Co. 114 Mich. 43; 72 N. W. 28.

[46] Nashville &c. Co. v. Foster, 10 Lea (Tenn.), 351; 11 Am. & Eng. R. Cas. 180; Mackin v. Boston &c. R. Co. 135 Mass. 201; 46 Am. R. 456; 15 Am. & Eng. R. Cas. 196; Whitmore v. Boston &c. R. Co. 150 Mass. 477; 23 N. E. 220; Potter v. New York &c. R. Co. 136 N. Y. 77; 32 N. E. 603; Byrnes v. New York &c. R. Co. 113 N. Y. 251; 21 N. E. 50; 4 L. R. A. 151; Philadelphia &c. R. Co. v. Hughes, 119 Pa. St. 301; 13 Atl. 286; Wonder v. Baltimore &c. R. Co. 32 Md. 411; 3 Am. R. 143; Smoot v. Mobile &c. R. Co 67 Ala. 13; Smith v. Potter, 46 Mich. 258; 9 N. W. 273; 41 Am. R. 161; 2 Am. & Eng. R. Cas. 140; Dewey v. Detroit &c. R. Co. 97 Mich. 329; 52 N. W. 942; 22 L. R. A. 292; 37 Am. St. 348; Fordyce v. Briney, 58 Ark. 206; 24 S. W. 250; St. Louis &c. R. Co. v. Rice, 51 Ark. 457; 11 S. W. 699; 4 L. R. A. 173. The supreme court of Arkansas argues with much ability that there is a difference between a general inspector and car inspectors, but we think the argument, although plausible, is unsound. The duty of inspection being that of the master its delegation to an employe makes him a superior agent,

reason that the duty of inspection is that of the master. Where the duty of inspection rests on the servant himself, or on fellow servants, it has been held that the rule that the master must inspect does not apply, and the inspector should be regarded as a fellow servant.[47]

§ 1328. Telegraph operators.—It is a matter of which judicial notice is taken that, in operating a railroad, the services of telegraph operators and signal men are required, and, as it seems to us, judicial notice must also extend to the fact that the class of employes named are ordinarily employed in matters of detail. The courts are by no means agreed upon the question whether telegraph operators are vice-principals or fellow servants. Many cases affirm that they are vice-principals,[48] while many others assert that they are not.[49] It

for what the master must himself do can not be the act of a mere fellow-servant, nor can it make any difference that the duty relates only to particular appliances or particular place inasmuch as over all places and appliances requiring inspection the master's duty extends. There may, perhaps, be appliances which the master is not under a duty to inspect. McCampbell v. Cunard &c. Co. 144 N. Y. 552; 39 N. E. 637.

[47] Nord &c. Co. v. Ingebregsten, 57 N. J. L. 400; 31 Atl. 619. See, however, and compare Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439; 20 N. E. 287; 10 Am. St. 67; Nord Deutscher &c. Co. v. Ingebregsten, 57 N. J. L. 400; 31 Atl. 619; 51 Am. St. 604; Martin v. Wabash R. Co. 142 Fed. 650; George &c. Brewing Co. v. Wood, 27 Ky. L. 1012; 87 S. W. 772.

[48] Flannegan v. Chesapeake &c. R. Co. 40 W. Va. 436; 21 S. E. 1028; 52 Am. St. 896; Madden v. Chesapeake &c. R. Co. 28 W. Va. 610; 57 Am. R. 695; Haney v. Pittsburgh &c. R. Co. 38 W. Va. 570; 18 S. E. 748; Illinois &c. R. Co. v. Hunter, 70 Miss. 471; 12 So. 482; Hall v. Galveston &c. R. Co. 39 Fed. 18; East Tennessee &c. R. Co. v. DeArmond, 86 Tenn. 73; 5 S. W. 600; 6 Am. St. 816; Northern Pac. &c. R. Co. v. Charless, 51 Fed. 562. The case last cited is built principally upon the decision in the Ross case, and, as the Ross case has been practically overthrown, the cases following it can not carry weight as authority. We think that the court in the Charless case, supra, was in error in confusing telegraph operators with train dispatchers and erroneously applied the doctrine of Lewis v. Seifert, 116 Pa. St. 628; 11 Atl. 514; 2 Am. St. 631.

[49] Price v. Detroit &c. R. Co. 145 U. S. 651; 12 Sup. Ct. 986; Northern Pac. R. Co. v. Dixon, 194 U. S. 338; 24 Sup. Ct. 683; Oregon &c. R. Co. v. Frost, 74 Fed. 965; Baltimore &c. R. Co. v. Camp, 65 Fed. 952; Cincinnati &c. R. Co. v. Clarke, 57 Fed. 125; Reiser v. Pennsylvania Co. 152 Pa. St. 38; 25 Atl. 125; 34 Am. St. 620; McKaig v. Northern &c. R. Co. 42 Fed. 288; Dana v. New York &c. R. Co. 23 Hun (N.

is, we know, somewhat bold to venture an opinion upon a question upon which the authorities fight so stubbornly, but, nevertheless, we briefly state our views upon the question. It seems to us that telegraph operators are employes engaged in performing duties connected with the detail work of operating a railroad, and are not entrusted with the duties devolved by law upon the master, and that they are engaged under a common master in a common employment, that of moving trains upon the road. As well say that persons in charge of telephones over which directions are given in a large manufacturing establishment are vice-principals as that telegraph operators are vice-principals. They cannot be regarded as vice-principals without violating the settled rule that the master's duty does not extend to the details of the work of the common employment, nor without violating the rule that he only is a vice-principal to whom a duty resting on the master is entrusted. There is no more reason for holding that the master's duty is to see that every telegraphic direction is correctly transmitted than there is for holding that the master must see that every verbal direction given by a switchman, conductor or brakeman regarding the opening or closing of a switch is correctly worded. Our conclusion is that where the master exercises ordinary care in selecting competent telegraph operators he is not liable to an employe injured by reason of their negligence. All the analogous cases support this conclusion, for with very rare exceptions it is held that matters of detail concerning the operation of a railroad pertain to the duties of employes and are not duties of the employer. A train dispatcher who has general charge of the movements of the trains occupies a different position from telegraph operators who assist in the details connected with the movements of trains. In some of the cases a distinction is made between signalmen or flagmen and telegraph operators, but we deferentially submit that there is no solid basis for the distinction.[50] It cannot be justly held that telegraph operators whose duty it is to transmit orders or give signals are superior agents, for they do not command, inasmuch as they simply transmit telegraphic orders, and in doing this no

Y.), 473; Slater v. Jewett, 85 N. Y. 61; 39 Am. R. 627; 5 Am. & Eng. R. Cas. 515; Monaghan v. New York &c. R. Co. 45 Hun (N. Y.), 113.

[50] Flannegan v. Chesapeake &c. R. Co. 38 W. Va. 570; 21 S. E. 1028; Haney v. Pittsburgh &c. R. Co. 38 W. Va. 570; 18 S. E. 748.

more discharge the master's duty than do ordinary signal-men or flagmen.

§ 1329. Foremen.—There is hopeless conflict upon the question whether a foreman, with authority to hire and discharge employes, is, or is not, a fellow servant of those engaged in the same common employment.[51] We do not believe that the question is to be deter-

[51] Affirming that he is not a fellow-servant: Chicago &c. R. Co. v. Lundstrum, 16 Neb. 254; 20 N. W. 198; 49 Am. R. 718; 21 Am. & Eng. R. Cas. 528; Sioux City &c. R. Co. v. Smith, 22 Neb. 775; 36 N. W. 285; Blomquist v. Chicago &c. R. Co. 60 Minn. 426; 62 N. W. 818; Claybaugh v. Kansas City &c. R. Co. 56 Mo. App. 630; Logan v. North Carolina &c. R. Co. 116 N. C. 940; 21 S. E. 959; Higgins v. Missouri &c. R. 43 Mo. App. 547; Dayharsh v. Hannibal &c. R. Co. 103 Mo. 570; 15 S. W. 442; 23 Am. St. 900; Cleveland &c. R. Co. v. Brown, 56 Fed. 804; Woods v. Lindvall, 48 Fed. 62; Borgman v. Omaha &c. R. Co. 41 Fed. 667; Texas &c. R. Co. v. Reed, 88 Tex. 439; 31 S. W. 1058; Mattise v. Consumers' &c. Co. 46 La. Ann. 1535; 16 So. 400; 49 Am. St. 356; Russ v. Wabash &c. R. Co. 112 Mo. 45; 20 S. W. 472; 18 L. R. A. 823; Orman v. Mannix, 17 Colo. 564; 30 Pac. 1037; 17 L. R. A. 602; 31 Am. St. 340; Sweeney v. Gulf &c. R. Co. 84 Tex. 433; 19 S. W. 555; 31 Am. St. 71; Sullivan v. Hannibal &c. R. Co. 107 Mo. 66; 17 S. W. 748; 28 Am. St. 388; Anderson v. Ogden &c. R. Co. 7 Utah, 396; 30 Pac. 305. The federal decisions are in a great measure controlled by the decision in Chicago &c. R. Co. v. Ross, 112 U. S. 377; 5 Sup. Ct. 184, and as that case has been virtually overruled the cases founded upon it can not be regarded as authority. Adjudging that the relation of fellow-servants exists: Keenan v. New York &c. R. Co. 145 N. Y. 190; 39 N. E. 711; 45 Am. St. 654; Norfolk &c. R. Co. v. Hoover, 79 Md. 253; 29 Atl. 994; 25 L. R. A. 710, and note; 47 Am. St. 392; Dowd v. Boston &c. R. Co. 162 Mass. 185; 38 N. E. 440; Ell v. Northern &c. R. Co. 1 N. Dak. 336; 48 N. W. 222; 12 L. R. A. 97; 26 Am. St. 621; Sherman v. Rochester &c. R. Co. 17 N. Y. 153; Loughlin v. State, 105 N. Y. 159; 11 N. E. 371; New Pittsburgh &c. Co. v. Peterson, 136 Ind. 398; 35 N. E. 7; 43 Am. St. 327; Spancake v. Philadelphia &c. R. Co. 148 Pa. St. 184; 23 Atl. 1006; 33 Am. St. 821; Dube v. Lewiston, 83 Me. 211; Houser v. Chicago &c. R. Co. 60 Iowa, 230; 14 N. W. 778; 46 Am. R. 65; Lawler v. Androscoggin &c. R. Co. 62 Me. 463; 16 Am. R. 492; Cumberland &c. R. Co. v. Scally, 27 Md. 589; Malone v. Hathaway, 64 N. Y. 5; 21 Am. R. 573; Minneapolis v. Lunden, 58 Fed. 525; Clarke v. Pennsylvania Co. 132 Ind. 199; 31 N. E. 808; 17 L. R. A. 811; Shepard v. Boston &c. R. Co. 158 Mass. 174; 33 N. E. 508; Sullivan v. New York &c. R. Co. 62 Conn. 209; 25 Atl. 711; Whittlesey v. New York &c. R. Co. 77 Conn. 100; 58 Atl. 459; 107 Am. St. 21; Coal Creek

mined upon the theory that the authority to hire and discharge is the test.[52] Possibly the act of a foreman in hiring an incompetent servant, knowing him to be incompetent, may be the act of the employer, but as to the use of appliances, direction of the details of the work, and the like, pertaining entirely to the common duties of the service, we think the foreman, although he may have authority to employ and discharge servants, is not a superior agent. But it is not the name given an employe, nor, indeed, the rank bestowed upon him, that controls, for the controlling question is whether he is entrusted with the performance of duties which rest upon the master. An employe may be called a foreman and yet not be a superior agent, or he may be so designated and yet be a superior agent. If he has charge of the working place and appliances, and is entrusted with the duty of providing safe appliances and a safe working place, then, so far as concerns that duty, he occupies the master's place and

&c. Min. Co. v. Davis, 90 Tenn. 711; 18 S. W. 387; Kinney v. Corbin, 132 Pa. St. 341; 19 Atl. 141; Legrone v. Mobile &c. R. Co. 67 Miss. 592; 7 So. 432; Johnson v. Ashland Water Co. 77 Wis. 51; 45 N. W. 807. See, generally, Dewey v. Parke, 76 Mich. 631; 43 N. W. 644; McBride v. Union Pac. R. Co. 3 Wyo. 47; 21 Pac. 687; Hussey v. Coger, 112 N. Y. 614; 20 N. E. 556; 3 L. R. A. 559; 8 Am. St. 787; Feltham v. England, L. R. 2 Q. B. 33; Searle v. Lindsay, 11 C. B. N. S. 429; Allen v. New Gas Co. L. R. 1 Exch. Div. 251; Howells v. London &c. Co. L. R. 10 Q. B. 62; McLean v. Blue Point &c. Co. 51 Cal. 255.

[52] In some jurisdictions authority to hire and discharge seems to be made a conclusive test both as to foreman and others. Chicago &c. R. Co. v. Kimmel, 221 Ill. 547; 77 N. E. 936; Texas &c. R. Co. v. Reed, 88 Tex. 439; 31 S. W. 1058; Bryan v. Southern R. Co. 128 N. Car. 387; 38 S. E. 914; Blomquist v. Chicago &c. R. Co. 60 Minn. 426; 62 N. W. 818. This is frequently mentioned as one of the attributes of a vice-principal. See note in 51 L. R. A. 548. But, while one having such power is a vice-principal in performing the master's duty of selecting competent servants, and while it is usually to be considered in other cases, we think that the better rule is that it is not of itself conclusive. Alaska &c. Co. v. Whelan, 168 U. S. 86; 18 Sup. Ct. 40; Cleveland &c. R. Co. v. Brown, 73 Fed. 970; Thomas v. Cincinnati &c. R. Co. 97 Fed. 245; Foster v. Missouri Pac. R. Co. 115 Mo. 165; 21 S. W. 916; New Pittsburgh &c. Co. v. Peterson, 136 Ind. 398; 35 N. E. 7; 43 Am. St. 327; Hastings v. Montana Union R. Co. 18 Mont. 493; 46 Pac. 264; Union Pac. R. Co. v. Doyle, 50 Neb. 555; 90 N. W. 43; Webb v. Richmond &c. R. Co. 97 N. Car. 387; 2 S. E. 440; Hathaway v. Illinois Cent. R. Co. 92 Iowa, 337, 342; 60 N. W. 651.

is a superior agent.[53] Some of the cases hold that a foreman is a superior agent although he has no authority to employ and discharge servants,[54] but the very great weight of authority is against that doctrine,[55] unless he represents the master and is negligent in relation to some positive duty of the master to the injured servant. One without any control or power to employ or discharge would ordinarily be a fellow servant while acting with others in a common employment to accomplish a common purpose of the master, but we think an employe might be a vice-principal as to a particular posi-

[53] McElligott v. Randolph, 61 Conn. 157; 22 Atl. 1094; 29 Am. St. 181; Houston v. Brush, 66 Vt. 431; 29 Atl. 380; Nixon v. Selby, &c. Co. 102 Cal. 458; 36 Pac. 803; Thomas v. Ann Arbor R. Co. 114 Mich. 59; 72 N. W. 40. See, also, for other instances in which he is a vice-principal in representing the master as to his positive duties: Addicks v. Cristoph, 62 N. J. L. 786; 43 Atl. 196; 72 Am. St. 687; Bloyd v. St. Louis &c. R. Co. 58 Ark. 66; 22 S. W. 1089; 41 Am. St. 85; Elledge v. National City R. Co. 100 Cal. 282; 34 Pac. 720; 38 Am. St. 290; Carlson v. Northwestern &c. R. Co. 63 Minn. 428; 65 N. W. 428, and other authorities cited in note in 75 Am. St. 613, et seq.; and in 4 Thomp. Neg. § 4958. See Davis v. New York &c. R. Co. 159 Mass. 532; 34 N. E. 1070; Fisher v. Oregon, 22 Ore. 533; 30 Pac. 425; 16 L. R. A. 519; Wellman v. Oregon &c. R. Co. 21 Ore. 530; 28 Pac. 625. See, also, Illinois &c. R. Co. v. Marshall, 210 Ill. 562; 71 N. E. 597; 66 L. R. A. 297.

[54] Foster v. Missouri &c. R. Co. 115 Mo. 165; 21 S. W. 916; Hall v. St. Joseph &c. R. Co. 48 Mo. App. 356.

[55] Marshall v. Schricker, 63 Mo. 308; Brabbitts v. Chicago &c. R. Co. 38 Wis. 289; Mealman v. Union &c. R. Co. 37 Fed. 189; 2 L. R. A. 192, and note; New York &c. R. Co. v. Bell, 112 Pa. St. 400; 4 Atl. 164; 28 Am. & Eng. R. Cas. 338; Berea &c. Co. v. Kraft, 31 Ohio St. 287; 27 Am. R. 510; Louisville &c. R. Co v. Lahr, 86 Tenn. 335; 6 S. W. 663; Peterson v. Whitebreast &c. Co. 50 Iowa, 673; 32 Am. R. 143; Mancuso v. Cataract &c. Co. 87 Hun (N. Y.), 519; 34 N. Y. S. 273; Louisville &c. R. Co. v. Isom, 10 Ind. App. 691; 38 N. E. 423; Schroeder v. Flint &c. R. Co. 103 Mich. 213; 61 N. W. 663; 29 L. R. A. 321; 50 Am. St. 354; Di Marcho v. Builders' &c. Co. 18 R. I. 514; 28 Atl. 661; Chicago &c. R. Co. v. Simmons, 11 Ill. App. 147; San Antonio &c. R. Co. v. Reynolds (Tex. Civ. App.), 30 S. W. 846; Salem &c. Co. v. Chastain, 9 Ind. App. 453; 36 N. E. 910; Oerllich v. Hayes, 8 Misc. (N. Y.) 211; 28 N. Y. S. 579. The authorities referred to in a preceding note asserting that a foreman, although he has power to hire and discharge employes, is not a fellow-servant are, of course, fully in line with those here cited upon the general question. See, also, upon the general subject, the note in 75 Am. St. 632–634.

tive duty of the master without necessarily having authority to employ or discharge servants.

§ 1330. Trainmen engaged in operating the same train.—There is comparatively very little conflict upon the question as to whether trainmen engaged in operating the same train are fellow servants, the very decided weight of authority holding them to be fellow-servants.[56] This seems to us the only rule that can be defended on principle, for such employes are in the strictest sense engaged in the service of a common master, their service is of the same general character and the object of the service is a common one. The doctrine declared in a case[57] decided by the Supreme Court of the United States has created some conflict, and, as we venture to say, brought error into some of the decisions,[58] but the case to which we

[56] Frazier v. Pennsylvania &c. R. Co. 38 Pa. St. 104; 80 Am. Dec. 467; Wallis v. Morgan's &c. R. Co. 38 La. Ann. 156; Houston &c. R. Co. v. Myers, 55 Tex. 110; 8 Am. & Eng. R. Cas. 114; Sherman v. Rochester &c. R. Co. 17 N. Y. 153; Kansas &c. R. Co. v. Peavy, 29 Kan. 169; 44 Am. R. 630, and note; 11 Am. & Eng. R. Cas. 260; Abell v. Western &c. R. Co. 63 Md. 433; 21 Am. & Eng. R. Cas. 503; Pittsburgh &c. R. Co. v. Lewis, 33 Ohio St. 196; East Tennessee &c. R. Co. v. Rush, 15 Lea (Tenn.), 145; 25 Am. & Eng. R. Cas. 502; Jordon v. Wells, 3 Woods (U. S.), 527; Henry v. Lake Shore &c. R. Co. 49 Mich. 495; 13 N. W. 832; Paulmier v. Erie &c. R. Co. 34 N. J. L. 151; Alabama &c. R. Co. v. Waller, 48 Ala. 459; Northern Pac. R. Co. v. Hogan, 63 Fed. 102; Becker v. Baltimore &c. R. Co. 57 Fed. 188; Newport News &c. R. Co. v. Howe, 52 Fed. 362; New Jersey &c. R. Co. v. Young, 49 Fed. 723; Baltimore &c. R. Co. v. Andrews, 50 Fed. 728; 17 L. R. A. 190; Norfolk &c. R. Co. v. Houchins, 95 Va. 398; 28 S. E. 578, 582; 46 L. R. A. 359, and note; 64 Am. St. 791 (quoting text). See, also, McDaniel v. Charleston &c. R. Co. 70 S. Car. 95; 49 S. E. 2. Even in Kentucky a conductor and engineer on the same train are fellow-servants. Edmonson v. Kentucky Cent. R. Co. 105 Ky. 479; 49 S. W. 200, 201, 448 (citing text).

[57] Railroad Co. v. Ross, 112 U. S. 377; 5 Sup. Ct. 184. The case above mentioned is often cited under the title of Chicago &c. R. Co. v. Ross.

[58] Henchman v. Mackey, 35 Fed. 353; Mealman v. Union &c. R. Co. 37 Fed. 189; 2 L. R. A. 192, and note; Howard v. Denver &c. R. Co. 26 Fed. 837; 24 Am. & Eng. R. Cas. 448; Garrahy v. Kansas City &c. R. Co. 25 Fed. 258; Van Wickle v. Manhattan &c. R. Co. 32 Fed. 278; Van Avery v. Union &c. R. Co. 35 Fed. 40; Naylor v. New York &c. R. Co. 33 Fed. 801. But with the virtual overthrow of the doctrine of the Ross case many of the decisions (the federal decisions of course) are left foundationless as authority.

refer cannot be regarded as expressing the rule which now prevails in the federal courts.[59] We cannot perceive how the doctrine which declares that employes of the same train are not fellow servants can be upheld without violating the principle that the details of operating a railroad do not pertain to or form part of the master's duty.[59a] Under the rule which we have stated, conductors, engineers, firemen, brakemen and baggage masters of the same train are fellow servants.[60] There are cases which apply what is sometimes called the "doctrine of subordination" to trainmen performing service on the same train.[61] Conductors are usually considered in the line of de-

[59] New England R. Co. v. Conroy, 175 U. S. 323; 20 Sup. Ct. 85.

[59a] Norfolk &c. R. Co. v. Houchins, 95 Va. 398; 28 S. E. 578, 582; 46 L. R. A. 359, and note; 64 Am. St. 791 (quoting text).

[60] Smith v. Potter, 46 Mich. 258; 9 N. W. 273; 41 Am. R. 161; 2 Am. & Eng. R. Cas. 140; Rodman v. Michigan &c. R. Co. 55 Mich. 57; 20 N. W. 788; 54 Am. R. 348; 17 Am. & Eng. R. Cas. 521; Sanks v. Chicago &c. R. Co. 112 Ill. App. 385; Higgins v. Atchison &c. R. Co. 70 Kans. 814; 79 Pac. 679; Dow v. Kansas City &c. R. Co. 8 Kan. 642; Atchison &c. R. Co. v. Moore, 29 Kan. 632; 11 Am. & Eng. R. Cas. 243; Hayes v. Western &c. R. Co. 3 Cush. (Mass.) 270; Kerlin v. Chicago &c. R. Co. 50 Fed. 185; Howard v. Railway Co. 26 Fed. 837; Southern &c. R. Co. v. McGill, 5 Ariz. 36; 44 Pac. 302; Ragsdale v. Memphis &c. R. Co. 3 Baxter (Tenn), 426; Slater v. Jewett, 85 N. Y. 161; 39 Am. R. 627; Johnston v. Pittsburgh &c. R. Co. 114 Pa. St. 443; 7 Atl. 184; Baltimore &c. R. Co. v. Atlanta &c. Co. 69 Fed. 358; Robinson v. Houston &c. R. Co. 46 Tex. 540; Chicago &c. R. Co. v. Doyle, 60 Miss. 977; 8 Am. & Eng. R. Cas. 171; St. Louis &c. R. Co. v. Needham, 63 Fed. 107; 25 L. R. A. 833; Shugart v. Atlanta &c. R Co. 133 Fed. 505. But see, in Illinois, Chicago &c. R. Co. v. Swan, 176 Ill. 424; 52 N. E. 916.

[61] Cincinnati &c. R. Co. v. Palmer, 98 Ky. 382; 33 S. W. 199; Louisville &c. R. Co. v. Moore, 83 Ky. 675; Volz v. Railway Co. 95 Ky. 188; 24 S. W. 119; Louisville &c. R. Co. v. Collins, 2 Duvall (Ky.), 118; Chicago &c. R. Co. v. Moranda, 108 Ill. 576; Louisville &c. R. Co. v. Moore, 83 Ky. 675; 24 Am. & Eng. R. Cas. 443; Louisville &c. R. Co. v. Brooks, 83 Ky. 129; 4 Am. St. 135; Little Miami &c. R. Co. v. Stephens, 20 Ohio 415; Madden v. Chesapeake &c. R. Co. 28 W. Va. 610; 57 Am. R. 695; Moon v. Richmond &c. R. Co. 78 Va. 745; 49 Am. R. 401, and note; 17 Am. & Eng. R. Cas. 531; Richmond &c. R. Co. v. Williams, 86 Va. 165; 9 S. E. 990; 19 Am. St. 876; Northern Pac. R. Co. v. O'Brien, 1 Wash. 599; 21 Pac. 32; Boatwright v. Northeastern &c. R. Co. 25 S. Car. 128. See Alabama &c. R. Co. v. Baldwin, 113 Tenn. 409; 82 S. W. 487; 67 L. R. A. 340; Central &c. R. Co. v. DeBray, 71 Ga. 406; Richmond &c. R. Co. v. Williams, 86 Va. 165; 9 S. E. 990; 19 Am. St. 876.

cisions just referred to as superiors, and not as fellow servants, for which heresy the Ross case, so often referred to, is to a great extent responsible. But even those courts which recognize and enforce the "doctrine of subordination" hold that employes on the same train of the same grade, as, for instance, brakemen, are fellow servants.[62]

§ 1331. Trainmen operating different trains.—It seems to us that the rule must be the same whether the trainmen are engaged on the same train or on different trains. There is, as we think, no valid reason for discriminating between cases where the employes are engaged in operating the same train and cases where they are engaged in operating different trains. In both cases they are employed in the same line of service and by a common master.[63] The weight of authority preponderates very strongly in favor of the doctrine that trainmen, although employed on different trains, are fellow servants,[64] but there is some conflict of authority upon the question.[65]

§ 1332. Trainmen and switchmen and laborers and sectionmen.—The rule supported by the weight of authority is that sectionmen

[62] Chicago &c. R. Co. v. Howard, 45 Neb. 570; 63 N. W. 872.

[63] Norfolk &c. R. Co. v. Houchins, 95 Va. 398; 28 S. E. 578, 582; 46 L. R. A. 359, and note; 64 Am. St. 791 (quoting text).

[64] Oakes v. Mase, 165 U. S. 363; 17 Sup. Ct. 345; Northern Pac. R. Co. v. Poirier, 167 U. S. 48; 17 Sup. Ct. 741; Rosney v. Erie R. Co. 135 Fed. 311; Norfolk &c. R. Co. v. Houchins, 95 Va. 398; 28 S. E. 578, 582; 46 L. R. A. 359, and note; 64 Am. St. 791 (quoting text); Wheatley v. Philadelphia &c. R. Co. 1 Marv. (Del.) 505; 30 Atl. 660; Herrington v. Lake Shore &c. R. Co. 83 Hun (N. Y.), 365; 31 N. Y. S. 910; Wright v. New York &c. R. Co. 25 N. Y. 562; Pittsburgh &c. R. Co. v. Devinney, 17 Ohio St. 197; Van Avery v. Union Pac. P Co. 35 Fed. 40; Au v. New York &c. R. Co. 29 Fed. 72; McMaster v. Illinois Cent. R. Co. 65 Miss. 264; 4 So. 59; 7 Am. St. 653; Relyea v. Kansas City &c. R. Co. 112 Mo. 86; 20 S. W. 480; 18 L. R. A. 817; Baltimore &c. R. Co. v. Andrews, 50 Fed. 728; 17 L. R. A. 190; Norfolk &c. R. Co. v. Donnelly, 88 Va. 853; 14 S. E. 692; Wright v. New York &c. R. Co. 25 N. Y. 562. See, Vick v. New York &c. R. Co. 95 N. Y. 267; 47 Am. R. 36.

[65] Northern Pac. R. Co. v. Poirier, 67 Fed. 881 (reversed in 167 U. S. 48; 17 Sup. Ct. 741) Kentucky &c. R. Co. v. Ackley, 87 Ky. 278; 8 S. W. 691. See, Madden v. Chesapeake &c. R. Co. 28 W. Va. 610; 57 Am. R. 695; Howard v. Denver &c. R. Co. 26 Fed. 837; Chicago &c. R. Co. v. Lundstrom, 16 Neb. 254; 20 N. W. 198; 49 Am. R. 718; Coleman v. Wilmington &c. R. Co. 25 S. Car. 446.

and trainmen are fellow servants in all matters relating to the details of operating a railroad.[66] But this rule does not apply where the master's duty is devolved upon such employes. Some of the courts, however, hold that laborers and workmen engaged on the track are not the fellow servants of trainmen,[67] while other cases

[66] Cumberland &c. R. Co. v. Scally, 27 Md. 589; Gillshannon v. Stony Brook &c. R. Co. 10 Cush. (Mass.) 228; McGowan v. St. Louis &c. R. Co. 61 Mo. 528; Loranger v. Lake Shore &c. R. Co. 104 Mich. 80; 62 N. W. 137; Atchison &c. R. Co. v. Martin, 7 N. Mex. 158; 34 Pac. 536; Northern Pac. R. Co. v. Hambly, 154 U. S. 349; 14 Sup. Ct. 983; Ohio &c. R. Co. v. Tindall, 13 Ind. 366; 74 Am. Dec. 259; Missouri &c. R. Co. v. Haley, 25 Kan. 35; 5 Am. & Eng. R. Cas. 594; Swartz v. Great Northern R. Co. 93 Minn. 339; 101 N. W. 504; Southern &c. R. Co. v. McGill, 5 Ariz. 36; 44 Pac. 302; Miller v. Ohio &c. R. Co. 24 Ill. App. 326; Heine v. Chicago &c. R. Co. 58 Wis. 525; 17 N. W. 420; Elliot v. Chicago &c. R. Co. 5 Dak. 523; 41 N. W. 758; 3 L. R. A. 363; Wilson v. Madison &c. R. Co. 18 Ind. 226; Lawless v. Connecticut &c. R. Co. 136 Mass. 1; 18 Am. & Eng. R. Cas. 96; Card v. Eddy, 129 Mo. 510; 28 S. W. 979; 36 L. R. A. 806; Norfolk &c. R. Co. v. Nuckols, 91 Va. 193; 21 S. E. 342; St. Louis &c. R. Co. v. Shackelford, 42 Ark. 417; Gormley v. Ohio &c. R. Co. 72 Ind. 31; 5 Am. & Eng. R. Cas. 581; O'Connell v. Baltimore &c. R. Co. 20 Md. 212; 83 Am. Dec. 549. See Neal v. Northern Pac. R. Co. 57 Minn. 365; 59 N. W. 312; Watts v. Hart, 7 Wash. 178; 34 Pac. 423, 771.

[67] Union &c. R. Co. v. Erickson, 41 Neb. 1; 59 N. W. 347; 29 L. R. A. 137; Swadley v. Missouri &c. R. Co. 118 Mo. 268; 24 S. W. 140; 40 Am. St. 366; McGill v. Southern &c. R. Co. 4 Ariz. 116; 33 Pac. 821; Dobbin v. Richmond &c. R. Co. 81 N. Car. 446; 31 Am. R. 512; Chicago &c. R. Co. v. Lundstrom, 16 Neb. 254; 20 N. W. 198; 49 Am. R. 718; Burlington &c. R. Co. v. Crockett, 19 Neb. 138; 26 N. W. 921; 24 Am. & Eng. R. Cas. 390; McKenna v. Missouri &c. R. Co. 54 Mo. App. 161; Howard v. Delaware &c. Canal Co. 40 Fed. 195; 6 L. R. A. 75; 41 Am. & Eng. R. Cas. 473; Chicago &c. R. Co. v. Kelly, 127 Ill. 637; 21 N. E. 203; Peoria &c. R. Co. v. Johns, 43 Ill. App. 83; Union Pac. R. Co. v. Geary, 52 Kans. 308; 34 Pac. 887; Parker v. Hannibal &c. R. Co. 109 Mo. 362; 19 S. W. 1119; 18 L. R. A. 802. Holding that they are, see Gormley v. Ohio &c. R. Co. 72 Ind. 31; Pennsylvania R. Co. v. Wachter, 60 Md. 395; Fagundas v. Central Pac. R. Co. 79 Cal. 97; 21 Pac. 437; 3 L. R. A. 824; Northern Pac. R. Co. v. Charless, 162 U. S. 359; 16 Sup. Ct. 848; Northern Pac. R. Co. v. Hambly, 154 U. S. 349; 14 Sup. Ct. 983; Wright v. Southern R. Co. 80 Fed. 260; Connelly v. Minneapolis &c. R. Co. 38 Minn. 80; 35 N. W. 582; Smith v. Erie R. Co. 67 N. J. L. 636; 52 Atl. 634; 59 L. R. A. 302; Schelereth v. Missouri Pac. R. Co. 115 Mo. 87; 21 S. W. 1110; Bradford &c. Co. v. Heflin (Miss.), 42 So.

hold that while going to their work they are fellow servants of the employes engaged in operating trains.[68] Switchmen and trainmen are generally held to be fellow servants.[69] It is, indeed, safe to affirm that upon principle, as well as according to the weight of authority, employes whose duties bring them together in relation to the running and movement of trains, whether they are track-walkers, track-repairers, bridgemen or laborers, are fellow servants,[70] and the

174. See Haney v. Pittsburgh &c. R. Co. 38 W. Va. 570; 18 S. E. 748.

[68] Abend v. Terre Haute &c. R. Co. 111 Ill. 202; 53 Am. R. 616, and note; Wright v. Northampton &c. R. Co. 122 N. Car. 852; 29 S. E. 100; Northern Pac. R. Co. v. Peterson, 162 U. S. 346; 16 Sup. Ct. 843. See Peoria &c. R. Co. v. Rice, 144 Ill. 227; 33 N. E. 951; Chicago &c. R. Co. v. Kelly, 127 Ill. 637; 21 N. E. 203; Chicago &c. R. Co. v. Gross, 35 Ill. App. 178; 133 Ill. 37; 24 N. E. 563; North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57; 29 N. E. 186; Ellington v. Beaver &c. Co. 93 Ga. 53; 19 S. E. 21; Austin &c. R. Co. v. Beatty, 6 Tex. Civ. App. 650; 24 S. W. 934; Louisville &c. R. Co. v. Hawthorn, 147 Ill. 226; 35 N. E. 534; White v. Kennon, 83 Ga. 343; 9 S. E. 1082.

[69] Rutledge v. Missouri &c. R. Co. 123 Mo. 121; 27 S. W. 327; Card v. Eddy, 129 Mo. 510; 28 S. W. 979; 36 L. R. A. 806; Smith v. Memphis &c. R. Co. 18 Fed. 304; Naylor v. New York &c. R. Co. 33 Fed. 801; Fowler v. Chicago &c. R. Co. 61 Wis. 159; 21 N. W. 40; 17 Am. & Eng. R. Cas. 536; Satterly v. Morgan, 35 La. Ann. 1166; Roberts v. Chicago &c. R. Co. 33 Minn. 218; 22 N. W. 389; Dealey v. Philadelphia &c. R. Co. (Pa. St.) 4 Atl. 170; 21 W. N. C. 45; Miller v. Southern &c. R. Co. 20 Ore. 285; 26 Pac. 70; 43 Alb. L. J. 354; Guthrie v. Southern &c. R. Co. (Ore.) 26 Pac. 76; Chicago &c. R. Co. v. Touhy, 26 Ill. App. 99; Slattery v. Toledo &c. R. Co. 23 Ind. 81; Roberts v. Chicago &c. R. Co. 33 Minn. 218; 22 N. W. 389; St. Louis &c. R. Co. v. Brown, 67 Ark. 295; 54 S. W. 865; Slavens v. Northern Pac. R. Co. 97 Fed. 255. See, generally, Fagundes v. Central &c. R. Co. 79 Cal. 97; 21 Pac. 437; 3 L. R. A. 824.

[70] East Tennessee &c. R. Co. v. Rush, 15 Lea (Tenn.), 145; Schultz v. Chicago &c. R. Co. 67 Wis. 616; 31 N. W. 321; 58 Am. R. 881; Easton v. Houston &c. R. Co. 32 Fed. 893; Tomlinson v. Chicago &c. R. Co. 97 Fed. 252; St. Louis &c. R. Co. v. Henson, 61 Ark. 302; 32 S. W. 1079; Parrish v. Pensacola &c. R. Co. 28 Fla. 251; 9 So. 696; Spencer v. Ohio &c. R. Co. 130 Ind. 181; 29 N. E. 915; International &c. R. Co. v. Ryan, 82 Tex. 565; 18 S. W. 219; Parker v. Hannibal &c. R. Co. 109 Mo. 362; 19 S. W. 1119; 18 L. R. A. 802; 35 Cent. L. J. 187; 46 Alb. L. J. 286; Wellman v. Oregon &c. R. Co. 21 Ore. 530; 28 Pac. 625; Corona v. Galveston &c. R. Co. (Tex.) 17 S. W. 384; Rose v. Gulf &c. R. Co. (Tex.) 17 S. W. 789; Mele v. Delaware &c. R. Co. 14 N. Y. S. 630; Knahtla v. Oregon &c. R. Co. 21 Ore. 136; 27 Pac. 91; Unfried v. Baltimore &c. R. Co.

master is not liable unless there was a violation of a positive duty which he owed to the injured employe. So, a flagman has been held to be a fellow-servant of employes running trains, even in passing across tracks to and from the place where he is stationed.[71] Even those courts which act upon the department theory, except a few courts which take a very extreme view of the question, recognize the general rule stated, but some of the courts decline to lay down any general rules, asserting that each case must be determined on its particular facts.

§ 1333. Recent federal cases.—Since the preparation of a great part of the text of this chapter the Supreme Court of the United States has made two decisions which completely overthrow some of the federal cases criticised by us. The decisions of the Supreme Court

34 W. Va. 260; 12 S. E. 512; St. Louis &c. R. Co. v. Triplett, 54 Ark. 289; 15 S. W. 831; 11 L. R. A. 773; Higgins v. Missouri &c. R Co. 104 Mo. 413; 16 S. W. 409; Corcoran v. Delaware &c. R. Co. 126 N. Y. 673; 27 N. E. 1022; Ford v. Lake Shore &c. R. Co. 117 N. Y. 638; 22 N. E. 946; 41 Am. & Eng. R. Cas. 369; Coon v. Syracuse &c. R. Co. 5 N. Y. 492; Rittenhouse v. Wilmington &c. R. Co. 120 N. Car. 544; 26 S. E. 922; Illinois &c. R. Co. v. Bishop, 76 Miss. 758; 25 So. 867; Waller v. Southwestern &c. R. Co. 2 Hurl. & C. 102; Wilson v. Madison &c. R. Co. 18 Ind. 226; Capper v. Louisville &c. R. Co. 103 Ind. 105; 2 N. E. 749; 53 Am. R. 495; Cassiday v. Maine Cent. R. Co. 76 Me. 488; Seaver v. Boston &c. R. Co. 14 Gray (Mass.), 466; Chicago &c. R. Co. v. Geary, 110 Ill. 383; Kirk v. Atlanta &c. R. Co. 94 N Car. 625; 55 Am. R. 621; Ewald v. Chicago &c. R. Co. 70 Wis. 420; 36 N. W. 12; 5 Am. St. 178; Stephani v. Southern &c. R. Co. 19 Utah, 196; 57 Pac. 34. But see Pike v. Chicago &c. R. Co. 41 Fed. 95; Southerland v. Northern Pac. R. Co. 43 Fed. 646; Louisville &c. R. Co. v. Ward, 61 Fed. 927; Northern Pac. R. Co. v. Beaton, 64 Fed. 563; Chicago &c. R. Co. v. Pontius, 157 U. S. 209; 15 Sup. Ct. 585; Missouri &c. R. Co. v. Hines (Tex. Civ. App.), 40 S. W. 152 (but compare St. Louis &c. R. Co. v. Welsh, 72 Tex. 298; 10 S. W. 529); Schlereth v. Missouri &c. R. Co. 115 Mo. 87; 19 S. W. 1134; Torian v. Richmond &c. R. Co. 84 Va. 192; 4 S. E. 339; Miller v. Missouri &c. R. Co. 109 Mo. 350; 19 S. W. 58; 32 Am. St. 673; Daniel v. Chesapeake &c. R. Co. 36 W. Va. 397; 15 S. E. 162; 16 L. R. A. 383; 32 Am. St. 870; Pool v. Southern &c. R. Co. 7 Utah, 303; 26 Pac. 654; Bean v. Western &c. R. Co. 107 N. C. 731; 12 S. E. 600; Louisville &c. R. Co. v. Davis, 91 Ala. 487; 8 So. 552.

[71] O'Neil v. Pittsburgh &c. R. Co. 130 Fed. 204.

to which we refer[72] practically deny much of the doctrine asserted in the Ross case, and assert a rule which is in line with that asserted by most of the state courts. The decisions referred to adjudge that the foreman of a gang of men is a fellow servant, not a superior agent. The court said: "The general rule is that those entering the service of a common master become thereby engaged in a common service and are fellow servants, and prima facie the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant."[73] And, since the publication of the first edition of this work, it has been expressly stated by the Supreme Court of the United States that the Ross case must be deemed to have been overruled insofar, at least, as it is to be understood as laying down the rule that a conductor, merely from his position as such, is a vice-principal.[74]

[72] Northern Pacific R. Co. v. Peterson, 162 U. S. 346; 16 Sup. Ct. 843; Northern Pacific &c. R. Co. v. Charless, 162 U. S. 359; 16 Sup. Ct. 848. The judgments in the cases of Northern Pacific v. Peterson, 51 Fed. 182, and Northern Pacific R. Co. v. Charless, 51 Fed. 562, were reversed. With the reversal of those cases many other cases must fall, for many are built on the Ross case, and, indeed, have gone much beyond it. The cases of Baltimore &c. R. Co. v. Baugh, 149 U. S. 368; 13 Sup. Ct. 914; Howard v. Denver &c. R. Co. 26 Fed. 837; Northern Pac. R. Co. v. Hambly, 154 U. S. 349; 14 Sup. Ct. 983, and Central Railroad Co. v. Keegan, 160 U. S. 259; 16 Sup. Ct. 269, are approved in the cases first cited. The case of Cleveland &c. R. Co. v. Brown, 56 Fed. 804, heretofore cited, is overturned by the recent decisions and a decision in the same case has been announced declaring a radically different rule from that originally asserted. Cleveland &c. R. Co. v. Brown, 73 Fed. 970.

[73] It was also held in Northern Pac. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, that negligence in running a hand-car was not the negligence of the employer, inasmuch as it was "not the neglect of any duty which the company, as master, was bound itself to perform." This is in harmony with the doctrine that the master's duty does not extend to matters of detail in the operation of the railroad which we have heretofore discussed.

[74] New England &c. R. Co. v. Conroy, 175 U. S. 323; 20 Sup. Ct. 85. See, also, for the recent cases as to the test adopted by that court, the prevailing and dissenting opinions and cases reviewed in both in Northern Pac. R. Co. v. Dixon, 194 U. S. 338; 24 Sup. Ct. 683; also, Santa Fe &c. R. Co. v. Holmes, 202 U. S. 438; 26 Sup. Ct. 676; Northern Pac. R. Co. v. Poirier, 167 U. S. 48; 17 Sup. Ct. 741; American Bridge Co. v. Seeds, 144 Fed. 605; Alaska Min. Co. v. Whelan, 168 U. S. 86; 18 Sup. Ct. 40.

§ 1333a. Other recent cases—Miscellaneous.—The varying doctrines prevailing in different jurisdictions as to the fellow-servant rule, have been considered in the preceding sections of this chapter, and we have stated what we regard as the true doctrine and test for determining whether one is to be regarded as a fellow servant of another or as a vice-principal, in the absence of a statute changing the common-law rule. Many illustrative cases have been cited and reviewed, and the application of the doctrine to particular classes has been pretty fully considered. But, since the preceding sections were written, several additional cases upon the subject have been reported. In a Colorado case it appeared that the plaintiff's intestate, his foremen, and defendant's roadmaster were all engaged in removing debris from defendant's track, caused by a landslide into a cut; during the afternoon one of the section foremen had been warned that the adjoining mountain side was dangerous, and in the evening the roadmaster stated, in the hearing of those present, that he had examined the mountain side before dark and that it was all right; thereafter several of the employes, including plaintiff's intestate, were killed by a rock which rolled down the side of the mountain during the night. The court held that all engaged in the work were fellow servants, and that plaintiff's intestate assumed the risk of the roadmaster's negligence in failing to properly inspect the mountain side.[75] In Georgia, except as the statute changes the rule in case of railroad companies, the general rule is recognized that it is not the grade or title that determines, whether one is a fellow servant or a vice principal, but the duty which he performs towards the other servants; and among the nonassignable duties of the master are providing machinery and appliances, the place to work, inspection and repair, selection and retention of servants, establishment of proper rules and regulations and the instruction of servants.[76] In Illinois, although a foreman or superintendent is not necessarily a vice principal,[77] even a subordinate employe may be a vice principal as to a nonassignable duty entrusted to him, and an employe directing a gang of men engaged in loading rails on a flat car and controlling the manner of performing the work, has been held a vice principal and

[75] Maloney v. Florence &c. R. Co. (Colo.) 89 Pac. 649.

[76] Moore v. Dublin Cotton Mills (Ga.), 56 S. E. 839, citing numerous cases.

[77] Schillinger Bros. Co. v. Smith, 225 Ill. 74; 80 N. E. 65.

not a fellow servant even though he had no power to employ or discharge the men.[78] In Massachusetts it is held that instructions received from a co-employe, to whom the duty of giving instructions has been delegated by the master, are the instructions of the master and negligence in giving them is negligence of the master.[79] In Michigan, keeping switches closed and locked while not in use is not one of the nonassignable duties of the company to its employes, but may be delegated.[80] In Texas a roadmaster in discharging his duty of seeing that the track is in good and safe condition has been held not to be a fellow servant with a fireman.[81] In a very recent case in Utah it appeared that the defendant railroad company's superintendent of bridges had general supervision and control of the bridge work on its line and the crews of men engaged therein; one of such crews, of which plaintiff was a member, consisted of four men, with whom was also a foreman, who directed where they should work and what they should do. A push car without any brake was used, and the foreman directed a scantling to be put on the car to be used as a brake, and in going down a grade directed one of the crew to so use the scantling. In doing so it was jerked from his hand, and, striking the ground in front of the car, derailed it, thereby throwing plaintiff to the ground and injuring him. It was held that the foreman was a fellow servant of plaintiff as to the matter which caused the plaintiff's injury.[82] Other recent decisions upon the general subject are cited below.[83]

[78] Chicago &c. R. Co. v. Rathneau, 225 Ill. 278; 80 N. E. 119. See, also, Schillinger Bros Co. v. Smith, 225 Ill. 74; 80 N. E. 65; Springfield &c. Co. v. Sloan, 225 Ill. 467; 80 N. E. 265.

[79] Morena v. Winston (Mass.), 80 N. E. 473. See, also, for a case in which the question as to whether negligence of a dispatcher under the statute making the master liable for negligence of one exercising superintendence, was held for the jury. Doe v. Boston &c. St. R. Co. (Mass.) 80 N. E. 814.

[80] Dixon v. Grand Trunk &c. R. Co. (Mich.) 111 N. W. 200, citing St. Louis &c. R. Co. v. Needham, 63 Fed. 107; 11 C. C. A. 56; 25 L. R. A. 833; Harvey v. New York &c. R. Co. 88 N. Y. 481; Walker v. Boston &c. R. Co. 128 Mass. 8; Roberts v. Chicago &c. R. Co. 33 Minn. 218; 22 N. W. 389; Miller v. Southern Pac. R. Co. 20 Or. 285; 26 Pac. 70; Henry v. Ann Arbor R. Co. 140 Mich. 446; 103 N. W. 846.

[81] Chicago &c. R. Co. v. Birk (Tex. Civ. App.), 99 S. W. 753. See, also, as to foreman, machinist and assistant. Texas &c. R. Co. v. Johnson (Tex. Civ. App.), 99 S. W. 738.

[82] Owen v. San Pedro &c. R. Co. (Utah), 89 Pac. 825.

[83] See Britt v. Carolina &c. R. Co.

§ 1333b. Fellow-servant doctrine not available to a stranger.—It must be understood, if it does not already sufficiently appear, that the doctrine that a servant accepts the risk of injury from the negligence of a fellow servant is available only to the common master of both and not to a stranger.[84] As said by Judge Sanborn: "The fellow-servant doctrine, where it is not abolished or modified by statute, exempts the common master only, from damages caused by the negligence of the fellow servant. That the negligence of the master or of the fellow servant contributed to an injury, the proximate cause of which was the negligence of a stranger, is no defense to the latter. One is liable for an injury caused by the concurring negligence of himself and another to the same extent as for one caused entirely by his own negligence."[85] Thus it has been held that a railroad company using the tracks of another company and injuring a servant while so doing cannot avoid liability for the

(N. Car.) 56 S. E. 910; Anglin v. American &c. Co. 96 N. Y. S. 49, affirmed in 79 N. E. 1100; Bell v. Rocheford (Neb.), 110 N. W. 646; Mack v. Chicago &c. R. Co (Mo. App.) 101 S. W. 142; Lay v. Willmar &c. R. Co. (Minn.) 110 N. W. 433; Gila Valley &c. R. Co. v. Lyon. 203 U. S. 465; 27 Sup. Ct. 145; Laughlin v. Brassil, 187 N. Y. 128; 79 N. E. 854; Lyon v. Charleston &c. R. Co. (S. Car.) 56 S. E. 18. A few cases are cited in the notes to this section that are not railroad cases, and it may be proper to suggest, by way of caution, applicable elsewhere as well as here, that in some jurisdictions the fellow-servant rule is changed by statute as to railroad companies and not as to other employers.

[84] Ft. Worth &c. R. Co. v. Mackney, 83 Tex. 410; 18 S. W. 949; Chicago &c. R. Co. v. Chambers, 15 C. C. A. 327; 68 Fed. 148; Gray v. Philadelphia &c. R. Co. 24 Fed. 168; Busch v. Buffalo Creek R. Co. 29 Hun (N. Y.), 112.

[85] Chicago &c. R. Co. v. Chambers, 15 C. C. A. 327; 68 Fed. 148; citing Chicago &c. R. Co. v. Sutton, 11 C. C. A. 251; 63 Fed. 394; Grand Trunk R. Co. v. Cummings, 106 U. S. 700; 1 Sup. Ct. 493; Union Pac. R. Co. v. Callaghan, 6 C. C. A. 205; 56 Fed. 938; Harriman v. Pittsburgh &c. R. Co. 45 Ohio St. 11; 12 N. E. 451; Lane v. Atlantic Works, 111 Mass. 136; Griffin v. Boston &c. R. Co. 148 Mass. 143; 19 N. E. 166; Cayzer v. Taylor, 10 Gray (Mass.), 274; Elmer v. Locke, 135 Mass. 575; Booth v. Boston &c. R. Co. 73 N. Y. 38; Cone v. Delaware &c. R. Co. 81 N. Y. 206; Coppins v. New York Cent. R. Co. 122 N. Y. 557; 25 N. E. 915; Gray v. Philadelphia &c. R. Co. 24 Fed. 168; New Jersey &c. R. Co. v. Young, 1 C. C. A. 428; 49 Fed. 723; Ft. Worth &c. R. Co. v. Mackney, 83 Tex. 410; 18 S. W. 949.

injury, on the ground that the negligence of a fellow servant of the employe injured, contributed to the accident.[86]

§ 1333c. Fellow servants in street railway operation.—The fellow-servant relation has been held to exist between these employes: The conductor and motorman of the same car;[87] the conductor of one car and the motorman[88] or gripman[89] of another car; the watchman stationed at a curve of a cable street railway to prevent cars from meeting on the curve and the gripman on one of the cars;[90] a conductor and a car starter;[91] and a conductor off duty and riding on a car while ill without payment of fare and the motorman.[92] On the other hand, the relation has been held not to exist between the gripman of a cable car and a member of the crew of a wrecking train.[93] Similarly it has been held that one employed to lay tracks for a street railway company with transportation to and from the work as part consideration, and who has no duties to perform in connection with the operation of the car on which he rides, and whose contract does not require him to ride on any particular car or any car, is not a fellow servant of the employes operating the car on which he is being so transported.[94]

[86] Ft. Worth &c. R. Co. v. Bell, 5 Tex. Civ. App. 28; 23 S. W. 922.

[87] Savage v. Nassau Elec. R. Co. 42 App. Div. (N. Y.) 241; 59 N. Y. S. 225, affirmed in 168 N. Y. 680; 61 N. E. 1134; Houts v. St. Louis Transit Co. 108 Mo. App. 686; 84 S. W. 161.

[88] Stocks v. St. Louis Transit Co. 106 Mo. App. 129; 79 S. W. 1176.

[89] Chicago &c. R. Co. v. Leach, 208 Ill. 198; 70 N. E. 222.

[90] Murray v. St. Louis &c. R. Co. 98 Mo. 573; 12 S. W. 252; 5 L. R. A. 735.

[91] Shaw v. Manchester St. R. Co. 73 N. H. 65; 58 Atl. 1073. But see Quinn v. Brooklyn Heights R. Co. 91 App. Div. (N. Y.) 489; 86 N. Y. S. 883.

[92] McLaughlin v. Interurban St. R. Co. 101 App. Div. (N. Y.) 134; 91 N. Y. S. 383.

[93] West Chicago St. R. Co. v. Dwyer, 57 Ill. App. 440.

[94] Peterson v. Seattle Trac. Co. 23 Wash. 615; 63 Pac. 539; 65 Pac. 543.

CHAPTER LV.

EMPLOYERS' LIABILITY ACTS.

§ 1334. Changes in the law of master and servant by legislation—Generally.—In England, and in many of the American states, great changes in the law of master and servant have been made by legislative enactments. The statutes of the different states differ in many respects, but all proceed upon the same general lines. These statutes are usually denominated "Employers' Liability Acts,"[1] and some of them limit the right of contract, and essentially, as it seems to us, violate the provisons of the constitution. The courts, however, have been strongly inclined to sustain laws regulating the subject of master and servant, and have upheld most of the statutes and some that are of questionable validity. But the courts have, in some cases, refused to sustain legislation upon this subject, and overthrown statutes which unduly abridged the right of contract.[2] Many duties have been added to those imposed upon the employer by the common law, and the obligations and liabilities of classes of employers enlarged and increased.[3] While the statutes work radical

[1] The term "Employers' Liability Acts" is used by us as applying generally to statutes enjoining duties upon the employer creating new obligations and adding new or additional liabilities. For states in which such statutes have been passed, and the substance of the various statutes, see 4 Thomp. Neg. § 5278, et seq. See, also, 12 Am. & Eng. Ency. of Law (2d ed.), 976, et seq.

[2] Post, § 1336.

[3] It has been held that a statute relating to railroad companies does not apply to street railway companies. Funk v. St. Paul &c. R. Co. 61 Minn. 435; 63 N. W. 1099; 29 L. R. A. 208; 52 Am. St. 608; Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 625; 72 N. E. 145; McLeod v. Chicago &c. Ry. Co. 125 Ia. 270; 101 N. W. 77; Landquist v. Duluth St. R. Co. 65 Minn. 387; 67 N. W. 1006; Riley v. Galveston City R. Co. 13 Tex. Civ. App. 247; 35 S. W. 826; Fallon v. West End St. Ry. Co. 171 Mass. 249; 50 N. E. 536. See, also, Stams v. St. Louis &c. R. Co. 174 Mo. 53; 73 S. W. 686; 61 L. R. A. 475; Whatley v. Zenida &c. Co. 122 Ala. 118; 26 So. 124. So, it has been held that a corporation chartered for the purpose of conducting the business of manufacturing lumber is not a railroad within the meaning of the statute, although it is authorized to use, and does use, locomotives and cars. Ellington v. Beaver Dam &c. Co. 93 Ga. 53; 19 S. E. 21; Williams v. Northern Lumber Co. 113 Fed. 382. See, also, Beeson v. Busenbark, 44 Kan. 669; 25 Pac. 48;

changes in the law of master and servant and greatly abridge the defense of common employment, they do not, as a general rule, entirely abrogate it, for such statutes are to be construed according to the ordinary canons of statutory construction, and under those canons the common law rules may be considered in connection with the statute, and are not to be regarded as swept away unless the statute expressly or impliedly so provides.[4] It has been held that it is erroneous to charge the jury that a railroad company is liable "to any person in its employment." The doctrine of the case referred to we believe to be sound, for, as elsewhere indicated, we think it clear that the defense of common employment is not entirely extinguished, but remains as at common law, except in so far as it is clearly taken away by the statute.[5]

§ 1335. Validity of statutes.—We have at another place referred to cases affirming that statutes declaring who shall not be deemed fellow-servants and prescribing the duties and liabilities of employers are constitutional.[6] To the authorities cited others may be

10 L. R. A. 839. But the contrary has also been held. Liles v. Fosburg Lumber Co. 142 N. Car. 39; 54 S. E. 795; Hemphill v. Lumber Co. 141 N. Car. 487; 54 S. E. 420; Schus v. Powers &c. Co. 85 Minn. 447; 89 N. W. 68; 69 L. R. A. 887. In another case it was held that a railroad company operating several lines is within the statute. Moran v. Eastern R. Co. 48 Minn. 46; 50 N. W. 930, citing Schneider v. Chicago &c. R. Co. 42 Minn. 68; 43 N. W. 783. See, generally, ante, § 1. Held not to apply to a construction company in Bradford &c. Co. v. Heflin (Miss.), 42 So. 174.

[4] In Caron v. Boston &c. R. Co. 164 Mass. 523; 42 N. E. 112, it was said: "The statute is to be fairly construed (Ryalls v. Mechanics' Mills, 150 Mass. 190; 22 N. E. 766; 5 L. R. A. 667, and note); and, while it removes the defense of common employment in some cases it does not extinguish it altogether." See, also, Baltimore &c. R. Co. v. Little, 149 Ind. 167; 48 N. E. 862; American Rolling Mill Co. v. Hullinger, 161 Ind. 673; 67 N. E. 986.

[5] Western &c. R. Co. v. Vandiver, 85 Ga. 470; 11 S. E. 781. As bearing upon the construction of the Georgia statute the court cited Central R. v. Sears, 59 Ga. 436; Central Railroad Co. v. Kelly, 58 Ga. 107; Central R. Co. v. Kenney, 58 Ga. 485; Savannah &c. R. Co. v. Barber, 71 Ga. 644; Central R. Co. v. Small, 80 Ga. 519; 5 S. E. 794. See, also, Southern Ind. R. Co. v. Harrell, 161 Ind. 689; 68 N. E. 262; 63 L. R. A. 460; Pittsburgh &c. R. Co. v. Moore, 152 Ind. 345; 53 N. E. 290; 44 L. R. A. 683; Birmingham &c. Co. v. Allen, 99 Ala. 359; 13 So. 8; 20 L. R. A. 457.

[6] Ante, § 668.

added.[7] It seems difficult in those states having constitutions prohibiting the enactment of local or special laws to support the decisions which adjudge valid statutes which apply only to railroad companies, since the singling out of one class of corporations appears very much as if it were special legislation. The reasoning by which the decisions are supported is that railroads are a peculiar class of corporations requiring legislation of a different character from that required by other corporations. It is also argued that such statutes meet "a particular necessity,"[8] and some cases of what seems to us an essentially different nature are adduced in support of the legislation.[9] There is some ground for affirming that the reasoning is not sound for the subject of the legislation is the relation of master and servant, and the law governing the contracts which create the relation ought, on principle, as we venture to say, to be the same as to all persons. The question, however, is settled so far as judicial decisions can settle it, and such statutes must be regarded as constitutional.[10]

[7] Chicago &c. R. Co. v. Pontious, 157 U. S. 209; 15 Sup. Ct. 585; Minneapolis &c. R. Co. v. Herrick, 127 U. S. 210; 8 Sup. Ct. 1176; Chicago &c. R. Co. v. Stahley, 62 Fed. 363; Bucklew v. Central &c. R. Co. 64 Iowa, 603; 21 N. W. 103; Chicago &c. R. Co. v. Pontious, 52 Kan. 264; 34 Pac. 739; McAunich v. Mississippi &c. R. Co. 20 Iowa, 338; Ditberner v. Chicago &c. R. Co. 47 Wis. 138; 2 N. W. 69; Kibbe v. Stevenson &c. Co. 136 Fed. 147; International &c. R. Co. v. Still (Tex. Civ. App.), 88 S. W. 257; St. Louis &c. Term. Ry. Co. v. Callahan, 194 U. S. 628; 24 Sup. Ct. 857; Kane v. Erie R. Co. 133 Fed. 681; 68 L. R. A. 788; Tullis v. Lake Erie &c. R. Co. 175 U. S. 348; 20 Sup. Ct. 136; Indianapolis Un. Ry. Co. v. Houlihan, 157 Ind. 494; 60 N. E. 943; 54 L. R. A. 787; and note in 58 L. R. A. 33. And it has recently been held that the equal protection of the laws is not denied by construing the proviso in the Minnesota statute as only exempting incomplete railroads. Minnesota Iron Co. v. Kline, 199 U. S. 593; 26 Sup. Ct. 159.

[8] Missouri Pacific R. Co. v. Mackey, 127 U. S. 205; 8 Sup. Ct. 1161.

[9] Missouri Pacific R. Co. v. Humes, 115 U. S. 512; 6 Sup. Ct. 110; Barbier v. Connolly, 113 U. S. 27; 5 Sup. Ct. 857; Soon Hing v. Crowley, 113 U. S. 703; 5 Sup. Ct. 730.

[10] The cases which deny the power to limit the right to contract in cases of particular corporations seem to us to oppose the doctrine of the cases to which we have referred, and so do other cases. State v. Tolle, 71 Mo. 645; State v. Herrmann, 75 Mo. 340; State v. Goodwill, 33 W. Va. 179; 10 S. E. 285; 25 Am. St. 863, and note; Jacobs, In re, 98 N. Y. 98; 50 Am. R. 636, and note; People v. Gillson, 109 N. Y. 389; 17 N. E. 343; 4 Am. St. 465; Ritchie v. People, 155 Ill. 98; 40 N. E. 454; 29 L. R. A. 79; 46 Am.

It is held in a Minnesota case[11] that a statute applying only to railroad companies, in order to be constitutional, must be confined to the "peculiar hazards incident to the use and operation of railroads." There is very great force in the reasoning of the court in the case referred to, and it seems to us that it should command respect and produce conviction, but the majority of the cases widely depart from the doctrine of the case under immediate mention, and in doing so, as we believe, run counter to just principles.

§ 1336. Invalid legislation.—The legislatures of some of the states have enacted statutes so clearly in violation of the constitution that the courts have unhesitatingly overthrown them. Thus, a statute which makes it a criminal offense to employ an alien laborer has been held to be unconstitutional.[12] So, a statute which requires a corporation to furnish a discharged employe with a statement of the reasons for which he was discharged has been adjudged to violate the constitution and to be void.[13] It has been held that a statute

St. 315; Sharer v. Pennsylvania Co. 71 Fed. 931; State v. Julow 129 Mo. 163; 31 S. W. 781; State v. Loomis, 115 Mo. 307; 22 S. W. 350; 21 L. R. A. 789, and note; Godcharles v. Wigemam, 113 Pa. St. 431; 6 Atl. 354; Smith v. Louisville &c. R. Co. 75 Ala. 449. See cases cited, ante, § 665. See, generally, Commonwealth v. Perry, 155 Mass. 117; 28 N. E. 1126; 14 L. R. A. 325, and note; 31 Am. St. 533; Cooley's Const. Lim. 391.

[11] Johnson v. St. Paul &c. R. Co. 43 Minn. 222; 45 N. W. 156; 8 L. R. A. 419. In the case cited it was said: "It is sometimes loosely stated that special legislation is not class if all persons brought under its influence are treated alike under the same conditions. But this is only half the truth. Not only must it treat alike under the same conditions all who are brought within its influence, but in its classification it must bring within its influence all who are in the same condition." See, also, Deppe v. Chicago &c. R. Co. 36 Ia. 52; Potter v. Chicago &c. R. Co. 46 Ia. 399; Chicago &c. R. Co. v. Pontius, 52 Kans. 264; 34 Pac. 739; Beleal v. Northern Pac. R. Co. (N. Dak.) 108 N. W. 33, 35.

[12] People v. Warren, 13 Misc. (N. Y.) 615; 34 N. Y. S. 942.

[13] Wallace v. Georgia &c. R. Co. 94 Ga. 732; 22 S. E. 579. But a statute making blacklisting an offense has been held constitutional and valid. Scheffer v. Justis, 85 Minn. 279; 88 N. W. 759; 56 L. R. A. 757; 89 Am. St. 550. And so has a statute prescribing a penalty for not paying an employe when discharged. St. Louis &c. R. Co. v. Paul, 64 Ark. 83; 40 S. W. 705; 37 L. R. A. 504; 62 Am. St. 154; 173 U. S. 404; 19 Sup. Ct. 419. In Crall v. Toledo &c. R. Co. 7 Ohio Cir. Ct. 132; 34 Am. L. Reg. & Rev. 635, it was held that the pen-

which singles out a class of corporations and requires the employer to limit a day's work to a specified number of hours is invalid.[14] In another case it was held that a statute which prohibited the employment of females by one class of employers was unconstitutional because it was a special law.[15] And in still another case a statute making it unlawful to employ as a conductor on a passenger train any person who had not had two years' experience within six years before the time of such employment as either a passenger or freight conductor, but excepting conductors already employed at the time of the passage of the act, was held unconstitutional.[16] In a Missouri case a statute making it unlawful for an employer to require an employe to withdraw from a labor organization was held to be unconstitutional.[17] In many other cases laws have been held void upon the ground that they violate the constitutional provisions protecting the right of contract, and are special laws within the prohibition of the constitution.[18] It has also been held that section four of the Indiana "employers' liability act," providing that, in an action against

alty provided by the statute could not be recovered by an employe, but no decison as to the validity of the statute was given.

[14] Eight-Hour Bill In re, 21 Colo. 29; 39 Pac. 328; Low v. Rees Printing Co. 41 Neb. 127; 59 N. W. 362; 24 L. R. A. 702; 43 Am. St. 670; Wheeling &c. Co. v. Gilmore, 8 Ohio Cir. C. 658; 1 Ohio Dec. 390. See, also, People v. Orange &c. Co. 175 N. Y. 84; 67 N. E. 129; 65 L. R. A. 33, and note. But compare Ten-Hour Law, Re, 24 R. I. 603; 54 Atl. 602; 61 L. R. A. 612; Atkin v. Kansas, 191 U. S. 207; 24 Sup. Ct. 124; Wenham v. State, 65 Neb. 394; 91 N. W. 421; 58 L. R. A. 825; State v. Buchanan, 29 Wash. 602; 70 Pac. 52; 92 Am. St. 930; 59 L. R. A. 342; Holden v. Hardy, 169 U. S. 366; 18 Sup. Ct. 383; Lochner v. New York, 198 U. S. 45; 25 Sup. Ct. 539.

[15] Ritchie v. People, 155 Ill. 98; 29 L. R. A. 79; 40 N. E. 454; 46 Am. St. 315; 27 Chicago Legal News, 270.

[16] Cleveland &c. R. Co. v. State, 26 Ohio Cir. Ct. 348, affirmed in State v. Cleveland &c. R. Co. 70 Ohio St. 506; 72 N. E. 1165.

[17] State v. Julow, 129 Mo. 163; 31 S. W. 781. In State v. Nelson, 52 Ohio St. 88; 39 N. E. 22; 10 Lewis' Am. R. & Corp. 771, it was held that a statute requiring screens to be put up for protection of mortormen on street railways was valid, but that case is a type of a different class of cases from those referred to in the text. See State v. Hoskins, 60 Minn. 168; 59 N. W. 545; 27 L. R. A. 412.

[18] Ante, §§ 660, 665. Janes v. Reynolds, 2 Tex. 250; Wynehamer v. People, 13 N. Y. 378; Vanzant v. Vaddel, 2 Yerg. (Tenn.) 259; Ramsey v. People, 142 Ill. 380; 32 N. E. 364; 17 L. R. A. 853; Harding v. People, 160 Ill. 624; 43 N. E. 624. See, also, note in 65 L. R. A. 33;

a railroad company in Indiana for a personal injury inflicted in another state, it shall not be competent for the company to plead or prove the decisions or statute of such other state as a defense, is unconstitutional.[19]

§ 1337. Construction of employers' liability statutes—Generally.—Many of the cases give a very liberal construction to statutes enlarging the liability of employers, holding that, as in favor of employes, such statutes are remedial, and are to be liberally construed so as to advance the remedy.[20] But such statutes are in derogation of the common law, add duties and increase liabilities, so that it seems to us that, while the construction is not to be technically strict, there is no valid reason for construing them with the same liberality that statutes truly remedial are construed. Such statutes as those we are considering do not simply create new remedies, but, on the contrary, they create new rights and provide for new obligations which were unknown to the common law. It is going far enough, as we think, to say that such statutes shall be reasonably construed according to the ordinary canons of construction, and it is going too far to give them a liberal construction upon the theory that they are to be regarded as purely remedial statutes.[21] If a statute such

Street v. Varney &c. Co. 160 Ind. 338; 66 N. E. 895; 61 L. R. A. 154; 98 Am. St. 325, and note.

[19] Baltimore &c. R. Co. v. Reed, 158 Ind. 25; 62 N. E. 488; 56 L. R. A. 468; 92 Am. St. 293. And the act is also held unconstitutional in so far as it applies to other than railroads.

[20] Gibbs v. Great Western &c. R. Co. L. R. 12 Q. B. D. 208; Ryalls v. Mechanics' Mills, 150 Mass. 190; 22 N. E. 766; 5 L. R. A. 667, and note; Coughlin v. Tow Boat Co. 151 Mass. 92; 23 N. E. 721; Clark v. Merchants' &c. 151 Mass. 352; 24 N. E. 49.

[21] In Beeson v. Busenbark, 44 Kan. 669; 25 Pac. 48; 10 L. R. A. 839, the court quoted the familiar statement that: "As a rule of exposition statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the legislature intended to make any innovation further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified and besides what has been plainly announced, for if the legislature had that design it is natural that they would have expressed it." The court cited the cases of Missouri &c. R. Co. v. Haley, 25 Kan. 35; Missouri Pac. R. Co. v. Mackey, 33 Kan. 298; 6 Pac. 291; Bucklew v. Central &c. R. Co. 64 Iowa, 603; 21 N. W. 103; Kansas &c. R. Co. v. Fitzsimmons, 18 Kan. 34; St. Louis &c. R. Co. v.

as those we are dealing with simply affected the remedy it would apply to pending cases, but certainly it will not be seriously insisted that they have any such effect, for to give them such an effect would be to add obligations not existing when the right of action accrued. Such statutes cannot have a retroactive operation, but can only operate prospectively.[22] If the relation of master and servant is created, it must, as it seems to us, be governed by the law in force at the time the relation is created, except where, after a change of the law, the relation is continued. We suppose that, if the relation continues after the enactment of a statute changing the obligations and liabilities of employers and employes, the rights of parties would be determined upon the rules of law prescribed by the statute as to accidents occurring subsequent to the enactment of the statute,[23] but as to accidents occurring prior to the enactment of the statutes the rights of the parties would be determined by the rules of the common law.

§ 1338. Construction of employers' liability acts—Definitions.—The courts have often been called upon to define the meaning of terms employed by the legislature in statutes regulating the subject of employer and employe, and we shall in this section refer to some of the cases in which definitions are given, but shall do so briefly, for we have touched upon the subject in several other places. It has been held that a car attached to a trolley and propelled by steam over rails is not "a locomotive engine" within the meaning of the statute.[24] So, a pile driver, consisting of a steam engine placed on a flat car and a driver to raise a hammer, all consisting of one machine capable of self propulsion, is not a locomotive engine within the meaning of the statute.[25] A locomotive in a roundhouse, al-

Willis, 38 Kan. 330; 16 Pac. 728. See, also, American Rolling Mill Co. v. Hullinger, 161 Ind. 673; 67 N. E. 986; Reinke v. Northern Pac. R. Co. 145 Fed. 988.

[22] See Alabama &c. R. Co. v. Carroll, 97 Ala. 126; 11 So. 803; 18 L. R. A. 433; 38 Am. St. 163; Wright v. Southern R. Co. 123 N. Car. 280; 31 S. E. 650.

[23] See Pittsburgh &c. Ry. Co. v. Lightheiser (Ind.), 78 N. E. 1033.

[24] Murphy v. Wilson, 52 L. J. (Q. B.) 524.

[25] Jarvis v. Hitch, 161 Ind. 217; 67 N. E. 1057, 1059 (citing text). As said by the court, "by the term 'locomotive engine,' the legislature only intended an engine constructed and used for traction purposes on a railroad track." And an electric car is not a locomotive engine. Indianapolis &c. Transit Co. v. Andis, 33 Ind. App. 625; 72 N. E. 145,

though resting on rails, but temporarily in the roundhouse for the purpose of being repaired, is not a locomotive "upon a railroad."[26] Cars connected in a train have been held to be machinery,[27] but this seems to us a questionable ruling. The term "ways and works," has been held not to embrace temporary structures.[28] But it has been held that staging used by workmen in the discharge of the duties of their service was part of the employer's "ways, works or machinery."[29] Foreign cars have been held to be part of employer's "ways, works or machinery" within the meaning of the statute.[30] The term "employer" means the person by whom the plaintiff was hired, although

149. So, the term "engineer" has been held to apply only to an engineer of a locomotive engine, and not to an engineer of a stationary engine used in unloading gravel from flat cars. Reinke v. Northern Pac. R. Co. 145 Fed. 988. And such statutes are usually held not to apply to street railways. McLeod v. Chicago &c. R. Co. 125 Ia. 270; 101 N. W. 77; Lundquest v. Duluth St. R. Co. 65 Minn. 387; 67 N. W. 1006; Riley v. Galveston City R. Co. 13 Tex. Civ. App. 247; 35 S. W. 826; ante, § 1334.

[26] Perry v. Old Colony R. Co. 164 Mass. 296; 41 N. E. 289. The court quoted from Thyng v. Fitchburg R. Co. 156 Mass. 13; 30 N. E. 169; 32 Am. St. 425, the following: "The statute seems chiefly to contemplate the damages from a locomotive engine or train as a moving body, and to provide against the negligence of those who in whole or in part control its movements."

[27] Georgia &c. R. Co. v. Brooks, 84 Ala. 138; 4 So. 289. See Seavly v. Central &c. Co. 111 Mass. 540.

[28] Burns v. Washburn, 160 Mass. 457; 36 N. E. 199; Lynch v. Allyn, 160 Mass. 248; 35 N. E. 550, citing Howe v. Finch, 17 Q. B. D. 187; Willets v. Watt, L. R. (1892) 2 Q. B. 92; O'Connor v. Neal, 153 Mass. 281; 26 N. E. 857; May v. Whittier Machine Co. 154 Mass. 29; 27 N. E. 768; Regan v. Donovan, 159 Mass. 1; 33 N. E. 702, and denying Brannigan v. Robinson, L. R. (1892) 1 Q. B. 344. See, also, Adasken v. Gilbert, 165 Mass. 443; 43 N. E. 199. Upon the question whether a defect is obvious the cases of Griffin v. Ohio &c. R. Co. 124 Ind. 326; 24 N. E. 888, and Swanson v. Lafayette, 134 Ind. 625; 33 N. E. 1033, were cited. Upon the question of negligence of superintendent, Connolly v. Waltham, 156 Mass. 368; 31 N. E. 302, and Willets v. Watt, were cited.

[29] Prendible v. Connecticut &c. Co 160 Mass. 131; 35 N. E. 675. And see as to a derrick, McMahon v. McHale, 174 Mass. 320; 54 N. E. 854. But compare Southern R. Co. v. Shook (Ala.), 43 So. 579.

[30] Bowers v. Connecticut &c. R. Co. 162 Mass. 312; 38 N. E. 508; citing Coffee v. New York &c. R. Co. 155 Mass. 21; 28 N. E. 1128; Fay v. Minneapolis &c. R. Co. 30 Minn. 231; 15 N. W. 241; Spaulding v. Flynt &c. Granite Co. 159 Mass. 587; 34 N. E. 1134; Alabama &c. R. Co. v. Carroll, 97 Ala. 126; 11 So. 803; 18 L. R. A. 433; 38 Am. St. 163.

the hirer may make use of appliances owned by a third person. Thus, where a municipal corporation hired a railroad train and used it on a temporary track constructed on its own property, it was held to be engaged in operating a railroad, and that it was liable as the operator of a railroad to an employe who received an injury while riding on the train.[31] A connecting track, used by the employer but owned by a different railroad company, is held not to be one of its "ways,"[32] and a like ruling was made as to a track owned by a shipper.[33] The term "a person who is in superintendence" has been defined to mean "a person whose sole or principal duty is that of superintendence and who is not ordinarily engaged in manual labor."[34]

§ 1339. The effect of the statute upon the contractual element in the relation of employer and employe.—There is real difficulty in solving the question as to whether the provisions of the statute enter into the contract upon which the relation of employer and employe is based. If such statutes are to be regarded as simply inflicting penalties by way of punishment, then it is doubtless true that they do not enter into the contract, but if they are to be considered as providing new obligations, then, under familiar general rules,

[31] Coughlan v. Cambridge, 166 Mass. 268; 44 N. E. 218, citing Hasty v. Sears, 157 Mass. 123; 31 N. E. 759; 34 Am. St. 267; Ward v. New England Fibre Co. 154 Mass. 419; 28 N. E. 299; Clapp v. Kemp, 122 Mass. 481; Johnson v. Boston, 118 Mass. 114; Rourke v. Colliery Co. 2 C. P. Div. 205; Connolly v. Waltham, 156 Mass. 368; 31 N. E. 302; Hennessy v. Boston, 161 Mass. 502; 37 N. E. 668; Driscoll v. Fall River, 163 Mass. 105; 39 N. E. 1003; McCann v. Waltham, 163 Mass. 344; 40 N. E. 20. See, also, Lodwick Lumber Co. v. Taylor (Tex. Civ. App.), 87 S. W. 358, 360 (citing text).

[32] Trask v. Old Colony R. Co. 156 Mass. 298; 31 N. E. 6. The court cited approvingly, Roberts Employer Liability, 249, 250.

[33] Engel v. New York &c. R. Co. 160 Mass. 260; 35 N. E. 547; 22 L. R. A. 283, and note. In the case cited it was suggested that the owner of the track, the shipper, might be liable and the court referred to the case of Finnegan v. Gas Works Co. 158 Mass. 311; 34 N. E. 523; Osborne v. Morgan, 130 Mass. 102, 104; 39 Am. R. 437. For other cases illustrating the meaning of the terms "ways, works, machinery and plant," see Brouillette v. Connecticut &c. R. Co. 162 Mass. 198; 38 N. E. 507; Shea v. Wellington, 163 Mass. 364; 40 N. E. 173; Louisville &c. Co. v. Pearson, 97 Ala. 211; 12 So. 176.

[34] Kellard v. Rooke, L. R. 21 Q. B. D. 365. But see post, § 1352. See, also, Southern R. Co. v. Shook (Ala.), 43 So. 579.

such provisions become factors in every contract creating the relation of master and servant. If such statutes simply prescribe penalties, by way of punishment, then, under well-settled rules, they can have no extraterritorial force, and yet it is very generally held that actions based upon the rights they create may be maintained in other states.[35] The federal courts have uniformly held that questions arising out of the relation of master and servant are questions of general law upon which the federal tribunals will not follow the state decisions if opposed to their convictions, but it is also held that, where there is a state statute, the federal courts will enforce it, and adopt the construction given it by the state courts, although the rules it prescribes are opposed to the law as previously declared by those courts.[36] It is also held that the federal courts sitting in one state may enforce the right of an employe to recover damages given him by the statute of the state in which the accident occurred.[37] It is not easy to understand how these decisions can be supported, if the theory that employers' liability acts affect only the remedy or simply denounce penalties is correct. There is, we are persuaded, reason for affirming that the provisions of the statute do enter into the contract, but the decisions are probably against this view.[38] It does

[35] In treating of the subject of the conflict of law we have referred to the authorities. See, also, post, §§ 1364–1366.

[36] Northern Pacific &c. R. Co. v. Hogan, 63 Fed. 102; Bucher v. Cheshire &c. R. Co. 125 U. S. 555; 8 Sup. Ct. 974; Detroit v. Osborn, 135 U. S. 492; 10 Sup. Ct. 1012; Griffin v. Overman &c. 61 Fed. 568. See, also, Fulton v. Wilmington &c. Co. 133 Fed. 193; 68 L. R. A. 168.

[37] Texas &c. R. Co. v. Cox, 145 U. S. 593; 12 Sup. Ct. 905, citing Dennick v. Railroad Co. 103 U. S. 11; and reviewing Willis v. Railroad Co. 61 Tex. 432; 48 Am. R. 301; Texas &c. R. Co. v. Richards, 68 Tex. 375; 4 S. W. 627; St. Louis &c. R. Co. v. McCormick, 71 Tex. 660; 9 S. W. 540; Turner v. Cross, 83 Tex. 218; 18 S. W. 578; 15 L. R. A. 262, and note; Texas &c. R. Co. v. Collins, 84 Tex. 121; 19 S. W. 365. See, also, Boston &c. R. Co. v. McDuffey, 79 Fed. 934.

[38] Alabama &c. R. Co. v. Carrol, 97 Ala. 126; 11 So. 803; 38 Am. St. 163; Chicago &c. R. Co. v. Doyle, 60 Miss. 977, 984. See, also, Boston &c. R. Co. v. McDuffey, 79 Fed. 934; Davis v. New York &c. R. Co. 143 Mass. 301; 9 N. E. 815; 58 Am. R. 138. Compare Leezotte v. Boston &c. R. Co. 70 N. H. 5; 45 Atl. 1084; Turner v. St. Clair &c. Co. 121 Mich. 616; 80 N. W. 720; 47 L. R. A. 112. In Williams v. Southern Ry Co. 128 N. Car. 286; 38 S. E. 893, it is said in such a case that although tort is alleged it is based on contract; and in Miller v. Southern Ry. Co. 141 N. Car. 45; 53 S. E. 726, the contract of employ-

not follow, from an affirmance of the proposition that the statutory provisions enter into the contract, that the law of another state may not be of controlling influence; on the contrary, that law must, upon familiar principles, be the governing law so far as concerns the performance of the contract in the state where that law prevails.[39] If, for instance, a railroad company of Pennsylvania, extending through New York, requires the performances of duties in New York, the law of that state as to the performance of duties there is the law of the contract. It seems to us that the view we have outlined is the correct one, and that the decisions which hold that the statutes simply punish negligence are unsound.

§ 1340. Railroad companies owning lines partly within the state and partly within other states.—It has been held that a statute applying in general terms to railroad companies applies to all railroad companies any part of whose lines extend into the state where the injury complained of was received, "within or without the state."[40] One of the judges dissented, and with much force argued that the statute did not apply to injuries occurring in another state. In the same case it was held that the provision of the statute making the existence of a defect prima facie evidence of negligence governed although the accident occurred in another state.[41]

ment being made in North Carolina, and it not appearing that the service was to be performed entirely outside the state, it was held that the provisions of the fellow-servant act of North Carolina should be read into the contract and would govern, although the injury was received in another state. See, also, Caldwell v. Seaboard Air Line Ry. 73 S. Car. 443; 53 S. E. 746; Cannedy v. Atlantic &c. R. Co. (N. Car.) 55 S. E. 836. See, generally, Northern Pac. R. Co. v. Babcock, 154 U. S. 190; 14 Sup. Ct. 978; East Tennessee &c. R. Co. v. Lewis, 89 Tenn. 235; 14 S. W. 603; Herrick v. Minnesota &c. R. Co. 31 Minn. 11; 16 N. W. 413; 47 Am. R. 771; Chicago &c. R. Co. v. Rouse, 178 Ill. 132; 52 N. E. 951; 44 L. R. A. 410, as to conflict of laws and enforcement employers' liability acts in other states.

[39] Whitford v. Panama &c. R. Co. 23 N. Y. 465; Gray v. Jackson, 51 N. H. 9; 12 Am. 1.

[40] Pennsylvania Co. v. McCann, 54 Ohio St. 10; 42 N. E. 768; 31 L. R. A. 651; 56 Am. St. 695. See, also, Peirce v. Van Dusen, 78 Fed. 693; 69 L. R. A. 705; Kansas City R. Co. v. Becker, 67 Ark. 1; 53 S. W. 406; 46 L. R. A. 814; 77 Am. St. 78.

[41] In a number of cases it is held that the statute of another state concerning the presumption of negligence pertains to the remedy and has no extraterritorial force. Smith

§ 1341. Railroads operated by receivers.—There is conflict upon the question whether statutes defining the duties and liabilities of railroad companies to their employes apply to receivers operating railroads under order of court. There are cases directly affirming that they do,[42] but other cases positively assert that they do not.[43] We think that ordinarily such statutes do apply to receivers. A receiver to a great extent takes the corporate property and rights as it was held by the corporation, and hence takes it subject to the restrictions and burdens imposed by law. If he undertakes to operate the railroad he must do it upon the terms and conditions which the law prescribes, and the law as to the duty to employes operates upon him substantially as it did upon the railroad corporation to whose rights he succeeded.[44]

§ 1342. The relation of master and servant must exist.—In order to entitle an injured person to the benefit of an employers' liability act, the relation of employer and employe must exist at the time the injury is received.[45] The effect of some of the statutes is to almost entirely abrogate the common-law rule exonerating the master from liability for the negligence of a fellow servant, but such statutes do not extend to persons not in the service of the employer,

v. Wabash &c. R. Co. 141 Ind. 92; 4 N. E. 270; Johnson v. Chicago &c. R. Co. 91 Iowa, 248; 59 N. W. 66; Knight v. Railroad Co. 108 Pa. St. 250; 56 Am. R. 200; Bridges v. Asheville &c. R. Co. 25 S. Car. 24; 3 S. E. 860. See infra, Conflict of Law. And see post, §§ 1364–1366.

[42] Hornsby v. Eddy, 56 Fed. 461; 5 C. C. A. 460; Rouse v. Hornsby, 67 Fed. 219; Peirce v. Van Dusen, 78 Fed. 693; 69 L. R. A. 705; Rouse v. Harvey, 55 Kans. 589; 40 Pac. 1007; Mikkleson v. Truesdale, 63 Minn. 137; 65 N. W. 260. See Little v. Dusenbury, 46 N. J. L. 614; 50 Am. R. 445; Murphy v. Holbrook, 20 Ohio St. 137; 5 Am. R. 633; Paige v. Smith, 99 Mass. 395; Sloan v. Central &c. R. Co. 62 Iowa, 728; 16 N. W. 331; 11 Am. & Eng. R. Cas. 145; Wall v. Platt, 169 Mass. 398; 48 N. E. 270; Daniels v. Hart, 118 Mass. 543.

[43] Campbell v. Cook, 86 Tex. 630; 26 S. W. 486; 40 Am. St. 878; Turner v. Cross &c. 83 Tex. 218; 18 S. W. 578; 15 L. R. A. 262, and note; Clyde v. Richmond &c. R. Co. 59 Fed. 394; Henderson v. Walker, 55 Ga. 481; Youngblood v. Corner, 97 Ga. 152; 23 S. E. 509. But by recent statute in Georgia receivers are included. Barry v. McGee, 100 Ga. 759; 28 S. E. 455.

[44] Ante, § 577, p. 815.

[45] But not, it seems, under the comprehensive provisions of some of the statutes making the company liable to any person. Chicago &c. R. Co. v. O'Brien, 132 Fed. 593.

while the effect of other statutes is to abrogate the rule in the cases specified. It seems to us that the ordinary rules for the construction of statutes must apply to such legislative enactments as we are here considering, and that, when specific cases are enumerated, other cases are excluded.[46] It makes no difference in what capacity the servant is engaged, the master is liable for the negligence of a fellow servant in those states where it is so provided and there is not an enumeration of the cases in which the employer shall be liable for the negligence of his employes.[47] A person who is sent by a contractor to perform service with workmen in his employment is held to be an employe within the statute.[48] So it has been held that a minor is an employe, although his name is not on the pay-roll and his father receives his wages.[49] In another case it was held that a watchman who undertook to couple cars was an employe while engaged in that duty by direction of the conductor.[50] But whether the watchman was an employe or a mere volunteer, must, as we suppose, depend upon the authority of the conductor, for if the conductor had no authority to require the watchman to couple cars the watchman was not an employe. And a statute providing that railroad companies shall be liable to employes for the negligence of a fellow servant does not apply where the injured person is the servant of an independent contractor of a railroad company, and is injured by a fellow servant.[51]

[46] Dixon v. Western Union Telegraph Co. 68 Fed. 630; Hittinger v. Westford, 135 Mass. 258.

[47] Larson v. Illinois &c. R. Co. 81 Iowa, 91; 58 N. W. 1076; Davie v. Cochrane &c. Co. 164 Mass. 453; 41 N. E. 678, citing Linnehan v. Rollins, 137 Mass. 123; 50 Am. R. 287; Harkins v. Sugar Refining &c. Co. 122 Mass. 400; Morgan v. Sears, 159 Mass. 570; 35 N. E. 101; Reagan v. Casey, 160 Mass. 374; 36 N. E. 58. See, also, Texas Southern Ry. Co. v. Pyle (Tex. Civ. App.), 83 S. W. 234, 236; Missouri &c. Ry. Co. v. Keaveney (Tex. Civ. App.), 80 S. W. 387; Texas Pac. R. Co. v. Behymer, 189 U. S. 468; 23 Sup. Ct. 622.

[48] Wild v. Waygood, L. R. (1892) 1 Q. B. 783.

[49] Tennessee &c. R. Co. v. Hayes, 97 Ala. 586; 12 So. 98, citing Wood Master and Servant, § 305; 14 Am. & Eng. R. Cas. 752.

[50] Georgia &c. R. Co. v. Propst, 85 Ala. 203; 4 So. 711; Georgia &c. R. Co. v. Propst, 83 Ala. 518; 3 So. 764.

[51] Avery v. Southern, 137 N. Car. 130; 49 S. E. 91. But see Jacobs v. Fuller &c. Co. 67 Ohio St. 70; 65 N. E. 617; 65 L. R. A. 833. See, also, as to when the statute does not apply, Kelly v. Union Trac. Co. 199 Pa. St. 322; 49 Atl. 70.

The employer is not liable where the acts of negligence which caused the injury to the employe were committed prior to the time the relation of employer and employe began.[52]

§ 1343. Care required by statute of employer respecting machinery and appliances.—The rule under the statute is, as at common law, that the employer must exercise reasonable care to provide safe machinery and appliances, and to keep them in a safe condition for use.[53] The employer is not bound to procure the best machinery. The statute does not require that the employer should discard machinery and appliances in order to procure new improved machinery or appliances.

§ 1344. Who are within the statute.—It is obvious that general rules cannot be safely stated for determining who are and who are not within the statute, for the provisions of the statutes vary so much that what would be true under one statute would not be so under other statutes. We cannot safely do much more than direct attention to the decisions of the courts. A brakeman injured by the negligence of an engineer in starting a train without giving a signal has been held entitled to recover, provided he, the brakeman, is not guilty of contributory negligence.[54] The Georgia courts hold that the statute of that state is not limited to any particular class of employes,[55] and that the statute is valid, but it seems to us that these

[52] O'Connor v. Rich, 164 Mass. 560; 42 N. E. 111; 49 Am. St. 483, citing Killea v. Faxon, 125 Mass. 485; Moynihan v. Hills Co. 146 Mass. 586; 16 N. E. 574; 4 Am. St. 348; Wilson v. Merry, L. R. 1 H. L. 326.

[53] O'Maley v. South Boston &c. Co. 158 Mass. 135; 32 N. E. 119; 47 L. R. A. 161, and note; Richmond &c. R. Co. v. Bivins, 103 Ala. 142; 15 So. 515; Wilson v. Louisville &c. R. Co. 85 Ala. 269; 4 So. 701. But see for cases under the safety-appliance act of congress, United States v. Chicago &c. R. Co. 149 Fed. 486; Johnson v. Southern Pac. Co. 196 U. S. 1; 25 Sup. Ct. 158; Lyon v. Charleston &c. R. Co. (S. Car.) 56 S. E. 18.

[54] Kruse v Chicago &c. R. Co. 82 Wis. 568; 52 N. W. 755. But compare Evans v. Railway, 70 Miss. 527; 12 So. 581; Lyon v. Charleston &c. R. Co. (S. Car.) 56 S. E. 18. See, generally, McKnight v. Chicago &c. R. Co. 44 Minn. 141; 46 N. W. 294. See Morgan v. London &c. Co. L. R. 12 Q. B. D. 201; 13 Q. B. D. 832, for a decision as to who is a workman within the meaning of the English statute. See, also, Jackson v. Hill & Co. L. R. 13 Q. B. D. 618.

[55] Thompson v. Central &c. R. Co. 54 Ga. 509; Georgia R. Co. v. Ivey,

courts go rather too far. In one of the reported cases it is held that a brakeman injured while shifting cars used by a steel company is not within a statute providing that an employe engaged in or about the roads, works, depots, or premises of a railroad company, assumes the risk of negligence by the employes of such company.[56] The ground upon which the decision was rested, shortly stated, is that the plaintiff was not on the premises of the railroad company. Where the work on which the employe is engaged is connected with the railroad only by irrelevant and immaterial circumstances, "the case," it is said, "is not within the statute."[57] It has been held that a section man unloading ties from a car is within the statute imposing a liability for the negligence of fellow servants,[58] and that an engineer standing between two tracks, waiting to take charge of his engine when it backed down, is within the Indiana statute.[59] The Canadian courts give rather a broader effect to the statutes than many of the American courts, and indicate that all persons rendering any service are within the statute.[60] It is held that the case of a section man injured while engaged in loading a car with iron rails by the negligence of another section man in letting one of the rails fall is not within a statute giving a right of action to an employe for injuries from dangers peculiar to the operation of a railroad.[61] A wiper of engines is held to be within the Iowa statute, and it is also held

73 Ga. 499; Georgia &c. R. Co. v. Goldwire, 56 Ga. 196.

[56] Spisak v. Baltimore &c. R. Co. 152 Pa. St. 281; 25 Atl. 497. The court cited and distinguished Kirby v. Pennsylvania R. Co. 76 Pa. St. 506; Cummings v. Pittsburgh &c. R. Co. 92 Pa. St. 82; Richter v. Pennsylvania Co. 104 Pa. St. 511; Christman v. Philadelphia &c. R. Co. 141 Pa. St. 604; 21 Atl. 738; Ricard v. North Pennsylvania R. Co. 89 Pa. St. 193; Baltimore &c. R. Co. v. Colvin, 118 Pa. St. 230; 12 Atl. 337.

[57] Spisak v. Baltimore &c. R. Co. 152 Pa. St. 281; 25 Atl. 497; Richter v. Pennsylvania Co. 104 Pa. St. 511; Christman v. Philadelphia &c. R. Co. 141 Pa. St. 604; 21 Atl. 738.

[58] Atchison &c. R. Co. v. Brassfield, 51 Kan. 167; 32 Pac. 814.

[59] Pittsburgh &c. R. Co. v. Lightheiser (Ind.), 78 N. E. 1033.

[60] LeMay v. Canadian &c. R. Co. 17 Ont. App. 293; 44 Am. & Eng. R. Cas. 627.

[61] Pearson v. Chicago &c. R. Co. 47 Minn. 9; 49 N. W. 302; citing Lavallee v. St. Paul &c. R. Co. 40 Minn. 249; 41 N. W. 974; Johnson v. St. Paul &c. R. Co. 43 Minn. 222; 45 N. W. 156; 8 L. R. A. 819; Smith v. St. Paul &c. R. Co. 44 Minn. 17; 46 N. W. 149. But see Blomquest v. Great Northern R. Co. 65 Minn. 69; 67 N. W. 804; Larson v. Illinois Cent. R. Co. 91 Ia. 81; 58 N. W. 1076; Stebbins v. Crooked Creek R. Co. 116 Ia. 513; 90 N. W.

that a wiper who is discharging the duties of another employe is not to be regarded as a volunteer.[62] A person employed by a railroad company to remove snow from its tracks is held to be within the provisions of a statute giving a right of action to employes who are engaged in the business of operating railroads, or, who are, by the nature of their employment, exposed to the hazards incident to moving trains.[63] It is held in several Iowa cases that an employe not engaged in duties connected with the movement of trains is not within the statute,[64] but there is confusion and conflict in the Iowa cases.[65] It has been held that a private detective in walking along

355; Akeson v. Chicago &c. R. Co. 106 Ia. 54; 75 N. W. 676. In Tay v. Willmar &c. Ry. Co. (Minn.) 110 N. W. 433, a sectionman in the employ of the defendant, while engaged with his foreman in repairing a side track in its railway yard, which necessitated the taking out of an old rail and putting another in its place, was injured by the negligence of his foreman in releasing his hold upon a rail without warning and letting it fall upon him, and it was held upon a consideration of the facts stated in the opinion, that it was a question for the jury whether the plaintiff's employment involved an element of hazard peculiar to railroad business.

[62] Whalen v. Chicago &c. R. Co. 75 Iowa, 563; 39 N. W. 894; 38 Am. & Eng. R. Cas. 141. In a note to the case cited in the Am. & Eng. R. Cas. (p. 143), the Iowa statute is copied. See, also, Jensen v. Omaha &c. R. Co. 115 Ia. 404; 88 N. W. 952. It seems to us that some of the statements of the opinion in the first case referred to upon the subject of the duty to volunteers are rather too broad. In Cloyd v. Galveston &c. Ry. Co. (Tex. Civ. App.) 84 S. W. 408, an engine wiper and a roundhouse hostler temporarily engaged with the the wiper in cleaning the engine were held to be fellow-servants.

[63] Smith v. Humeston &c. R. Co. 78 Iowa, 583; 43 N. W. 545; 41 Am. & Eng. R. Cas. 278, citing Deppe v. Chicago &c. R. Co. 36 Iowa, 52; Malone v. Burlington &c. R. Co. 65 Iowa, 417; 21 N. W. 756; 54 Am. R. 11; 17 Am. & Eng. R. Cas. 644; Luce v. Chicago &c. R. Co. 67 Iowa, 75; 24 N. W. 600; Smith v. Burlington &c. R. Co. 59 Iowa, 73; 6 Am. & Eng. R. Cas. 149; Stroble v. Chicago &c. R. Co. 70 Iowa, 555; 13 N. W. 63; 59 Am. R. 456; 28 Am. & Eng. R. Cas. 510.

[64] Potter v. Chicago &c. R. Co. 46 Iowa, 399; Schroeder v. Chicago &c. R. Co. 41 Iowa, 344; Smith v. Burlington &c. R. Co. 59 Iowa, 73; 12 N. W. 763; 6 Am. & Eng. R. Cas. 149; Malone v. Burlington &c. R. Co. 61 Ia. 326; 16 N. W. 203; 47 Am. R. 813; Stroble v. Chicago &c. R. Co. 70 Ia. 555; 13 N. W. 63; 59 Am. R. 456; Dunn v. Chicago &c. R. Co. 130 Ia. 580; 107 N. W. 616. The Iowa cases are reviewed on the principal and dissenting opinions in this case.

[65] Haden v. Sioux City &c. R. Co. 92 Iowa, 226; 60 N. W. 537; Butler

the track, according to the directions of the company, is within the statute,[66] and it has also been held that a person working with a ditching machine transported on the cars of the company is an employe that the statute protects.[67]

§ 1345. Assumption of risks—Effect of the statute.—The courts generally hold that the common-law doctrine of the assumption of risks is, in some respects, but not in all, materially changed by the statutes enlarging the liabilities of employers. There can, of course, be no doubt that, to a very great extent, the common-law doctrine that employes assume the risk of injuries from the negligence of fellow servants is essentially changed, although not in all the states entirely abrogated. Where the statute enumerates the cases in which the master shall be liable for the negligence of co-employes, the common law rule must, as we believe, still prevail as to the cases not enumerated. Some of the courts hold that the employe does not assume the risk from a breach of duty expressly enjoined by statute.[68] In our opinon both principle and authority require the con-

v. Chicago &c. R. Co. 87 Iowa, 206; 54 N. W. 208; post, § 1356.

[66] Pyne v. Chicago &c. R. Co. 54 Iowa, 223; 37 Am. R. 198.

[67] Nelson v. Chicago &c. R. Co. 73 Iowa, 576; 35 N. W. 611. See, generally, the Iowa cases cited in note to this section, and also post, § 1356, note.

[68] Baddely v. Earl Granville, L. R. 19 Q. B. D. 423; Yarmouth v. France, L. R. 19 Q. B. D. 647; Thomas v. Quartermaine, L. R. 18 Q. B. D. 685; Weblen v. Ballard, L. R. 17 Q. B. D. 122; Mobile &c. R. Co. v. Holborn, 84 Ala. 133; 4 So. 146; Highland Ave. R. Co. v. Walters, 91 Ala. 435; 8 So. 357. In Pittsburgh &c. Ry. Co. v. Lightheiser (Ind.), 78 N. E. 1033, 1037, it is said in regard to the clause of the statute making any person in the service of the company who has charge of any signal, telegraph office, switchyard, roundhouse, locomotive engine or train on a railway in effect a vice-principal that: "It is clear that the doctrine of assumed risk is not applicable to an action brought, like this, under the part of said fourth subdivision above quoted. To hold otherwise would establish in its full vigor the fellow-servant rule, which the statute was intended to abrogate as to the employes mentioned. American Rolling Mills Co. v. Hullinger, 161 Ind. 673, 679, 680; 67 N. E. 986; 69 N. E. 460; Davis v. New York &c. R. Co. 159 Mass. 532, 536; 34 N. E. 1070; Murphy v. City Coal Co. 172 Mass. 324; 52 N. E. 503; Woodward Iron Co. v. Andrews, 114 Ala. 243; 21 So. 440; Southern R. Co. v. Johnson, 114 Ga. 329; 40 S. E. 235; St. Louis R. Co. v. Touhey, 67 Ark. 209; 54 S. W. 577; 77 Am. St. 109;

clusion that an employe who knows of defects and is aware of the danger from them, and voluntarily continues in the service and makes no complaint, is not entitled to recover.[69] The safety of passengers and employes makes it the duty of railroad employes to make reasonable complaint where they have full knowledge of defects and

2 Labatt's Master & Servant, § 650, and note; Reno's Employers' Liability Acts (2d ed.), §§ 249, 250." The later Alabama cases hold a doctrine essentially different from that asserted in the earlier cases (Birmingham R. Co. v. Allen, 99 Ala. 359; 13 So. 8; 20 L. R. A. 457), and the cases of Mobile &c. R. Co. v. Holborn, 84 Ala. 133; 4 So. 146; Highland Ave. R. Co. v. Walters, 91 Ala. 435; 8 So. 357, are overruled. The English cases are reviewed in Birmingham &c. R. Co. v. Allen, and it is said that they go no further than to adjudge that mere knowledge of defects is not itself sufficient to defeat a recovery, but the knowledge may be such as to establish contributory negligence.

[69] Larkin v. New York &c. R. Co. 166 Mass. 110; 44 N. E. 122; Malcom v. Fuller, 152 Mass. 160; 25 N. E. 83; Yarmouth v. France, 19 Q. B. D. 647; Ryalls v. Mechanics' Mills, 150 Mass. 190; 22 N. E. 766; 5 L. R. A. 667, and note; Mellor v. Merchants' &c. Co. 150 Mass. 362; 23 N. E. 100; 5 L. R. A. 792, and note; Louisville &c. R. Co. v. Banks, 104 Ala. 508; 16 So. 547; Louisville &c. R. Co. v. Stutts, 105 Ala. 368; 17 So. 29; 53 Am. St. 127; O'Maley v. South Boston &c. Co. 158 Mass. 135; 32 N. E. 1119; 47 L. R. A. 161, and note; Toomey v. Donovan, 158 Mass. 232; 33 N. E. 396; Pingree v. Leyland, 135 Mass. 398; Moulton v. Gage, 138 Mass. 390; Gleason v. New York &c. R. Co. 159 Mass. 68; 34 N. E. 79; Connelly v. Hamilton &c. Co. 163 Mass. 156; 39 N. E. 787; Cassaday v. Boston &c. R. Co. 164 Mass. 168; 41 N. E. 129; Sullivan v. Fitchburg R. Co. 161 Mass. 125; 36 N. E. 751; East Tennessee &c. R. Co. v. Turvaville, 97 Ala. 122; 12 So. 63; Goldthwait v. Haverhill &c. R. Co. 160 Mass. 554; 36 N. E. 486; Louisville &c. R. Co. v. Hall, 91 Ala. 112; 8 So. 371; 24 Am. St. 863; Lynch v. Boston &c. R. Co. 159 Mass. 536; 34 N. E. 1072; Caron v. Boston &c. R. Co. 164 Mass. 523; 42 N. E. 112; Lothrop v. Fitchburg &c. R. Co. 150 Mass. 423; 23 N. E. 227; Boyle v. New York &c. R. Co. 151 Mass. 102; 23 N. E. 827; Goddard v. McIntosh, 161 Mass. 253; 37 N. E. 169; Watts v. Boston Towboat Co. 161 Mass. 378; 37 N. E. 197. In Cassaday v. Boston &c. R. Co. 164 Mass. 198; 41 N. E. 129, it was said: "On the question whether the plaintiff took the risk there is no difference whether the action is brought at common law or under the statute." The following cases and authorities were cited: Fisk v. Fitchburg R. Co. 158 Mass. 238; 33 N. E. 510; Daigle v. Lawrence Manufacturing Co. 159 Mass. 378; 34 N. E. 458; Kleineist v. Kunhardt, 160 Mass. 230; 35 N. E. 458; Roberts Liability and Duty of Employers, 136, 146, 160, 161, 240; Buswell Personal Injuries, §§ 207, 209.

possess the means and opportunity of complaining to their employer. It is impossible to state in general terms just to what extent the doctrine of assumption of risk still applies under the various statutes, as many of them differ materially in their provisions; but it would seem that under most of the employers' liability acts, which do not point out definitely just what the master must do, the common-law doctrine of assumption of risk still applies, except in so far as the particular statute in question may contain provisions inconsistent therewith.[70] But to apply the doctrine so as to make an employe assume the risk of negligence of all those deemed fellow servants, as to whom the doctrine applied at common law, would be to emasculate the statute and defeat the very purpose of such statutes.[71]

§ 1346. Who are fellow servants under employers' liability acts.—It is not possible to lay down general rules which will apply to all cases for the reason that there is a difference in the language of the various statutes, and for the additional reason that there is a diversity of opinion. We shall, therefore, refer to the adjudged cases without special comment, and shall not undertake to formulate general rules. In one of the cases it is held that, under a statute providing that "all persons who are engaged in the common service of railway corporations, working together at the same time and place, are fellow servants," a station agent is not the fellow servant of trainmen.[72] Under the same statute it has been held that a hostler, whose duty it was to bring engines into a roundhouse and take them out when required, was the fellow servant of a boiler washer whose duty it was to clean out the boiler.[73] A wiper in a roundhouse has been held not to be a fellow servant with an employe engaged in un-

[70] American Rolling Mill Co. v. Hullinger, 161 Ind. 673; 67 N. E. 986. See, also, Whitcomb v. Standard Oil Co. 153 Ind. 513; 55 N. E. 440; Pittsburgh &c. R. Co. v. Moore, 152 Ind. 345; 53 N. E. 290; 44 L. R. A. 638.

[71] See last note to section 1356a. See, also, Baggneski v. Mills (Mass.), 78 N. E. 852; Murphy v. City Coal Co. 172 Mass. 324; 52 N. E. 503. Some of the statutes expressly, or by necessary implication, do away with the doctrine of assumption of risks in cases within such statutes, and others modify it to a greater or less degree.

[72] Gulf &c. R. Co. v. Calvert, 1 Tex. Civ. App. 297; 32 S. W. 246.

[73] Missouri &c. R. Co. v. Whitaker, Tex. Civ. App. 668; 33 S. W. 716.

loading gravel,[74] and a wiper in a roundhouse has been held to be entitled to recover for injuries caused by the negligence of other employes.[75] Negligence of a brakeman has been held to make the company liable to a yard workman.[76] It is held that a foreman, with authority to hire and discharge employes, is a co-employe with the men who work under him within the meaning of the Iowa statute.[77] Under the Ohio statute an engineer in charge of an engine is not a co-employe of a brakeman of another train, but he is a superior of the fireman of the locomotive.[78] In Mississippi and South Carolina, however, it is held that an engineer is not a superior, or person having the right to direct or control a brakeman or flagman who is acting under a conductor, within the meaning of the constitution.[79] A person employed to carry water for workmen engaged in operating a train has been held to be within the protection of the statute.[80] The fellow-servant rule is not, as elsewhere shown, entirely abrogated, so that employes may still be co-employes and governed by the common-law rule.[81]

[74] Nichols v. Chicago &c. R. Co. 60 Minn. 319; 62 N. W. 386.

[75] Chicago &c. R. Co. v. Pontious, 157 U. S. 209; 15 Sup. Ct. 585. See Chicago &c. R. Co. v. Stahley, 62 Fed. 363; 11 C. C. A. 88.

[76] Promer v. Milwaukee &c. R. Co. 90 Wis. 215; 63 N. W. 90; 48 Am. St. 905.

[77] Houser v. Chicago &c. R. Co. 60 Iowa, 230; 14 N. W. 778; 46 Am. 65. But see Chicago &c. R. Co. v. Rathneau, 225 Ill. 278; 80 N. E. 119.

[78] Cincinnati &c. R. Co. v. Margrat, 51 Ohio St. 130; 37 N. E. 11.

[79] Evans v. Railway, 70 Miss. 527; 12 So. 581; Lyon v. Charleston &c. R. (S. Car.) 56 S. E. 18. It is also held in the South Carolina case that where failure of the company to have cars in a train equipped with air brakes operated from the engine, as required by the act of Congress, was not a proximate cause of the servant's injury, he can not rely thereon as actionable negligence, and that before he can be held not to have assumed risks of his employment, which he would not reasonably expect to encounter because not within the scope of his contract of hiring, it must be shown that he was transferred to essentially new duties, and that the order under which he acted was negligent. Distinguishing Carson v. Southern R. Co. 68 S. Car. 55, 68; 46 S. E. 525.

[80] Missouri &c. R. Co. v. Haley, 25 Kan. 35; 5 Am. & Eng. R. 594. See, also, Keatley v. Illinois Cent. R. Co. 94 Ia. 685; 63 N. W. 560. For other cases under the Kansas statute see Union &c. R. Co. v. Thomason, 25 Kan. 1; 5 Am. & Eng. R. Cas. 589; Atchison &c. R. Co. v. Koehler, 37 Kan. 463; 15 Pac. 463; 31 Am. & Eng. R. Cas. 312.

[81] McMaster v. Illinois Central R. Co. 65 Miss. 264; 4 So. 59; 7 Am. St. 653; Chicago &c. R. Co. v.

§ 1347. Defects in appliances or machinery—What are within meaning of the statute.—Many of the statutes make the employer liable for defects in machinery and appliances, and the question as to what is a defect within the meaning of the statute has arisen in some of the cases. It is held that, although machinery is perfect of its kind and in good repair, but unsuitable for the purpose for which employes were required to use it, there is nevertheless a defect within the meaning of the statute.[82] It has been held that where the draw-bar of an engine is placed too low there is a defect.[83] Temporary obstructions, as a stone on a scaffold, are not defects in "ways, works or machinery."[84] So, it has been held that a steel bar, which is not connected with any mechanical appliance, and which is operated by muscular strength directly applied, is not machinery within the meaning of the statute.[85] And similar decisions have been made as to hammers.[86] In some instances it has been held that whether a defect exists is a question of fact for the jury.[87]

§ 1348. Latent defects—Rule under the statute.—The rule in regard to the employer's liability for latent defects is substantially the same under the statute as at common law. If the hidden defect is one not discoverable by reasonable care in performing the duty of inspection, the employer is not liable.[88] If, however, there is a

Doyle, 60 Miss. 977; 8 Am. & Eng. R. Cas. 171.

[82] Geloneck v. Dean &c. Co. 165 Mass. 202; 43 N. E. 85. The court said that: "An unsuitableness of ways, works or machinery for work intended to be done and actually done by means of them is a defect, within the meaning of the statute."

[83] Lawless v. Connecticut &c. R. Co. 136 Mass. 1; Bowers v. Connecticut River &c. R. Co. 162 Mass. 312; 38 N. E. 508.

[84] Carroll v. Willcutt, 163 Mass. 221; 39 N. E. 1016, citing Lynch v. Allyn, 160 Mass. 248; 35 N. E. 550; Burns v. Washburn, 160 Mass. 457; 36 N. E. 199; Prendible v. Connecticut Manufacturing Co. 160 Mass. 131; 35 N. E. 675. See, ante, § 1338; McGiffin v. Palmer &c. Co. L. R. 10 Q. B. D. 5.

[85] Clements v. Alabama &c. R. Co. 127 Ala. 166; 28 So. 643.

[86] Georgia &c. R. Co. v. Nelms, 83 Ga. 70; 9 S. E. 1049; 20 Am. St. 308; Georgia Pac. R. Co. v. Brock, 84 Ala. 138; 4 So. 289.

[87] Graham v. Boston &c. R. Co. 156 Mass. 4; 30 N. E. 359; Birmingham &c. Co. v. Allen, 99 Ala. 359; 13 So. 8; 20 L. R. A. 457.

[88] See Coffee v. New York &c. R. Co. 155 Mass. 21; 28 N. E. 1128; Ladd v. New Bedford R. Co. 119 Mass. 412; 20 Am. R. 331; Louisville &c. R. Co. v. Campbell, 97 Ala.

duty to inspect, and that duty is not performed, the employer is liable, if the defect is such as a reasonably careful inspection would have disclosed.

§ 1349. Rule where the defect is not attributable to the negligence of the employer.—The common law, as we have seen, did not hold an employer liable for an injury to an employe resulting from a defect in machinery or appliances unless there was negligence on the part of the employer. As this was the settled rule of the common law, and as the legislature is held to adopt statutes in view of the common-law rules, we think it clear that the mere existence of a defect is not sufficient to charge the employer, except, perhaps, where the statute clearly provides otherwise. Silence upon the subject will not, in our judgment, exclude the rule of the common law, but, of course, an express statutory provision would do so.[89] The common-law rule that the defect must be the proximate cause of the injury is enforced,[90] and in other instances reference is made to the common-law so that the conclusion that the common-law rule that the mere existence of a defect without evidence of negligence on the part of the employer is not enough to charge the employer is not excluded except where the statute makes the existence of the defect sufficient prima facie evidence of negligence. It is held that evidence of subsequent repairs is not competent upon the question of negligence on the part of the employer.[91] There can, of course, be no doubt that the general rules of pleading[92] and evidence apply to

147; 12 So. 574. See, also, Atlantic Coast Line R. Co. v. Ryland, 50 Fla. 190; 40 So. 24.

[89] Walsh v. Whiteley, L. R. 21 Q. B. D. 371; Wilson v. Louisville &c. R. Co. 85 Ala. 269; 4 So. 625; Seaboard &c. R. Co. v. Woodson, 94 Ala. 143; 10 So. 87; United States &c. Co. v. Weir, 96 Ala. 396; 11 So. 436. The cases to which we have referred are based on special statutory provisions but they show the full recognition given the common law rules.

[90] Brady v. Ludlow &c. Co. 154 Mass. 468; 28 N. E. 901; Louisville &c. R. Co. v. Binion, 98 Ala. 570; 14 So. 619; Tuck v. Louisville &c. R. Co. 98 Ala. 150; 12 So. 168. In the latter case the court cited Mobile &c. R. Co. v. Holborn, 84 Ala. 133; 4 So. 146; Louisville &c. R. Co. v. Davis, 91 Ala. 487; 8 So. 552; Mobile &c. R. Co. v. George, 94 Ala. 199; 10 So. 145.

[91] Ashley v. Hart, 147 Mass. 573; 18 N. E. 416; 1 L. R. A. 355. See, also, ante, § 1177.

[92] Shinners v. Proprietors &c. 154 Mass. 168; 28 N. E. 10; 12 L. R. A. 554, and note; 26 Am. St. 226. This is the common rule. Nalley

actions against employers under the statute except where they are changed by the statute. Thus the burden of proof on the question of the employer's negligence, no statutory provision to the contrary existing, is upon the employe.[93] The courts apply to the question of contributory negligence, so far as involves the burden of proof, the rule which prevailed at common law prior to the enactment of the statute.[94] As we have elsewhere shown, upon the question who has the burden of proof there is stubborn conflict of authority. In Indiana it is held that an act passed after the enactment of the employers' liability act, and providing that in all actions for damages for personal injuries caused by negligence it shall not be necessary for the plaintiff to allege or prove want of contributory negligence, but that contributory negligence shall be a defense provable under the general denial, had the effect of making it unnecessary for the plaintiff to allege freedom from contributory negligence in his complaint in an action under the employers' liability act, but did not take away the defense of contributory negligence no matter by whose evidence it is made to appear.[95]

v. Hartford &c. R. Co. 51 Conn. 524; 50 Am. R. 47, and note; Terre Haute &c. R. Co. v. Clem, 123 Ind. 15; 23 N. E. 965; 7 L. R. A. 588; Hodges v. Percival, 132 Ill. 53; 23 N. E. 423; Columbia &c. R. Co. v. Hawthorne, 144 U. S. 202; 12 Sup. Ct. 591; Ely v. St. Louis &c. R. Co. 77 Mo. 34. See authorities cited, note, Elliott Roads and Streets, 647. See as to complaint or declaration, McNamara v. Logan, 100 Ala. 187; 14 So. 175; Louisville &c. R. Co. v. Coulton, 86 Ala. 129; 5 So. 458.

[93] Regan v. Donovan, 159 Mass. 1; 33 N. E. 702; Louisville &c. R. Co. v. Binion, 98 Ala. 570; 14 So. 619. In the first case cited the court said, speaking of the defendants, that: "Proof of mere knowledge on their part that the steps were movable, without any evidence to show that movable steps were unsafe in themselves or unsuitable for the place, or that the defendants knew or had reason to suppose that the owner would leave them insecure is not sufficient to sustain the burden of proof." See, also, Louisville &c. R. Co. v. Campbell, 97 Ala. 147; 12 So. 574; McGuire v. Lehigh Valley R. Co. (Pa. St.) 64 Atl. 825.

[94] Shea v. Boston &c. R. Co. 154 Mass. 31; 27 N. E. 672, citing Hinckley v. Cape Cod R. Co. 120 Mass. 257; Crafts v. Boston, 109 Mass. 519; Guffin v. Boston &c. R. Co. 148 Mass. 143; 19 N. E. 166; 1 L. R. A. 698, and note 12 Am. St. 526. For cases holding burden on the defendant, Bromley v. Birmingham &c. R. Co. 95 Ala. 397; 11 So. 341; Moffatt v. Tenney, 17 Colo. 189; 30 Pac. 348; Guffin v. Overman &c. Co. 61 Fed. 568.

[95] Pittsburgh &c. R. Co. v. Light-

§ 1350. Presumption of negligence.—Some of the statutes provide that the occurrence of an accident resulting in injury to an employe raises a presumption of negligence on the part of the employe. It has been held that under such a statute the presumption does not arise unless the plaintiff has shown that he was not guilty of contributory negligence.[96] We can not perceive upon what principle there can be a presumption of negligence on the part of the employer in the absence of a statute providing that the occurrence of an accident shall be prima facie evidence of negligence, for the established common-law rule is that there is no such presumption, and a rudimental principle of law and logic is that "wrong is not to be presumed."

§ 1351. Selection of co-employes.—In some of the statutes it is provided that an employer shall not be liable for the negligence of a co-employe unless he has been guilty of negligence in selecting or keeping in service such co-employe. It has been held under such a statute that it is incumbent upon the plaintiff to prove that the co-employe was incompetent, and that the employer knew, or ought to have known, that the co-employe was incompetent.[97] This is substantially the common-law rule, but is not the rule under most of the statutes, for the general rule under those statutes is that care in the selection of co-employes will not exonerate the employer from liability.[98] In a case where a section man was injured while

heiser, 163 Ind. 247; 71 N. E. 218; Pittsburgh &c. R. Co. v. Collins, 163 Ind. 569; 71 N. E. 661.

[96] Georgia &c. R. Co. v. Cosby, 97 Ga. 299; 22 S. E. 912. See Maloy v. Port Royal &c. R. Co. 97 Ga. 295; 22 S. E. 588. We have elsewhere referred to decisions holding that the common-law doctrine of contributory negligence prevails unless clearly changed by statute. Ante, § 1315. See, also, Duval v. Hunt, 34 Fla. 85; 15 So. 876.

[97] Gier v. Los Angeles &c. R. Co. 108 Cal. 129; 41 Pac. 22. But see Culver v. Alabama &c. R. Co. 108 Ala. 330; 18 So. 827, for a decision holding the master liable, although he had used care in selecting fellow servants. The statutes are, however, essentially different. As to what is not sufficient to show incompetency, see Hamann v. Milwaukee &c. Co. 127 Wis. 550; 106 N. W. 1081.

[98] Northern Pacific R. Co. v. Behling, 57 Fed. 1037; 6 C. C. A. 681; Unfried v. Baltimore &c. R. Co. 34 W. Va. 260; 12 S. E. 512; Georgia &c. R. Co. v. Brown, 86 Ga. 320; 12 S. E. 812; Hissong v. Richmond &c. R. Co. 91 Ala. 514; 8 So. 776; Louisville &c. R. Co. v. Markee, 103 Ala. 160; 15 So. 511;

riding on a hand-car, by being pushed off the car, the decision was that the railroad was liable under the statute.[99] A similar decision was made in an Alabama case.[100] In a recent case the question arose as to whether the master was liable where the injured employe, who belonged to a labor union, had made it a condition of service that the master should employ only those belonging to the union, and yield his freedom to select employes, and it was held that the master was not liable to the plaintiff for the negligence of one that such union required him to employ.[101]

§ 1352. Superintendents within the meaning of employers' liability acts.—Under many of the statutes the question whether an employe is under superintendence or whether he receives an injury while acting in obedience to the orders or directions of a superintendent is often one of importance and difficulty. The term "superintendent" has, perhaps, as a general rule, a wider meaning under an employers' liability act than that assigned it at common law. In some cases an employe occupying the position of a foreman, and who would not be regarded as a superior agent or vice-principal at common law, is a superintendent under the statute in such a sense as to make the common master responsible for his negligence.[102] Under the Massachusetts statute a railroad company is held not to be liable for the errors of an employe although he does occasionally perform acts of superintendence.[103] In the case just referred to it

49 Am. St. 21; Rine v. Chicago &c. R. Co. 100 Mo. 228; 12 S. W. 640; 41 Am. & Eng. R. Cas. 555. See, generally, Chambliss v. Mary Lee &c. R. Co. 104 Ala. 665; 16 So 572.

[99] Steffenson v. Chicago &c. R. Co. 45 Minn. 355; 47 N. W. 1068; 11 L. R. A. 271. See, generally, Hall v. Chicago &c. R. Co. 46 Minn. 439; 49 N. W. 239.

[100] Richmond &c. R. Co. v. Hammond, 93 Ala. 181; 9 So. 577.

[101] Farmer v. Kearney, 115 La. Ann. 722; 39 So. 967; 3 L. R. A. (N. S.) 1105.

[102] Kansas City &c. R. Co. v. Burton, 97 Ala. 240; 12 So. 88; 53 Am. & Eng. R. Cas. 115.

[103] Cashman v. Chase, 156 Mass. 342; 31 N. E. 4. And to the same effect is Hartford v. Northern Pac. R. Co. 91 Wis. 374; 64 N. W. 1033. See, also, Whittaker v. Bent, 167 Mass. 588; 46 N. E. 121; Whelton v. West End St. R. Co. 172 Mass. 555; 52 N. E. 1072; Brittain v. West End St. R. Co. 168 Mass. 10; 46 N. E. 111; Shepard v. Boston &c. R. Co. 158 Mass. 174; 33 N. E. 508; Vecchioni v. New York &c. R. Co. 191 Mass. 9; 77 N. E. 306. But as to who are superintendents and to the effect that if the act is one

is said:[104] "The law recognizes that an employe may have two duties, that he may be a superintendent for some purposes and also an ordinary workman, and that if negligent in the latter capacity the employer is not answerable." The familiar rule is that where a right is given by a statute a plaintiff who seeks to avail himself of such a right must make a case within the statute, and it is therefore correctly held that where the statute makes the liability of the employers depend upon the fact that the employe whose negligence caused the injury was a superintendent, that fact must be affirmatively proved by the plaintiff.[105]

§ 1353. What constitutes negligence in superintendence.—The plaintiff has the burden of proving, in order to make a case under the statutes, that the person whose negligence caused the injury was a superintendent, and at the time the accident occurred was engaged in the duty of superintendence.[106] The negligence of a person in

of superintendence the fact that they may also perform manual labor will not make any difference, see Kansas City &c. R. Co. v. Burton, 97 Ala. 240; 12 So. 88; Louisville &c. R. Co. v. Mothershed, 97 Ala. 261; 12 So. 714; Byrne v. Learnard, 191 Mass. 269; 77 N. E. 316; Murphy v. New York &c. R. Co. 187 Mass. 18; 72 N. E. 330; Crowley v. Cutting, 165 Mass. 436; 43 N. E. 197; Canney v. Walkeline, 113 Fed. 66; 58 L. R. A. 33, and note; McCoy v. Westborough, 172 Mass. 504; 52 N. E. 1064. And see, generally, note in 58 L. R. A. 33; Choctaw &c. R. Co. v. Doughty, 77 Ark. 1; 91 S. W. 768.

[104] In the case referred to the court cited: Shaffers v. General &c. Navigation Co. L. R. 10 Q. B. D. 356; Osborne v. Jackson, L. R. 11 Q. B. D. 619; Kellard v. Rooke, L. R. 19 Q. B. D. 585, and L. R. 21 Q. B. D. 367.

[105] Fitzgerald v. Boston &c. R. Co. 156 Mass. 293; 31 N. E. 7. In the case cited the court referred to Hodgkins v. Eastern R. Co. 119 Mass. 419; Connors v. Holden, 152 Mass. 598; 26 N. E. 137, and quoted with approval from a text writer the following: "The negligence complained of must occur not only during the superintendence but substantially in the exercise of it." Roberts Liability of Employers, 265, 266. See, also, Ashley v. Hart, 147 Mass. 573; 18 N. E. 416; 1 L. R. A. 355; McDonnell v. Oceanic Steam &c. Co. 143 Fed. 480.

[106] Ante, § 1352; Shaffers v. General &c. Navigation Co. L. R. 10 Q. B. D. 356; Kellard v. Rooke, L. R. 19 Q. B. D. 585; Dantzler v. De Bardeleben &c. Co. 101 Ala. 309; 14 So. 10; 22 L. R. A. 361; Shepard v. Boston &c. R. Co. 158 Mass. 174; 33 N. E. 508 (citing Clifford v. Old Colony &c. R. Co. 141 Mass. 564; 6 N. E. 751); McCauley v. Norcross, 155 Mass. 584; 30 N. E. 464. See Hennessy v. Boston, 161 Mass. 502; 37 N. E. 668; McPhee v.

charge and control in the capacity of a superintendent may consist in the omission to use ordinary care to keep appliances, works and ways in a reasonably safe condition for use by employes whose duty is to work with such machinery and appliances.[107] The failure of an employe in charge or control to exercise ordinary care to make the place where other employes are required to work reasonably safe may constitute negligence,[108] and so negligence may consist in furnishing defective appliances or in placing appliances in unsafe positions so as to endanger the safety of employes.[109] Many other illustrations of negligence in superintendence will be found in the cases cited below.[110] The superintendent is bound to exercise reasonable care, and the employer cannot escape liability for his negligence upon the ground that due care was exercised in employing him.[111]

§ 1354. Cars—Trains—Meaning of term "cars" as used in statutes enlarging liabilities of railroad companies.—The term "cars," when employed in an employers' liability act, may be taken to mean any kind of a vehicle other than a locomotive or tender used by a railroad company for the transportation of passengers, employes, or property upon and along its tracks. The term is not confined to

Scully, 163 Mass. 216; 39 N. E. 1007; Shea v. Wellington, 163 Mass. 364; 40 N. E. 73; Osborne v. Jackson, L. R. 11 Q. B. D. 619; note in 58 L. R. A. 33, 34.

[107] Seaboard &c. Co. v. Woodson, 94 Ala. 143; 10 So. 87; Hall v. Posey, 79 Ala. 84; Louisville &c. R. Co. v. Coulton, 86 Ala. 129; 5 So. 458; Western &c. R. Co. v. Lazarus, 88 Ala. 453; 6 So. 877.

[108] Hennessy v. Boston, 161 Mass. 502; 37 N. E. 668.

[109] Illinois Car &c. Co. v. Walch, 132 Ala. 490; 31 So. 470; Collier v. Coggins, 103 Ala. 281; 15 So. 578; Kansas City &c. R. Co. v. Burton, 97 Ala. 240; 12 So. 88. See, also, Postal Tel. &c. Co. v. Hulsey, 132 Ala. 444; 31 So. 527.

[110] McHugh v. Manhattan R. Co. 179 N. Y. 378; 72 N. E. 312; Hooe v. Boston &c. St. R. Co. 187 Mass. 67; 72 N. E. 341; Davis v. New York &c. R. Co. 159 Mass. 532; 34 N. E. 1070; Aitken v. Newport &c. Co. (1887) 3 Times L. R. 527; McPhee v. Scully, 163 Mass. 216; 39 N. E. 1007; Williamson Iron Co. v. McQueen, 144 Ala. 265; 40 So. 306; Faith v. New York &c. R. Co. 95 N. Y. S. 774, affirmed in 185 N. Y. 556; 77 N. E. 1186; and note in 58 L. R. A. 33, et seq. See, also, Choctaw &c. R. Co. v. Doughty, 77 Ark. 1; 91 S. W. 768. Under the Indiana statute designating certain employes as vice-principals, the act need not be one of superintendence or in regard to a non-delegable duty. Chicago &c. R. Co. v. Williams (Ind.), 79 N. E. 442.

[111] Malcom v. Fuller, 152 Mass. 160; 25 N. E. 83.

coaches nor to freight cars, but embraces all kinds of cars. A hand-car is "a car" within the meaning of the statute.[112] A locomotive and one or more cars coupled to it constitute a train within the meaning of the Massachusetts statute,[113] but in order to constitute a train it is not necessary that the cars should be attached to a locomotive or that two or more cars should be coupled together at the precise time of the occurrence of the accident.[114] A single car on its way to be returned to its owner is held not to be part of the ways, works or machinery of a railroad company.[115]

§ 1355. Use and operation of railway—Meaning of term.—Some of the statutes use the term "any wrongs connected with the use and operation of any railway," and controversy has arisen as to the meaning to be ascribed to the term.[116] In one of the cases where an employe engaged in elevating coal into a shed was injured, it was held

[112] Kansas City &c. R. Co. v. Crocker, 95 Ala. 412; 11 So. 262. See Richmond &c. R. Co. v. Hammond, 93 Ala. 181; 9 So. 577; San Antonio &c. R. Co. v. Stevens (Tex Civ. App.), 83 S. W. 235; Texas &c. R. Co. v. Hervey (Tex. Civ. App.), 89 S. W. 1095. In the case first cited the court referred to the definitions of the word car given in Webster's dictionary and in the Century dictionary and among other things, said: "It is not necessary that the car be connected in any way with a locomotive, or with other cars forming a train."

[113] Dacey v. Old Colony R. Co. 153 Mass. 112; 26 N. E. 437.

[114] Devine v. Boston &c. R. Co. 159 Mass. 348; 34 N. E. 539; Caron v. Boston &c. R. Co. 164 Mass. 523; 42 N. E. 112. The rule under the English act is the same as that stated in the text. Cox v. Great Western &c. R. Co. L. R. 9 Q. B. D. 106; Roberts Employers' Liability (3d ed.), 300.

[115] Coffee v. New York &c. R. Co. 155 Mass. 21; 28 N. E. 1128; 48 Am. & Eng. R. Cas. 370.

[116] See Beleal v. Northern Pac. R. Co. (N. Dak.) 108 N. W. 33 (held not within the statute); Galveston &c. R. Co. v. Mohrmann (Tex. Civ. App.), 93 S. W. 1090 (not within statute); Orendorff v. Terminal Ass'n, 116 Mo. App. 348; 92 S. W. 148 (employe engaged in trucking freight held within the statute); Callahan v. St. Louis &c. R. Co. 170 Mo. 473; 71 S. W. 208; 60 L. R. A. 249; 94 Am. St. 746 (section man injured by other section men held within the statute); Mounce v. Lodwick Lumber Co. (Tex. Civ. App.), 91 S. W. 240 (servant of sawmill company operating private railroad held within statute); Blomquist v. Great Northern R. Co. 65 Minn. 69; 67 N. W. 804 (held within the statute); Steffenson v. Chicago &c. R. Co. 45 Minn 355; 47 N. W. 1068; 11 L. R. A. 271 (held within the statute); Smith v. St. Paul &c. R. Co. 44 Minn. 17; 46 N. W. 149; Nicholas

that the plaintiff was not within the statute,[117] but in a later case, in the same court, a somewhat different view was taken, and it was held that a section man, injured while using a hand-car, was within the statute, and that the statute was not confined to cases of employes engaged in moving trains, as held in the earlier case.[118] The doctrine declared in the case last referred to was asserted in a case in which it was held that a section man injured while on a hand-car by his feet catching in the rails of the track was entitled to recover.[119]

§ 1356. "Charge and control."—It often becomes important to

v. Chicago &c. R. Co. 60 Minn. 319; 62 N. W. 386; Leier v. Minnesota &c. Co. 63 Minn. 203; 65 N. W. 269 (all held within statute); Holtz v. Great Northern R. Co. 69 Minn. 524; 72 N. W. 805; Johnson v. St. Paul &c. R. Co. 43 Minn. 222; 45 N. W. 156; 8 L. R. A. 419 (both held not within the statute); Atchison &c. R. Co. v. Brassfield, 51 Kans. 167; 32 Pac. 814; Atchison &c. R. Co. v. Vincent, 56 Kans. 444; 43 Pac. 251; Chicago &c. R. Co. v. Stahley, 62 Fed. 363 (all held within the statute).

[117] Stroble v. Chicago &c. R. Co. 70 Iowa, 555; 31 N. W. 63; 59 Am. R. 456, citing Foley v. Chicago &c. R. Co. 64 Iowa, 644; 21 N. W. 124; Malone v. Burlington &c. R. Co. 65 Iowa, 417; 21 N. W. 756; 54 Am. R. 11. See, also, Depuy v. Chicago &c. R. Co. 110 Mo. App. 10; 84 S. W. 103.

[118] Larson v. Illinois Cent. R. Co. 91 Iowa, 81; 58 N. W. 1076. See, also, Akeson v. Chicago &c. R. Co. 106 Ia. 54; 75 N. W. 676; Handelun v. Burlington &c. R. Co. 72 Ia. 709; 32 N. W. 4.

[119] Chicago &c. R. Co. v. Artery, 137 U. S. 507; 11 Sup. Ct. 129. In the case cited the court reviewed the cases of Schroeder v. Chicago &c. R. Co. 47 Iowa, 375; Pyne v. Chicago &c. R. Co. 54 Iowa, 223; 6 N. W. 281; 37 Am. R. 198; Smith v. Burlington &c. R. Co. 59 Iowa, 73; 12 N. W. 763; Malone v. Burlington &c. R. Co. 61 Iowa, 326; 16 N. W. 203; 47 Am. R. 813; Foley v. Chicago &c. R. Co. 64 Iowa, 644; 21 N. W. 124; Malone v. Burlington &c. R. Co. 65 Iowa, 417; 21 N. W. 756; 54 Am. R. 11; Luce v. Chicago &c. R. Co. 67 Iowa, 75; 24 N. W. 600; Matson v. Chicago &c. R. Co. 68 Iowa, 22; 25 N. W. 911; Stroble v. Chicago &c. R. Co. 70 Iowa, 555; 31 N. W. 63; 59 Am. R. 456; Pierce v. Central &c. R. Co. 73 Iowa, 140; 34 N. W. 783; Nelson v. Chicago &c. R. Co. 73 Iowa, 576; 35 N. W. 611, and Rayburn v. Central R. Co. 74 Iowa, 637; 35 N. W. 606. It seems to us that the earlier Iowa cases hold that an employe not engaged in moving or operating trains is not within the statute and that the later cases have to some extent, at least, departed from that doctrine. Haden v. Sioux City R. Co. 92 Iowa, 226; 60 N. W. 537; Butler v. Chicago &c. R. Co. 87 Iowa, 206; 54 N. W. 208. See, also, Missouri &c. R. Co. v. Smith (Tex. Civ. App.), 99 S. W. 743.

determine the meaning of the words "charge and control," for cases sometimes turn upon the meaning to be ascribed to those words.[120] In one of the English cases it was suggested that probably the words are intended to mean different things, but there was no authoritative decision upon the question.[121] The Massachusetts decisions, however, hold the words to be "explanatory of each other."[122] The American cases hold that it is not necessary, in order to bring a case within the statute, that the "charge or control" should be permanent, but that it is sufficient to show that the "charge or control" was in the employe whose negligence caused the injury at the time the accident occurred.[123] The English authorities seem to lay down a somewhat different doctrine.[124] It has been held that it cannot be determined as matter of law who is in charge or control at a par-

[120] The fourth clause of the Indiana statute makes the company liable to an employe, who is free from contributory negligence, for injury to him caused by the negligence of any person in the service of the company who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine or train upon the railway, or of any person, co-employe, or fellow-servant at the time acting in the place and performing the duty of the corporation in that behalf, the person so injured obeying or conforming to the order of some superior at the time of such injury having authority to direct. It is held that it does not include a brakeman merely charged with the duty of opening and closing a switch. Baltimore &c. R. Co. v. Little, 149 Ind. 167; 48 N. E. 862, and that the first part of the clause is not limited by the latter, and it is unnecessary to allege and prove that the injured employe, in cases based on the first subdivision, was obeying or conforming to the order of some superior at the time having authority to direct. Indianapolis Un. R. Co. v. Houlihan, 157 Ind. 494; 60 N. E. 943; 54 L. R. A. 787. The last subdivision is no broader than the common law, if indeed, it is as broad. Thacker v. Chicago &c. R. Co. 159 Ind. 82, 86; 64 N. E. 605; 59 L. R. A. 792.

[121] Gibbs v. Great Western R. Co. L. R. 11 Q. B. D. 22, and L. R. 12 Q. B. D. 208; Roberts Employers Liability (3d ed.), 293, 294.

[122] Caron v. Boston &c. R. Co. 164 Mass. 523; 42 N. E. 112, citing Davis v. New York &c. R. Co. 159 Mass. 532; 34 N. E. 1070; Lynch v. Boston &c. R. Co. 159 Mass. 536; 34 N. E. 1072; Devine v. Boston &c. R. Co. 159 Mass. 348; 34 N. E. 539; Donahoe v. Old Colony &c. R. Co. 153 Mass. 356; 26 N. E. 868; Thyng v. Fitchburg R. Co. 156 Mass. 13; 30 N. E. 169; 32 Am. St. 425.

[123] Steffe v. Old Colony &c. R. Co. 156 Mass. 262; 30 N. E. 1137; Louisville &c. R. Co. v. Richardson, 100 Ala. 232; 14 So. 209.

[124] Gibbs v. Great Western &c. R. Co. L. R. 12 Q. B. 208, and L. R 11 Q. B. D. 22.

ticular time, and that the question is one of fact for the jury,[125] but we think there may be cases in which the question may be one of law. The rank of the person to whom charge or control is given is not important, for the important element is the fact of actual charge and control. A brakeman or other subordinate employe may be a person in charge or control.[126] A conductor of a train may be in charge or control, although he may be temporarily absent from the train.[127] It is held that the charge and control must exist at the time the injury is inflicted.[128] It has also been held that a foreman of a gang of men may be a person in charge or control of a car.[129] And the Indiana statute, making the company liable for negligence of an employe "in charge of any locomotive engine or train," applies in favor of an engineer injured by the negligence of another locomotive engineer, and also in favor of a conductor injured by the negligence of the engineer of the locomotive of the same train.[129a]

§ 1356a. Person to whose order the injured servant was bound to conform and did conform.—Some of the statutes give a right of action to an employe who is injured, while in the exercise of due care and diligence, by the negligence of another to whose order or direction the injured employe was bound to conform, and did con-

[125] Louisville &c. R. Co. v. Richardson, 100 Ala. 232; 14 So. 209; citing Louisville &c. R. Co. v. Mothershed, 97 Ala. 261; 12 So. 714.

[126] Steffe v. Old Colony R. Co. 156 Mass. 262; 30 N. E. 1137, citing Cox v. Great Western &c. R. Co. L. R. 9 Q. B. D. 106; Roberts Employers' Liability, 294. But see Caron v. Boston &c. R. Co. 164 Mass. 523; 42 N. E. 112.

[127] Donahoe v. Old Colony R. Co. 153 Mass. 356; 26 N. E. 868. But see Thyng v. Fitchburg R. Co. 156 Mass. 13; 30 N. E. 169; 32 Am. St. 425.

[128] Chicago &c. R. Co. v. Touhy, 26 Ill. App. 99.

[129] Kansas City &c. R. Co. v. Crocker, 95 Ala. 412; 11 So. 262; Richmond &c. R. Co. v. Hammond, 93 Ala. 181; 9 So. 577. For cases of engineers held in charge or control, see Hissong v. Richmond &c. R. Co. 91 Ala. 514; 8 So. 776; Alabama &c. R. Co. v. McDonald, 112 Ala. 216; 20 So. 472; Davis v. New York &c. R. Co. 159 Mass. 532; 34 N. E. 1070; McCord v. Cammell, (1896), A. C. 57; 65 L. J. Q. B. (N. S.) 202. See, also, Southern Ind. R. Co. v. Baker (Ind. App.), 77 N. E. 64.

[129a] Pittsburgh &c. R. Co. v. Gipe, 160 Ind. 360; 65 N. E. 1034; Pittsburgh &c. R. Co. v. Collins, 163 Ind. 569; 71 N. E. 661. See, also, Caron v. Boston &c. R. Co. 164 Mass. 523, 529; 42 N. E. 112.

form.[130] The injury must be caused by the negligence of such a person,[131] but it has been held that it need not immediately follow the order.[132] There is some doubt as to whether the order must be a special order or may relate to the general discharge of duties, but we think that a somewhat general order may be sufficient to bring the case within the statute.[133] An employe does not assume the risk of unknown danger caused by the negligence of the very person to whose order he is bound to conform, and does conform.[134]

[130] See as to what must be shown under this provision, Louisville &c. R. Co. v. Wagner, 153 Ind. 420; 53 N. E. 927; Thacker v. Chicago &c. R. Co. 159 Ind. 82; 64 N. E. 605; 59 L. R. A. 792; Southern Ind. R. Co. v. Martin, 160 Ind. 280; 66 N. E. 886; Indianapolis &c. Transit Co. v. Foreman, 162 Ind. 85; 69 N. E. 669; 102 Am. St. 185; Central &c. R. Co. v. Lamb, 124 Ala. 172; 26 So. 969.

[131] Grand Rapids &c. R. Co. v. Pettit, 27 Ind. App. 120; 60 N. E. 1000; Hodges v. Standard Wheel Co. 152 Ind. 680; 52 N. E. 391; 54 N. E. 383; Thacker v. Chicago &c. R. Co. 159 Ind. 82; 64 N. E. 605; 59 L. R. A. 792. See, also, Fergerson v. Galt Pub. School, 27 Ont. App. 480; Howard v. Bennett, 58 L. J. (Q. B.) 129.

[132] Indianapolis Gas Co. v. Schumack, 23 Ind. App. 87; 54 N. E. 414. That the negligence rendering the company liable may be in the subsequent act or omission of the employe who gave the order, see, also, Lake Erie &c. R. Co. v. Charman, 161 Ind. 95; 67 N. E. 923; Thacker v. Chicago &c. R. Co. 159 Ind. 82, 92, 93; 64 N. E. 605; 59 L. R. A. 792; 2 Labbatts Master and Servant, § 696; and see Barnett &c. Co. v. Schlapka, 208 Ill. 426: 70 N. E. 343. For cases in which the orders and negligence of foreman and the like have been held to make the master liable, see Terre Haute &c. R. Co. v. Rittenhouse, 28 Ind. App. 633; 62 N. E. 295; Wild v. Waygood (1892), 1 Q. B. 783.

[133] Cox v. Hamilton &c. Co. 14 Ont. Rep. 300; Millward v. Midland R. Co. L. R. (1884) 14 Q. B. Div. 68; Cincinnati &c. R. Co. v. Thieband, 114 Fed. 918. See, however, Grand Rapids &c. R. Co. v. Pettit, 27 Ind. App. 120; 60 N. E. 1000; Mobile &c. R. Co. v. George, 94 Ala. 199; 10 So. 145. It is held that the order must not be as broad as the service. Southern Ind. R. Co. v. Harrell, 161 Ind. 689, 694; 68 N. E. 262; 63 L. R. A. 460; McElwaine &c. Co. v. Wall (Ind. App.), 76 N. E. 408.

[134] Pittsburgh &c. R. Co. v. Nicholas, 165 Ind. 679; 76 N. E. 522; Terre Haute &c. R. Co. v. Rittenhouse, 28 Ind. App. 633; 62 N. E. 295; Woodward Iron Co. v. Andrews, 114 Ala. 243; 21 So. 440, 443. See, also, Louisville &c. R. Co. v. Wagner, 153 Ind. 420; 53 N. E. 927; Pittsburgh &c. R. Co. v. Gipe, 160 Ind. 360, 361, 363; 65 N. E. 1034; Davis v. New York &c. R. Co. 159 Mass. 532; 34 N. E. 1070, 1072; Southern R. Co. v. Johnson, 114 Ga. 329; 40 S. E. 235, 236.

§ 1357. Contributory negligence—Doctrine of as affected by the statute.—We have elsewhere treated of the effect of statutes upon the doctrine of contributory negligence,[135] and we do not deem it necessary to add very much to what was there said. It seems very clear to us that the statute cannot be held to abrogate a rule so long and so firmly established as the rule upon the subject of contributory negligence, unless the statute by express words or clear and unmistakable implication abrogates the rule. Our conclusion is well fortified by authority and rests on sound principle.[136]

§ 1358. Contracts waiving right of action invalid.—The Alabama court holds a contract on the part of an employe not to hold the employer responsible for injuries resulting from the negligence of other employes to be invalid,[137] and there are other recent de-

[135] Ante, § 1315. For the rule under the Georgia statute, see Campbell v. Atlanta &c. R. Co. 53 Ga. 488; Central &c. R. Co. v. Kelly, 58 Ga. 107; Thompson v. Central R. Co. 54 Ga. 509; Central &c. R. Co. v. Mitchell, 63 Ga. 173; 1 Am. & Eng. R. Cas. 145.

[136] Murphy v. Chicago &c. R. Co. 45 Iowa, 661; Geyette v. Fitchburg R. Co. 162 Mass. 549; 39 N. E. 188, citing (Chandler v. New York &c. R. Co. 159 Mass. 589; 35 N. E. 89; Tyndale v. Old Colony R. Co. 156 Mass. 503; 31 N. E. 655; Felt v. Boston &c. R. Co. 161 Mass. 311; 37 N. E. 375; Irwin v. Alley, 158 Mass. 249; 33 N. E. 517, and distinguishing Maguire v. Fitchburg Railroad Co. 146 Mass. 379; 15 N. E. 904; Maher v. Boston &c. R. Co. 158 Mass. 36; 32 N. E. 950; Thyng v. Fitchburg R. Co. 156 Mass. 13; 30 N. E. 169); 32 Am. St. 425; Columbus &c. R. Co. v. Bridges, 86 Ala. 448; 5 So. 864; 11 Am. St. 58, and note; Columbus &c. R. Co. v. Bradford, 86 Ala. 574; 6 So. 90; Richmond &c. R. Co. v. Thomason, 99 Ala. 471; 12 So. 273; Memphis &c. R. Co. v. Graham, 94 Ala. 545; 10 So. 283; Louisville &c. R. Co. v. Orr, 91 Ala. 548; 8 So. 360; Weblin v. Ballard, L. R. 17 Q. B. D. 122; Trinity &c. R. Co. v. Mitchell, 72 Tex. 609; 10 S. W. 698. See, also, Hancock v. Norfolk &c. R. Co. 124 N. Car. 222; 32 S. E. 679; Whitcomb v. Standard Oil Co. 153 Ind. 513; 55 N. E. 440; Buckner v. Richmond &c. R. Co. 72 Miss. 878; 18 So. 449; Norfolk &c. R. Co. v. Cheatwood, 103 Va. 356; 49 S. E. 489. Duty of employe is to adopt the safer of two lines of conduct. Chase v. Burlington &c. R. Co. 76 Iowa, 675; 38 Am. & Eng. R. Cas. 148; Tennessee &c. Co. v. Herndon, 100 Ala. 451; 14 So. 287.

[137] Hissong v. Richmond &c. R. Co. 91 Ala. 514; 8 So. 776. See, also, Wilson v. Southern R. 73 S. Car. 481; 53 S. E. 968; Kansas &c. R. Co. v. Peavy, 29 Kans. 169; 44 Am. R. 630; Atchison &c. R. Co. v. Fronk (Kans.), 87 Pac. 698. But compare Chicago &c. R. Co. v. Curtis, 51 Neb. 442; 71 N. W. 42; 66 Am. St. 456, and note.

cisions to the same effect. The English cases assert a different doctrine.[138] In Massachusetts it is held that the employe may effectively contract that the employer shall not be responsible for obvious defects.[139] Many of the statutes themselves provide that any contract attempting to release the company from its liability to an employe under the statute shall be null and void, and such a provision has been held constitutional and valid.[140] And in a recent Iowa case the court held that a statute providing that no contract of insurance, relief, or indemnity, entered into prior to the injury, should be a defense to any action under the statute, was not unconstitutional.[141]

§ 1358a. Recent Act of Congress.—One of the most radical of the "employers' liability acts" is the Act of Congress, approved June 11, 1906, "relating to the liability of common carriers in the District of Columbia and territories, and common carriers engaged in commerce between the states, and between the states and foreign nations, to their employes.[142] Section 1 of the Act provides "that every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employes, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the neg-

[138] Griffiths v. Earl of Dudley, 9 Q. B. D. 357.

[139] O'Maley v. South Boston &c. Co. 158 Mass. 135; 32 N. E. 1119; 47 L. R. A. 161, and note.

[140] Mumford v. Chicago &c. R. Co. 128 Ia. 685; 104 N. W. 1135; Pittsburgh &c. R. Co. v. Montgomery, 152 Ind. 1; 49 N. E. 582; 69 L. R. A. 875; 71 Am. St. 301. But it has been held not to apply to the acceptance of benefits from a relief department and a release of the company on such acceptance. Pittsburgh &c. R. Co. v. Moore, 152 Ind. 345; 53 N. E. 290; 44 L. R. A. 638; Pittsburgh &c. R. Co. v. Hosea, 152 Ind. 412; 53 N. E. 419.

[141] McGuire v. Chicago &c. R. Co. (Ia.) 108 N. W. 902. Many cases are cited and reviewed in the prevailing opinion and in the dissenting opinion.

[142] 34 Stat. 232, 233, C. 3073.

ligence of any of its officers, agents, or employes, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works." Section 2 provides "that in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. All questions of negligence and contributory negligence shall be for the jury." The third section provides "that no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employe, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employe: Provided, however, that upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employe, or, in case of his death, to his personal representative." By the fourth section any action under the Act must be commenced within one year from the time the cause of action accrued. The fifth, and last section, merely guards against any construction that might be given this Act as limiting the duty of railroad carriers, or impairing the rights of their employes, under the safety appliance act of Congress.

§ 1358b. Act of Congress — Construction and effect.—The act under consideration, if constitutional and valid, apparently abolishes or abrogates the fellow-servant doctrine entirely in all cases in which the act applies. The statute covers death as well as injury to the employe, and gives or preserves a right of action in case of death under the same circumstances. It apparently revives the old discarded doctrine of comparative negligence; and it has, on the other hand, somewhat unusual provisions in regard to diminishing the amount of damages by the jury in proportion to the amount of negligence of the employe and in regard to setting off any sum the

employer contributed toward insurance, relief benefit or indemnity paid to the injured employe, or to his personal representative in case of death. The statute has been held to be prospective, and not retrospective,[143] and it cannot be applied, we think, to injuries received under circumstances having no connection with interstate commerce, even though the employer may, at other times and places, be a common carrier engaged in interstate commerce, that is, to cases where neither the employer nor the employe, in regard to the work in question, has anything to do with interstate commerce, but is operating wholly within one state; and, if it must be construed as applicable to all such cases, it would clearly seem to be invalid. For instance, suppose a railroad company is engaged in interstate commerce on its main line, extending into and through several states, and that it has leased, or owns, a short independent branch which is wholly within one state, and over which no interstate shipments are, or even could be, made, and that a local switchman is injured by the negligence of another switchman working with him in switching cars to and from a coal mine, while getting coal to be used only by the company on such branch, or even for dealers along the line of the branch for local use within the state. It seems clear that Congress would have no jurisdiction over such matter, and that the act must either be construed as not applicable to such cases or held unconstitutional, at least to that extent. If constitutional, many other questions will doubtless arise as to its construction and application to other cases of the same general character as that suggested, and also as to how far, if at all, it abrogates, supersedes or controls state legislation.[144] So, the provision as to comparative negligence opens a wide door to litigation, and it is doubtful whether the average jury, if contributory negligence is not a bar, will give much effect to the negligence of the employe in determining the amount of damages in ordinary cases. The statutory rule on this subject seems to be much like that which once prevailed in Illinois, except in regard to diminishing the damages in proportion to the amount of negligence attributable to the employe. It also bears some resemblance to the rule in admiralty, and to a somewhat different statutory rule in Georgia and Florida, but there seem to be essential differences in

[143] Hall v. Chicago &c. R. Co. 149 Fed. 564.

[144] See Henderson v. Wickham, 92 U. S. 252, 271, 272; Gulf &c. R. Co. v. Hefley, 158 U. S. 98; 15 Sup. Ct. 802.

all. The provison in regard to contracts for insurance, relief benefits, and the like, not being a bar, is somewhat similar to provisions in other statutes that have been held constitutional and valid,[145] but it has been held that such a provision does not apply to an acceptance of benefits from a relief fund and a release of the company on such acceptance as distinguished from a mere contract made in advance.[146] Whether this is true, however, under the act in question, which also provides for setting off at the trial any sum the defendant contributed to such fund, is somewhat doubtful.

§ 1358c. Act of Congress—Reasons for holding it unconstitutional.—If the act under consideration must be construed as applicable to intrastate as well as interstate commerce, and hence beyond the domain of Congress it is unconstitutional and invalid, at least to that extent, and, if the provisions are inseparable, it is wholly void. So, too, the result is the same, and the act is wholly void if it is not in any constitutional sense a regulation of commerce. The title of the act does not "label" it as an act to regulate commerce, or the like, but as an act relating to *liability* of common carriers engaged in commerce between the states and between the states and foreign nations *to* their *employes.* The words we have italicized seem to be the emphatic ones. The provisons in the body of the statute have no reference to the rights, duties, or regulations of such companies in carrying goods, live-stock or passengers, nor to dealings or relations of any kind with any one but employes. Changing the rule in regard to master and servant, and creating new liabilities in that relation, seems to be the real purpose and effect of the act, and nothing more. This cannot, in any just sense, be said to be a regulation of commerce. So, the act literally applies to all common carriers engaged in interstate commerce, no matter whether at the time and place of the injury or not, and no matter whether the employe is or ever was so engaged or not. It provides that "every" common carrier engaged in interstate commerce shall be liable to "any" of its employes for "all" damages which may result from the negligence of "any" of its officers, agents or employes, or by reason of "any" defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works.

[145] See Ante, § 1358.

[146] See Ante, § 1358, next to last note.

It goes, therefore, beyond the domain of Congress, and its parts and provisions are so inseparably connected that all must fall. Such, in substance, is the reasoning in support of the contention that the act is unconstitutional, and this reasoning prevailed with the courts first considering the question, the earlier decisions being to the effect that the act is wholly invalid.[147]

§ 1358d. Act of Congress—Reasons for holding it valid.—On the other hand, much may also be said in support of the statute. "Commerce" has been given a very comprehensive meaning in some cases by the Supreme Court of the United States, and the authority of Congress under the commerce clause has been upheld in some cases that carry it very far. The regulation of transportation and instrumentalities of interstate traffic have been held to be within its scope. May it not also be said that the service may likewise be regulated by such a statute as that in question, and even that an essential purpose and effect of the statute may well be to increase the safety of passengers and make such companies better serve the public in all respects? So, too, although the act literally applies to all carriers engaged in interstate commerce, must the letter govern the spirit? Can it, and should it not, be so construed, in order to uphold it as constitutional and valid, as applying only to cases within the domain of Congress under the commerce clause, and can it not at least be upheld as to injuries received by employes while both employer and employe are engaged in transporting interstate shipments, and the like? Congress is not presumed to have intended to violate any constitutional provision or law, but, on the contrary, is presumed not to have intended to exceed its jurisdiction, and the construction should be such as to uphold the law, if there can justly be such a construction, even though it may be contrary to the letter that killeth.[148] In several cases state statutes, although broad enough

[147] Brooks v. Southern Pac. Co. 148 Fed. 986; 64 Cent. Law Jour. 52; Howard v. Illinois Cent. R. Co. 148 Fed. 997. See, also, article in 63 Cent. Law Jour. 278. The courts also distinguish the safety appliance act on the ground that it relates only to interstate traffic and is not anything like so broad in terms. One or two additional considerations might plausibly be urged, we think, but we have confined ourselves, in the main, to a brief outline of the reasoning of the courts.

[148] See United States v. Coombs, 12 Pet. (U. S.) 75, 76; Brewer v. Blougher, 14 Pet. (U. S. 178, 198;

in terms to include interstate commerce, have been so construed as to be upheld.[149] So, the "safety appliance act" and several other acts of Congress seem to have some provisions that are literally broad enough to include cases not within the jurisdiction of Congress, yet these acts have either been upheld, in part at least, or have passed unquestioned for years.[150] Such, in brief, is the reasoning indulged in favor of the statute. The question is not entirely free from doubt, and, while the decisions at present are against the validity of the act, the question cannot be regarded as settled until it is decided by the court of last resort.

§ 1358e. Act of Congress—Recent cases holding it valid.—Two decisions of federal courts, reported since the last four preceding sections were put in type, are contrary to the earlier decisions upon the subject and uphold the act in question as constitutional and valid.[151] They rest upon grounds in most respects the same as those stated in the last preceding section, but call attention to one or two other considerations, and, as the opinions are elaborate, it may be well to review them carefully and to quote from them at some length. In the opinions in both of the cases referred to the courts start

Petri v. Bank, 142 U. S. 644, 650; 12 Sup. Ct. 325; Opinion of the Justices, 41 N. H. 555; Ohio &c. R. Co. v. Lander, 104 Ky. 431; 47 S. W. 344; Riggs v. Palmer, 115 N. Y 506; 22 N. E. 188; 5 L. R. A. 340, and note; Johnson v. Southern Pac. Co. 196 U. S. 1; 25 Sup. Ct. 158; Packet Co. v. Keokuk, 95 U. S. 80; People v. Hayne, 83 Cal. 111; 23 Pac. 1; 7 L. R. A. 348; 17 Am. St. 211; Grenada County v. Brogden, 112 U. S. 261; 5 Sup. Ct. 125; United States v. Central Pac. R. Co. 118 U. S. 235; 6 Sup. Ct. 1038; Sykes v. Columbus, 55 Miss. 143; Roosevelt v. Goddard, 52 Barb. (N. Y.) 533.

[149] Chesapeake &c. R. Co. v. Kentucky, 179 U. S. 388; 21 Sup. Ct. 101, 103; Louisville &c. R. Co. v. Mississippi, 133 U. S. 587; 10 Sup. Ct. 348. See, also, American Exp. Co. v. Southern Ind. Exp. Co. (Ind.) 78 N. E. 1021; 79 N. E. 353; New Mexico v. Denver (U. S.), 27 Sup. Ct. 1; People v. Chicago &c. R. Co. 223 Ill. 581; 79 N. E. 144; Southern Kans. R. Co. v. State (Tex. Civ. App.), 99 S. W. 166; Merrill v. Boston &c. R. Co. 63 N. H. 259.

[150] See Johnson v. Southern Pac. Co. 196 U. S. 1; 25 Sup. Ct. 158; United States v. Chicago &c. R. Co. 149 Fed. 486. Article in 63 Cent. Law Jour. 356; United States v. Chicago &c. R. Co. 143 Fed. 353. As to statute valid in part, see Western Un. Tel. Co. v. Pennsylvania, 128 U. S. 39; 9 Sup. Ct. 6.

[151] Snead v. Central &c. R. Co. 151 Fed. 608; Spain v. St. Louis &c. R. Co. 151 Fed. 522.

out with, and lay stress upon, the well-settled proposition that the presumption is in favor of the constitutionality and validity of a statute. They then show that Congress has full power to regulate interstate commerce and that this includes the instrumentalities of commerce.[152] Both courts also argue and hold that employes so engaged in interstate commerce are instruments of commerce for whose protection Congress might and did legislate, and that even if the act in question is broad enough to include those engaged in other than interstate commerce it can be separated and upheld as to those engaged in interstate commerce. In one of the cases,[153] it is said of the objection to the act on the ground of interference with intrastate traffic and the domain of the state, that "by parity of reasoning this would annul the laws in interior waterway navigation already discussed; it would abolish the Interstate Commerce Commission, and all of those regulations which Congress has enacted for the transportation of and business of interstate commerce," and the court holds that "it is immaterial to the validity of the act that somewhere in its operation it may have a casual or contingent effect upon the domain of state legislation."[154] In the other case it is

[152] Citing Welton v. Missouri, 91 U. S. 280; Pacific Coast S. S. Co. v. Board of Railroad Com'rs, 18 Fed. 11; Sherlock v. Alling, 93 U. S. 104; 23 L. Ed. 819; United States v. Joint Traffic Ass'n, 171 U. S. 569; 19 Sup. Ct. 25; 43 L. Ed. 259; Hopkins v. United States, 171 U. S. 597; 19 Sup. Ct. 40; 43 L. Ed. 290; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 203; 5 Sup. Ct. 828, and other cases, and referring to various definitions of "commerce," most of them collated in the Lottery Cases, 188 U. S. 321; 23 Sup. Ct. 321. Cases of laws upheld in regard to seamen, passengers, and the like are also cited. The Bark Chusan, 2 Story (U. S.), 455; Cooley v. Board of Wardens, 12 How. (U. S.) 315; The Lottawanna, 21 Wall. (U. S.) 577; United States v. Coombs, 12 Pet. (U. S.) 78; Patterson v. Bark Eudora, 190 U. S. 169, 175; 23 Sup. Ct. 821, 822; Head Money Cases, 112 U. S. 580; 5 Sup. Ct. 247. See, also, Smith v. Alabama, 124 U. S. 465; 8 Sup. Ct. 564; Debs, In re, 158 U. S. 564, 15 Sup. Ct. 900.

[153] Snead v. Central &c. R. Co. 151 Fed. 608.

[154] The court distinguishes, or attempts to distinguish the Trade Mark Cases, 100 U. S. 82, and Illinois Cent. R. Co. v. Mc Kendree, 203 U. S. 514; 27 Sup. Ct. 153, and then continues as follows:

"In the case here the act is an express regulation of interstate commerce, limited to the employes of those common carriers who are engaged therein. It operates neither expressly nor impliedly upon employes or carriers in solely intrastate traffic. But even could it

said:[155] "Assuming, but not deciding, that the act is broad enough to include all servants of a common carrier engaged in interstate trade, including those employed solely in transportation within one state and others not employed in transportation at all, the main question is whether it is not separable so as to be valid when invoked by one actually employed in interstate traffic, as the plaintiff alleges in his complaint he was at the time of the injury.[156] . . . If a part of a statute is unconstitutional the remainder is not void unless all the provisions are connected in the subject-matter, dependent on each

be so construed, certainly the power of Congress to control interstate instrumentalities would not be divested, merely because those instrumentalities may be incidentally used as mediums of local commerce. The Wheeling Bridge Case, 18 How. (U. S.) 421. Nor can it be justly contended that any injury will result to any corporation or person engaged in interstate or foreign commerce by the means of redress for injuries thus afforded by the act of Congress. There is no deprivation of due process of law. Missouri Pacific R. Co. v. Mackey, 127 U. S. 205; 8 Sup. Ct. 1161; 32 L. Ed. 107; McGuire v. Chicago, &c. R. R. (Iowa) 108 N. W. 902. . . . Congress has now drawn the whole subject within the boundaries of its constitutional power. It is seeking to protect the employes who are the instruments and agents of commerce. The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines." Pensacola Tel. Co. v. Western Union Tel. Co. 96 U. S. 10; 24 L. Ed. 708; Nashville &c. R. Co. v. Alabama, 128 U. S. 99; 9 Sup. Ct. 28; Smith v. Alabama, 124 U. S. 473; 8 Sup. Ct. 564; New York &c. R. Co. v. New York, 165 U. S. 631; 17 Sup. Ct. 418. Citing, also, Peirce v. Van Dusen, 78 Fed. 694 (as deciding the identical question); Johnson v. Southern Pac. Co. 196 U. S. 16; 25 Sup. Ct. 158; and United States v. Great Northern R. Co., 145 Fed. 438. Much is also said in the opinion in praise of the law and of reasons for its enactment.

[155] Spain v. St. Louis &c. R. Co., 151 Fed. 522.

[156] "The authorities relied upon by learned counsel for the defendant to sustain their contentions are United States v. Reese, 92 U. S. 214; 23 L. Ed. 563; Trade Mark Cases, 100 U. S. 82; 25 L. Ed. 550; United States v. Harris, 106 U. S. 629; 1 Sup. Ct. 601; 27 L. Ed. 290; Baldwin v. Franks, 120 U .S. 678; 7 Sup. Ct. 656, 763; 32 L. Ed. 766; and the Virginia Coupon Cases, 114 U. S. 270; 5 Sup. Ct. 903, 962; 29 L. Ed. 185. A careful examination of the first four cases will show that the acts construed and declared invalid in those cases were all penal statutes, and that the court laid great stress on that fact." The last case above cited is also distinguished.

other, operating together with the same purpose, or otherwise connected together in meaning that it cannot be presumed that the Legislature would have passed one without the other.[157] . . . Is there any room for the presumption that Congress would not have passed the act unless it could be applied to all employes, including those not engaged on trains employed in interstate transportation or not engaged in transportation at all? If the act itself is ambiguous on that subject, reference to the title will at once remove it. That title is, 'An Act Relating to Liability of Common Carriers in the District of Columbia and Territories and Common Carriers Engaged in Commerce between the States and Foreign Nations.' "[158] In another recent case[159] it was deemed unnecessary to decide whether the act in question is valid, and in still another its validity seems to have been assumed.[160]

[157] Packer Co. v. Keokuk, 95 U. S. 80; 24 L. Ed. 377; Tiernan v. Rinker, 102 U. S. 123; 26 L. Ed. 103; Unity v. Burrage, 103 U. S. 447; 26 L. Ed. 405; Railroad Co. v. Schutte, 103 U. S. 118, 142; 26 L. Ed. 327; McCullough v. Virginia, 172 U. S. 102, 112; 19 Sup. Ct. 134; 43 L. Ed. 382.

[158] "That in cases of this kind the title of the act, as well as the circumstances surrounding its enactment, as exhibited in public documents, may be referred to, is well-settled. Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 563; 12 Sup. Ct. 689; 36 L. Ed. 537; Johnson v. Southern Pac. R. Co. 196 U. S. 1, 19; 25 Sup. Ct. 158; 49 L. Ed. 363; Petri v. Creelman Lumber Co. 199 U. S. 487, 495; 26 Sup. Ct. 133; 50 L. Ed. 281; Millard v. Roberts, 202 U. S. 429, 437; 26 Sup. Ct. 674; 50 L. Ed. 1090."

[159] Hall v. Chicago &c. R. Co., 149 Fed. 564.

[160] Malloy v. Northern Pac. R. Co., 151 Fed. 1019.

CHAPTER LVI.

INJURIES RESULTING IN DEATH.

§ 1359. Introductory.—As is well known, the right of action for damages for injuries resulting in death is purely statutory. At common law no action could be maintained.[1] It is said, however,

[1] Higgins v. Butcher, Yelverton, 89; Weems v. Mathieson, 4 Macqu. H. L. C. 215; Carey v. Berkshire R. Co. 1 Cush. (Mass.) 475; 48 Am. Dec. 616, and note; Insurance Co. v. Brame, 95 U. S. 754; Eureka v. Merrifield, 53 Kan. 794; 37 Pac. 113; Eden v. Lexington &c. R. Co. 14 B. Monr. (Ky.) 204; Jackson v. Pittsburgh &c. R. Co. 140 Ind. 241; 39 N. E. 663; 49 Am. St. 192; Kahl v. Memphis &c. R. Co. 95 Ala. 337; 10 So. 661; Dwyer v. Chicago &c. R. Co. 84 Ia. 479; 51 N. W. 244; 35 Am. St. 322; Harshman v. Northern Pac. R. Co. (N. Dak.)

that such a right existed under the civil law.[2] The act of the British Parliament, generally known as "Lord Campbell's Act," gave a right of action, and the provisions of that act, but much varied in form, if not in substance, have been incorporated in statutes of the American states.[3] It was held under the common law rule that, although no action could be maintained for causing death, an action would lie in a proper case for the loss of services during the period intervening between the injury and the death.[4] As the right of action is purely statutory the plaintiff who seeks to enforce it must state such facts as clearly bring his case within the statute.[5] The allegations of the complaint or declaration must show that the plaintiff is entitled to maintain the action,[6] and, where it is essential to a right of recovery that there should be beneficiaries of a designated class, the fact that there are such beneficiaries must be properly averred.[7] Where the law requires the performance of acts as condi-

103 N. W. 412; note in 70 Am. St. 670; 6 Thomp. Neg. § 6978–6980. But see, Stanly v. Bircher, 78 Mo. 245; Shields v. Yonge, 15 Ga. 349; 60 Am. Dec. 698; Sullivan v. Union Pac. R. Co. 3 Dill. (U. S.) 334.

[2] Hubgh v. New Orleans &c. R. Co. 6 La. Ann. 495; 54 Am. Dec. 565; Hermann v. New Orleans &c. R. Co. 11 La. Ann. 5. See Canadian &c. R. Co. v. Robinson, 14 Can. Sup. Ct. 105; Harrisburg, The, 119 U. S. 199; 7 Sup. Ct. 140.

[3] Mr. Tiffany has collected these statutes. Death by Wrongful Act, §§ 34, 59. See, also, 6 Thomp. Neg. (2d ed.) § 6984, et seq.

[4] Baker v. Bolton, 1 Campb. 493; Davis v. Railway Co. 53 Ark. 117; 13 S. W. 801; 7 L. R. A. 283; Hyatt v. Adams, 16 Mich. 180. See "Statutory Liability for Causing Death," 28 Am. Law Reg. (N. S.) 328, 585; Cooley Torts, 264; Bradshaw v. Lancashire &c. R. Co. 10 C. P. 189; 44 L. J. (C. P.) 148.

[5] McDonald v. Pittsburgh &c. R. Co. 144 Ind. 459; 43 N. E. 447; 32 L. R. A. 309; 55 Am. St. 185; Hilliker v. Citizens' St. R. Co. 152 Ind. 86; 52 N. E. 607; Wabash &c. R. Co. v. Cregan, 23 Ind. App. 1; 54 N. E. 767; Bowen v. Illinois Cent. R. Co. 136 Fed. 306; 70 L. R. A. 915.

[6] Frazier v. Georgia &c. R. Co. 96 Ga. 785; 22 S. E. 936; Orgall v. Burlington &c. R. Co. 46 Neb. 4; 64 N. W. 450; Holston v. Coal & Iron Co. 95 Tenn. 521; 32 S. W. 486. See, generally, Close v. McIntire, 120 Ind. 262; 22 N. E. 128; Louisville &c. R. Co. v. Berg (Ky.), 32 S. W. 616; Hicks v. New York &c. R. Co. 164 Mass. 424; 41 N. E. 721; 49 Am. St. 471; Sawyer v. Perry, 88 Me. 42; 33 Atl. 660; Deni v. Pennsylvania R. Co. 181 Pa. St. 525; 37 Atl. 558; 59 Am. St. 676; St. Louis &c. R. Co. v. Yocum, 34 Ark. 493. See as to pleading negligence, Northern &c. R. Co. v. Craft, 69 Fed. 124.

[7] Indianapolis &c. R. Co. v. Keely, 23 Ind. 133; Stewart v. Terre Haute &c. R. Co. 103 Ind. 44; 2 N. E.

tions precedent to the right of recovery performance of such conditions must, as a general rule, be averred and proved.[8]

§ 1360. Constitutional questions.—The question as to whether the provision of the New York constitution forbidding a limitation upon the amount of recovery in actions for injuries resulting in death can have a retrospective operation has been before the courts of that state and the decisions are in direct conflict. In one of the cases it was held that the provision only operates prospectively,[9]

208; Commonwealth v. Eastern R. Co. 5 Gray (Mass.), 473; Commonwealth v. Boston &c. R. Co. 121 Mass. 36; Harvey v. Baltimore &c. R. Co. 70 Md. 319; 17 Atl. 88; State v. Grand Trunk &c. R. Co. 60 Me. 145; Muhl v. Michigan Southern &c. R. Co. 10 Ohio St. 272; Missouri Pacific R. Co. v. Barber, 44 Kan. 612; 24 Pac. 969; Barnum v. Chicago &c. R. Co. 30 Minn. 461; 16 N. W. 364; Seresen v. Northern Pac. R. Co. 45 Fed. 407; West Chicago &c. R. Co. v. Mabie, 77 Ill. App. 176; Barnum v. Chicago &c. R. Co. 30 Minn. 461; 16 N. W. 364; Warren v. Englehart, 13 Neb. 283; 13 N. W. 401; Conlin v. Charleston &c. R. Co. 15 Rich. L. (S. C.) 201; Lilly v. Charlotte &c. R. Co. 32 S. Car. 142; 10 S. E. 932; East Tennessee &c. R. Co. v. Lilly, 90 Tenn. 563; 18 S. W. 243; Northern Pac. R. Co. v. Ellison, 3 Wash. 225; 28 Pac. 333; Woodman v. Chicago &c. R. Co. 23 Wis. 400. But see Kessler v. Smith, 66 N. Car. 154; Columbus &c. R. Co. v. Bradford, 86 Ala. 574; 6 So. 90; Alabama &c. R. Co. v. Waller, 48 Ala. 459; Warner v. Western &c. R. Co. 94 N. Car. 250. But see Southern Pac. Co. v. Wilson (Ariz.), 85 Pac. 401. Some of the cases hold that it is not necessary to give names of beneficiaries. Conant v. Griffin, 48 Ill. 410; Jeffersonville &c. R. Co. v. Hendricks, 41 Ind. 48. See Howard v. Delaware &c. R. Co. 40 Fed. 195; 6 L. R. A. 75, and note.

[8] Allen v. Atlantic &c. R. Co. 54 Ga. 503; Casey v. St. Louis Transit Co. 116 Mo. App. 235; 91 S. W. 419, 427 (citing text and numerous cases). See Cuttingham v. Weeks, 54 Ga. 275. But compare Brown v. New York &c. R. Co. 136 Fed. 700. It has been held that the plaintiff is not required to prosecute a wrong-doer although the wrong which caused the injury was felonious. Lofton v. Vogles, 17 Ind. 105. See, also, Pettingill v. Rideout, 6 N. H. 454; 25 Am. Dec. 473; Newell v. Cowan, 30 Miss. 492; Chick v. Southeastern &c. R. Co. 57 Ga. 357; Sawtell v. Western &c. R. Co. 61 Ga. 567; Dodson v. McCauley, 62 Ga. 130; South Carolina R. Co. v. Nix, 68 Ga. 572; Western &c. R. Co. v. Meigs, 74 Ga. 857.

[9] O'Reilly v. Utah &c. Co. 87 Hun, 406; 34 N. Y. S. 358, citing New York &c. R. Co. v. Van Horn, 57 N. Y. 473; Endlich Inter. of Stat. sec. 271; Potter's Dwarris Stat. 162; Sedgwick Stat. and Const. Law, p. 180, 680.

but in another case it is held that it has a retroactive operation.[10] In our opinion the case last mentioned is not well decided. It may be doubted whether an enactment changing the measure of liability could, in any event, be valid as against prior contracts, rights and obligations, but, however this may be, it seems quite clear that the provision in the New York constitution must, upon principle, be held to operate prospectively. There are many analogous cases holding that such provisions cannot be given a retroactive effect.[11] Statutes giving a right of action in cases of death caused by negligence have been almost uniformly upheld,[12] and the contention that such enactments violate the contract contained in corporate charters denied. Some of the cases place the doctrine upon the ground that there is no creation of new duties and nothing more than the creation of a new remedy for the breach of a previously existing duty.[13] Such statutes have generally been held valid although made to apply exclusively to one class of corporations,[14] but this doctrine has been challenged in an opinion of much strength.[15] Before the

[10] Isola v. Webber, 13 Misc. (N. Y.) 97; 34 N. Y. S. 77; Smith v. Metropolitan &c. R. Co. 15 Misc. (N. Y.) 158; 35 N. Y. S. 1062. The cases of Denver &c. R. Co. v. Woodward, 4 Colo. 1 and 162; Linden v. Kansas &c. R. Co. 4 Colo. 433, go far in support of O'Reilly v. Utah &c. Co. 87 Hun (N. Y.), 406; 34 N. Y. S. 358, and are opposed to the doctrine of Isola v. Webber, 13 Misc. (N. Y.) 97; 34 N. Y. S. 77. This is true of the case of Chicago &c. R. Co. v. Pounds, 11 Lea, (Tenn.) 130.

[11] In Shreveport v. Cole, 129 U. S. 36; 5 Sup. Ct. 210, the court thus stated the rule: "Constitutions as well as statutes are construed to operate prospectively, unless on the face of the instrument or enactment, the contrary intention is manifested beyond reasonable doubt." See Cooley Const. Lim. (3d ed.) 62. See, also, Chicago &c. R. Co. v. Pounds, 11 Lea (Tenn), 130.

[12] Clay v. Central R. &c. Co. 84 Ga. 345; 10 S. E. 967; Owensboro &c. R. Co. v. Barclay, 102 Ky. 16; 43 S. W. 177, and authorities cited in following notes.

[13] Boston &c. R. Co. v. State, 32 N. H. 215; Board &c. v. Scearce, 2 Duv. (Ky.) 576; Southwestern &c. R. Co. v. Paulk, 24 Ga. 356.

[14] Schoolcroft v. Louisville &c. R. Co. 92 Ky. 233; 17 S. W. 567; 14 L. R. A. 579, and note, citing Railway Co. v. Mackey, 127 S. 205; 8 Sup. Ct. 1161; Minneapolis &c. R. Co. v. Beckwith, 129 U. S. 27; 9 Sup. Ct. 207; Boston &c. R. Co. v. State, 32 N. H. 215; Carroll v. Missouri &c. R. Co. 88 Mo. 239; 57 Am. R. 382, and note; McAunich v. Mississippi &c. R. Co. 20 Ia. 338. See Van Brunt v. Cincinnati &c. R. Co. 78 Mich. 530; 44 N. W. 321; Chiles v. Drake, 2 Metcf. (Ky.) 146; 74 Am. Dec. 406.

[15] Smith v. Louisville &c. R. Co. 75 Ala. 449. See, also, Chicago &c.

recent act of Congress it was settled that such statutes do not contravene the commerce clause of the federal constitution.[16] It is held that where the constitution confers upon an administrator the right to sue he may maintain an action although no statute had been enacted conferring or regulating the right.[17]

§ 1361. Construction of statutes.—The authorities are not in harmony upon the question whether a statute giving a right of action for death is or is not to be strictly construed. The scale is almost in equipoise, and it is difficult to say on which side the weight of authority is.[18] It seems to us that as such statutes are in derogation of the common law they should receive a strict construction; not, indeed, a construction so strict as that given penal statutes, except in cases where punitive damages are given, but where damages not simply compensatory are given, then, it seems to us, the statute should be construed according to the canons of construction applicable to penal statutes. Where a punishment is denounced and the recovery is not confined to compensatory damages the statute is in effect penal, and not simply remedial.[19] It is held by the federal courts that the statute does not create a new cause of action,[20] but this seems to be contrary to the doctrine of the English

R. Co. v. Moss, 60 Miss. 641; Wilson v. Tootle, 55 Fed. 211.

[16] Sherlock v. Alling, 93 U. S. 999.

[17] Thomas v. Royster, 98 Ky. 206; 32 S. W. 613. The constitutional provision was held to be self-executing.

[18] Holding that the statute is to receive a liberal construction. Hayes v. Williams, 17 Colo. 465; 30 Pac. 352; Soule v. New York &c. R. Co. 24 Conn. 575; Lamphear v. Buckingham, 33 Conn. 237; Merkle v. Bennington Township, 58 Mich. 156; 24 N. W. 776; 55 Am. R. 666; Bolinger v. St. Paul &c. R. Co. 36 Minn. 418; 31 N. W. 856; 1 Am. St. 680. See, also, Haggerty v. Central R. Co. 31 N. J. L. 349; Whitford v. Panama R. Co. 23 N. Y. 465. Holding that the statute should be strictly construed. Thornburg v. American &c. Co. 141 Ind. 443; 40 N. E. 1062; 50 Am. St. 334, and cases cited. Pittsburg &c. R. Co. v. Hine, 25 Ohio St. 629; Jackson v. St. Louis &c. R. Co. 87 Mo. 422; 56 Am. R. 460; Illinois Cent. &c. R. Co. v. Johnson, 77 Miss. 727; 28 So. 753; 51 L. R. A. 837. See 3 Wood Railroads (Minor's ed.), 1826; Tiffany, Death by Wrongful Act, § 32; note in 70 Am. St. 672; 6 Thomp. Neg. (2d ed.) § 6985.

[19] Board v. Scearce, 2 Duv. (Ky.) 576; Burns v. Grand Rapids &c. R. Co. 113 Ind. 169; 15 N. E. 230; Raisor v. Chicago &c. R. Co. 215 Ill. 47; 74 N. E. 69; 106 Am. St. 153.

[20] Bigelow v. Nickerson, 70 Fed 113; 30 L. R. A. 336; Nickerson v.

courts.[21] There is, as it seems to us, difficulty in maintaining the doctrine of the federal courts. If a new right is not given, then it can hardly be true that the limitation forms part of the right, and yet it is uniformly held that it does form part of the right itself.[22] If there is no new right created, then it is difficult to sustain the decisions which hold that the law of the place of the accident governs,[23] for if there be nothing more than a remedy created, the statute of a foreign jurisdiction could not govern the courts of the place where the cause is tried. But some of the apparent conflict upon the subject is explained by the fact that the various statutes are not all of the same type or class, as will be shown in the next section. A statute giving a right of action for death caused by wrongful act is to be construed as including negligent acts of omission as well as of commission.[24] We suppose that the term "wrongful," as ordinarily employed, is to be taken as meaning actionable wrong, and that

Bigelow, 62 Fed. 900; The Robert Holland, 59 Fed. 200; The City of Norwalk, 55 Fed. 98. In the case last cited the court quoted with approval the statement in the opinion in Steamboat Co. v. Chase, 16 Wall. (U. S.) 532, that, "The statute does no more than take the case out of the operation of the common law maxim that an action for death dies with the person."

[21] Pym v. Great Northern &c. R. Co. 4 Best & S. 396; Canadian &c. R. Co. v. Robinson, 19 Can. Sup. Ct. 292; 54 Am. & Eng. R. Cas. 49; Seward v. Vera Cruz, L. R. 10 App. Cas. 59; Blake v. Midland R. Co. 18 Q. B. 93; 21 L. J. Q. B. 233. See Russell v. Sunbury, 37 Ohio St. 372; 41 Am. R. 523; Hamilton v. Jones, 125 Ind. 176; 25 N. E. 192.

[22] Post, § 1373.

[23] Post, § 1366. It is also true that the doctrine of the federal court is antagonistic to the rule that where the death is instantaneous there can be recovery, for there was no right in the decedent to recover damages had he survived and therefore none in his representatives after his death. Kearney v. Boston &c. R. Co. 9 Cush. (Mass.) 108; Hansford v. Payne, 11 Bush. (Ky.) 380; Hollenbeck v. Berkshire &c. R. Co. 9 Cush. (Mass.) 478; Mulchahey v. Washburn &c. Co. 145 Mass. 281; 14 N. E. 106; 1 Am. St. 458; Whitford v. Panama &c. R. Co. 23 N. Y. 465. Post, § 1363.

[24] American &c. R. Co. v. Johnson, 60 Fed. 503. See, also, Galveston &c. R. Co. v. Currie (Tex.), 96 S. W. 1073; Lipscomb v. Railway Co. 95 Tex. 5; 64 S. W. 923; 55 L. R. A. 869; 93 Am. St. 804; Shannon v. Jefferson Co. 125 Ala. 384; 27 So. 977; American &c. Co. v. Guy, 25 Ind. App. 588; 58 N. E. 738; Bussey v. Gulf &c. R. Co. 79 Miss. 597; 31 So. 212. It is held that the Rhode Island statute does not embrace mere passive negligence or acts of omission. Myette v. Gross, 18 R. I. 729; 30 Atl. 602, citing Bradbury v. Furlong, 13 R. I. 15; 43 Am. R. 1.

whether the act which causes death be a culpable breach of duty by failing or neglecting to do what the law requires or doing what the law forbids, there is a right of recovery. But so much depends upon the language of the particular statute that only very general statements can be safely made. The term "heirs at law" has been held to mean the widow and children,[25] and in another case it was held that the term "heirs" includes all persons capable of inheriting from the deceased generally.[26]

§ 1361a. Two classes of statutes.—The statutes in different jurisdictions vary considerably in their provisions. But they may be divided into two general classes or types. This classification, though statutes of each class may differ somewhat from others of the same class as to the party entitled to maintain the action, the beneficiaries, the amount of damages that may be recovered, or in other particulars, includes most of the statutes upon the subject, although there are a few statutes, having peculiar features, that might, perhaps, be considered as not coming fairly within either class. The two classes referred to are: 1. Those which create an entirely new cause of action. 2. Those which provide merely for the survival of the action which the deceased would have had if he had survived.[27] In a few states there are statutes of both types.[28] Under statutes of the

[25] St. Louis &c. R. Co. v. Needham, 52 Fed. 371. See, also, Noble v. Seattle, 19 Wash. 133; 52 Pac. 1013; 40 L. R. A. 822. Statute giving right to "heir or heirs," if no husband or wife survives, held limited to lineal descendants in Hindry v. Holt, 24 Colo. 464; 51 Pac. 1002; 39 L. R. A. 351; 65 Am. St. 235; and Jordan v. Cincinnati &c. R. Co. 89 Ky. 40; 11 S. W. 1013.

[26] Redfield v. Oakland &c. R. Co. 110 Cal. 277; 42 Pac. 822. But see Johnson v. Seattle Elec. Co. 39 Wash. 211; 81 Pac. 705.

[27] Note in 70 Am. St. 676; 6 Thomp. Neg. §§ 6986, 6987.

[28] See Louisville &c. R. Co. v. Will, 23 Ky. 1961; 66 S. W. 628; Lubrano v. Atlantic Mills, 19 R. I. 129; 32 Atl. 205; 34 L. R. A. 797, and note; Vicksburg &c. R. Co. v. Phillips, 64 Miss. 693; 2 So. 537; Dolson v. Lake Shore &c. R. Co. 128 Mich. 444; 87 N. W. 629; Brown v. Chicago &c. R. Co. 102 Wis. 137; 77 N. W. 748; 44 L. R. A. 579; Davidson Benedict Co. v. Severson, 109 Tenn. 572; 72 S. W. 967. St. Louis &c. R. Co. v. Dawson, 68 Ark. 1; 56 S. W. 46. In some of these cases a recovery under one is held a bar to a recovery under the other but in some of the others it is held that there may be a recovery under both. See, especially, the Michigan and Wisconsin cases, on opposite sides of the question. As to joinder in certain cases under the Massachusetts statute, see

first class the loss to the statutory beneficiaries by the death of the deceased is that for which the right of action is ordinarily given, and it makes no difference whether death was instantaneous or not.[29] But under statutes of the second class the action is for the damages sustained by the deceased, which he might have recovered if he had lived, and there can be no recovery, under some of them, at least, if death was instantaneous.[30] So, there may be a difference in the parties entitled to bring the action, the beneficiaries, or the like, as well as in the damages to be recovered, and under a mere survival statute the deceased in his lifetime may contract in regard to the

Smith v. Thompson-Houston Elec. Co. 188 Mass. 371; 74 N. E. 644. See, also, Anderson v. Fielding, 92 Minn. 42; 99 N. W. 357; 104 Am. St. 665. As to actions for death employes under the Massachusetts statute and to their not being aided by the employers' liability act, see Vecchioni v. New York &c. R. Co. 191 Mass. 9, 77 N. E. 306.

[29] Malott v. Shimer, 153 Ind. 35; 54 N. E. 101; 74 Am. St. 278, and note; Worden v. Humeston &c. R. Co. 72 Iowa, 201, 33 N. W. 629; Boyden v. Fitchburg &c. R. Co. 70 Vt. 125; 39 Atl. 771; Legg v. Britton, 64 Vt. 652; 24 Atl. 1016; Louisville &c. R. Co. v. Coniff, 90 Ky. 560; 14 S. W. 543; Givens v. Kentucky Cent. R. Co. 89 Ky. 231; Reed v. Northeastern R. Co. 37 S. Car. 42; 16 S. E. 289; Northeastern R. Co. Ex Parte 60 S. Car. 401; 38 S. E. 634; 54 L. R. A. 660; Perham v. Portland &c. Co. 33 Oreg. 451; 53 Pac. 12, 24; 40 L. R. A. 799; 72 Am. St. 730; International &c. R. Co. v. Kindred, 57 Tex. 491; Sternenberg v. Mailhos, 99 Fed. 43; Matz v. Chicago &c. R. Co. 85 Fed. 180; Brown v. Buffalo &c. R. Co. 22 N. Y. 191. But in a few states the death must be instantaneous or without conscious suffering. Sawyer v. Perry, 88 Me. 42; 33 Atl. 660; Bligh v. Biddeford R. Co. 94 Me. 499; 48 Atl. 112; Conley v. Portland &c. Co. 96 Me. 281; 52 Atl. 656. Compare Dolson v. Lake Shore &c. R. Co. 128 Mich. 444; 87 N. W. 129, and cases cited in the different opinions there given; Hennessy v. Bavarian Brew. Co. 145 Mo. 104; 46 S. W. 966; 41 L. R. A. 385; 68 Am. St. 554.

[30] McVey v. Illinois Cent. R. Co. 73 Miss. 487; 19 So. 209; Illinois Cent. R. Co. v. Pendergrass, 69 Miss. 425; 12 So. 954; Belding v. Black Hills &c. R. Co. 13 S. Dak. 369; 53 N. W. 750. See Hastings Lumber Co. v. Garland, 115 Fed. 15; Storrie v. Grand Trunk &c. Co. 134 Mich. 297; 96 N. W. 569; Olivier v. Houghton County St. R. Co. 134 Mich. 367; 96 N. W. 434; 104 Am. St. 607; St. Louis &c. R. Co. v. Dawson, 68 Ark. 1; 56 S. W. 46; Davis v. St. Louis &c. R. Co. 53 Ark. 117; 13 S. W. 801; 7 L. R. A. 283; Budd v. Meriden &c. Co. 69 Conn. 272; 37 Atl. 683; Hollenbeck v. Berkshire R. Co. 9 Cush. (Mass.) 478; Mulcahey v. Washburn &c. Co. 145 Mass. 281; 14 N. E. 106; 1 Am. St. 458.

amount or release of damages[31] when he could not do so under statutes of the other class, at least in some jurisdictions, so as to bar the beneficiaries.

§ 1362. Limiting the right to sue—Designating the forum.—The statute which gives a right to sue may limit the time in which the action shall be brought, may limit the amount of recovery, and may also limit the persons who shall receive the damages recovered. Upon the propositions stated there is no diversity of opinion. How much further the state may go in limiting the right is a question, which, in some of its phases, may fairly admit of debate. There is reason for affirming that the power to give or withhold the principal thing carries with it the power to annex the incidents. It would seem, therefore, that the power of the state to give or withhold includes the power to provide the forum in which the remedy for the enforcement of the newly given right shall be sought. But it has been held by an able court, not, however, without a vigorous dissent, that the provision of a statute which assumes to confine the right to sue for causing death by wrongful act to the state courts, and thus exclude the jurisdiction of the federal courts, is invalid, the theory of the decision being that the state cannot exclude the jurisdiction of the federal tribunals. That the state cannot exclude the jurisdiction of the federal courts where the right to be vindicated is a general one is entirely clear, but it is not so clear that where a statute gives an entirely new right—one of its own creation

[31] See Hill v. Pennsylvania R. Co. 178 Pa. St. 223; 35 Atl. 997; 35 L. R. A. 196; 56 Am. St. 754; Price v. Railroad Co. 33 S. Car. 556; 12 S. E. 413; 26 Am. St. 700; Brown v. Electric R. Co. 101 Tenn. 252; 47 S. W. 415; 70 Am. St. 666, and note; Pittsburgh &c. R. Co. v. Hosea, 152 Ind. 412, 417–419; 53 N. E. 419; Hurst v. Detroit City R. 84 Mich. 539; 48 N. W. 44; Illinois Cent. &c. R. Co. v. Cozby, 69 Ill. App. 256. In Lyon v. Boston &c. R. Co. 107 Fed. 386, it is held that the New Hampshire statute there set out does not create a new right of action but is a survival statute with enlarged and remedial damages, that if it had given a new cause of action it would have been transitory and the action could have been brought wherever there was jurisdiction of the defendant, but, as it could come to the administrator only by survival, under such statute, the administrator must be such a one as it would survive to, and that the survival could be only where the right is. See, also, as to statute of limitations, Whaley v. Catlett, 103 Tenn. 347; 53 S. W. 131.

—that did not exist at common law, the state legislature may not prescribe the terms and conditions upon which it may be enforced.[32]

§ 1363. Instantaneous death.—Some of the courts hold that where death is instantaneous no action can be maintained by the personal representatives of the deceased,[33] but there is authority holding that the action will lie although death is instantaneous.[34] Much, however, depends upon the wording and intent of the particular statute involved and the class to which it belongs.[35] A distinction is made by some of the courts between cases where the statute confers the right of action upon personal representatives and cases where the right is conferred upon the widow or children of the deceased person.[36] Very subtle and fine-drawn distinctions are made in considering the question whether death was or was not instantaneous, and it is held that it cannot be concluded that the death

[32] Bigelow v. Nickerson, 70 Fed. 113; 30 L. R. A. 336. Other cases approving or supporting the majority opinion are Williams v. Crabb, 117 Fed. 193, 197; 59 L. R. A. 425, and decisions there cited. In the case cited, Showalter, J., dissented, and referred in support of his dissent to Dudley v. Mayhew, 3 N. Y. 9; Chandler v. Hanna, 73 Ala. 390; Dickinson v. Van Wormer, 39 Mich. 141; Janney v. Buell, 55 Ala. 408; Phillips v. Ash, 63 Ala. 414; Vestry of St. Pancras v. Batterbury, 2 C. B. (N. S.) 477; Hollister v. Hollister Bank, 2 Keyes (N. Y.), 245; Sutherland Stat. Const. § 399.

[33] McVey v. Illinois Cent. R. Co. 73 Miss. 487; 19 So. 209 (citing Illinois &c. R. Co. v. Pendergrass, 69 Miss. 425; 12 So. 954; Vicksburg &c. R. Co. v. Phillips, 64 Miss. 693; 2 So. 537); Sawyer v. Perry, 88 Me. 42; 33 Atl. 660. See Belding v. Black Hills &c. R. Co. 3 So. Dak. 369; 53 N. W. 750; State v. Maine &c. R. Co. 60 Me. 490; State v. Grand Trunk &c. R. Co. 61 Me. 114; 14 Am. R. 552; Commonwealth v. Metropolitan &c. R. Co. 107 Mass. 236.

[34] Brown v. Buffalo &c. R. Co. 22 N. Y. 191; Nashville &c. R. Co. v. Prince, 2 Heisk. (Tenn.) 580; Fowlkes v. Nashville &c. R. Co. 5 Baxter (Tenn.), 663; Conners v. Burlington &c. R. Co. 71 Iowa, 490; 32 N. W. 465; 60 Am. R. 814; Worden v. Humeston &c. R. Co. 72 Iowa, 201; 33 N. W. 629; Broughel v. Southern &c. Co. 73 Conn. 614; 48 Atl. 751; 84 Am. St. 176; Hamilton v. Morgan &c. Co. 42 La. Ann. 824; 8 So. 586; Cooley Torts, 310; Tiffany, Death by Wrongful Act, §§ 73, 74; Buswell, Personal Injuries, §§ 18, 19; 6 Thomp. Neg. (2d ed.) §§ 6986, 6987.

[35] See Ante, § 1361a.

[36] See cases cited from Mississippi reports in the first note to this section.

was not instantaneous although there were spasmodic muscular movements after the injury.[37]

§ 1364. Statutes have no extraterritorial effect.—It is elementary learning that a statute has no force beyond the territorial limits of the state by which it was enacted. This rule applies to cases of personal injuries made actionable by legislation.[38] If there is no legislation giving a right of action, then no such right exists unless it is given by the common law. If the common law makes the wrong actionable, or if it is made actionable by the statutes of the state in which the wrong is committed, then, as we shall presently see, a remedy will generally be supplied by the state where the action is brought. Where the statute of the state in which the injury was received is not pleaded the rule in cases where the action is brought in another state is that the court will presume that the common law was in force.[39]

[37] Kearney v. Boston &c. R. Co. 9 Cush. (Mass.) 108; Bancroft v. Boston &c. R. Co. 11 Allen (Mass.), 34; Hollenbeck v. Berkshire R. Co. 9 Cush. (Mass.) 478; Mulchahey v. Washburn &c. Co. 145 Mass. 281; 14 N. E. 106; 1 Am. St. 458. See, also, Kellow v. Cent. &c. R. Co. 68 Ia. 470; 23 N. W. 740; 27 N. W. 466; 56 Am. R. 858. It was held in Dietrich v. Northampton, 138 Mass. 14; 52 Am. R. 242, that a child prematurely born, which lived a very few minutes after its birth was not a "person" within the meaning of the statute. See Sawyer v. Perry, 88 Me. 42; 33 Atl. 660, for a definition of the term "immediate death." See as to there being no recovery in Massachusetts under employers' liability act where there is conscious suffering. Martin v. Boston &c. R. Co. 175 Mass. 502; 56 N. E. 719.

[38] Knight v. West Jersey R. Co. 108 Pa. St. 250; 56 Am. R. 200; 26 Am. & Eng. R. Cas. 485; De Harn v. Mexican &c. R. Co. 86 Tex. 68; 23 S. W. 381; Willis v. Missouri Pac. R. Co. 61 Tex. 432; 48 Am. R. 301; 23 Am. & Eng. R. Cas. 379; Texas &c. R. Co. v. Richards, 68 Tex. 375; 4 S. W. 627. See Johnson v. Chicago &c. R. Co. 91 Iowa, 248; 59 N. W. 66; Boyce v. Wabash &c. R. Co. 63 Iowa, 70; 18 N. W. 673; 50 Am. R. 730; 23 Am. & Eng. R. Cas. 172; Morris v. Chicago &c. R. Co. 65 Iowa, 727; 23 N. W. 143; 54 Am. R. 39; 19 Am. & Eng. R. Cas. 180; McCarthy v. Chicago &c. R. Co. 18 Kan. 46; 26 Am. R. 742; Needham v. Grand Trunk R. Co. 38 Vt. 294.

[39] Burdict v. Missouri &c. R. Co. 123 Mo. 221; 27 S. W. 453; 26 L. R. A. 384, and note; 45 Am. St. 528; LeForest v. Tolman, 117 Mass. 109; 19 Am. R. 400; Hyde v. Wabash &c. R. Co. 61 Iowa, 441; 16 N. W. 351; 47 Am. R. 820; 15 Am. & Eng. R. Cas. 503; Davis v. New York &c. R. Co. 143 Mass. 301; 9 N. E. 815; 58 Am. R. 138; 28 Am. & Eng.

§ 1365. The right and the remedy.—The rule is that the law of the forum governs as to the remedy, including the mode of proceeding and all matters therewith directly connected.[40] It is obvious that a foreign state or nation cannot prescribe rules of procedure for the government of other states or nations, so that the rules of procedure, including the rules of evidence, are those prescribed by the law of the forum.[41] But the state or nation may enact laws governing the conduct and prescribing the responsibility for wrongs of persons within its jurisdiction. It is true that there is no absolute right in any person to an enforcement of such laws by the courts of other states or nations, but upon the principle of comity such laws are generally enforced. We do not mean, of course, that one state will enforce the penal laws of another state, for it is well settled that the penal laws of a state can only be enforced by its own courts.[42] The ruling in Pennsylvania is that the person entitled to sue in

R. Cas. 223; Wooden v. Western &c. R. Co. 126 N. Y. 10; 26 N. E. 1050; 13 L. R. A. 458, and note; 22 Am. St. 803; Buckles v. Ellers, 72 Ind. 220; 37 Am. R. 156, and note.

[40] Dulin v. McCaw, 39 W. Va. 721; 20 S. E. 681; Hurley v. Missouri &c. R. Co. 57 Mo. App. 675; Herrick v. Minneapolis &c. R. Co. 31 Minn. 11; 16 N. W. 413; 47 Am. R. 771; Helton v. Alabama &c. R. Co. 97 Ala. 275; 12 So. 276; Higgins v. Central &c. R. Co. 155 Mass. 176, 181; 29 N. E. 534; 31 Am. St. 544; Smith v. Wabash R. Co. 141 Ind. 92, 105; 40 N. E. 270; Knight v. West Jersey R. Co. 108 Pa. St. 250; 56 Am. R. 200. See, also, Northern Pac. R. Co. v. Babcock, 154 U. S. 190; 14 Sup. Ct. 978; Slater v. Mexican &c. R. Co. 194 U. S. 120; 24 Sup. Ct. 581; Eingartner v. Illinois &c. Co. 94 Wis. 70; 68 N. W. 664; 34 L. R. A. 503; 59 Am. St. 859.

[41] In Richmond &c. R. Co. v. Mitchell, 92 Ga. 77; 18 S. E. 290, it is said: "Touching the evidence requisite to make a prima facie case in behalf of the plaintiff, the court gave in charge to the jury the law applicable in this state between the parties where the action is against a railroad company. This was correct although the injury sued for was sustained in the state of Alabama. The quantity or degree of evidence requisite to sustain the action or to change the burden of proof is determined by the law of the forum, and not by the law of the place where the cause of action arose." See, also, Smith v. Wabash &c. R. Co. 141 Ind. 92; 40 N. E. 270; Johnson v. Chicago &c. R. Co. 91 Iowa, 248; 59 N. W. 66; Knight v. West Jersey &c. R. Co. 108 Pa. St. 250; 56 Am. R. 200; Pennsylvania Co. v. McCann, 54 Ohio St. 10; 42 N. E. 768; Nicholas v. Burlington &c. R. Co. 78 Minn. 43; 80 N. W. 776; Stewart v. Baltimore &c. R. Co. 168 U. S. 445; 18 Sup. Ct. 105.

[42] Gwin v. Breedlove, 2 How. (U. S.) 29; Gwin v. Barton, 6 How. (U. S.) 7; Huntington v. Attrill,

the state where the injury was received is the person who must sue, although the action is brought in another state. The theory of the court was that the question of who may sue is not a question of remedy merely, but pertains to the right.[43] This, we believe, to be sound doctrine, for, as a new right was created, all incidents, whether in the form of limitations as to the amount of recovery, or as to who may be beneficiaries, travel with the right into the foreign jurisdiction.[44]

§ 1366. Conflict of law.—The general rule is that the right to recover for damages resulting from personal injuries is governed by the law of the place where the injury was received and not by the law of the forum.[45] This well-known general rule applies, as we have shown, to actions brought to recover damages for injuries causing death. The rule now generally approved is that the courts of one state will enforce the statutes of another state giving civil rights unless such statutes are in conflict with the laws or policy of the state in which the action is brought.[46] There is, however, authority

118 N. Y. 365; 23 N. E. 544; and authorities cited in last note to next following section.

[43] Usher v. West Jersey &c. R. Co. 126 Pa. St. 206; 17 Atl. 597; 4 L. R. A. 261, and note; 12 Am. St. 863; Derr v. Lehigh Valley &c. R. Co. 158 Pa. St. 365; 27 Atl. 1002; 38 Am. St. 848. The same doctrine is declared in Oates v. Union Pacific R. Co. 104 Mo. 514; 16 S. W. 487; 24 Am. St. 348. In the case last cited the court distinguishes the case of Vawter v. Missouri &c R. Co. 84 Mo. 679; 54 Am. R. 105.

[44] Other authorities supporting our conclusion are cited in the last note to § 1372, post.

[45] Northern &c. R. Co. v. Mase, 63 Fed. 114; Johnson v. Union Pac. &c. Co. 28 Utah, 46; 76 Pac. 1089; 67 L. R. A. 506; Northern Pac. R. Co. v. Babcock, 154 U. S. 190; 14 Sup. Ct. 978; note to Boston &c. R. Co. v. Hurd (108 Fed. 116) in 56 L. R. A. 193, et seq., where many cases are cited. See Conflict of Laws, Concerning Actions for Death, 35 Central L. J. 185.

[46] Dennick v. Railroad Co. 103 U. S. 11; Stewart v. Baltimore &c. R. Co. 168 U. S. 445; 18 Sup. Ct. 105; Northern &c. R. Co. v. Mase, 63 Fed. 114; Theroux v. Northern &c. R. Co. 64 Fed. 84; Northern &c. R. Co. v. Babcock, 154 U. S. 190; 14 Sup. Ct. 978; Texas &c. R. Co. v. Cox, 145 U. S. 593; 12 Sup. Ct. 905; South Carolina &c. R. Co. v. Nix, 68 Ga. 572; Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439; 20 N. E. 287; 10 Am. St. 67; Boyce v. Wabash &c. R. Co. 63 Iowa, 70; 18 N. W. 673; 50 Am. R. 730; Chicago &c. R. Co. v. Doyle, 60 Miss. 977; Leonard v. Columbia &c. R. Co. 84 N. Y. 48; 38 Am. R. 491; O'Reilly v. New York

to the contrary.[47] Some of the courts hold that the statutes of the state in which the injury was received must be similar to those of the state in which the action is brought.[48] A peculiar case came under judgment in South Carolina. In that case the action was brought in South Carolina for an injury received in North Carolina. The law of North Carolina provided that a child could only be held to the exercise of care according to its age; the trial court charged that the case was governed by the law of North Carolina, and this

&c. R. Co. 16 R. I. 388; 17 Atl. 906; 29 Cent. L. J. 210; 6 L. R. A. 719; Missouri &c. R. Co. v. Lewis, 24 Neb. 848; 40 N. W. 401; 2 L. R. A. 67, and note; Higgins v. Central &c. R. Co. 155 Mass. 176; 29 N. E. 534; 31 Am. St. 544; Hanna v. Grand Trunk &c. R. Co. 41 Ill. App. 116; McMaster v. Illinois &c. R. Co. 65 Miss. 264; 4 So. 59; 7 Am. St. 653; Denver &c. R. Co. v. Warring (Colo.), 86 Pac. 305; Nelson v. Chesapeake &c. R. Co. 88 Va. 971; 14 S. E. 838; 15 L. R. A. 583, and note; 54 Am. & Eng. R. Cas. 82; Stoeckman v. Terre Haute &c. R. Co. 15 Mo. App. 503; Walsh v. New York &c. R. Co. 160 Mass. 571; 36 N. E. 584; 39 Am. St. 514; Texas &c. R. Co. v. Richards, 68 Tex. 375; 4 S. W. 627; St. Louis &c. R. Co. v. Haist, 71 Ark. 258; 72 S. W. 893; 100 Am. St. 65; Nicholas v. Burlington &c. R. Co. 78 Minn. 43; 80 N. W. 776; Nelson v. Chesapeake &c. R. Co. 88 Va. 971; 14 S. E. 838; 15 L. R. A. 583; Eingartner v. Illinois Steel Co. 94 Wis. 70; 68 N. W. 664; 34 L. R. A. 503; 59 Am. St. 859; note in 14 Am. St. 354. In Northern &c. R. Co. v. Babcock, 154 U. S. 190; 14 Sup. Ct. 978, the doctrine of Judge Rorer that the law of the forum and of the place of the injury must concur is expressly denied. An extreme application of the rule was made in Mexican &c. R. Co. v. Jackson (Tex.), 32 S. W. 230. Compare Williams v. Camden &c. R. Co. 138 Fed. 571; Slater v. Mexican &c. R. Co. 194 U. S. 120; 24 Sup. Ct. 581.

[47] McCarthy v. Chicago &c. R. Co. 18 Kan. 46; 26 Am. R. 742; Richardson v. New York &c. R. Co. 98 Mass. 85; Woodard v. Michigan &c. R. Co. 10 Ohio St. 121; Armstrong v. Beadle, 5 Sawyer (U. S.), 484. See Anderson v. Milwaukee &c. R. Co. 37 Wis. 321; Mackay v. Central R. Co. 14 Blatch. (U. S.) 65; 4 Fed. 617; Bruce v. Cincinnati &c. R. Co. 83 Ky. 174; Vawter v. Missouri &c. R. Co. 84 Mo. 679; 54 Am. R. 105; Ash v. Baltimore &c. R. Co. 72 Md. 144; 19 Atl. 643; 20 Am. St. 461; Phillips v. Eyre, L. R. 6 Q. B. 1; 28, 29; St. Louis &c. R. Co. v. McCormick, 71 Tex. 660; 9 S. W. 540; Runt v. Illinois Cent. R. Co. (Miss.) 41 So. 1; De Ham v. Mexican Nat. R. Co. (Tex. Civ. App.), 22 S. W. 249; Louisville &c. R. Co. v. Williams, 113 Ala. 402; 21 So. 938.

[48] Wooden v. Western &c. R. Co. 126 N. Y. 10; 26 N. E. 1050; 22 Am. St. 803; Debevoise v. New York &c. R. Co. 98 N. Y. 377; 50 Am. R. 683. See, also, Wabash R. Co. v. Fox, 64 Ohio St. 133; 59 N. E. 888; 83 Am. St. 739; Baltimore &c. R. Co. v. Chambers, 73 Ohio, 16; 76 N. E. 91.

was held to be correct.[49] The case referred to is very near the line, if, indeed, it is not unsound, for the question would seem to be one of evidence, and hence to pertain to the remedy, and not the right.[50] It seems to us, as we have elsewhere indicated, that where punitive damages are given the statute cannot have an extra territorial effect.[51]

§ 1366a. Aliens.—The question has arisen in a number of cases as to whether the statutes giving a right of action for death or injuries resulting in death, such as those under consideration in this chapter, apply in favor of non-resident aliens. There were few decisions upon the subject until recently, but within the last three or four years the question has been decided by many of the courts. The weight of authority is to the effect that such statutes, being broad enough in terms, as most of them are, to include all persons of the class designated, apply in favor of non-resident aliens as well as others.[52] But there are decisions directly to the contrary.[53] The

[49] Bridger v. Asheville &c. R. Co. 25 S. Car. 24; 3 S. E. 860, citing Atlanta R. Co. v. Tanner, 68 Ga. 384; Atchison &c. R. Co. v. Moore, 29 Kan. 632.

[50] See ante, § 1365.

[51] Raisor v. Chicago &c. R. Co. 215 Ill. 47; 74 N. E. 69; 106 Am. St. 153; Marshall v. Wabash R. Co. 46 Fed. 269; Matthewson v. Kahsas City &c. R. Co. 61 Kans. 667; 60 Pac. 747; Adams v. Fitchburg &c. R. Co. 67 Vt. 76; 30 Atl. 687; 48 Am. St. 800; O'Reilly v. New England R. Co. 16 R. I. 388; 17 Atl. 171, 906; 19 Atl. 244.

[52] Bouthron v. Phoenix &c. Co. (Ariz.) 71 Pac. 941; 61 L. R. A. 563; Cleveland &c. R. Co. v. Osgood, 36 Ind. App. 34; 73 N. E. 285; Romano v. Capital &c. Co. 125 Ia. 591; 101 N. W. 437; 68 L. R. A. 132; 106 Am. St. 323; Atchison &c. R. Co. v. Fajardo (Kans.), 86 Pac. 681; Mulhall v. Fallon, 176 Mass. 266; 57 N. E. 386; 54 L. R. A. 934; 79 Am. St. 309; Renlund v. Commodore &c. Co. 89 Minn. 41; 93 N. W. 1057; 99 Am. St. 934; Alfson v. Bush Co. 182 N. Y. 393; 75 N. E. 230; Tanas v. Municipal &c. Co. 88 App. Div. (N. Y.) 251; 84 N. Y. S. 1053; Pittsburg &c. R. Co. v. Naylor, 73 Ohio St. 115; 76 N. E. 505; Baltimore &c. R. Co. v. Baldwin, 144 Fed. 53; Hirschkovitz v. Pennsylvania R. Co. 138 Fed. 438; Vetaloro v. Perkins, 101 Fed. 393; Davidsson v. Hill (1901) 2 K. B. 606. See, also, Syymasski v. Blumenthal, 3 Penn. (Del.) 558; 52 Atl. 347; Kellyville v. Petraytis, 195 Ill. 215; 63 N. E. 94; 88 Am. St. 191; Luke v. Calhoun, 52 Ala. 115; Augusta &c. R. Co. v. Glover, 92 Ga. 142; 18 S. E. 406; Pocahontas &c. Co. v. Ruka, 104 Va. 278; 51 S. E. 449; Low Moor Iron Co. v. La Bianca (Va), 55 S. E. 532.

[53] Deni v. Pennsylvania R. Co. 181 Pa. St. 525; 37 Atl. 558; 59 Am. St. 676; McMillan v. Spider Lake &c. Co. 115 Wis. 332; 91 N. W. 979; 60 L. R. A. 589; 95 Am. St. 947;

decisions applying the statute in favor of non-resident aliens are based, in general, upon the propositions that they are included within the letter of the statute, and that, if the legislature had meant to except them from the benefit of its provisions, it would have so provided; that the purpose of such legislation is to supply an omission in the common law and to protect or give compensation to those who suffer pecuniary loss by the death of a person caused by the negligence of another, regardless of their residence or citizenship; and that there is nothing contrary to policy in this view, but, on the contrary, it is more in consonance with the policy and spirit of our institutions.[54] The decisions to the effect that the statute does not apply in favor of non-resident aliens are based, in the main, upon the propositions that in general statutes are to be understood as applying only to those who owe obedience to the legislature which enacts them, and that it has no concern to protect the rights of non-resident aliens; that the object of such statutes is to protect those within the jurisdiction, to prevent them from becoming a public charge, or the like, and not to favor those in another country, put burdens on our own people and require them to pay out money to be taken to a foreign country, which, perhaps, may recognize no such right in favor of our own citizens; and that, if the legislature had

Brannigan v. Union Gold Min. Co. 93 Fed. 164; Adam v. British &c. Co. (1898) 2 Q. B. 430; Utah &c. Co. v. Diamond &c. Co., decided by the district court of the Second Judicial District of Utah and referred to in Cleveland &c. R. Co. v. Osgood (Ind. App.), 70 N. E. 839, 841.

[54] See cases cited in first note to this section, particularly Alfson v. Bush Co. 182 N. Y. 393; 75 N. E. 230; Pittsburgh &c. R. Co. v. Naylor, 73 Ohio St. 115; 76 N. E. 505; 3 L. R. A. (N. S.) 473, and note; Mulhall v. Fallon, 176 Mass. 266; 57 N. E. 336; 54 L. R. A. 934; 79 Am. St. 309. Additional reasons are suggested in the first and last cases cited, but we think the Massachusetts statute involved in the last case is in several respects distinguishable from most of the statutes, and that some of the reasons there given, even if good under that statute, would not apply to all. See Cleveland &c. R. Co. v. Osgood (Ind. App.), 70 N. E. 839. So, as shown by the withdrawal of the original opinion in the Osgood case last above cited, and the substitution of an opinion taking the opposite view, as reported in 36 Ind. App. 34; 73 N. E. 285, the apparent change in the view of the English court in Davidsson v. Hill (1901), 2 K. B. 606, holding the statute applicable in favor of aliens, has exerted an important influence on the courts in the later decisions in this country. A federal court has held itself bound by the construction given by the state

intended to give non-resident aliens such rights, it would have done so by express language.[55]

§ 1367. Who may recover—Generally.—To determine who may recover for the death of a human being, the statute in force at the place where the accident occurred must be consulted. It is therefore, not possible to state anything more than general rules without considering the different statutes, and that would be foreign to our purpose. It may, of course, be safely said that those persons, and only those persons, to whom the statute gives the right of action can recover, for there is no general or common-law right.[56] It is an established rule of the common law[57] that there can be no liability for injury resulting from negligence, unless there is a breach of a specific duty owing to the person who sustains an injury, and the general principle must apply to statutes giving a right of action for wrongfully causing death, in the sense that the right created by the statute must be shown to be in the person or persons by whom the action is prosecuted,[58] for it is only as to such persons that there is a duty to respond in damages.

court to the Pennsylvania statute. Zeigler v. Pennsylvania R. Co., 151 Fed. 348.

[55] One of the strongest opinions presenting this view is that in Cleveland &c. R. Co. v. Osgood, 70 N. E. 839 (afterwards withdrawn), where most of the other decisions and text-books tending to sustain such view are quoted from.

[56] Western Union Tel. Co. v. McGill, 57 Fed. 699; 21 L. R. A. 818 (citing St. Louis &c. R. Co. v. Needham, 52 Fed. 371; 3 C. C. A. 129; Dickins v. New York &c. R. Co. 23 N. Y. 158; Drake v. Gilmore, 52 N. Y. 389; Trafford v. Adams Express Co. 8 Lea (Tenn.), 96; Blake v. Midland R. Co. 10 Eng. Law & Eq. 437; Safford v. Drew, 3 Duer (N. Y.), 627; Burke v. Cork &c. R. Co. 10 Cent. L. J. 48; Duckworth v. Johnson, 4 Hurl. & N. 653; Jeffersonville &c. R. Co. v. Swayne, 26 Ind. 477; Perry v. St. Joseph &c. R. Co. 29 Kan. 420; Kansas Pac. R. Co. v. Cutter, 19 Kan. 83); "The Alaska," 130 U. S. 201; 9 Sup. Ct. 461; Thornburg v. American &c. Co. 141 Ind. 443; 40 N. E. 1062; 50 Am. St. 334; Eureka v. Merrifield, 53 Kans. 794; 37 Pac. 113. And only for the benefit of the persons within the statute and only for the recovery of such damages as are contemplated by it. Swift Co. v. Johnson, 138 Fed. 867.

[57] O'Donnell v. Providence &c. R. Co. 6 R. I. 211; Smith v. Tripp, 13 R. I. 152; Atkinson v. Newcastle &c. Co. L. R. 2 Exch. Div. 441; Metallic &c. Co. v. Fitchburg R. Co. 109 Mass. 277; 12 Am. R. 689; Holland v. Sparks, 92 Ga. 753; 18 S. E. 990.

[58] Clay v. Central &c. R. Co. 84 Ga. 345; 10 S. E. 967; Daniels v. Savannah &c. R. Co. 86 Ga. 236;

§ 1368. Who may recover—Illustrative cases.—We shall not attempt to give all the cases which consider and decide who may maintain an action, but shall refer to such cases as seem to most clearly outline the rulings of the courts upon the general subject, premising our reference by the statement that the statutes vary so much that it is exceedingly difficult to extract general rules or to select the cases which best outline the views of the courts. The husband of the mother of an illegitimate child is not entitled to maintain an action for the death of the child under the provisions of a statute vesting the right of action in a father.[59] The English courts have held that a bastard is not a child within the meaning of Lord Campbell's act,[60] and a Canadian court has held that the mother of an illegitimate child has no right of action.[61] Most of the American courts have asserted the same general doctrine,[62] but others have

12 S. E. 365; Augusta &c. R. Co. v. Glover, 92 Ga. 132; 18 S. E. 406; Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369; 20 S. E. 550; 26 L. R. A. 553; 44 Am. St. 145. See, also, James v. Richmond &c. R. Co. 92 Ala. 231; 9 So. 335; Hilliker v. Citizens' St. R. Co. 152 Ind. 86; 52 N. E. 607; Louisville &c. R. Co. v. Jones, 45 Fla. 407; 34 So. 246; Brown v. Chicago &c. R. Co. 102 Wis. 137; 78 N. W. 771; 44 L. R. A. 579; Winnt v. International &c. R. Co. 74 Tex. 32; 11 S. W. 907; 5 L. R. A. 172, and note.

[59] Thornburg v. American &c. Co. 141 Ind. 443; 41 N. E. 1062; 50 Am. St. 334.

[60] Dickinson v. Northeastern R. Co. 2 Hurl. & Colt, 735. See Clarke v. Carfin Coal Co. L. R. (1891) A. C. 412.

[61] Gibson v. Midland R. Co. 2 Ont. R. 658.

[62] Harkins v. Philadelphia R. Co. 15 Phila. (Pa.) 286; McDonald v. Southern R. 71 S. Car. 352; 51 S. E. 138; McDonald v. Pittsburgh &c. R. Co. 144 Ind. 459; 43 N. E. 447; 32 L. R. A. 309; 55 Am. St. 185; Robinson v. Georgia R. &c. Co. 117 Ga. 168; 43 S. E. 452; 60 L. R. A. 555; 97 Am. St. 156; Alabama &c. R. Co. v. Williams, 78 Miss. 209; 28 So. 853; 51 L. R. A. 836; 84 Am. St. 624. See, also, Citizens' St. R. Co. v. Cooper, 22 Ind. App. 459; 53 N. E. 1092; 72 Am. St. 319. In Marshall v. Wabash R. Co. 46 Fed. 269, the court said that a bastard was not a "child" within the meaning of the statute, and referred to Barns v. Allen, 9 Am. Law. Reg. 747, but, as it was held that the court had no jurisdiction (which holding, by the way, was erroneous), the statement that an illegitimate child was not within the statute was mere obiter dictum. It has also been held that a stepchild or stepfather can not recover for the death of the other as a child or parent. Marshall v. Macon &c. Co. 103 Ga. 725; 30 S. E. 571; 41 L. R. A. 211; 68 Am. St. 140; Hennessy v. Bavarian Brew. Co. 145 Mo. 104; 46 S. W. 966; 41 L. R. A. 385; 68 Am. St. 554. So, as to adopted child in

adopted a different rule.[63] We incline to the opinion, that where the right of action is given, as it is by some of the statutes, for the benefit of "dependents," a mother of a bastard might recover, in the proper case, and so might the bastard in the case of the death of the mother. It has been held, under a statute giving a right of action to children, that a child born after the death of a father may sue.[64] Many of the statutes provide that the father may sue, or if the father be dead, the mother may sue for the death of a minor child.[65] Generally the provisions of the statutes are that the action shall be brought by the personal representatives[66] of the deceased person in cases of adults, but in some others the right to sue is vested in the widow,[67] or husband.[68] Some of the statutes provide that the remedy shall be by indictment, but even when by indictment the proceeding is treated as a civil one.[69] Some of the statutes give a right of action in favor of a person who was dependent upon the person whose

New Jersey, Heidecamp v. Jersey City &c. R. Co. 69 N. J. L. 284; 55 Atl. 239; 101 Am. St. 707.

[63] Muhl v. Michigan &c. R. Co. 10 Ohio St. 272. See, also, Security &c. Co. v. West Chicago St. R. Co. 91 Ill. App. 332; Marshall v. Wabash R. Co. 120 Mo. 275; 25 S. W. 179.

[64] Texas &c. R. Co. v. Robertson, 82 Tex. 657; 17 S. W. 1041; 27 Am. St. 929; Nelson v. Galveston &c. R. Co. 78 Tex. 621; 14 S. W. 1041; 11 L. R. A. 391; 22 Am. St. 81. As to suits by children, see Barker v. Hannibal &c. R. Co. 91 Mo. 86; 14 S. W. 280; and note in 70 Am. St. 674, 675.

[65] Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369; 20 S. E. 550; 26 L. R. A. 553; 44 Am. St. 145; Gulf &c. R. Co. v. Southwick (Tex. Civ. App.), 30 S. W. 592; Kerr v. Pennsylvania R. Co. 169 Pa. St. 95; 32 Atl. 96; Illinois &c. R. Co. v. Hunter, 70 Miss. 471; 12 So. 482.

[66] This means the administrator or executor. Schleiger v. Northern Term. Co. 43 Oreg. 4; 72 Pac. 324; Weidner v. Rankin, 26 Ohio St 522; Usher v. West Jersey R. Co. 126 Pa. St. 206; 4 L. R. A. 261, and note; 12 Am. St. 863; Goodwin v. Nickerson, 17 R. I. 478; Kramer v. Market St. R. Co. 25 Cal. 434.

[67] McDonald v. McDonald, 96 Ky. 209; 28 S. W. 482; 49 Am. St. 289; Wright v. Woods, 96 Ky. 56; 27 S. W. 979; Canadian &c. R. Co. v. Robinson, 19 Can. S. C. 292.

[68] Ferguson v. Washington &c. R. Co. (D. C. App.) 23 Wash. L. R. 407.

[69] State v. Grand Trunk &c. R. Co. 60 Me. 145; Commonwealth v. Boston &c. R. Co. 134 Mass. 211; Commonwealth v. Sanford, 12 Gray (Mass.), 174; Commonwealth v. East Boston &c. Co. 13 Allen (Mass.), 589; Commonwealth v. Boston &c. R. Co. 121 Mass. 36; Commonwealth v. Boston &c. Co. 133 Mass. 383; State v. Manchester &c. R. Co. 52 N. H. 528; State v. Grand Trunk &c. R. Co. 58 Me. 176; 4 Am. R. 258; Baltimore &c. R. Co. v. State, 81 Md. 371; 32 Atl. 201.

death was caused by the wrongful act of another, and in such cases the right to sue turns upon the solution of the question whether the plaintiff was dependent upon the deceased, the general rule being that if the plaintiff received any material aid from the deceased, and there is such kinship as entitles him or her to such aid, there is a right to sue.[70] A wife who leaves her husband and becomes an inmate of a brothel is not entitled to the benefit of the statute,[71] but it has been held that the fact that she was not living with her husband will not defeat a recovery.[72] Where the right of action is given to a minor child, the general rule is that a guardian cannot maintain an action.[73]

§ 1369. What must be shown to constitute a cause of action.—We shall not undertake to state in detail what must be shown in order to constitute a cause of action under the statutes, but will state in outline what facts are generally regarded as essential to give a right of recovery. The general rule is that the plaintiff must show that the death of the decedent was caused by the wrongful act of the defendant, and in actions against railroad companies this ordinarily depends upon whether there was or was not negligence on the part of the company or its employes, the rule being, in the absence of statutory provisions to the contrary, that the burden is on the plaintiff to affirmatively prove the negligence of the defendant and

[70] Augusta &c. R. Co. v. Glover, 92 Ga. 132; 18 S. E. 406; Schnatz v. Philadelphia &c. R. Co. 160 Pa. St. 602; 28 Atl. 952; Baltimore &c. R. Co. v. State, 81 Md. 371; 32 Atl. 201; Duval v. Hunt, 34 Fla. 85; 15 So. 876; Gulf &c. R. Co. v. Southwick (Tex. Civ. App.), 30 S. W. 592; St. Louis &c. R. Co. v. Henson, 58 Fed. 531; 7 C. C. A. 349; Richmond &c. R. Co. v. Johnston, 89 Ga. 560; 15 S. E. 908; Clay v. Central &c. R. Co. 84 Ga. 345; 10 S. E. 967; 42 Am. & Eng. R. Cas. 76; Smith v. East &c. R. Co. 84 Ga. 183; 10 S. E. 602. See Petrie v. Columbia &c. R. Co. 29 S. Car. 303; 7 S. E. 515; Daly v. New Jersey &c. Co. 155 Mass. 1; 29 N. E. 507; Hodnett v. Boston &c. R. Co. 156 Mass. 86; 30 N. E. 224; Chicago &c. R. Co. v. Branyan, 10 Ind. App. 570; 37 N. E. 190; San Antonio &c. R. Co. v. Long, 87 Tex. 148; 27 S. W. 113; 24 L. R. A. 637; 47 Am. St. 87; St. Louis &c. R. Co. v. Johnston, 78 Tex. 536; 15 S. W. 104; Howard v. Delaware &c. Co. 40 Fed. 195; 41 Am. & Eng. R. Cas. 473; 6 L. R. A. 75.

[71] Fort Worth &c. R. Co. v. Floyd (Tex. Civ. App.), 21 S. W. 544.

[72] Dallas &c. R. Co. v. Spicker, 61 Tex. 427; 48 Am. R. 297; Galveston &c. R. Co. v. Murray, (Tex. Civ. App.) 99 S. W. 144.

[73] Louisville &c. R. Co. v. Goodykoontz, 119 Ind. 111; 21 N. E. 472; 12 Am. St. 371, and note.

that such negligence was the proximate cause of the injury.[74] To establish negligence there must be evidence of an actionable breach of duty.[75] In many jurisdictions, as we have elsewhere shown, the burden is on the plaintiff upon the question of the contributory negligence, but in many others it is on the defendant. The death must be shown to have been caused by the wrongful act of the defendant.[76] It has been held that where a person already mortally wounded was injured by the negligence of another there could be no recovery, as it could not be said that death was caused by the wrongful act.[77]

[74] Hanley v. West Virginia Cent. &c. R. Co. (W. Va.) 53 S. E. 625; Merrihew v. Chicago &c. R. Co. 92 Ill. App. 346; United Elec. Light &c. Co. v. State, 100 Md. 634; 60 Atl. 248; Donaldson v. New York &c. R. Co. 188 Mass. 484; 74 N. E. 915.

[75] Chandler v. New York &c. R. Co. 159 Mass. 589; 35 N. E. 89; Irwin v. Alley 158 Mass. 249; 33 N. E. 517; Riley v. Connecticut &c. R. Co. 135 Mass. 292; 15 Am. & Eng. R. Cas. 181; Missouri &c. R. Co. v. Moseley, 57 Fed. 921; Jackson v. St. Louis &c. R. Co. 87 Mo. 422; 56 Am. R. 460; Railway Co. v. Valleley, 32 Ohio St. 345; 30 Am. R. 601; Haley v. Chicago &c. R. Co. 21 Iowa, 15; Palmer v. New York &c. R. Co. 112 N. Y. 234; 19 N. E. 678; Norfolk &c. R. Co. v. Stegall (Va.), 54 S. E. 19. See, also, Bowen v. Illinois Cent. Ry. Co. 136 Fed. 306; 70 L. R. A. 915.

[76] Daniels v. New York &c. R. Co. 183 Mass. 393; 67 N. E. 424; 62 L. R. A. 751; McCafferty v. Pennsylvania R. Co. 193 Pa. St. 339; 44 Atl. 435; 74 Am. St. 690.

[77] Jackson v. St. Louis &c. R. Co., 87 Mo. 422; 56 Am. R. 460; 25 Am. & Eng. R. Cas. 327. But it is well settled that a recovery may be had for the aggravation of existing injuries. Louisville &c. R. Co. v. Wood, 113 Ind. 544; 14 N. E. 572; 16 N. E. 197; Fitzpatrick v. Great Western &c. R. Co. 12 U. C. Q. B. 645; Louisville &c. R. Co. v. Falvey, 104 Ind. 409; 3 N. E. 389; Terre Haute &c. R. Co. v. Buck, 96 Ind. 346; 49 Am. R. 168; Baltimore &c. R. Co. v. Reaney, 42 Md. 117; Lapleine v. Morgan's &c. Co. 40 La. Ann. 661; 1 L. R. A. 378; Baltimore &c. R. Co. v. Kemp, 61 Md. 74; Mobile &c. R. Co. v. McArthur, 43 Miss. 180; Driess v. Frederich, 73 Tex. 460; 11 S. W. 493; Allison v. Chicago &c. R. Co. 42 Iowa, 274; Dickson v. Hollister, 123 Pa. St. 421; 16 Atl. 484; 10 Am. St. 533; Quackenbush v. Chicago &c. R. Co. 73 Iowa, 458; 35 N. W. 523; Stewart v. Ripon, 38 Wis. 584; Ehrgott v. Mayor, 96 N. Y. 264; 48 Am. R. 622; Barbee v. Reese, 60 Miss. 906. See Beauchamp v. Saginaw &c. Co. 50 Mich. 163; 15 N. W. 65; 45 Am. R. 30; Pullman &c. Co. v. Barker, 4 Colo. 344; 34 Am. R. 89. See, also, Meekins v. Norfolk &c. R. Co. 134 N. Car. 217; 46 S. E. 493; Strode v. St. Louis Transit Co. 197 Mo. 616; 95 S. W. 851. But where there is an existing injury there can only be a recovery for the aggravation caused by the wrong of the defendant. Whelan v. New York &c. R.

The question as to what may be deemed sufficient evidence that the wrong was the proximate cause of death was considered in a Tennessee case, and it was held that it was proper to instruct the jury that "if the death was hastened or occurred sooner by reason of the injury than it otherwise would, then the injury was the cause of the death."[78] Where, however, the injured person was ill or wounded prior to the infliction of the wrong by the defendant, that fact must exert an important influence upon the question of the amount of the recovery, especially in jurisdictions where only compensatory damages can be awarded for pecuniary loss. There must be evidence of the existence of persons designated by the statute as beneficiaries, and in some states evidence that there were persons dependent upon the decedent for support.[79]

§ 1370. Year and a day.—The rule which prevails at common law that in order to sustain a prosecution for the killing of a human being death must occur within "a year and a day" does not apply to statutes providing for the recovery of damages in cases where death is caused by a wrongful act.[80] In the case referred to the court

Co. 38 Fed. 15; Bray v. Latham, 81 Ga. 640; 8 S. E. 64; Robinson v. Waupaca, 77 Wis. 544; 46 N. W. 809.

[78] Louisville &c. R. Co. v. Northington, 91 Tenn. 56; 17 S. W. 880; 16 L. R. A. 268.

[79] Ante, §§ 1359, 1367. Loague v. Railroad, 91 Tenn. 458; 19 S. W. 430; Barnum v. Chicago &c. R. Co. 30 Minn. 461; 16 N. W. 364; Daly v. New Jersey &c. R. Co. 155 Mass. 1; 29 N. E. 507; Hodnett v. Boston &c. R. Co. 156 Mass. 86; 30 N. E. 224; Railroad Co. v. Barron, 5 Wall. 90, 106; Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526. See, generally, Miller v. Southwestern R. Co. 55 Ga. 143; Kansas &c. R. Co. v. Miller, 2 Colo. 442; Chicago &c. R. Co. v. Morris, 26 Ill. 400; Serensen v. Northern Pac. R. Co. 45 Fed. 407; Grotenkemper v. Harris, 25 Ohio St. 510.

[80] Louisville &c. R. Co. v. Clarke, 152 U. S. 230; 14 Sup. Ct. 579. The court reviewed the cases of Pittsburgh &c. R. Co. v. Vining, 27 Ind. 513; 92 Am. Dec. 269; Mayhew v. Burns, 103 Ind. 328; 2 N. E. 793; Hanna v. Jeffersonville &c. R. Co. 32 Ind. 113; Burns v. Grand Rapids &c. R. Co. 113 Ind. 169; 15 N. E. 230, and Hecht v. Ohio &c. R. Co. 132 Ind. 507; 32 N. E. 302; Read v. Great Eastern R. Co. L. R. 3 Q. B. 555; Littlewood v. Mayor, 89 N. Y. 24; 42 Am. R. 271, and held that: "The right of a personal representative to bring an action for the exclusive benefit of the widow and children, or next of kin, of one whose death was caused by the wrongful act or omission of another, depends upon the existence or non-existence of a right in the decedent immediately before his death to have maintained an action

considered the English authorities, and declared that, while applicable to criminal prosecutions, they were wholly inapplicable to civil proceedings. The reasoning of the court is well sustained and seems to us to justly apply to all statutes giving a right of action in cases of death by wrongful act, and not to be confined to the statute of Indiana.

§ 1371. Actions for injuries causing death are transitory.—Actions for injuries causing death are transitory and not local. They may be brought against railroad companies in any county where the law provides for suing railroad companies and where service of summons can be effectively made, or, in cases where the statute permits and the company is a non-resident, where property can be seized under a writ of attachment, but in the latter class of cases no personal judgment can be obtained against the company unless by appearance or in some other mode it submits its person to the jurisdiction of the court out of which the attachment issues. The federal courts may take jurisdiction in a proper case either by original action therein or by removal from the state court in the proper case.[81]

on account of such act or omission." See Schlichting v. Wintgen, 25 Hun (N. Y.), 626. See, also, Western &c. R. Co. v. Bass, 104 Ga. 390; 30 S. E. 874.

[81] Railway Co. v. Whitton, 13 Wall. (U. S.) 270 (citing Paul v. Virginia, 8 Wall. (U. S.) 168; Ohio &c. R. Co. v. Wheeler, 1 Black (U. S.), 286; Railroad Co. v. Harris, 12 Wall. (U. S.) 65); Steamboat Co. v. Chase, 16 Wall. (U. S.) 522; Dennick v. Railroad Co. 103 U. S. 11. See, also, White v. Chicago &c. R. Co. (Ky.) 96 S. W. 911. In Lung Chung v. Northern &c. R. Co. 19 Fed. 254, it was held that the cause of action arose at the place of death and not where letters of administration were granted. It was held that the case of Goff v. Norfolk &c. R. Co. 36 Fed. 299, that the fact that the administrator was selected in order to give the federal court jurisdiction does not affect the question. Harper v. Norfolk R. Co. 36 Fed. 102. The case last cited is wrong upon the question of pleading. Serensen v. Northern &c. R. Co. 45 Fed. 407. The provisions of a state statute excluding the jurisdiction of the federal courts are held to be invalid. Railway Co. v. Whitton, 13 Wall. (U. S.) 270; Goldey v. Morning News, 156 U. S. 518; 15 Sup. Ct. 559; Union Bank v. Jolly, 18 How. (U. S.) 503; Barron v. Burnsides, 121 U. S. 186; 7 Sup. Ct. 931; Hyde v. Stone, 20 How. (U. S.) 170; Payne v. Hook, 7 Wall. (U. S.) 425; Dennistoun v. Draper, 5 Blatch. (U. S.) 336; Southern &c. R. Co. v. Denton, 146 U. S. 202; 13 Sup. Ct. 44; Kern v. Huidekoper, 103 U. S. 485, 492; Bigelow v. Nickerson, 70 Fed. 113; 30 L. R. A. 336. The case last cited contains a valuable collection

A foreign administrator cannot sue in a federal court for the recovery of damages for causing death under a state statute which authorizes foreign administrators to sue for the recovery of "debts due their decedent."[82] In one of the reported cases it was held that in transitory actions the general rule is that the action may be brought wherever the wrongdoer can be found, and under this rule it was decided that an action will lie in Texas for injuries received in Kansas, although neither of the parties is a resident of Texas.[83]

§ 1372. Actions by administrators and executors.—The general theory of the statutes granting a right to personal representatives to sue is that the action is for the benefit of the persons designated, that the amount recovered does not become assets of the decedent's estate, and that the personal representative is a mere conduit for the transmission of the amount recovered.[84] It follows from this general doctrine that there must be beneficiaries such as the statute designates. Where provision is made for a specified class of persons only the persons designated are entitled to the avails of the recovery.[85]

of cases upon the subject of injuries on navigable waters. See, also, to the effect that the action is transitory, Burns v. Grand Rapids &c. R. Co. 113 Ind. 169, 172; 15 N. E. 230; Louisville &c. R. v. Cooley (Ky.), 49 S. W. 1372; Drea v. Carrington, 32 Ohio St. 595; Austin v. Cameron, 83 Tex. 351; 18 S. W. 437.

[82] Maysville &c. Co. v. Marvin, 59 Fed. 91, reversing Marvin v. Maysville &c. R. Co. 49 Fed. 436, citing Noonan v. Bradley, 9 Wall. (U. S.) 394; Louisville &c. R. Co. v. Case, 9 Bush, 728; Louisville &c. R. Co. v. Sanders, 86 Ky. 259; 5 S. W. 563. See, also, Courtney v. Pratt, 135 Fed. 818, 820.

[83] Missouri &c. R. Co. v. Thompson, 11 Tex. Civ. App. 658; 33 S W. 718.

[84] Drake v. Gilmore, 52 N. Y. 389; Trafford v. Adams Exp. Co. 8 Lea (Tenn.), 96, 111; Dickins v. New York &c. R. Co. 23 N. Y. 158; St. Louis &c. R. Co. v. Needham, 52 Fed. 371; Jeffersonville &c. R. Co. v. Swayne, 26 Ind. 477; Perry v. St. Joseph &c. R. Co. 29 Kan. 420; Lucus v. New York &c. R. Co. 21 Barb. (N. Y.) 245; State v. Gilmore, 24 N. H. 461; Johnston v. Cleveland &c. R. Co. 7 Ohio St. 336; Commonwealth v. Eastern R. Co. 5 Gray (Mass.), 473; Woodard v. Michigan &c. R. Co. 10 Ohio St. 121; Union &c. R. Co. v. Dunden, 37 Kan. 1; 14 Pac. 501; Blake v. Midland &c. R. Co. 10 Eng. Law & Eq. 437; Chicago &c. R. Co. v. Morris, 26 Ill. 400; Duckworth v. Johnson, 4 Hurl. & N. 653; Western Union Tel. Co. v. McGill, 57 Fed. 699; 21 L. R. A. 818; Baltimore &c. R. Co. v. Then, 159 Ill. 135; 42 N. E. 971.

[85] See cases cited in preceding note. See, also, ante, § 1359. As elsewhere said the action can only

Many of the statutes give a right of action to personal representatives for the benefit of the "next of kin," and there is some diversity of opinion as to who can be regarded as the "next of kin."[86] Whether a foreign administrator can maintain the action depends upon the provisions of the statute, but the views of the courts as to the construction the statute should receive are not harmonious. We refer to some of the decided cases without criticism or comment.[87] It may be said, however, that in most jurisdictions a foreign administrator may maintain the action if he is given the right by the statute of the foreign state enforced where the action is brought, and, indeed, it is also the general rule that no other person than the one designated by such statute can maintain the action.[88]

be maintained by the person or persons authorized by statute. See, also, Berry v. Louisville &c. R. Co. 128 Ind. 484; 24 N. E. 182; "Alaska The," 130 U. S. 201; 9 Sup. Ct. 461; Frazier v. Georgia &c. R. Co. 96 Ga. 785; 22 S. E. 936.

[86] In Western Union Tel. Co. v. McGill, 57 Fed. 699; 21 L. R. A. 818, it was held, reversing the judgment of the circuit court, that a widower is not entitled to share as a beneficiary under a statute providing that the recovery should be for the exclusive benefit of the widow and children, if any, or the next of kin. It is held by some of the courts that the husband is included within the term "next of kin." Steel v. Kurtz, 28 Ohio St. 191; East Tennessee &c. R. Co. v. Lilly, 90 Tenn. 563; 18 S. W. 243; Bream v. Brown, 5 Cold. (Tenn.) 168; Trafford v. Adams Express Co. 8 Lea (Tenn.), 96; Atchison &c. R. Co. v. Townsend, 71 Kans. 524; 81 Pac. 205. Other courts hold a different doctrine, Dickins v. New York &c. R. Co. 23 N. Y. 158; Warren v. Englehart, 13 Neb. 283; 13 N. W. 401, citing Woodward v. Chicago &c. R. Co. 23 Wis. 400; Commonwealth v. Boston &c. R. Co. 11 Cush. (Mass.) 512; Safford v. Drew, 3 Duer (N. Y.), 627; Indianapolis &c. R. Co. v. Keely, 23 Ind. 133. But see Drake v. Gilmore, 52 N. Y. 389. See, generally, the note in 70 Am. St. 673, et seq.

[87] Brown v. Louisville &c. R. Co. 97 Ky. 228, 30 S. W. 639; Maysville &c. R. Co. v. Marvin, 59 Fed. 91 (reversing Marvin v. Maysville &c. R. Co. 49 Fed. 436); Southwestern &c. R. Co. v. Paulk, 24 Ga. 356; Jeffersonville &c. R. Co. v. Hendricks, 26 Ind. 228; Wabash &c. R. Co. v. Shacklett, 10 Ill. App. 404; Union &c. R. Co. v. Shacklett, 119 Ill. 232; 10 N. E. 896; Kansas &c. R. Co. v. Cutter, 16 Kan. 568; Hulbert v. Topeka, 34 Fed. 510; Limekiller v. Hannibal &c. R. Co. 33 Kan. 83; 5 Pac. 401; 52 Am. R. 523; Stewart v. Baltimore &c. R. Co. 6 App. Cas. (D. C.) 56; 23 Wash. L. 247; Leonard v. Columbia Steam Nav. Co. 84 N. Y. 48; 38 Am. R. 491; Richardson v. New York &c. R. Co. 98 Mass. 85, 91; Alabama &c. Co. v. Griffin (Ala.), 42 So. 1034.

[88] Fabel v. Cleveland &c. Ry. Co. 30

§ 1373. Limitations—Time within which action must be brought.—Where the injury is received in the state where the action is brought it is, of course, governed by the statute of limitations of that state. The action, if not brought within the time limited, cannot be maintained if the proper defense is interposed.[89] Where the injury is received in one state and the action is brought in another it would seem that there would be difficulty in solving the question as to what statute governs, that of the forum or that of the place where the injury was received, but upon that question the authorities are well agreed. The federal courts hold that the statute of the place where the injury was received governs,[90] and the same doctrine is laid down by other courts.[91] The theory is that the

Ind. App. 268; 65 N. E. 929; Erickson v. Pacific &c. Co. 96 Fed. 80; Cincinnati &c. R. Co. v. Thieband, 114 Fed. 918; Missouri Pac. R. Co. v. Lewis, 24 Neb. 848; 40 N. W. 401; 2 L. R. A. 67, and note; Oates v. Union Pac. R. Co. 104 Mo. 514; 16 S. W. 487; 24 Am. St. 348; Denver &c. R. Co. v. Warring (Colo.), 86 Pac. 305; Wooden v. Western &c. R. Co. 126 N. Y. 10; 26 N. E. 1050; 22 Am. St. 803; 13 L. R. A. 458; Hyde v. Wabash &c. R. Co. 61 Ia. 441; 16 N. W. 351; 47 Am. R. 820. See, also, Usher v. West Jersey R. Co. 126 Pa. St. 206; 17 Atl. 597; 4 L. R. A. 261; 12 Am. St. 863; Stewart v. Baltimore &c. R. Co. 168 U. S. 445; 18 Sup. Ct. 105; Lower v. Segal, 59 N. J. L. 66; 34 Atl. 945; Memphis &c. Packet Co. v. Pikey, 142 Ind. 304; 40 N. E. 527.

[89] It is generally held that as the time within which the action is brought is part of the right the objection that it is not brought within the time limited need not be presented by plea or answer. See authorities cited in the notes to this section. See, also, Jeffersonville &c. R. Co. v. Hendricks, 41 Ind. 48. In Georgia v. Chicago &c. R. Co. 51 Wis. 603; 8 N. W. 374, it is held that a complaint which shows that the action was not brought within the time limited is bad on demurrer. The court cited Howell v. Howell, 15 Wis. 55.

[90] Theroux v. Northern Pac. R. Co. 64 Fed. 84; Boyd v. Clark, 8 Fed. 849; The Harrisburg, 119 U. S. 199; 7 Sup. Ct. 140; Munos v. Southern &c. R. Co. 51 Fed. 188; International &c. Co. v. Lindstrom, 123 Fed. 475.

[91] Eastwood v. Kennedy, 44 Md. 563; Pittsburgh &c. R. Co. v. Hine. 25 Ohio St. 629; O'Shields v. Georgia &c. R. Co. 83 Ga. 621; 10 S. E. 268; 6 L. R. A. 152; Cavanaugh v. Ocean &c. Co. 19 Civ. Proc. (N. Y.) 391; 13 N. Y. S. 540; Hill v. New Haven, 37 Vt. 501; Taylor v. Cranberry &c. Co. 94 N. Car. 525; Hanna v. Jeffersonville &c. R. Co. 32 Ind. 113; Bonnell v. Jewett, 24 Hun (N. Y.), 524; Best v. Kinston, 106 N. Car. 205; 10 S. E. 997; Benjamin v. Eldridge, 50 Cal. 612; Weaver v. Baltimore &c. R. Co. 21 D. C. 499; Hamilton v. Hannibal &c. R Co. 39 Kans. 56; 18 Pac. 57. See Louisville &c. Co. v. Sanders, 86

limitation inheres in the right itself, and it is only on this theory that the doctrine can be supported, for ordinarily the limitation of actions pertains to the remedy rather than the primary right.[92] It is held that, where the right is fully barred by the statute of limitations during the life of the decedent, no action can be maintained after his death by his personal representatives,[93] and this is in harmony with the doctrine that a recovery by the decedent in his lifetime bars his representatives.[94]

§ 1374. Statutes do not deny the right to rely upon the defense of contributory negligence.—The creation of the right to maintain an action for the recovery of damages for causing the death of another does not deprive the defendant of the defense of contributory negligence.[95] In many jurisdictions the plaintiff cannot recover un-

Ky. 259; 5 S. W. 563; Nelson v. Galveston &c. R. Co. 78 Tex. 621; 14 S. W. 1021; 11 L. R. A. 391; 22 Am. St. 81; Conger v. Grand Trunk &c. R. Co. 13 Ont. 160; Zimmer v. Grand Trunk &c. R. Co. 19 Ont. App. 693; North Shore &c. R. Co. v. McWillie, 17 Can. Sup. Ct. 511; Selma &c. R. Co. v. Lacey, 49 Ga. 106; Wingert v. Carpenter, 101 Mich. 395; 59 N. W. 662.

[92] Johnston v. Canadian &c. R. Co. 50 Fed. 886; Williams v. St. Louis &c. R. Co. 123 Mo. 573; 27 S. W. 387; Munos v. Southern &c. R. Co. 51 Fed. 188. In the last case just cited the distinction is drawn as to cases where there is no special statute affecting such actions in the state where the injury was inflicted and it is held that the statute of limitations of the state where the action is brought governs in such a case.

[93] Canadian &c. R. Co. v. Robinson, 19 Can. Sup. Ct. 292; 54 Am. & Eng. R. Cas. 49.

[94] Post, § 1375. In Canadian v. Robinson, 19 Can. Sup. Ct. 292; 54 Am. & Eng. R. Cas. 49; Taschereau, J., said: "And one of these rules, I would say to-day an uncontroverted one—is that under the act the widow or other relatives therein mentioned have no action if at the time of his death the deceased had none." The cases of Read v. Great Eastern &c. R. Co. L. R. 3 Q. B. 555; Haigh v. Royal Mail &c. Co. 52 L. J. Q. B. 640; Armsworth v. Southeastern R. Co. 11 Juris. 758; Tucker v. Chaplin, 2 C. & K. 730; Boulter v. Webster, 11 L. T. N. S. 598; Griffiths v. Earl of Dudley, L. R. 9 Q. B. D. 357; Beven Negligence, 185.

[95] In Passamaneck v. Louisville R. Co. 98 Ky. 195; 32 S. W. 620, it was held that the provision of the Kentucky constitution did not exclude the defense of contributory negligence. The English rule is that the defense still exists under the statute. Senior v. Ward, 1 E & E. 385; Canadian Pacific R. Co. v. Robinson, 19 Can. Sup. Ct. 292; 54 Am. & Eng. R. Cas. 49. Contributory negligence of the person

less he affirmatively proves that the negligence of the deceased person did not proximately contribute to the injury,[96] and we suppose that in no case does the mere creation of the right to maintain an action abrogate or change the ordinary rules of pleading and evidence, and that unless the defense of contributory negligence is clearly excluded it exists, as at common law.[97] The rule that the defense of contributory negligence is not taken away in any case, unless the statute clearly so provides, is a general rule applicable to all classes of actions in which, at common law, the defense of contributory negligence was a valid and effective one, for the settled doctrine is that the rules of the common law are not abrogated except in cases where the intention to abrogate them is clearly manifested.[98] And it has been held that the defense of contributory neg-

killed is fatal, and, if an employe, the fellow-servant doctrine has been held to apply. State v. Manchester &c. R. 52 N. H. 528; State v. Maine Cent. R. Co. 60 Me. 490; Linck v. Louisville &c. R. Co. 107 Ky. 370; 54 S. W. 184; Dacey v. Old Colony R. Co. 153 Mass. 112; 26 N. E. 437. Numerous cases cited in the chapter on "Fellow-Servants" also support this proposition.

[96] See, generally, as to the effect of contributory negligence: Seats v. Georgia &c. R. Co. 86 Ga. 811; 13 S. E. 88; Price v. Richmond &c. R. Co. 33 S. Car. 556; 12 S. E. 413; 26 Am. St. 700; Tucker v. Chaplin, 2 Car. & K. 730; Senior v. Ward, 1 El. & El. 385; Holland v. Tennessee &c. R. Co. 91 Ala. 444; 8 So. 524; 12 L. R. A. 232; Little Rock &c. R. Co. v. Cavenesse, 48 Ark. 106; 2 S. W. 505; Jackson v. Crilly, 16 Colo. 103; 26 Pac. 331; Baltimore &c. R. Co. v. Sherman, 30 Grat. (Va.) 602; Baltimore &c. R. Co. v. State, 29 Md. 252; 96 Am. Dec. 528; Michigan &c. R. Co. v. Campau, 35 Mich. 468; Carney v. Chicago &c. R. Co. 46 Minn. 220; 48 N. W. 912; Abend v. Terre Haute &c. R. Co. 111 Ill. 202; 53 Am. R. 616, and note; Illinois Cent. R. Co. v. Cozby, 174 Ill. 109; 50 N. E. 1011; Karle v. Kansas City &c. R. Co. 55 Mo. 476; Hamilton v. Delaware &c. R. Co. 50 N. J. Law, 263; 13 Atl. 29; Wilds v. Hudson River R. Co. 29 N. Y. 315; Fulmer v. Illinois &c. R. Co. 68 Miss. 355; 8 So. 517; Evansville &c. R. Co. v. Lowdermilk, 15 Ind. 120; Pennsylvania Co. v. Meyers, 136 Ind. 242; 36 N. E. 32; Walsh v. Boston &c. R. Co. 171 Mass. 52; 50 N. E. 453; 3 Elliott Ev. § 2011.

[97] Ante, § 1315; Helfrich v. Ogden &c. R. Co. 7 Utah, 186; 26 Pac. 295; Noyes v. Southern &c. R. Co. (Cal.) 24 Pac. 927; Rowland v. Cannon, 35 Ga. 105; Pennsylvania &c. R. Co. v. Zebe, 33 Pa. St. 318; Pennsylvania R. Co. v. Bell, 122 Pa. St. 58; 15 Atl. 561; Quinn v. New York &c. R. Co. 56 Conn. 44; 12 Atl. 97; 7 Am. St. 284; Newman v. Chicago &c. R. Co. 80 Iowa, 672; 45 N. W. 1054; Murray v. Pontchartrain R. Co. 31 La. Ann. 490; Nashville &c. R. Co. v. Smith, 6 Heisk. (Tenn.) 174.

[98] See, ante, § 1315; Lake Erie

ligence goes to the right of action rather than the remedy, and that if good in the state in which the death was caused it is good in another state in which the action is brought.[99]

§ 1375. One recovery merges cause of action.—Where the deceased in his lifetime brings an action and recovers damages for the injury sustained, his representatives cannot maintain an action for damages where death results from the same injury for which the recovery was had.[100] The wrongful injury and the damages constitute the right of action, and if there is a judgment the right is therein merged, for the same injury cannot be split into fragments. "While the act relates to the remedy it is, nevertheless, in derogation of the common law, because it gives a right of action where none existed

&c. R. Co. v. Craig, 73 Fed. 642, citing Krause v. Morgan (Ohio St.), 40 N. E. 886; Cincinnati &c. R. Co. v. Van Horne, 69 Fed. 139; 16 C. C. A. 182. In Lake Erie &c. R. Co. v. Craig, supra, the statute provided that the failure of a railroad company to block frogs should subject it to punishment and it was held that the statute did not exclude the defense of contributory negligence. The case of Cincinnati &c. R. Co. v. Van Horne, supra, does not touch upon the question of contributory negligence, but holds that the failure to obey the statute constitutes negligence on the part of the railroad company.

[99] Morisette v. Canadian Pac. Ry. Co. 76 Vt. 267; 56 Atl. 1102. But it is held that the burden of proving contributory negligence is on the defendant in the federal courts and that this rule governs in such a court no matter what the state rule is. Baker v. Philadelphia &c. R. Co. 149 Fed. 882, 887.

[100] Hecht v. Ohio &c. R. Co. 132 Ind. 507; 32 N. E. 302 (approved in Strode v. St. Louis Transit Co. 197 Mo. 616; 95 S. W. 851, 854); Littlewood v. Mayor, 89 N. Y. 547; Read v. Great Eastern &c. R. Co. L. R. 3 Q. B. 555; Griffiths v. Dudley, L. R. 9 Q. B. D. 357; Haigh v. Royal &c. Co. 52 L. J. (N. S.) Q. B. D. 640; see Hegerich v. Keddie, 99 N. Y. 258; 1 N. E. 787; 52 Am. R. 25; Putnam v. Southern Pac. Co. 21 Oreg. 230; 27 Pac. 1033; Fowlkes v. Nashville &c. R. Co. 9 Heisk. (Tenn.) 829; Legg v. Britton, 64 Vt. 652; 24 Atl. 1016 (disapproving Needham v. Grand Trunk &c. R. Co. 38 Vt. 294); Holton v. Daly, 106 Ill. 131; Chicago &c. R. Co. v. O'Connor, 119 Ill. 586; 9 N. E. 263; McCarthy v. Chicago &c. R. Co. 18 Kan. 46; 26 Am. R. 742; Louisville &c. R. Co. v. McElwain, 18 Ky. L. 379; 34 S. W. 236. In the case last cited it was said that, "It was not the intention of the legislature to multiply actions," and the cases of Hansford v. Payne, 11 Bush. (Ky.) 380, and Conner v. Paul, 12 Bush. (Ky.) 144, were reviewed. But see Leggott v. Great Northern &c. R. Co. L. R. 1 Q. B. D. 599; Hulbert v. Topeka, 34 Fed. 510; Hurst v. Detroit &c. R. Co. 84 Mich. 539; 48 N. W. 44.

at common law, and so it should be strictly construed. A further consideration in favor of a single action is the confusion of damages which would result from the maintenance of two actions. Although they might be theoretically separate, a practical separation would be quite impossible." It seems clear to us that there can only be one recovery, and that a recovery adjudicates the whole right.[101] Possibly a different rule may prevail in jurisdictions where rights are severed and concurrent actions given by clear and unequivocal statutory provisions,[102] but this can only be true where the statute makes peculiar provisons upon the subject; so peculiar, indeed, as to clearly contravene the general principles of law, and entirely exclude them from consideration. The fact that an action brought by a deceased person in his lifetime was pending at the time of his death will not bar an action brought after his death by his legal representatives.[103]

§ 1376. Release—Compromise.—Where the injured person, after

[101] Lubrano v. Atlantic Mills, 19 R. I. 129; 32 Atl. 205; 34 L. R. A. 797, and note. In the case cited, and from which we have quoted, there is an able discussion of the question and an excellent review of the authorities.

[102] Hedrick v. Ilwaco &c. R. Co. 4 Wash. 400; 30 Pac. 714. See, also, Clare v. New York &c. R. Co. 172 Mass. 211; 51 N. E. 1083; Nelson v. Galveston &c. R. Co. 78 Tex. 621; 14 S. W. 1021; 11 L. R. A. 391; 22 Am. St. 81. The court in the first case cited placed its decision in great part upon the case of Walters v. Chicago &c. R. Co. 36 Iowa, 458. In Hartigan v. Southern &c. R. Co. 86 Cal. 142; 24 Pac. 851, it was held that under a statute providing that the action may be brought by the heirs or by the personal representative a judgment in an action by the former would merge the right of action. In Munro v. Pacific &c. Co. 84 Cal. 515; 34 Pac. 303, 305; 18 Am. St. 248, the court quoted from the opinion in Blake v. Midland R. Co. 18 Q. B. 93, the statement that the statute "gives to the representative a totally new right," and cited approvingly Franklin v. Southeastern R Co. 3 Hurl. & N. 211; Dalton v. Southeastern R. Co. 4 C. B. (N. S.) 296; Bradshaw v. Lancashire &c. R. Co. L. R. 10 C. P. 189; Leggott v. Great Northern R. Co. L. R. 1 Q. B. D. 599; Pym v. Great Northern R. Co. 2 Best & S. 759; Safford v. Drew, 3 Duer (N. Y.), 627. See Putnam v. Southern &c. R. Co. 21 Ore. 230; 27 Pac. 1033; 44 Alb. L. J. 517.

[103] Indianapolis &c. R. Co. v. Stout, 53 Ind. 143; International &c. R. Co. v. Kuehn, 70 Tex. 582; 8 S. W. 484. See Davis v. St. Louis &c. R. Co. 53 Ark. 117; 13 S. W. 801; 7 L. R. A. 283; Bowes v. Boston, 155 Mass. 344; 29 N. E. 633; 15 L. R. A. 365, and note; Brown v. Chicago &c. R. Co. 102 Wis. 137; 78 N. W. 771; 44 L. R. A. 579.

the accident and prior to his death, executes a valid release, his representatives cannot maintain an action.[104] This is certainly true where the statute is a mere survival statute, and it is also generally held to be the rule under most statutes of the other class, but in the case of statutes of the latter class, where they give a new right of action not dependent upon the right of the deceased to maintain an action if he had lived, it is somewhat difficult to support the rule by logical reasoning, and some judges deny it in such cases.[105] A plea of accord and satisfaction is sufficient to bar the action.[106] There is some diversity of opinion as to whether a beneficiary can execute an effective release or whether it must be executed by the administrator, but we suppose that much depends upon the provisions of the statute involved in the particular case. It has been held that where the action must be brought by an administrator the widow, although the sole beneficiary, cannot compromise the case,[107] but in other jurisdictions a different rule prevails.[108] Where the beneficiary is

[104] Price v. Richmond &c. R. Co. 33 S. Car. 556; 12 S. E. 413; 26 Am. St. 700; Dibble v. New York &c R. Co. 25 Barb. (N. Y.) 183. See, also, Southern Bell &c. Co. v. Cassin, 111 Ga. 575; 36 S. E. 881; 50 L. R. A. 694; Brown v. Chattanooga &c. R. Co. v. 101 Tenn. 252; 47 S. W. 415; 70 Am. St. 666; Syhora v. Case &c. Co. 59 Minn. 130; 60 N. W. 1008; Missouri &c. R. Co. v. Brantley, 26 Tex. Civ. App. 11; 62 S. W. 94; Strode v. St. Louis Transit Co. 197 Mo. 616; 95 S. W. 851. Mr. Freeman regards the case of Price v. Richmond &c. R. Co. 33 S. Car. 556; 12 S. E. 413; 26 Am. St. 700, as in conflict with Donahue v. Drexler, 82 Ky. 157; 56 Am. R. 886.

[105] Strode v. St. Louis Transit Co. (Mo.) 87 S. W. 976 (but the court in banc withdrew this opinion and held otherwise, 197 Mo. 616; 95 S. W. 851). The question is well argued and the authorities on both sides are cited and reviewed in the principal and dissenting opinions in Southern Bell Tel. Co. v. Cassin, 111 Ga. 575; 36 S. E. 881; 50 L. R. A. 694.

[106] Read v. Great Eastern &c. R. Co. L. R. 3 Q. B. 555; 37 L. J. Q. B. 278; Guldager v. Rockwell, 14 Colo. 459; 34 Pac. 556. In the last named case the court directed a verdict for the defendant upon the answer of accord and satisfaction. Upon the question of directing a verdict the court cited, Trippe v. Fiske, 4 Colo. 24; Behrens v. Kansas &c. R. Co. 5 Colo. 400; Schwenke v. Union &c. R. Co. 12 Colo. 341; 21 Pac. 43; Lord v. Pueblo &c. Refining Co. 12 Colo. 390; 21 Pac. 148.

[107] Yelton v. Evansville &c. R. Co. 134 Ind. 414; 33 N. E. 629; 21 L. R. A. 158; Dowell v. Burlington &c. R. Co. 62 Iowa, 629; 17 N. W. 901; Long v. Morrison, 14 Ind. 595; 77 Am. Dec. 72.

[108] Schmidt v. Deegan, 69 Wis. 300; 34 N. W. 83; Mc Keigue v. Chicago &c. R. Co. (Wis.) 110 N. W. 384. In Southern Pac. R.

given the right to sue and is vested with the whole interest, then, as it seems to us, it is entirely clear that he may make an effective compromise.[109] The question is not, as a general rule, as to the right to compromise, but as to who has the authority to make a compromise. In jurisdictions where the right to sue is vested in the personal representatives the safe course is for the administrator, acting under the approval of the court, to make the adjustment.[110] But it seems that he has a right to do so, in the absence of fraud or the like, even without submitting the matter to the court.[111] We are

Co. v. Tomlinson, 163 U. S. 369; 16 Sup. Ct. 1171, it is held that where there is a right in one of several to sue but the amount of recovery is to be apportioned among all the party having a right to sue can not remit part of the amount, reversing Tomlinson v. Southern Pacific R. Co. (Ariz.) 33 Pac. 710, citing Houston &c. R. Co. v. Bradley, 45 Tex. 171; March v. Walker, 48 Tex. 372; Houston &c. R. Co. v. Moore, 49 Tex. 31; 30 Am. R. 98; Galveston &c. R. Co. v. La Gierse, 51 Tex. 189; East Line &c. R. Co. v. Culberson, 68 Tex. 664; 5 S. W. 820; St. Louis &c. R. Co. v. Needham, 52 Fed. 371; 10 U. S. App. 339. See, also, Christie v. Chicago &c. R. Co. 104 Ia. 707; 74 N. W. 697; Doyle v. New York &c. R. Co. 66 App. Div. (N. Y.) 398; 72 N. Y. S. 936. But see Holden v. Nashville &c. R. Co. 92 Tenn. 141; 20 S. W. 537; 36 Am. St. 77; Greenlee v. Railroad, 5 Lea (Tenn.), 418.

[109] Holder v. Railroad, 92 Tenn. 141; 20 S. W. 537; 36 Am. St. 77; Greenlee v. East Tennessee &c. R. Co. 5 Lea (Tenn.), 418; Stephens v. Railway Co. 10 Lea (Tenn.), 448; Knoxville &c. R. Co. v. Acuff, 92 Tenn. 26; 20 S. W. 348; Webb v. East Tennessee &c. R. Co. 88 Tenn. 119; 12 S. W. 428; Western &c. R Co. v. Strong, 52 Ga. 461; Hendricks v. Western &c. R. Co. 52 Ga. 467; Natchez &c. Co. v. Mullins, 67 Miss. 672; 7 So. 542; Stuebing v. Marshall, 10 Daly (N. Y. C. P.), 406. But see Maney v. Chicago &c. R. Co. 49 Ill. App. 105.

[110] South &c. R. Co. v. Sullivan, 59 Ala. 272; Hartigan v. Southern &c. R. Co. 86 Cal. 142; 24 Pac. 851; Henchey v. Chicago, 41 Ill. 136; Washington v. Louisville &c. R. Co. 34 Ill. App. 658; Natchez &c. Co. v. Mullins, 67 Miss. 672; 7 So. 542; Rogers v. Zook, 86 Ind. 237; Hulbert v. Topeka, 34 Fed. 510. See, generally, Woerner Administration, § 326, p. 683; Owen v. Brockschmidt, 54 Mo. 285; McNamara v. Slavens, 76 Mo. 329. As to the effect of release upon right of beneficiary who executes it, see, Davis v. St. Louis &c. R. Co. 53 Ark. 117; 13 S. W. 801; 7 L. R. A. 283; Vicksburg &c. R. Co. v. Phillips, 64 Miss. 693; 2 So. 537; Needham v. Grand Trunk &c. R. Co. 38 Vt. 294; Earl v. Tupper, 45 Vt. 275. But in Legg v. Britton, 64 Vt. 652; 24 Atl. 1016, the doctrine of the earlier Vermont cases is disapproved.

[111] Pittsburgh &c. R. Co. v. Gipe, 160 Ind. 360; 65 N. E. 1034 (disapproving a statement in Yelton v. Evansville &c. R. Co. 134 Ind. 414; 33 N. E. 629; 21 L. R. A. 158, and

not, at this place, it may be well to say, treating of contracts made in advance stipulating for exoneration from liability for injuries resulting from negligence, but of contracts made after the injury was received. As to contracts made prior to the time the injury is received it is to be said that the rule generally supported by the American decisions is that such contracts are against public policy, and, therefore, ineffective.[112]

§ 1377. Avoiding releases and compromises.—A release executed by an injured person during life or by his personal representatives after death may, of course, be avoided and annulled in cases where it was procured by fraud.[113] There is no conflict upon the proposition that courts will, in a proper case, relieve against the release or compromise of a claim for damages resulting from negligence, but there is conflict upon the question whether the person who receives money or property as a consideration for the release is bound to tender it back. Some of the cases hold that he is not bound

note, to the contrary); Foot v. Great Northern R. Co. 81 Minn. 493; 84 N. W. 342; 83 Am. St. 395; 52 L. R. A. 354; Washington v. Louisville &c. R. Co. 34 Ill. App. 658; 136 Ill. 49; 26 N. E. 653. See, also, Parker v. Providence &c. Co. 17 R. I. 376; 22 Atl. 284; 23 Atl. 102; 14 L. R. A. 414, and note; 33 Am St. 869; Stuber v. McEntee, 142 N. Y. 200; 36 N. E. 878; Cogswell v. Concord &c. R. Co. 68 N. H. 192, 195; 44 Atl. 293. But see Pisano v. B. M. Shanley &c. Co. 66 N. J. L. 1; 48 Atl. 618.

[112] Roesner v. Hermann, 8 Fed. 782; Annas v. Milwaukee &c. R. Co. 67 Wis. 46; 30 N. W. 282; 58 Am. R. 848; Alabama &c. R. Co. v. Carroll, 97 Ala. 126; 11 So. 803; 18 L. R. A. 443; 38 Am. St. 163; Commonwealth v. Vermont &c. R. Co. 108 Mass. 7; 11 Am. R. 301; Railway Co. v. Spangler, 44 Ohio St. 471; 8 N. E. 467; 58 Am. R. 838, and note; Little Rock &c. R. Co. v. Ewbanks, 48 Ark. 460; 3 S. W. 808; 3 Am. St. 245, and note; Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357; Railroad Co. v. Stevens, 95 U. S. 655; Mobile &c. R. Co. v. Hopkins, 41 Ala. 486; 94 Am. Dec. 607; Rose v. Des Moines &c. R. Co. 39 Iowa, 246; Kansas &c. R. Co. v. Peavey, 29 Kan. 169; 44 Am. R. 630, and note; 34 Kan. 472; 8 Pac. 780; Purdy v. Rome &c. R. Co. 125 N. Y. 209; 26 N. E. 255; 21 Am. St. 736. But see, Great Western &c. R. Co. v. Bishop, 50 Ga. 465; Fulton &c. Mills Co. v. Wilson, 89 Ga. 318; 15 S. E. 322; Haigh v. Royal Mail &c. R. Co. 52 L. J. Q. B. 640.

[113] Jones v. Alabama &c. R. Co. 72 Miss. 32; 16 So. 379; Byers v. Nashville &c. R. Co. 94 Tenn. 345; 29 S. W. 128; Union &c. R. Co. v. Harris, 63 Fed. 800; Albrecht v. Milwaukee &c. R. Co. 87 Wis. 105; 58 N. W. 72; 41 Am. St. 30.

to tender it back,[114] others that the amount received by him will be credited to the defendant upon the judgment that may be recovered by the plaintiff, and still others that what is received must be tendered back.[115] In one of the reported cases it was held that where the injured person had property destroyed in the same accident in

[114] O'Brien v. Chicago &c. R. Co. 89 Iowa, 644; 57 N. W. 425 (citing Hendrickson v. Hendrickson, 51 Iowa, 68; 50 N. W. 287; Citizens' Bank v. Barnes, 70 Iowa, 412; 30 N. W. 857, and approving Gulliher v. Chicago &c. R. Co. 59 Iowa, 416; 13 N. W. 429; Wallace v. Chicago &c. R. Co. 67 Iowa, 547; 25 N. W. 772); Chicago &c. R. Co. v. Lewis, 109 Ill. 120; Chicago &c. R. Co. v. Doyle, 18 Kan. 58; Allerton v. Allerton, 50 N. Y. 670; Kley v. Healy, 127 N. Y. 555; 28 N. E. 593; International &c. R. Co. v. Brazzil, 78 Tex. 314; 14 S. W. 609; Star &c. Co. v. Sibley, 57 Ill. App. 315. See, also, Jones v. Alabama &c. R. Co. 72 Miss. 22; 16 So. 379; leading article in 63 Cent. L. J. 85; Indiana &c. R. Co. v. Fowler, 201 Ill. 152; 66 N. E. 394; 94 Am. St. 158; Missouri Pac. Ry. Co. v. Goodholm, 61 Kan. 758; 60 Pac. 1066; Bliss v. New York &c. R. Co. 160 Mass. 447; 36 N. E. 65; 39 Am. St. 504; Austin v. Piedmont &c. Co. 67 S. Car. 122; 45 S. E. 135. See Boikens v. New Orleans &c. R. Co. (La.) 19 So. 737, where the amount paid the injured person was under the peculiar provisions of the release held to be a donation.

[115] Gibson v. Western &c. R. Co. 164 Pa. St. 142; 30 Atl. 308; 44 Am. St. 586; 40 Cent. L. J. 233; Vandewelden v. Chicago &c. R. Co. 61 Fed. 54; Strodder v. Southern &c. Co. 94 Ga. 626; 19 S. E. 1022; Lomax v. Southwest Mo. &c. Co. 119 Mo. App. 192; 95 S. W. 945; Memphis St. R. Co. v. Giardino (Tenn.), 92 S. W. 855; 63 Cent. L. J. 32; Drohan v. Lake Shore &c. R. Co. 162 Mass. 435; 38 N. E. 1116; East Tennessee &c. Ry. Co. v. Hayes, 83 Ga. 558; 10 S. E. 350; Hill v. Northern Pac. R. Co. 113 Fed. 914; Barker v. Northern Pac. R. Co. 65 Fed. 460. In Louisville &c. R. Co. v. Herr, 135 Ind. 591; 35 N. E. 556, it is held that there must be a disaffirmance and the clear implication is that there must be a restoration of the thing received as the consideration for the release. See International &c. R. Co. v. Brazzil, 78 Tex. 314; 14 S. W. 609; 44 Am. & Eng. R. Cas. 437; Home Ins. Co. v. Howard, 111 Ind. 544; 13 N. E. 103; Louisville &c. R. Co. v. Faylor, 126 Ind. 126, 131; 25 N. E. 869. But there are exceptional cases, as, for instance, where he would in any event be entitled to as much as was received. Winter v. Kansas City &c. R. Co. 160 Mo. 159, 190; 61 S. W. 606; Girard v. St. Louis &c. Co. 123 Mo. 358, 387; 27 S. W. 648; 25 L. R. A. 514; 45 Am. St. 556. As to giving credit on trial or deducting from verdict, see Chicago &c. R. Co. v. Doyle, 18 Kans. 58; O'Brien v. Chicago &c. Ry. Co. 89 Ia. 644; 57 N. W. 425; Haslun v. Holy Terror &c. Co. 16 S. Dak. 261; 92 N. W. 31. But compare Lyons v. Allen, 11 App. (D. C.) 543.

which he received his injury, and believed the representation that the money paid him was for the property and not on account of the personal injury, he was not bound to tender it back.[116] It has also been held that a release specifying certain injuries does not operate upon a claim for personal injuries not known to the parties at the time the release was executed.[117] The doctrine of the majority of the cases seems to us to be erroneous. We can see no reason why such a case should not fall within the general rule that one who receives a thing of value must tender it back in order to be entitled to a recovery on the original claim. The rule which we venture to criticize is productive of evil consequences inasmuch as it tends to prevent the compromise of controversies and to increase litigation. So, too, it arms a plaintiff with the means of prosecuting an action against the person with whom he effected a settlement, and this is unjust. Some of the courts hold that a release is effective until annulled by a court of equity.[118] But others, and probably a majority, hold that fraud in procuring it may be set up in the action at law.[119] The party who assails the release must, as is well known,

[116] Bliss v. New York &c. R. Co. 160 Mass. 447; 36 N. E. 65; 9 Lewis' Am. R. & Corp. 484; 39 Am. St. 504. See Mullen v. Old Colony R. Co. 127 Mass. 86; 34 Am. 349; Droham v. Lake Shore &c. R. Co. 162 Mass. 435; 38 N. E. 1116.

[117] Union &c. R. Co. v. Artist, 60 Fed. 365; 23 L. R. A. 581; Lumley v. Wabash R. Co. 76 Fed. 66. But where specific injuries are not designated and others are feared, a release will include all injuries from the same cause. Eccles v. Union &c. R. Co. 7 Utah, 335; 26 Pac. 924. See, also, Houston &c. R. Co. v. McCarty, 94 Tex. 298; 60 S. W. 429; 86 Am. St. 854; 53 L. R. A. 507; note in 55 Am. St. 507–513.

[118] Och v. Missouri &c. R. Co. 130 Mo. 27; 31 S. W. 962; 36 L. R. A. 442 (rule since changed in Missouri, however); Hill v. Northern Pac. R. Co. 104 Fed. 754; Vandervelden v. Chicago &c. R. Co. 61 Fed. 54. See, also, George v. Tate, 102 U. S. 564, 570: Gould v. Cayuga &c. Bank, 86 N. Y. 75. A distinction is made between cases in which the release is intentionally executed but is voidable because of misrepresentation or deceit, in which case most of these authorities hold that it must first be avoided in equity, and cases in which it is absolutely void for fraud in its execution. See, also, Papke v. G. H. Hammond Co. 192 Ill. 631; 61 N. E. 910; Atchison &c. R. Co. v. Vandordetrand, 67 Kans. 386; 73 Pac. 113; Homuth v. Metropolitan &c. R. Co. 129 Mo. 629; 31 S. W. 903. Of course, a release fairly obtained and supported by a valuable consideration is effective. Retzer v. Jacob Dold Packing Co. 58 Mo. App. 264; Sykora v. Case &c. Co. 59 Minn. 130; 60 N. W. 1008.

[119] Brundige v. Nashville &c. R.

affirmatively establish its invalidity, and this, where fraud is relied on, can only be done by proving some artifice, trick, or some fraudulent misrepresentation of a fact or facts.[120] It is held that if a release, although under seal, is shown to be without consideration, it will not defeat a recovery.[121]

§ 1378. Measure of damages.—It may be safely said that the general rule is that in actions to recover for injuries resulting in death the amount of the recovery is to be measured by the pecuniary loss sustained by the persons for whose benefit the statute gives a right of recovery,[122] not exceeding, of course, the amount allowed

Co. 112 Tenn. 526; 81 S. W. 1248; Memphis St. R. Co. v. Giardino (Tenn.), 92 S. W. 855; 63 Cent. L. J. 32, and note; Rauen v. Prudential &c. Co. 129 Ia. 725; 106 N. W. 198; Alabama &c. R. Co. v. Jones, 73 Miss. 110; 19 So. 105; 86 Am. St. 488; Wagner v. National &c. Insurance Co. 90 Fed. 395, and cases there cited; Missouri Pac. R. Co. v. Goodholm, 61 Kans. 758; 60 Pac. 1066.

[120] Spitze v. Baltimore &c. R. Co. 75 Md. 162; 23 Atl. 307; 32 Am. St. 378, and note; 48 Am. & Eng. R. Cas. 495; Doty v. Chicago &c. R. Co. 49 Minn. 499; 52 N. W. 135; Albrecht v. Milwaukee &c. Ry. Co. 87 Wis. 105; 58 N. W. 72; 41 Am. St. 30; Thomas v. Chicago &c. R. Co. 49 Mo. App. 110; Nelson v. Minneapolis &c. R. Co. 61 Minn. 167. 63 N. W. 486; Homuth v. Metropolitan &c. R. Co. 129 Mo. 629; 31 S. W. 903; Mathis v. Kansas City &c. R. Co. 185 Mo. 434, 459; 84 S. W. 66; Lomax v. Southwest Mo. &c. R. Co. 119 Mo. App. App. 192; 95 S. W. 945; Johnson v. Chicago &c. R. Co. 107 Ia. 1; 77 N. W. 476. See Union &c. R. Co. v. Harris, 158 U. S. 326; 15 Sup. Ct. 843. Citing Chicago &c. R. Co. v. Lewis, 109 Ill. 120; Chicago &c. R. Co. v. Doyle, 18 Kan. 58; Lusted v. Chicago &c. Ry. Co. 71 Wis. 391; 36 N. W. 857; Dixon v. Brooklyn &c. R. Co. 100 N. Y. 170; 3 N. E. 65; Illinois &c. R. Co. v. Welch, 52 Ill. 183; 4 Am. R. 593; Mateer v. Missouri &c. R. Co. 105 Mo. 320; 16 S. W. 839; Stone v. Chicago &c. R. Co. 66 Mich. 76; 33 N. W. 24; Smith v. Occidental &c. Steamship Co. 99 Cal. 462; 34 Pac. 84. See National &c. Co. v. Carlson, 47 Ill. App. 178; and see 6 Thomp. Neg. §§ 734–737, for examples of releases set aside and those not set aside for fraud or misrepresentation.

[121] Wabash &c. R. Co. v. Brow, 65 Fed. 941; 13 C. C. A. 222. But see, generally, as to consideration, note to Missouri &c. R. Co. v. Smith, 98 Tex. 47; 81 S. W. 22; 66 L. R. A. 741, in 107 Am. St. 607, 615, et seq.; and see Gulf &c. Ry. Co. v. Minter (Tex. Civ. App.), 93 S. W. 516, 518.

[122] The decisions are very numerous and we cite very few of the great number. Blake v. Midland &c. R. Co. 18 Q. B. 93; Railroad Co. v. Barron, 5 Wall. (U. S.) 90; Baltimore &c. R. Co. v. Mackey, 157 U. S. 72; 15 Sup. Ct. 491;

by statute and claimed in the complaint or declaration. In some of the states provision is made for exemplary damages, and, of course, in such states the general rule we have stated does not apply. The right to recover is not in whole or in part defeated by the fact that the beneficiaries received money on policies of life insurance taken out by the decedent.[123] Life tables are admissible in evidence,[124]

Pennsylvania Co. v. Roy, 102 U. S. 451; Louisville &c. R. Co. v. Trammell, 93 Ala. 350; 9 So. 870; Bromly v. Birmingham &c. R. Co. 95 Ala. 397; 11 So. 341; Farmers' &c. Co. v. Toledo &c. R. Co. 67 Fed. 73; Pierce v. Conners, 12 Colo. 178; 37 Pac. 721; Huntington &c. Co. v. Decker, 84 Pa. St. 419; Telfer v. Northern &c. R. Co. 30 N. J. L. 188; Chicago &c. R. Co. v. Harwood, 80 Ill. 88; Kansas Pacific &c. R. Co. v. Cutter, 19 Kan. 83; Mynning v. Detroit &c. R. Co. 59 Mich. 257; 26 N. W. 514; Hutchins v. St. Paul &c. R. Co. 44 Minn. 5; 46 N. W. 79; Atchison &c. R. Co. v. Wilson, 48 Fed. 57; Pennsylvania &c. R. Co. v. Butler, 57 Pa. St. 335; Galveston &c. R. Co. v. Matula, 79 Tex. 577; 15 S. W. 573; Webb v. Denver &c. R. Co. 7 Utah, 17; 24 Pac. 616; Louisville &c. R. Co. v. Rush, 127 Ind. 545; 26 N. E. 1010; Morgan v. Southern &c. R. Co. 95 Cal. 510; 30 Pac. 603; 17 L. R. A. 71, and note; 29 Am. St. 143; Kelley v. Central &c. R. Co. 48 Fed. 663; Carlson v. Oregon &c. R. Co. 21 Ore. 450; 28 Pac. 497; Ladd v. Foster, 31 Fed. 827; Klepsch v. Donald, 4 Wash. 436; 30 Pac. 991; 31 Am. St. 936; Pepper v. Southern &c. R. Co. 105 Cal. 389; 38 Pac. 974; Smith v. Chicago &c. R. Co. 6 S. Dak. 583; 62 N. W. 967; Walker v. Lake Shore &c. R. Co. 104 Mich. 606; 62 N. W. 1032; North Chicago St. R. Co. v. Brodie, 156 Ill. 317; 40 N. E. 942; Garrick v. Florida &c. R. Co. 53 S. Car. 448; 31 S. E. 334; 69 Am. St. 874.

[123] Sherlock v. Alling, 44 Ind. 184; Althorf v. Wolfe, 22 N. Y. 355; Kellogg v. New York &c. R. Co. 79 N. Y. 72; Pittsburgh &c. R. Co. v. Thompson, 56 Ill. 138; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15; Carroll v. Missouri &c. R. Co. 88 Mo. 239; 57 Am. R. 382, and note; 26 Am. & Eng. R. Cas. 268; Baltimore &c. R. Co. v. Wightman, 29 Gratt. (Va.) 431; 26 Am. R. 384; Coulter v. Pine Tp. 164 Pa. St. 543; 30 Atl. 490.

[124] Louisville &c. R. Co. v. Miller, 141 Ind. 533; 37 N. E. 343; Shover v. Myrick, 4 Ind. App. 7, 13; 30 N. E. 207; Donaldson v. Mississippi &c. R. Co. 18 Iowa, 280; 87 Am. Dec. 391; Walters v. Chicago &c. R. Co. 41 Iowa, 71; Central R. Co. v. Crosby, 74 Ga. 737; 58 Am. R. 463; Central &c. R. Co. v. Richards, 62 Ga. 306; McKigue v. Janesville, 68 Wis. 50; 31 N. W. 298; Scheffler v. Minneapolis &c. R. Co. 32 Minn. 125; 19 N. W. 656; Coates v. Burlington &c. R. Co. 62 Iowa, 486; 17 N. W. 760; Worden v Humeston &c. R. Co. 76 Iowa, 310; 41 N. W. 26; Mills v. Catlin, 22 Vt. 98; Sauter v. New York &c. R. Co. 66 N. Y. 50; 23 Am. R. 18; Haden v. Sioux City &c. R. Co. 92 Iowa, 22, 26; 60 N. W. 537; Vicksburg &c. R. Co. v. Putnam, 118 U. S. 545; 7 Sup. Ct. 1; Gorman v. Minneapolis

but such tables are not to be taken as fixing the expectancy of life of the particular person. The only legitimate use that can be made of such tables is to aid the jury in ascertaining the probable duration of life, for they do not do more than furnish some evidence upon that question; more than this they cannot do. It is proper, as we conceive, and, indeed, necessary to instruct the jury as to the effect of life or mortality tables,[125] for, while they are instruments of evidence, many other elements enter into the question of the computation of damages. There are many contingencies to be considered, as, for instance, the probability of physical ability to labor or conduct business, the exposure to danger, the probability of obtaining employment, and the like.[126] Unless instructions are given to the jury justly limiting the effect of mortality tables as evidence, the jury are likely to give them undue weight, and treat them as conclusive evidence of the duration of the particular life, and to leave out of mind elements that justice requires should have due consideration. It is held that it is not necessary that the evidence should supply the jury with the exact data upon which to compute dam-

&c. R. Co. 78 Iowa, 509; 43 N. W. 303; Louisville &c. R. Co. v. Mahony, 7 Bush (Ky.), 235; Cooper v. Lake Shore &c. R. Co. 66 Mich. 261; 33 N. W. 306; 11 Am. St. 482; Hunn v. Michigan &c. R. Co. 78 Mich. 513; 44 N. W. 502; 7 L. R. A. 500, and note; Sellars v. Foster, 27 Neb. 118; 42 N. W. 907; Mississippi &c. R. Co. v. Ayres, 16 Lea (Tenn.), 725; San Antonio &c. R. Co. v. Bennett, 76 Tex. 151; 13 S. W. 319; 1 Elliott Ev. § 418. In Rajnowski v. Detroit &c. R. Co. 74 Mich. 20; 41 N. W. 847, the injured person was a child five years of age and it was held prejudicial error to admit in evidence life tables not giving the expectancy of any person under ten years of age.

[125] Campbell v. York, 172 Pa. St. 205; 33 Atl. 879, citing Steinbrunner v. Pittsburgh &c. Ry. Co. 146 Pa. St. 504; 23 Atl. 239; 28 Am. St. 806; McCue v. Knoxville, 146 Pa. St. 580; 23 Atl. 439; Kraut v. Frankford &c. R. Co. 160 Pa. St. 327; 28 Atl. 783. See, also, 1 Elliott Ev. § 418.

[126] Savannah &c. R. Co. v. McLeod, 94 Ga. 530; 20 S. E. 434; Railroad Co. v. Spence, 93 Tenn. 173; 23 S. W. 211; 42 Am. St. 907, There can not be any fixed and certain rule where so many contingencies enter into the inquiry. St. Louis &c. R. Co. v. Needham, 52 Fed. 371, 378; Vickburg &c. R. v. Putnam, 118 U. S. 545; 7 Sup. Ct. 1. But see Farmers' &c. Co. v. Toledo &c. R. Co. 67 Fed. 73. In Atchison &c. R. Co. v. Hughes, 55 Kan. 491; 40 Pac. 919, it was held that such tables were not indispensable evidence as the jury may base their conclusion upon other facts. See, also, Boswell v. Barnhart, 96 Ga. 521; 23 S. E. 414.

ages,[127] but we suppose there must be, in the absence of statutory provisions to the contrary, some evidence upon which the jury can legally act, for the matter cannot be left wholly and entirely to conjecture.[128] Possibly some damages of a nominal character might be awarded in the absence of evidence, but if there be no evidence at all upon the subject a verdict cannot go beyond damages of a nominal nature, although, perhaps, the recovery would not be limited to strictly nominal damages.[129] It is not necessary that there should be direct evidence of pecuniary loss, for that fact may be inferred from circumstances.[130] The capacity to earn money, and the amount of the earnings, may be shown in evidence,[131] not, however, for the purpose of fixing an absolute standard, for in all cases there are contingencies to be considered such as arise in the life of almost every person.

§ 1378a. Measure of damages—Evidence.—As stated in the last

[127] Baltimore &c. R. Co. v. Then, 159 Ill. 535; 42 N. E. 971; Ohio &c. R. Co. v. Wangelin, 152 Ill. 138; 38 N. E. 760; Robel v. Chicago &c. R. Co. 35 Minn. 84; 27 N. W. 305.

[128] See Swift &c. Co. v. Johnson, 138 Fed. 867; 1 L. R. A. (N. S.) 1161; Cherokee &c. Co. v. Limb, 47 Kans. 469; 28 Pac. 181; Burk v. Arcata &c. R. Co. 125 Cal. 364; 57 Pac. 1065; 73 Am. St. 52.

[129] Howard v. Delaware &c. R. Co. 40 Fed. 195; 6 L. R. A. 75, and note. See as to nominal damages being allowed even though there is no actual proof of loss. Alabama Mineral R. Co. v. Jones, 121 Ala. 113; 25 So. 814; Burk v. Arcata &c. R. Co. 125 Cal. 364; 57 Pac. 1065; 73 Am. St. 52.

[130] As to when damages are too remote, see Colorado &c. R. Co. v. Lamb, 6 Colo. App. 255; 40 Pac. 251; Bonnet v. Galveston &c. R. Co. 89 Tex. 72; 33 S. W. 334. As to what are not. Catawissa &c. R. Co. v. Armstrong, 52 Pa. St. 282; Castello v. Landwehr, 28 Wis. 522; Lake Erie &c. R. Co. v. Mugg, 132 Ind. 168; 31 N. E. 564; Tuteur v. Chicago &c. R. Co. 77 Wis. 505; 46 N. W. 897.

[131] St. Louis &c. R. Co. v. Sweet. 60 Ark. 550; 31 S. W. 571; Baltimore &c. R. Co. v. Mackey, 157 U. S. 72; 15 Sup. Ct. 491; Pennsylvania Co. v. Roy, 102 U. S. 451; Lowe v. Chicago &c. R. Co. 89 Iowa, 420; 56 N. W. 519; Simonson v. Chicago &c. R. Co. 49 Iowa, 87; Beems v. Chicago &c. R. Co. 58 Iowa, 150; 12 N. W. 222; Fish v. Illinois Cent. R. Co. 96 Ia. 702; 65 N. W. 995; Georgia Cent. R. Co. v. Perkerson, 112 Ga. 923; 38 S. E. 365; 53 L. R. A. 210; Pittsburgh &c. R. Co. v. Kinnare, 203 Ill. 388; 67 N. E. 826, 827; 3 Elliott Ev. § 2017. See, generally, Central &c. R. Co. v. Rouse, 80 Ga. 442; 5 S. E. 627; Louisville &c. R. Co. v. Orr, 91 Ala. 548; 8 So. 360; Clapp v. Railway Co. 36 Minn. 6; 29 N. W. 340; 1 Am. St. 629; Board v. Legg, 110 Ind. 479; 11 N. E. 612; Hogue v. Chicago &c. R. Co. 32 Fed. 365.

preceding section, the damages under most statutes are measured by the pecuniary loss, and no more definite rule can well be laid down as applicable to all cases. The reasonable expectation of the beneficiaries of pecuniary advantage from the life of the deceased is taken into account,[132] and the damages are awarded as compensation for the pecuniary loss caused by the death. In the case of the death of a parent it is generally held that the loss to the minor children of physical, intellectual and moral instruction and training, is a proper element of damages.[133] But in an action by one spouse for

[132] See St. Louis &c. R. Co. v. Sweet, 60 Ark. 550; 31 S. W. 571; Denver &c. R. Co. v. Spencer, 25 Colo. 9; 52 Pac. 211; Cleveland &c. R. Co. v. Baddeley, 150 Ill. 328; 36 N. E. 965; Louisville &c. R. Co. v. Morgan, 114 Ala. 449; 22 So. 20; Van Brunt v. Cincinnati &c. R. Co. 78 Mich. 530; 44 N. W. 321; Anderson v. Chicago &c. R. Co. 35 Neb. 95; 52 N. W. 840; Missouri &c. R. Co. v. Baier, 37 Neb. 235; 55 N. W. 913; Countryman v. Fonda &c. R. Co. 166 N. Y. 201; 59 N. E. 822; 82 Am. St. 640; May v. West Jersey &c. R. Co. 62 N. J. L. 63; 42 Atl. 163; Benton v. North Carolina R. Co. 122 N. Car. 1007; 30 S. E. 333; Galveston &c. R. Co. v. Worthy, 87 Tex. 459; 29 S. W. 376; Galveston &c. R. Co. v. Kutas, 72 Tex. 643; 11 S. W. 127; Lierman v. Chicago &c. R. Co. 82 Wis. 286; 52 N. W. 91; 33 Am. St. 37; Baltimore &c. R. Co. v. Mackey, 157 U. S. 72; 15 Sup. Ct. 491. See, also, Louisville &c. R. Co. v. Jones, 130 Ala. 456; 30 So. 586; Savannah &c. R. Co. v. Flannagan, 82 Ga. 579; 9 S. E. 471; 14 Am. St. 183; Florida Cent. &c. R. Co. v. Foxworth, 41 Fla. 1; 25 So. 338; 79 Am. St. 149. The fact that there is no legal liability to support the beneficiary does not prevent recovery if there is a reasonable expectation of continued support or advantage from the life of the deceased which is taken away by the death, but only the pecuniary loss is to be considered, and contingencies and uncertainties are usually to be taken into account. Chicago &c. R. Co. v. Branyan, 10 Ind. App. 570; 37 N. E. 190; Louisville &c. R. Co. v. Wright, 134 Ind. 509; 34 N. E. 314; Maxwell v. Wilmington City R. Co. 1 Marv. (Del.) 199; 40 Atl. 945; Howard v. Delaware &c. Co. 40 Fed. 195; 6 L. R. A. 75, and note. See, also, Sneed v. Marysville &c. Co. (Cal.) 87 Pac. 376; Consolidated Coal Co. v. Shepherd, 220 Ill. 123; 77 N. E. 133.

[133] St. Louis &c. R. Co. v. Haist, 71 Ark. 258; 72 S. W. 893; 100 Am. St. 65; Green v. Southern Cal. R. Co. (Cal.) 67 Pac. 4; Kansas Pac. R. Co. v. Miller, 2 Colo. 442; Howard County v. Legg, 93 Ind. 523; 47 Am. R. 390; Stoher v. St. Louis &c. R. Co. 91 Mo. 509; 4 S. W. 389; Sternfels v. Metropolitan St. R. Co. 174 N. Y. 512; 66 N. E. 1117; Galveston &c. R. Co. v. Davis, 27 Tex. Civ. App. 279; 65 S. W. 217; Searle v. Kanawha &c. R. Co. 32 W. Va. 370; 9 S. E. 248; Northern Pac. R. Co. v. Freeman, 83 Fed. 82. See, also, Goddard v. Ensler, 222 Ill. 462; 78 N. E. 805; Omaha Water Co. v. Schamel, 147 Fed. 502.

the death of the other, or by a parent for the death of a child, or by the next of kin for the death of the deceased, it is generally held that loss of society is not a proper element of damages.[134] So, under statutes giving a new right of action for the benefit of designated beneficiaries, such as the widow and children, or next of kin, the pain or suffering of the deceased is not a proper element of damages.[135] Where the recovery, under the particular statute, is for the

[134] Little Rock &c. R. Co. v. Barker, 33 Ark. 350; 34 Am. R. 44; Wales v. Pacific &c. Co. 130 Cal. 521; 62 Pac. 932, 1120; Munro v. Pacific &c. Co. 84 Cal. 515; 24 Pac. 303; 18 Am. St. 248; Donaldson v. Mississippi &c. R. Co. 18 Ia. 280; 87 Am. Dec. 391; Mobile &c. R. Co. v. Watly, 69 Miss. 145; 13 So. 825; Schaub v. Hannibal &c. R. Co. 106 Mo. 74; 16 S. W. 924; Illinois Cent. R. Co. v. Bentz, 108 Tenn. 670; 69 S. W. 317; 58 L. R. A. 690; 91 Am. St. 763; Galveston &c. R. Co. v. Worthy, 87 Tex. 459; 29 S. W. 376; Taylor &c. R. Co. v. Warner, 84 Tex. 122; 19 S. W. 449; 20 S. W. 823; Atchison &c. R. Co. v. Wilson, 48 Fed. 57; Sternfels v. Metropolitan St. R. Co. 77 App. Div. (N. Y.) 309; 77 N. Y. S. 309; Northern Pac. R. Co. v. Freeman, 83 Fed. 82. Nor is mental suffering such as grief of the beneficiaries for the bereavement. Alabama &c. R. Co. v. Burgess, 116 Ala. 509; 22 So. 913; Florida Cent. R. Co. v. Foxworth, 41 Fla. 1; 25 So. 338; 79 Am. St. 149; Chicago &c. R. Co. v. Ranis, 203 Ill. 417; 67 N. E. 840; St. Louis &c. R. Co. v. Hicks, 79 Fed. 262; Blake v. Midland R. Co. 18 Q. B. 93; Louisville &c. R. Co v. Graham, 98 Ky. 688; 34 S. W., 229; Barth v. Kansas City &c. R. Co. 142 Mo. 535; 44 S. W. 778; Carlson v. Oregon Short Line &c. R. Co. 21 Oreg. 450; 28 Pac. 497; Huntington &c. R. Co. v. Decker, 84 Pa. St. 419; Knoxville &c. R. Co. v. Wyrich, 99 Tenn. 500; 42 S. W. 434; McGowan v. International &c. R. Co. 85 Tex. 289; 20 S. W. 80; Corbett v. Oregon &c. R. Co. 25 Utah, 449; 71 Pac. 1065; Potter v. Chicago &c. R. Co. 21 Wis. 372; 94 Am. Dec. 548; Commercial Club v. Hilliker, 20 Ind. App. 239; 50 N. E. 578; 6 Thomp. Neg. § 7082.

[135] James v. Richmond &c. R. Co. 92 Ala. 231; 9 So. 335; Holton v. Daly, 106 Ill. 131; Dwyer v. Chicago &c. R. Co. 84 Ia. 479; 51 N. W. 244; 35 Am. St. 322; Oakes v. Maine Cent. R. Co. 95 Me. 103; 49 Atl. 418; Galveston &c. R. Co. v. Matula, 79 Tex. 577; 15 S. W. 573. See, also, Corbett v. Short Line R. Co. 25 Utah, 449; 71 Pac. 1065; Cerrilos Coal R. Co. v. Deserant, 9 N. Mex. 49; 49 Pac. 807; Oldfield v. New York &c. R. Co. 14 N. Y. 310; Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329; Louisville &c. R. Co. v. Graham, 98 Ky. 688; 34 S. W. 229; The Corsair, 145 U. S. 335; 12 Sup. Ct. 949; 6 Thomp. Neg. § 7095. But it is held otherwise under the survival statutes. St. Louis &c. R. Co. v. Dawson, 68 Ark. 1; 56 S. W. 46; Louisville &c. R. Co. v. Sanders 19 Ky. L. 1941, 44 S. W. 644; Sweetland v. Chicago &c. R. Co. 117 Mich. 329; 75 N. W. 1066; 43 L. R. A. 568; Illinois Cent. R. Co. v. Harris (Miss), 29 So. 760;

benefit of the estate, it is generally measured by the amount which would probably have been saved to the estate, taking into consideration the occupation, age, health, habits of industry, sobriety and economy of the deceased, and his probable duration of life,[136] much the same as under the other statutes. Proper evidence is admissible on these points, and, in statutes designating beneficiaries, evidence as to the character and habits of the deceased in such respects, and as to his domestic relations, at least with respect to making provision for the beneficiaries, is usually competent.[137] There is some actual and much apparent conflict among the authorities as to whether evidence of the physical and pecuniary condition and poverty of the beneficiaries is competent. Many authorities hold that such evidence[138]

Illinois Cent. R. Co. v. Davis, 104 Tenn. 442; 58 S. W. 296.

[136] Carlson v. Oregon Short Line &c. R. Co. 21 Oreg. 450; 28 Pac. 497; Louisville &c. R. Co. v. Creighton, 106 Ky. 42; 50 S. W. 227; Lowe v. Chicago &c. R. Co. 89 Ia. 420; 56 N. W. 519; Neal v. Wilmington &c. R. Co. 3 Pennav. (Del.) 467; 53 Atl. 338; Holmes v. Oregon &c. R. Co. 5 Fed. 523. See, also, Alabama &c. R. Co. v. Jones, 114 Ala. 519; 21 So. 507; 62 Am. St. 121 (also the amount of his property or what he had accumulated); Linss v. Chesapeake &c. R. Co. 91 Fed. 964; Kansas Pac. R. Co. v. Cutter, 19 Kans. 83; Keyes v. Valley Tel. Co. 132 Mich. 281; 93 N. W. 623; Catawissa R. Co. v. Armstrong, 52 Pa. St. 282.

[137] Ohio &c. R. Co. v. Voight, 122 Ind. 288; 23 N. E. 774; Elwood v. Addison, 26 Ind. App. 28; 59 N. E. 47; Bromley v. Birmingham &c. R. Co. 95 Ala. 397; 11 So. 341; Anthony &c. Brick Co. v. Ashby, 198 Ill. 562; 64 N. E. 1109; Wheelan v. Chicago &c. R. Co. 85 Ia. 167; 52 N. W. 119; Clapp v. Minneapolis &c. R. Co. 36 Minn. 6; 29 N. W. 340; 1 Am. St. 629; Standlee v. St. Louis &c. R. Co. 25 Tex. Civ. App. 340; 60 S. W. 781; Meekins v. Norfolk &c. R. Co. 134 N. Car. 217; 46 S. E 493; Augusta &c. R. Co. v. Glover, 92 Ga. 132; 18 S. E. 406; Pool v. Southern Pac. R. Co. 7 Utah, 303; 26 Pac. 654; Chilton v. Union Pac. R. Co. 8 Utah, 47; 29 Pac. 963; 3 Elliott Ev. §§ 2016, 2017; note in 85 Am. St. 841.

[138] Little Rock &c. R. Co. v. Leverett, 48 Ark. 333; 3 S. W. 50; 3 Am. St. 230; Louisville &c. R. Co. v. Jones, 130 Ala. 456; 30 So. 586; Hunt v. Conner, 26 Ind. App. 41; 59 N. E. 50; Louisville &c. R. Co. v. Jones, 45 Fla. 407; 34 So. 246; Haehl v. Wabash R. Co. 119 Mo. 325; 24 S. W. 737; Overholt v. Viethis, 93 Mo. 422; 6 S. W. 74; 3 Am. St. 557; but see Waller v. Chicago &c. R. Co. 120 Mo. 635; 23 S. W. 1061; Opsahl v. Judd, 30 Minn. 126; 14 N. W. 575; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291; Cooper v. Lake Shore &c. R. Co. 66 Mich. 261; 33 N. W. 306; 11 Am. St. 482; Fowler v. Buffalo &c. Co. 41 App. Div. (N. Y.) 84; 58 N. Y. S. 223; 7 Am. R. 233; Thompson v. Johnston Bros. Co. 86 Wis. 576; 57 N. W. 298. See,

is admissible, but many others hold that it is incompetent,[139] and we are inclined to think that the latter is the better doctrine, at least in ordinary cases, where the question is as to direct, and not merely collateral, beneficiaries, and there is no necessity of showing their dependence upon the deceased for support.[140] On this subject it has been observed by the Pennsylvania Supreme Court: "It is argued that while the husband might have lived a certain number of years, yet the wife might not, and therefore her damages ought to be limited by the double contingency of their joint lives. The point is new, and the fact that it has not been raised before in any of the very numerous cases where it would have been appropriate if sound, would seem to indicate that it has not appeared tenable to the professional mind. We are of this opinion. The life of the husband having been terminated by the accident, its probable duration in the regular course of nature must, as already said, be approximated by the best evidence attainable, even though that leads only to conjecture. But the widow, plaintiff, is living and is entitled now to

also, Lockwood v. New York &c. R. Co. 98 N. Y. 523; Barley v. Chicago &c. R. Co. 4 Biss. (U. S.) 430.

[139] Green v. Southern Pac. R. Co. 122 Cal. 563; 55 Pac. 577; Pennsylvania Co. v. Roy, 102 U. S. 451; Holt v. Spokane &c. R. Co. 4 Idaho, 443; 40 Pac. 56; Chicago &c. R. Co. v. Woolridge, 174 Ill. 330; 51 N. E. 701; Benton v. Chicago &c. R. Co. 55 Ia. 498; 8 N. W. 330; Delphi v. Lowry, 74 Ind. 520, 527; 39 Am. R. 98; Consolidated Stone Co. v. Morgan, 160 Ind. 241; 66 N. E. 696; Indianapolis &c. R. Co. v. Pitzer, 109 Ind. 179; 6 N. E. 310; 10 N. E. 70; 58 Am. R. 387; Chicago &c. R. Co. v. Holmes, 68 Neb. 826; 94 N. W. 1007; Cincinnati &c. R. Co. v. Altemeier, 60 Ohio St. 10; 53 N. E. 300; 3 Elliott Ev. § 2017. We think this is certainly the better rule in ordinary cases where the beneficiary is a lineal descendant or one entitled as a matter of law to support. See, also, English v. Southern Pac. R. Co. 13 Utah, 407; 45 Pac. 47; 35 L. R. A. 155; 57 Am. St. 772; Illinois &c. R. Co. v. Baches, 55 Ill. 379; Pittsburgh &c. R. Co. v. Kinnare, 105 Ill. App. 566, affirmed in 203 Ill. 388; 67 N. E. 826.

[140] There may be cases as in some of those cited in favor of the admissibility of such evidence, where it is competent under the particular statute or under the particular circumstances, as, for instance, to show that the alleged beneficiary was dependent upon the deceased for support although having no strict legal right thereto. This distinction harmonizes many of the cases and does away with much of the apparent conflict. Life expectancy of parents entitled to damages is held not to be considered in determining amount. Alabama &c. Co. v. Griffin (Ala.), 42 So. 1034.

compensation for what she had lost by her husband's death. To complicate the question by another conjecture as to her expectation of survivorship, would add further uncertainty in the result without being so clearly demanded by reason or justice as to be imperative or even advisable."[141]

§ 1378b. Mitigation of damages.—The fact that the beneficiaries have received money from an insurance company for the death of the deceased cannot be shown in mitigation of damages.[142] Neither can it be shown in mitigation that the widow or the husband, as the case may be, in an action by the one for the death of the other, has remarried,[143] or that the beneficiary has received property by descent from the deceased.[144] It has also been held that the fact that the defendant paid the funeral expenses and expenses of supporting the deceased from the time of his injury to the time of his death cannot be shown in mitigation.[145] But it has been held, on the other

[141] Emery v. Philadelphia, 208 Pa. St. 492; 57 Atl. 977.

[142] Western &c. R. Co. v. Meigs, 74 Ga. 857; Sherlock v. Alling, 44 Ind. 184; Spaulding v. Chicago &c. R. Co. 98 Ia. 205; 67 N. W. 227; Carroll v. Missouri Pac. R. Co. 88 Mo. 239; 57 Am. R. 382; Kellogg v. New York &c. R. Co. 79 N. Y. 72; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15; Lipscomb v. Houston &c. R. Co. 95 Tex. 5; 64 S. W. 923; 55 L. R. A. 869; 93 Am. St. 804; Baltimore &c. R. Co. v. Wightman, 29 Gratt. (Va.) 431; 26 Am. R. 384; 3 Elliott Ev. § 2019. See, also, Clune v. Ristine, 94 Fed. 745; Geary v. Metropolitan St. R. Co. 73 App. Div. (N. Y.) 441; 77 N. Y. S. 54; Boulden v. Pennsylvania R. Co. 205 Pa. St. 264; 54 Atl. 906.

[143] Chicago &c. R. Co. v. Driscoll, 107 Ill. App. 615, affirmed in 207 Ill. 9; 69 N. E. 620; Consolidated Stone Co. v. Morgan, 160 Ind. 241; 66 N. E. 696; Davis v. Guarneeri, 45 Ohio St. 470; 15 N. E. 350; 4 Am. St. 548; Philpott v. Pennsylvania R. Co. 175 Pa. St. 570; 34 Atl. 856; Gulf &c. R. Co. v. Younger, 90 Tex. 387; 38 S. W. 11, 21; 3 Elliott Ev. § 2019. See, also, Thomas v. East Tennessee &c. R. Co. 63 Fed. 420; Chicago &c. R. Co. v. Lagerkrans, 65 Neb. 566; 91 N. W. 358.

[144] St. Louis &c. R. Co. v. Maddry, 57 Ark. 306; 21 S. W. 472; Stahler v. Philadelphia &c. R. Co. 199 Pa. St. 383; 49 Atl. 273; 85 Am. St. 791; Clune v. Ristine, 94 Fed. 745. See, also, Terry v. Jewett, 78 N. Y. 338; Boswell v. Barnhardt, 96 Ga. 521; 23 S. E. 414. But compare San Antonio &c. R. Co. v. Long, 87 Tex. 148; 27 S. W. 113; 47 Am. St. 87; 24 L. R. A. 637. See Brown v. Southern R. Co. 65 S. Car. 260; 43 S. E. 794.

[145] Murray v. Usher, 117 N. Y. 542; 23 N. E. 564; Linden v. Anchor &c. Co. 20 Utah, 134; 58 Pac. 355.

hand, that, in an action to recover damages for the death of a minor, the fact that he had been emancipated may be considered in mitigation of damages,[146] and that in other cases evidence is admissible to show the deceased was an habitual drunkard, or the like, as tending to mitigate or decrease the damages.[147]

§ 1378c. Release executed in one state and death in another, where such release is prohibited.—The subject of releases and contracts attempting to relieve a railroad company from liability for its negligence has already been considered, and will be further considered, in connection with relief departments and the acceptance of benefits, in the next chapter. But a recent case presents a peculiar phase of the subject that seems to demand consideration here. The constitution of Wyoming[148] provides that any contract or agreement with any employe waiving any right to recover damages for causing death or injury of any employe shall be void, and that it shall be unlawful for any corporation to require of an employe any contract whereby the corporation shall be released from liability on account of personal injuries received by the employe by reason of the negligence of the corporation or the employes thereof, and that such contracts shall be void. It appeared, in an action brought in Utah, that at the time plaintiff's intestate executed in this state a release of liability to an express company of both itself and defendant railroad company by both of whom the intestate was employed part of his services was to be performed in Wyoming, and the injuries having been inflicted while intestate was engaged in the performance of those services in Wyoming, the court held that the release was to be deemed a contract of that state, and as such was void.[149] It was also held that even in the absence of such a constitutional or statutory provision the contract was void as against public policy.[150]

[146] St. Joseph &c. R. Co. v. Wheeler, 35 Kans. 185; 10 Pac. 461.

[147] Wright v. Crawfordsville, 142 Ind. 636; 42 N. E. 227; Nashville &c. R. Co. v. Prince, 2 Heisk. (Tenn.) 580. See, also, Disbrow v. Ulster (Pa.), 8 Atl. 912; Standlee v. St. Louis &c. R. Co. 25 Tex. Civ. App. 340; 60 S. W. 781.

[148] Art. 10, § 4, and Art. 19, § 1.

[149] Stone v. Union Pac. R. Co. (Utah), 89 Pac. 715.

[150] The court distinguished Northern Pac. R. Co. v. Adams, 192 U. S. 440; 24 Sup. Ct. 408; 48 L. Ed. 513; Boering v. Chesapeake Beach R. Co. 193 U. S. 442; 24 Sup. Ct. 515; 48 L. Ed. 742; Quimby v. Boston &c. R. 150 Mass. 365; 23 N. E.

205; 5 L. R. A. 846, and Muldoon v. Seattle R. Co. 7 Wash. 528; 35 Pac. 422; 22 L. R. A. 794; 38 Am. St. 901; Express Cases, 117 U. S. 1; 6 Sup. Ct. 542, 628; Baltimore & Ohio R. Co. v. Voight, 176 U. S. 498; 20 Sup. Ct. 385; 44 L. Ed. 560; Pittsburgh &c. R. v. Mahony, 148 Ind. 196; 46 N. E. 917; Louisville &c. R. Co. v. Keefer, 146 Ind. 21; 44 N. E. 796; 38 L. R. A. 93; 58 Am. St. 348, and Peterson v. Chicago &c. R. Co. 119 Wis. 197; 96 N. W. 532; 100 Am. St. 879, and Bates v. Old Colony R. Co. 147 Mass. 255; 17 N. E. 633; and said: "In none of the cited cases did the relation of master and servant exist between the railway company and the person injured or killed, and for whose injury damages were claimed; nor was such person in any particular performing duties or services for it. Here, by the admission in the pleading, as well as by the evidence, it is shown that the deceased was not only an employe of the express company, but that he was also an employe of the defendant railway company. The relation of master and servant existed between him and the defendant. The decided weight of authority in this country sustains the proposition that a contract whereby the employe agrees in advance to relieve his employer from liability for injuries resulting from the latter's negligence, or that of his other employes, when he is by the law of the jurisdiction responsible for their negligence, is void as against public policy. 1 Page on Contracts, § 367; 20 A. & E. Enc. Law, 155; 1 Bailey's Mast. & Serv. § 1048; Johnston v. Fargo, 184 N. Y. 379; 77 N. E. 388; Tarbell v. Rutland Rd. 73 Vt. 347; 51 Atl. 6; Lake Shore &c. R. v. Spangler, 44 Ohio St. 471; 8 N. E. 467; 58 Am. R. 833; Richmond R. Co. v. Jones, 92 Ala. 218; 9 South, 276; Little Rock &c. R. Co. v. Eubanks, 48 Ark. 460; 3 S. W. 808; 3 Am. St. 245; Blanton v. Dold, 109 Mo. 64; 18 S. W. 1149; Willis v. Grand Trunk &c. R. Co. 62 Me. 488; Johnson v. Richmond R. Co. 86 Va. 975; 11 S. E. 829; Kansas R. Co. v. Peavy, 29 Kan. 169; 44 Am. R. 630; Roesner v. Hermann 8 Fed. 782; Chicago Coal Co. v. Peterson, 39 Ill. App. 114. If the defendant could not have directly entered into a contract so as to relieve itself from the consequences of such negligence, it cannot avail itself of such a contract made for its benefit by some third party."

CHAPTER LVII.

RELIEF DEPARTMENTS AND HOSPITALS.

§ 1379. Power of railroad company to establish relief department.—Many railroad companies have recently established voluntary relief departments for the accumulation and management of a relief fund out of which definite amounts are to be paid to the employes, who voluntarily become members and contribute thereto, in case of accident or sickness, or to their relatives or other designated beneficiaries in case of their death. In some instances the railroad company takes entire charge of the fund, guarantees the fulfillment of its obligations, and makes the relief department a regular department of its service. It seems to have been assumed in several cases that this is within the express or implied powers of a railroad

company, but there are comparatively few cases in which this phase of the subject has been considered. In one case the court held that, as the charter of the company was not before it, there was no way of telling whether the company had power to establish and conduct such a department or not, but it could not presume, in the absence of any evidence, that it was ultra vires.[1] Much, of course, may depend upon the charter of the particular company and the scheme or plan of the relief association or department, but, as the company is benefited as well as the employes and the public, and as the matter is so intimately connected with the operation of the road, we incline to think that the express powers usually granted to railroad companies carry with them the implied power to establish such departments or contribute to such associations within proper limits.[2] At all events, one who has voluntarily become a member and received the benefits cannot well question the legality of the association and repudiate his contract, upon that ground, after he has been injured and elected to take advantage of its provisions.

§ 1380. Relief association not an insurance company.—In one case it is held that a relief association of a railroad company, in so far as its relief department is concerned, is an insurance company;

[1] Chicago &c. R. Co. v. Bell, 44 Neb. 44; 62 N. W. 314; 11 Lewis' Am. R. & Corp. 682. The scheme or plan of the particular relief department in question is fully stated in the opinion in this case.

[2] In Beck v. Pennsylvania R. Co. 63 N. J. L. 232; 43 Atl. 908; 76 Am. St. 210, it is said: "A contract by which an employe permits such an employer to create a fund in part out of his wages, supplemented by a contribution by the employer when necessary, out of which relief for sick and injured employes is provided, and by which the employer undertakes to manage the fund and furnish the agreed on relief, is . . . within the implied powers of the employer, if a corporation. On the part of the employer, such a scheme may be deemed likely to increase efficiency of the force it employs, and on the part of the employe it may tend to relieve from anxiety as to support if injured by any of the many dangers to which he is daily and hourly exposed. As incidental to the contract of employment and compensation, therefore, it is not ultra vires." It is also held in the same case that it is not against public policy, nor lacking in mutuality or consideration, nor is it an insurance contract. See, also, State v. Pittsburgh &c. R. Co. 68 Ohio St. 9; 67 N. E. 93; 64 L. R. A. 405; 96 Am. St. 635; Maine v. Chicago &c. R. Co. 109 Iowa, 260; 70 N. W. 630, 631, 632; 80 N. W. 315 (citing text); Harrison v. Alabama &c. R. Co. 144 Ala. 246; 40 So. 394.

that the member who has paid his premium is entitled to the benefits irrespective of his relation to the railroad company as an employe, and that he cannot, therefore, be required to give up his right of action against the railroad company any more than if he had taken a policy in an entirely separate accident or casualty company.[3] The conclusion of the court in this case, however, is opposed to the almost unbroken current of authority. The reasoning also seems to be unsound. If it were sound it would clearly follow that the act of the railroad company in establishing a relief department was ultra vires, for a railroad company, with only the ordinary powers of such a corporation, cannot engage in an independent insurance business. But such a relief association or department is not an insurance company.[4]

§ 1381. Effect of rule that company cannot contract against negligence.—It is a general rule that an employer cannot contract in advance that he shall not be liable for his own negligence.[5] Doubtless this rule would, in most jurisdictions, prevent the enforcement by a railroad company of an unconditional contract by a member of a relief association to release the company or not to sue it if he should be injured thereafter by the negligence of the company. If the terms of the contract were such that the mere membership in the association and the right to receive benefits should of themselves release the company from all liability, or if the contract, rules and regulations of the relief association were such as to compel him to accept the benefits and release and discharge the company, they would probably be void as against public policy.[6]

[3] Miller v. Chicago &c. R. Co. 65 Fed. 305.

[4] Johnson v. Philadelphia &c. R. Co. 163 Pa. St. 127; 29 Atl. 854; Donald v. Chicago &c. R. Co. 93 Iowa, 284; 61 N. W. 971; 33 L. R. A. 492. See, also, Commonwealth v. Equitable Assn. 137 Pa. St. 412; 18 Atl. 1112; Northwestern &c. Assn. v. Jones, 154 Pa. St. 99; 26 Atl. 253; 35 Am. St. 810; Vickers v. Chicago &c. R. Co. 71 Fed. 139, 141; and authorities cited in last note to last preceding section.

[5] Richmond &c. R. Co. v. Jones, 92 Ala. 218; 9 So. 276; Lake Shore Co. v. Spangler, 44 Ohio St. 471; 8 N. E. 467; 58 Am. R. 833, and note; Roesner v. Hermann, 8 Fed. 782; Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174; Kansas Pac. R. Co. v. Peavey, 29 Kan. 169; 44 Am. R. 630, and note; Johnson v. Richmond &c. R. Co. 86 Va. 975; 11 S. E. 829; 4 Thomp. Neg. (2d ed.) 3850; Clark Contracts, 468; 1 Jaggard Torts, 303.

[6] See Johnson v. Philadelphia &c.

This seems to be conceded in all the cases upon the subject. But a contract giving the employe the option to do so, or providing that if he does do so voluntarily after the injury the railroad company shall be released, is a very different thing; and, as we shall show in the next section, the rule to which we have referred is not controlling where one accepts the benefits under such a contract.

§ 1382. Contract that employe may elect to accept benefits and thereby release company not void as against public policy.—There is no rule of public policy which forbids or discourages the settlement by compromise, in good faith, of a claim for damages after an injury has been inflicted. Such a contract as that to which we referred in the conclusion of the last section does not compel the employe to accept the benefit of the relief fund nor to release the company unless he does so. The contract, or transaction, is, in reality, not concluded until after the injury, and the company is not released until the relief fund is accepted. This completes the transaction, and the contract or release is no more against public policy than any other release or settlement by way of compromise after the injury is inflicted.[7] Indeed, it has been held that a stat-

R. Co. 163 Pa. St. 127; 29 Atl. 854; Tarbell v. Rutland R. Co. 73 Vt. 347; 56 L. R. A. 656; 51 Atl. 6; 87 Am. St. 734.

[7] Lease v. Pennsylvania Co. 10 Ind. App. 47; 37 N. E. 423; Pittsburgh &c. R. Co. v. Moore, 152 Ind. 345; 53 N. E. 290; 44 L. R. A. 638; Johnson v. Philadelphia &c. R. Co. 163 Pa. St. 127; 29 Atl. 854; Chicago &c. R. Co. v. Bell, 44 Neb. 44; 62 N. W. 314; 11 Lewis' Am. R. & Corp. 682; Owens v. Baltimore &c. R. Co. 35 Fed. 715; 1 L. R. A. 75, and note; Otis v. Pennsylvania Co. 71 Fed. 136. In the last case, just cited, the court, in speaking of such a contract, said: "But upon a careful examination it will be seen that it contains no stipulation that the plaintiff should not be at liberty to bring an action for damages in case he sustained an injury through the negligence of the defendant. He still had as perfect a right to sue for his injury as though the contract had never been entered into. Before the contract was entered into, his right of action for an injury resulting from the defendant's negligence was limited to a suit against it for the recovery of damages therefor. By the contract he was given an election either to receive the benefits stipulated for, or to waive his right to the benefits, and pursue his remedy at law. He voluntarily agreed that, when an injury happened to him, he would then determine whether he would accept the benefits secured by the contract, or waive them and retain his right of action for damages.

ute prohibiting any such contract with a railroad company, and declaring that all such agreements and stipulations to surrender or waive any right to damages against any railroad company shall be void, is unconstitutional.[8]

§ 1383. Consideration and mutuality of contract.—By becoming a member of the relief department the employe receives benefits, if he chooses to accept them and release the company, not only where he is injured by the negligence of the company, but also where the company is guilty of no negligence, and, indeed, for mere sickness, with causing which the company has nothing to do. All this he may receive without the expense and uncertainty of litigation with the company. The railroad company's contribution to the association and its guaranty of its obligations also constitute a consideration moving to every member of the association. It cannot be said, therefore, that there is no consideration for the agreement of the employe, nor can it be said that there is no mutuality in the contract.[9] Indeed, under the old equity rule, which has been adopted in

He knew, if he accepted the benefits secured to him by the contract, that it would operate to release his right to the other remedy. After the injury happened, two alternative modes were presented to him for obtaining compensation for such injury. With full opportunity to determine which alternative was preferable, he deliberately chose to accept the stipulated benefits. There was nothing illegal or immoral in requiring him so to do. And it is not perceived why the court should relieve him from his election in order to enable him now to pursue his remedy by an action at law, and thus practically to obtain double compensation for his injury." See, also, Hamilton v. St. Louis &c. R. Co. 118 Fed. 92; Eckman v. Chicago &c. R. Co. 169 Ill. 312; 48 N. E. 496; 38 L. R. A. 750; Fuller v. Baltimore &c. Assn. 67 Md. 433; 10 Atl. 237; Chicago &c. R. Co. v. Curtis, 51 Neb. 442; 71 N. W. 42; 66 Am. St. 456.

[8] Shaver v. Pennsylvania R. Co. 71 Fed. 931; Cox v. Pittsburgh &c. R. Co. 33 Ohio L. J. April, 1895; 1 Ohio N. P. 213; 2 Ohio Dec. 594. But many of the authorities already cited hold such a provision constitutional. See, especially, Pittsburgh &c. R. Co. v. Montgomery, 152 Ind. 1; 49 N. E. 582; 69 L. R. A. 875; 71 Am. St. 300; Pittsburgh &c. R. Co. v. Hosea, 152 Ind. 412; 53 N. E. 419. But that the ordinary relief fund contract is not a release within the prohibition of such a statute but is rather in the nature of a contract for choice between two sources of compensation. Pittsburgh &c. R. Co. v. Moore, 152 Ind. 346; 53 N. E. 290; Pittsburgh &c. R. Co. v. Cox, 55 Ohio St. 497; 45 N. E. 641; 35 L. R. A. 507.

[9] Lease v. Pennsylvania Co. 10 Ind. App. 47; 37 N. E. 423; Pitts-

most of the states, a promise to one for the benefit of a third person may be enforced by the latter, no matter whether the consideration moves directly from him or not, and where the contract is completed by accepting benefits from the relief fund after the injury has been inflicted it would be a strange doctrine that would permit the employe to repudiate it upon the ground of want of consideration or mutuality.

§ 1384. Acceptance of benefits under such contract after injury releases the company.—It is well settled by the almost unruffled current of authority that the voluntary acceptance of benefits from a relief association, after an injury has been inflicted, under an agreement made upon becoming a member of the association that such acceptance shall operate as a release of the railroad company, or the acceptance of such benefits and the execution of a release in consideration thereof, does operate to release the company.[10] Indeed, it has been held that when an employe of a railroad company becomes a member of a relief association, and, although at the time a minor, as a condition of membership and in consideration of the contributions and guaranty of the company, signs a contract by which he releases the company from liability for any accident which may happen to him while in its employment, he cannot recover against the company where both before and after bringing the action he receives

burgh &c. R. Co. v. Moore, 152 Ind. 345; 53 N. E. 290; 44 L. R. A. 638; Chicago &c. R. Co. v. Bell, 44 Neb. 44; 62 N. W. 314; 11 Lewis' Am. R. & Corp. 682; Otis v. Pennsylvania Co. 71 Fed. 136; Pittsburgh &c. R. Co. v. Cox, 55 Ohio St. 497; 45 N. E. 641; 35 L. R. A. 507.

[10] Ringle v. Pennsylvania R. Co. 164 Pa. St. 529; 30 Atl. 492; Graft v. Baltimore &c. R. Co. (Pa. St.) 8 Atl. 206; Spitze v. Baltimore &c. R. Co. 75 Md. 162; 23 Atl. 307; 48 Am. & Eng. R. Cas. 495; Lease v. Pennsylvania Co. 10 Ind. App. 47: 37 N. E. 423; State v. Baltimore &c. R. Co. 36 Fed. 655; Clements v. London &c. Co. L. R. (1894) 2 Q. B. 482; 70 L. T. (N. S.) 531; Otis v. Pennsylvania Co. 71 Fed. 136; Vickers v. Chicago &c. R. Co. 71 Fed. 139; 2 Am. Law. Reg. (N. S. 1895), 231; Contra, Miler v. Chicago &c. R. Co. 65 Fed. 305. See, also, O'Neil v. Lake Superior Iron Co. 63 Mich. 690; 30 N. W. 688; 16 Am. & Eng. R. Cas. 107, which holds that although the employe signed an agreement releasing the company and received benefits from the relief fund if he was misled in so doing and supposed it to be a mere receipt he was not precluded from maintaining an action against the company and was not obliged to repay the benefit fund before bringing such action.

money from the association on account of the injury and executes receipts releasing the company from all claims for damages on account of such injury.[11] In the last case the contract apparently attempted to take away all right of action against the company, and did not give the employe the option of accepting the benefits from the relief association or suing the company. He was also a minor at the time he executed it. For these reasons it could probably not have been enforced, but he voluntarily accepted the benefits after the injury and executed a release in full, presumably after becoming of age, and this barred him from recovery against the company.

§ 1385. Release of railroad company may be made a prerequisite to action against relief association.—It has been said that "even if the release of the railroad is good it is doubtful whether the provision that no benefits shall be paid if the company is sued is valid. That contract seems to be wholly without consideration. The employe, in case he sues the company, forfeits all contributions and the relief association receives the benefit of them without the slightest return."[12] But it has been held that a provision of the constitution of a railroad relief association that the railroad company shall be released before the association will pay the beneficiary any benefits on account of the accident, or, in other words, that he can not claim benefits out of the relief fund if he elects to sue the railroad company, is reasonable and valid.[13] It seems to us that such a provision or stipulation is founded upon a sufficient consideration and that one who voluntarily waives the benefits of the relief fund by electing to sue the railroad company has no reason to complain.

§ 1386. Suit against company or compromise with it releases the relief association—Beneficiary barred.—In the case last referred to in the preceding section it appeared that a provision of the constitution of the relief association required that the person who was entitled to recover damages for the death of the employe should release the railroad company before the beneficiary should be entitled

[11] Martin v. Baltimore &c. R. Co. 41 Fed. 125. See Griffith v. Earl of Dudley, L. R. 9 Q. B. Div. 357.

[12] 2 Am. Law Reg. & Rev. (N. S. 1895), 234.

[13] Fuller v. Baltimore &c. Assn. 67 Md. 433; 10 Atl. 237.

to any benefits from the relief association; that his mother had been designated as beneficiary, but that his wife and child were the persons legally entitled to recover damages for his death, and that such wife and child did not release the railroad company but brought suit against it and received a large sum of money from it by way of compromise. The court held that the mother could not maintain an action against the association for benefits.[14] So, in another recent case it was held that the beneficiary took only what the contract of membership provided she should take, and that a suit by the administrator of a member who was killed and the compromise thereof precluded the beneficiary from recovering upon the certificate where the contract of membership provided that if suit should be brought by his legal representative against the company and proceed to judgment or be compromised all claims upon the relief fund for benefits upon account of death should be precluded.[15]

§ 1387. Acceptance of benefits by widow or child—When a bar to action against the company.—In most of the states are found statutes, based upon Lord Campbell's Act, which provide that in case of death by the wrongful act of another, the personal representative of the deceased may maintain an action for the benefit of the widow and children or next of kin. We suppose, that, in accordance with the principles already stated, the acceptance of benefits from a relief association under an agreement that the railroad company shall be released will prevent the recovery of damages for the benefit of the particular person who accepts such relief and executes a release of the railroad company after the injury. But the acceptance by the widow of benefits from the relief fund and the release by her of all claims against the company will not necessarily prevent her from maintaining an action as administra-

[14] Fuller v. Baltimore &c. Assn. 67 Md. 433; 10 Atl. 237. This has been criticised as "rank injustice." 1 Jaggard Torts, 313, note 60, quoting from 2 Am. L. Reg. & Rev. (N. S. 1895), 234. The decision, however, while it may be close to the line, is not so clearly erroneous as such a criticism would indicate or imply.

[15] Donald v. Chicago &c. R. Co. 93 Iowa, 284; 61 N. W. 971; 33 L. R. A. 492. See, also, Chicago &c. R. Co. v. Healy (Neb.), 107 N. W. 1005. But compare Chicago &c. R. Co. v. Olson, 70 Neb. 831; 97 N. W. 831.

trix against the company for the benefit of the children.[16] Where, however, the widow, who was also administratrix, accepted the benefits from the relief fund, and signed the release both as widow and as administratrix, it was held that it constituted, prima facie at least, a bar not only to her claim against the company as widow, but also to a recovery for the benefit of the children.[17] So, where the railroad company failed to comply with its relief fund agreement with an injured employe, it was held that the employe might sue the railroad company for damages for his injury, and the company could not set up the relief fund agreement as a bar, although it would be entitled to credit for the amount paid and accepted from the relief fund.[18]

§ 1387a. Effect of release or acceptance of benefits in only one capacity—Recent Nebraska case.—Since the last two preceding sections were written and printed the Supreme Court of Nebraska[18a] has withdrawn its opinion in one of the cases cited, vacated its former judgment and affirmed the judgment of the trial court, at the same time overruling another decision. The syllabus, prepared by the court, in the case referred to[18b] is as follows: "Under a contract of membership in the Relief Department of the Chicago, Burlington & Quincy Railroad Company, which provided that the receipt of benefits by the beneficiary should bar all actions for damages arising from the death of the member, the beneficiary, after receiving the benefit provided for in the certificate of membership, cannot maintain an action to recover damages for herself caused by such death; but the receipt of such benefit will not bar her action as administratrix of the estate of the deceased for the benefit of her

[16] Chicago &c. R. Co. v. Wymore, 40 Neb. 645; 58 N. W. 1120. See and compare Oyster v. Burlington &c. Co. 65 Neb. 789; 91 N. W. 69; 59 L. R. A. 291.

[17] Pittsburgh &c. Ry. Co. v. Gipe, 160 Ind. 360; 65 N. E. 1034. See, also, Walters v. Chicago &c. R. Co. (Neb.) 104 N. W. 1066.

[18] Pennsylvania Co. v. Chapman, 220 Ill. 428; 77 N. E. 248.

[18a] In Chicago &c. R. Co. v. Healy (Neb.), 111 N. W. 598, vacating judgment and decision in 107 N. W. 1005, and overruling Walters v. Chicago &c. R. Co. (Neb.) 104 N. W. 1066, so far as in conflict.

[18b] Chicago &c. R. Co. v. Healy (Neb.), 111 N. W. 598, reviewing the earlier Nebraska cases upon the subject. But compare Pittsburgh &c. R. Co. v. Gipe, 160 Ind. 360; 65 N. E. 1034.

minor children. The provision, in a contract of membership in the Relief Department, that 'if any suit at law shall be brought against said company for damages arising from or growing out of' the death of the member, the benefit otherwise payable shall thereby be forfeited, is against public policy, and will not be enforced."

§ 1388. Hospitals and medical attendance.—Some railroad companies, instead of maintaining a relief department from which benefits are paid, voluntarily and gratuitously furnish medical and surgical attendance or maintain or contribute to hospitals in which an injured employe may be treated without charge. It is a general rule that if there is no negligence in selecting the surgeon, physician or other attendants, those who furnish them or those who maintain and furnish the hospital accommodations out of charity and not for profit are not liable for the malpractice or negligence of the physician or attendant.[19] And even if a railroad company

[19] Union Pac. R. Co. v. Artist, 60 Fed. 365; 23 L. R. A. 581; McDonald v. Massachusetts &c. Hospital, 120 Mass. 432; 21 Am. R. 529; Fire Ins. Patrol v. Boyd, 120 Pa. St. 624; 15 Atl. 553; 1 L. R. A. 417; Secord v. St. Paul &c. R. Co. 18 Fed. 221; Van Tassell v. Manhattan &c. Hospital, 60 Hun (N. Y.), 585; 15 N. Y. S. 620, and note; Laubheim v. De Koninglyke &c. 107 N. Y. 228; 13 N. E. 781; 1 Am. St. 815; Glavin v. Rhode Island Hospital, 12 R. I. 411; 34 Am. R. 675; Hearns v. Waterbury Hospital, 66 Conn. 98; 33 Atl. 595; 31 L. R. A. 224; "The Liability of Charitable Corporations for the Torts of their Employes," 35 Cent. L. J. 125. See, also, 3 Am. L. Reg. & Rev. (N. S.) 185. Thus, in the case first cited it is said: "If one undertakes to treat such patient for the purpose of making profit thereby, the law implies the contract to treat him carefully and skillfully, and holds him liable for the carelessness of the physicians and attendants he furnishes. But this doctrine of respondeat superior has no just application where one voluntarily aids in establishing or maintaining a hospital without expectation or pecuniary profit. If one, out of charity, with no purpose of making profit, sends a physician to a sick neighbor or to an injured servant, or furnishes him with hospital accommodations and medical attendance, he is not liable for the carelessness of the physicians or of the attendants. The doctrine of respondeat superior no longer applies, because, by fair implication, he simply undertakes to exercise ordinary care in the selection of physicians and attendants who are reasonably competent and skillful, and does not agree to become personally responsible for their negligence or mistakes. The same rule applies to corporations and to individuals, whether they are engaged in dispensing their own charities, or

is morally obliged to furnish such attendance it is not liable on this ground if it does so and uses due care in the selection of a competent surgeon or physician.[20]

§ 1389. When company is liable for negligence of surgeon in its hospital.—Even a gratuitous bailee, however, must exercise some care, and the failure to exercise such reasonable care as the nature of the thing bailed and the circumstances of the case require, may be such negligence as to render the bailee liable in damages.[21] If,

in dispensing the charitable gifts of others intrusted to them to administer. One reason why corporations and individuals conducting hospitals supported by charitable endowments and contributions, and operated to heal the sick and injured, but not for profit, are not liable for the negligence of their employes, is, that the moneys in their hands constitute a trust fund devoted to a charitable purpose, and the courts refuse to permit it to be diverted to the very different purpose of paying for the malpractice of their physicians or the negligence of their attendants. Moreover, the corporations or individuals that administer such trust must, after all, leave the treatment of the patients to the superior knowledge and skill of the physicians. They can not direct the latter, as the master may ordinarily direct the servant, what to do, and how to do it. . . . . And, finally, the patient is not required to accept the proffered accommodations and attendance. They are but freely offered to him. He may refuse to accept them, and seek other physicians and other accommodations." In Illinois Cent. R. Co. v. Buchanan (Ky.), 88 S. W. 312, where the relief hospital was a separate corporation, it was held that the railroad company was not liable for the negligence of the hospital directors or attendants.

[20] Atchison &c. R. Co. v. Zeiler, 5 Kan. 340; 38 Pac. 282; Pittsburgh &c. R. Co. v. Sullivan, 141 Ind. 83; 40 N. E. 138; 27 L. R. A. 840; 50 Am. St. 313; South Florida R. Co. v. Price, 32 Fla. 46; 13 So. 638; Quinn v. Kansas City &c. R. Co. 94 Tenn. 713; 30 S. W. 1036; 28 L. R. A. 552; 45 Am. St. 767. See, also, Allan v. State &c. Co. 132 N. Y. 91; 30 N. E. 482; 15 L. R. A. 166; 28 Am. St. 556; O'Brien v. Cunard &c. Co. 154 Mass. 272; 28 N. E. 266; 13 L. R. A. 329; Pierce v. Union Pac. R. Co. 66 Fed. 44; Eighmy v. Union Pac. R. Co. 93 Iowa, 538; 61 N. W. 1056; 27 L. R. A. 296; Maine v. Chicago &c. R. Co. 109 Iowa, 260; 70 N. W. 630; 80 N. W. 315; Laubheim v. De Koninglyke &c. 107 N. Y. 228; 13 N. E. 781; 1 Am. St. 815; Chicago &c. R. Co. v. Howard, 45 Neb. 570; 63 N. W. 872; Southern &c. R. Co. v. Mauldin, 19 Tex. Civ. App. 166; 46 S. W. 650.

[21] See Steamboat New World v. King, 16 How. (U. S.) 469, 470; Coggs v. Bernard, 2 Ld. Raym. 909; Philadelphia &c. R. Co. v. Derby, 14 How. (U. S.) 468; Tracy v.

therefore, a railroad company voluntarily undertakes to care for an injured employe who can not help himself, it may be held liable for negligence in its own treatment of him, or in knowingly or carelessly selecting an incompetent surgeon or physician to treat him. This is certainly true where it takes him to a hospital which it maintains with funds deducted out of the wages of the injured man and other employes, and he is there injured by the negligence of an incompetent physician in charge, whom the company has negligently selected to treat him.[22]

§ 1390. When release of claim against company will not include claim for negligent treatment in hospital.—As a railroad company can not, as a general rule, contract in advance that it shall not be held liable for its own negligence, it may be argued with some degree of plausibility that it can not thus escape liability for negligence in selecting an incompetent physician to take charge of its hospital or treat its injured employes. But, if no duty rests upon the company to take care of an injured employe in any particular case, it would seem that if the employe chooses to accept the voluntary assistance of the company and, in consideration of the company's furnishing him with surgical or medical attendance at its own cost, agrees that he will take all risks of the competency of the particular physician or surgeon so furnished, and will not hold the company liable for any negligence of such physician or surgeon, the contract is a valid one and will prevent any recovery by the employe against the company on account of the negligence of such attendant.[23] A release of claims against a railroad company

Wood, 3 Mason (U. S.), 132; Milwaukee &c. R. Co. v. Arms, 91 U. S. 489; Conner v. Winton, 8 Ind. 315; 65 Am. Dec. 761; Hutchinson Carriers (2d ed.), § 566; Story Bailm. 194.

[22] Richardson v. Carbon Hill Coal Co. 6 Wash. 52; 32 Pac. 1012; 20 L. R. A. 338; 32 Pac. 1012; Wabash R. Co. v. Kelley, 153 Ind. 119; 52 N. E. 152; 54 N. E. 752. See, also, Union Pac. R. Co. v. Winterbotham, 52 Kan. 433; 34 Pac. 1052; Northern Cent. R. Co. v. State, 29 Md. 420; 96 Am. Dec. 545; Atchison &c. R. Co. v. Jones, 9 Neb. 67; 2 N. W. 363; Texas &c. Co. v. Connaughton, 20 Tex. Civ. App. 642; 50 S. W. 173; 4 Thomp. Neg. (2d ed.) §§ 3841, 3842.

[23] See Ohio &c. R. Co. v. Early, 141 Ind. 73; 40 N. E. 257; 28 L. R. A. 546, and note; Pittsburgh &c. R. Co. v. Sullivan, 141 Ind. 83, 90; 40 N. E. 138; 27 L. R. A. 840; 50 Am. St. 313.

on account of specified personal injuries caused by the latter will not, however, include a claim for damages for other injuries caused by negligent treatment in the hospital maintained by the company, where the latter injuries were not known to either party at the time, although the release purported to cover all "claims and demands whatever" against the company "from the beginning of the world" to the date of its execution.[24]

[24] Union Pac. R. Co. v. Artist, 60 Fed. 365; 23 L. R. A. 581.

END OF VOLUME III.