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DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES, ENGLAND AND CANADA.

EDITED BY

THOMAS J. MICHIE.

VOLUME XIV.

NEW SERIES.

GEO. R. B. MICHIE & CO., PUBLISHERS,

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**PUBLICATIONS
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THE
AMERICAN AND ENGLISH
RAILROAD CASES

NEW SERIES.

VOLUME XIV.

WOOD & GUMAER MFG. CO.

v.

WHITCOMB *et al.*

(*Supreme Court of Wisconsin, Nov. 22, 1898.*)

Actions for Injuries to Stock*—Notice.—Under the law of Wisconsin no action against any railroad corporation for damages for stock killed or injured by it can be maintained unless, within one year after the injury, a certain notice in writing, signed by the owner of the stock, his agent or attorney is given to the company. *Held*, that the law was not complied with where no such notice was given until after a judgment had been rendered in a justice's court, and there had been an appeal by defendant to the circuit court.

APPEAL by plaintiff from Waupaca county circuit court.
Affirmed.

A. L. Hutchinson, for appellant.

Howard Morris and *T. H. Gill*, for respondents.

CASSODAY, C. J. This action was commenced in justice's court to recover \$100, the alleged value of a horse belonging to the plaintiff, which is alleged to have, on August 25, 1896, escaped from the lands of the plaintiff to the right of way of the Wisconsin Central Railroad Company, of which the defendants were receivers, through the carelessness and

*See note at end of case.

Wood & Gumaer Mfg. Co. v. Whitcomb
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negligence of the defendants, and while there was killed by being struck and run over by a train of cars and locomotive engine upon the track of said railroad; that said horse was killed by reason of the carelessness and negligence of the defendants; that the defendants had refused to pay for the same, although due notice and demand for payment thereof had been made on the defendants. The defendants answered by way of admissions and denials. Upon the trial before the justice, December 28, 1896, the court found the defendants guilty of negligence, and that the plaintiff was entitled to recover judgment for \$100 and the costs of the action, taxed at \$20.46. From that judgment the defendants appealed to the circuit court. August 4, 1897, the plaintiff caused a written notice to be served upon the defendants, which notice described the place and time and killing of the horse, its value, and that satisfaction therefor was claimed of the defendants, as required by chapter 202, Laws 1893. November 8, 1897, the case was called for trial before the circuit court and a jury, when the plaintiff moved for leave to amend its complaint by adding thereto an allegation of the giving of such notice August 4, 1897. That motion was denied. Thereupon, and after a witness had been sworn on behalf of the plaintiff, the defendants objected to the admission of any evidence under the complaint, for the reason that it did not state facts sufficient to constitute a cause of action; which objection was sustained by the court. Thereafter the court ordered judgment to be entered in favor of the defendants and against the plaintiff dismissing the action, and for costs to be taxed. From the judgment entered thereon accordingly, the plaintiff brings this appeal.

The statute provides, in effect, that no action against any railroad corporation for damages for stock killed or injured by such corporation shall be maintained unless, within one year after the happening of the event causing such damage, notice in writing, signed by the party owning such stock, his agent or attorney, shall be given to the corporation against which damage is claimed, stating the time and place

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Note

where such damage occurred, and that satisfaction therefor is claimed of such corporation. Such notice may be given in the manner provided for the service of summons upon such corporations in courts of record. Laws 1893, c. 202; Rev. St. 1898, § 1816b. There was an attempt made to prove by parol that a letter was written to the attorney of the defendants in relation to the killing of the horse, but it was a failure. There is no pretense that any written notice, as required by the statute, was served on the defendants before the commencement of this action. The question recurs whether the notice served August 4, 1897,—more than seven months after the rendition of the judgment in favor of the plaintiff in justice's court,—satisfied the requirements of the statutes. The statute requiring the prescribed notice to be given to the corporation is mandatory. *Atkinson v. Railway Co.*, 93 Wis. 366, 67 N. W. 703; *Donovan v. Railway Co.*, 93 Wis. 376, 67 N. W. 721. True, the statute does not say that no action shall be commenced until the notice is given, but does say that no action shall be "maintained" unless the notice is given within the year. Contrary to the statute, this action was maintained, and judgment recovered in the justice's court months before the giving of such notice. Had not the defendants appealed to the circuit court, that judgment would have been collected, and the statute nullified. The manifest purpose of the enactment was to enable the corporation to investigate, and then pay, if practicable, and, if not, prepare for the defense. To carry into effect such purpose, the notice must be regarded as a condition precedent. This construction is in harmony with that given to section 1339, Rev. St. 1898. The judgment of the circuit court is affirmed.

NOTE.

Action for Injuries to Stock—Notice.—Under Alabama Code, § 1701. it is necessary to present a claim against a company for killing stock to an agent of the company, or to bring suit, within sixty days; and when the case is tried by the court without a jury, and the statute

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is set up as a defence, and the amount claimed is less than \$20, it is error to render judgment for plaintiff without proof that such demand was made, or that the suit was commenced as provided by statute. *South & N. Ala. R. Co. v. Reid*, 66 Ala. 250.

To sustain an action, under Kansas Laws 1874, ch. 94, against a railroad company for the killing of stock, proof must be made of a demand in accordance with the provisions of § 2. *Kansas Pac. R. Co. v. Ball*, 19 Kan. 535.

RYAN

v.

CHICAGO & N. W. RY. CO.

(*Supreme Court of Wisconsin, Jan. 10, 1899.*)

Actions for Injuries to Stock—Notice.*—The notice required by ch. 202, Laws 1893 of Wisconsin, is a condition precedent to the maintenance of an action against a railroad for the killing of stock by locomotives or cars.

Same—Same.—Such notice must point as directly and plainly to the place of the injury as is reasonably practicable; and a notice which applies equally to any place on defendant's road within a distance of three miles is not reasonably certain.

Same—Same.—In such an action, the fact that some of defendant's officers or employees may have known where the damage occurred is immaterial, in this connection.

Same—Same—Statutes.—The amendment to such chapter is not applicable to a case where the right of action became fixed prior to its passage.

APPEAL by plaintiff from Langlade county circuit court.
Affirmed.

This is an action to recover damages for the killing of three horses by the defendant's railroad train on the evening of the 13th or the morning of the 14th of July, 1895, said horses having strayed upon the defendant's right of way by reason of the fence being down.

Case Stated.

*See *Wood & Gumaer Mfg. Co. v. Whitcomb et al.* (Wis.), *ante* and *note*.

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The defendant's railroad runs north and south, through sections 1, 11, and 36, in the township of Summit, and section 18, township 33, range 11, both in the county of Langlade. The plaintiff lived on section 5, township 34, range 10, and had a pasture, which was unfenced, on the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 1, township 34, range 10. The plaintiff turned his horses out into this pasture on the evening of the 13th of July. It appears by the testimony that the horses went south from the pasture a mile and a half, and went upon the track at a place where the fence had been open since the 24th of June, which was in section 18, township 33, range 11. On the 15th of July, 1895, the plaintiff wrote and sent to the claim agent of the defendant railroad the following letter: "Dear Sir: I had three horses killed by the limited train on Chicago & Northwestern Railroad, in T. 33, R. 11 E. I have a pasture on S. 1, T. 33, R. 11, and which I keep my stock in. They strayed out, and went south, and the fence of the railroad was open, and the horses went on the track. This fence is on the west side of the railroad. The fence was down on the 9th of July, when I passed there. It was also down June 25th, when Mr. John Miller passed it. There are two gates on east side,—one which has been down about all summer, and the other one for a month. Now there are several places where stock may pasture. My claim for three horses is as follows: One mare, seven years old, weight 1,550, \$175.00; one horse, four or five, weight 1,695, \$175.00; one bay mare, eight years, weight 1,420, \$100.00,—\$450.00." On the 29th of July he also sent to the superintendent of the defendant another letter, containing the following sentences: "Dear Sir: On Saturday, July 13th, or on the morning of July 14th, I had three horses killed by the limited train, which I reported to the claim agent at Chicago, and asked for a reply, and have received no answer. I wrote the claim agent July 15, 1895, stating the condition of fence and how the horses got on the railroad track." On the 4th of September the plaintiff's attorneys sent the defendant

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a letter containing the following paragraph: "Dear Sir: Phil Ryan, of Summit Lake, Wisconsin, has left with us for collection a claim against your company for the sum of four hundred and fifty dollars (\$450.00). The sum is for the killing by one of your passenger trains, during the month of July, 1895, of three horses. The negligence of the company consisted in having their fences down and destroyed at different places along the road where the horses got upon the track." The evidence showed that the plaintiff's horses were killed upon the railroad track, but a verdict for the defendant was directed by the court because the notice required by chapter 202 of the Laws of 1893 had not been given, and from judgment upon this verdict the plaintiff appeals.

Bouck & Hilton and Eaton & Weed, for appellant.

Fish, Carey, Upham & Black, for respondent.

WINSLOW, J. (after stating the facts). The notice required to be given by chapter 202, Laws 1893, was a condition precedent to the maintenance of the action. *Manufacturing Co. v. Whitcomb* (Wis.) 77 N. W. 175, 14 Am. & Eng. R. Cas. N. S., 1. Such notice must state the "time and place" where such damage occurred. Laws 1893, c. 202. This means that "it must point as directly and plainly to the place of the injury as is reasonably practicable, having regard to its character and surroundings." *Weber v. Town of Greenfield*, 74 Wis. 234, 42 N. W. 101; *Sowle v. City of Tomah*, 81 Wis. 349, 51 N. W. 571. The fact that some of defendant's officers or employees may have known where the damage occurred is not material, nor will such knowledge dispense with the necessity of giving the prescribed notice. *Sowle v. City of Tomah, supra*.

The letters which constitute the notice in the present case fail to state where the horses were run over with any degree of certainty. It is stated that they were killed in township 33, range 11. The railroad runs for a distance of about three miles through township 33, range 11, and a notice which

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Notice.

Same—Same.

Same—Same.

applies equally to any place within a distance of three miles cannot be said to be reasonably certain.

The amendment to chapter 202, *supra*, which was added in the Revised Statutes of 1898, and appears as the last paragraph of section 1816b of the Revised Statutes of 1898, does not apply to this case, because it was passed after the rights in this action became fixed, and it is unnecessary to construe it. Judgment affirmed.

Same—Same—
Statutes.

LOUISVILLE & W. R. CO.

v.

HALL.

(*Supreme Court of Georgia, March 16, 1899.*)

Action for Killing Stock—Evidence.—In the trial of a suit against a railroad company for the negligent killing of stock by the running of a train, evidence tending to establish that the stock were at large through no fault of the plaintiff was admissible.

Same—Proximate Cause—Duty to Instruct.*—When, in such a trial, the evidence was that the stock killed had been a part of a car load of stock which had been transported by the defendant company, and tended to establish that the stock being at large was due to the fact that the defendant had failed to provide a stock pen and other proper facilities for unloading stock, it was the duty of the court, without any request to that effect, to have instructed the jury that the escape of the mules under these circumstances would not, of itself, make the defendant liable in damages for the subsequent killing of the mules, and that the defendant would not be liable if, at the time of the killing, its agents and employees exercised all ordinary care and diligence to prevent the same. The rule here stated was essentially a part of the law of the case, an understanding of which by the jury was necessary to a fair and lawful trial.

(*Syllabus by the Court.*)

*As to Liability for Injuries Depending on Proximate Cause, and for Definition of Proximate Cause, see note 12 Am. & Eng. R. Cas., N. S., 168 *et seq.*

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ERROR by defendant from Jefferson county superior court.
Reversed.

Phillips & Phillips, for plaintiff in error.

Jas. K. Hines, for defendant in error.

COBB, J. Hall sued the Louisville & Wadley Railroad Company, for damages, alleging, in substance, that he was the owner of four mules, which, without the fault of petitioner, strayed upon the track and grounds occupied by the defendant's line of railway, near its terminus at Louisville; that the defendant, by its agents and servants, so carelessly and negligently operated its train of cars that the same ran over and killed petitioner's mules, to his damage. It is further alleged that the mules killed were part of a car load of mules transported by defendant from Wadley to Louisville, reaching there about sunset on the day the mules were killed, but that, in consequence of the fact that the defendant had its turntable at Louisville torn up for repairs, and that it had none of the means and appliances by which stock could be quickly and safely unloaded at this place, it was after night and very dark before the mules could be unloaded. The four mules above mentioned escaped, and ran down the track of the defendant, which fact was known to the agents and servants of the defendant. As soon as the last of the mules were unloaded, the servants and agents in charge of the train started to run the train back to Wadley, and the train was negligently and without due care and caution run at a rapid rate of speed towards Wadley, when it was known to the employees in charge of the train that the mules were on the track. The servants and agents of the defendant failed to keep a watch-out for the mules, and were negligent in not running slowly until the mules could be taken from the track, by reason of which negligence three of petitioner's mules were killed outright, and the fourth so wounded and damaged that it was rendered worthless. The defendant answered, denying the allegations of negligence charged against it.

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At the trial the evidence for the plaintiff tended to establish the allegations in the petition in reference to the time at which the stock were unloaded and the cause of the delay. There was also testimony in his behalf as to the value of the mules. There was further testimony that, when the mules escaped from the car from which they were being unloaded, the plaintiff called to one of his assistants, who was in the car at the time, unloading the stock, that the mules had run down the railroad, and to go and get them, and that the conductor, engineer, and other train hands were standing there at the time, sufficiently near to have heard what was said easier than the person to whom the order was addressed, who heard what was said. The plaintiff testified that the agent of the railroad at Louisville told him next morning that he heard him give the order in question. There is an embankment which reaches from near the depot to about 300 yards below, and then the track runs in a cut from that point to near the stock gap where the mules were killed. There is a road which crosses the track near the end of the embankment, and near this point is where the mules first came upon the track. A few minutes after the plaintiff ordered his assistant to go after the mules, and after he had gone, the train left for Wadley, running at a rapid rate of speed. The defendant had no stock pen at Louisville. There was evidence for the defendant that the delay in allowing the stock to be unloaded was but a few minutes after the train reached Louisville, and that it was dark when the train reached that place. The employees of the defendant in charge of the train were ignorant of the fact that the mules had escaped and run down the track. The night was dark and rainy, and there is a steep grade on the track leading down to the point where the mules were killed,—so steep, in fact, that the train was allowed to run down it of its own weight, as was always done at this grade. The speed at which the train was run on this occasion was about 15 miles per hour. The engine was in good condition, the headlight was in order, and the mules could not have been earlier dis-

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covered. The engineer was on the lookout for anything which might be upon the track. After the mules were discovered, the engineer blew for brakes, reversed his engine, sanded the tracks, and did everything in his power to stop the train. The jury returned a verdict for the plaintiff for \$400 and costs of suit. The defendant's motion for a new trial having been overruled, it excepted.

The original motion contained the general grounds. The first ground of the amended motion was as follows: "The court erred in allowing Will Hall to testify as follows: 'The car reached Louisville before sundown, but the turntable was out of repair, and they were working on it, and this caused delay in unloading the stock, and it was after night when we got them unloaded,'—said testimony being objected to by defendant's counsel on the ground that such delay, if any, and the fact that the turntable was out of repair, if true, was not the proximate cause of the damage claimed, and could not be used as any evidence of negligence, or want of ordinary care and diligence, when the damage alleged was the killing of certain mules on the line of the road at a different place from where the stock was unloaded." We do not think there was any error in admitting this testimony, nor do we think that the testimony was very material to the issues raised in the case. The way in which the mules escaped from the car having been described with great particularity in the petition, it was permissible to prove these allegations, simply to show how the mules escaped, and thus account for their being at large. This evidence, however, throws very little light on the controlling question to be decided in the case; that is, whether the mules, after they escaped and wandered upon the track, were killed by the negligence of the defendant. But it was admissible for the purpose of showing that the mules were at large through no fault of the plaintiff. *Railroad Co. v. Neely*, 56 Ga. 543.

2. The second ground of the amended motion was as follows: "The court erred in not giving the jury instruction to

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the effect that the negligence complained of on the part of the plaintiff would have to operate as the cause of the damage sustained by him, and only such negligence as was the natural and proximate cause of the damage could be invoked against the defendant." We think it was error in the court to fail to charge the principle referred to in this ground. This was an action brought for the negligent killing of stock. Even if the defendant was negligent in failing to provide a stock pen and other proper facilities for unloading stock, this had little bearing upon the real question at issue. It was proper to allege and prove the circumstances which brought about the escape of the mules, and thus account for their being at large, simply to explain how they came to be upon the track; but these circumstances, no matter how pregnant with negligence on the part of the defendant, would not authorize a recovery for the subsequent killing of the stock, if in that transaction the agents and employees of the defendant were free from fault. It was, therefore, all-important to the defendant that the jury should be made clearly to understand that the failure to supply proper facilities for unloading these mules at the depot would not render the defendant liable for killing them at the stock gap, after the engineer and other employees in charge of the train had exercised that degree of diligence that the law required, both in keeping a lookout for objects upon the track, and in endeavoring to save the stock from injury after their presence upon the track became known. The case of the plaintiff, at best, is weak and unsatisfactory. The testimony of the engineer and other persons on the train seems to establish that the killing of the mules was inevitable; and the only circumstance in the case that could be relied upon at all to hold the company liable was that the employees upon the train knew, before they left the station, that the mules had escaped, and were at some point on the track. The evidence as to this knowledge on the part of the employees was directly conflicting, and the great preponderance of the evidence was in favor of the view that the em-

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ployees did not know this fact. In view of the character of the testimony on this important point, it was very material to the defendant that the jury should have been distinctly instructed that the question of the defendant's liability was to be determined by what occurred at the time the mules were killed. We do not say that the plaintiff should recover in this case at all. It is not necessary to decide that on this record; but it is clear to us that the case should be tried again, when the jury should, under proper instructions, be required to determine the question of the liability of the defendant by ascertaining whether there was any negligence on its part growing out of the killing of the stock upon the track. Judgment reversed. All the justices concurring.

CENTRAL OF GEORGIA RY. CO.

v.

ROSS.

(*Supreme Court of Georgia, March 18, 1899.*)

Injuries to Stock—Evidence of Similar Injuries.*—It was, in the trial of an action against a railway company for killing a mule, erroneous to permit, over a proper objection by counsel, for defendant, a witness to testify: "They killed a good many stock out in that way. They kill the mules and cows. It has not been a year since they killed a mule right below where they killed mine."

Prejudicial Error—New Trial.—This being a case in which the evidence on the main and controlling issue was close and conflicting, such an error as that above indicated entitled the defendant, against whom the verdict was rendered, to a new trial. This is so because the evidence illegally admitted tended to prejudice the jury against the company.

Sufficiency of Evidence.—A new trial is the more readily ordered, because the liability of the defendant depended upon whether or not the plaintiff's mule was killed upon a public-road crossing, and it was not clearly shown that, even if the killing occurred upon the crossing at all, it was one of the kind just mentioned.

Evidence.—The court erred in overruling the *certiorari*.

(Syllabus by the Court.)

*See notes at end of case.

ERROR by defendant from Bibb county superior court.
Reversed.

Steed & Wimberly, John R. Cooper, and R. C. Jordan, for plaintiff in error.

Hope Polhill, for defendant in error.

LITTLE, J. Ross brought an action in a justice's court in Bibb county against the Central of Georgia Railway Company to recover damages for killing a mule. The case was tried before a jury in the justice's court, and a verdict for \$50 and costs was rendered against the company. A *certiorari* was sanctioned by the judge of the superior court, and on the hearing the *certiorari* was overruled by the superior court; and to that judgment the plaintiff in error excepted. Case Stated.

The plaintiff in the justice's court testified that his mule was killed at a road crossing (and, inasmuch as the engineer, for the defendant, testified that he blew the whistle for this crossing, it will be taken that it was a public-road crossing); that it could have been seen over 120 yards by the engineer before it was struck; that no whistle was blown, bell rung, or other signal given; and that the place at which the mule was killed was within the limits of the city of Macon. For the defendant, the engineer in charge of the train testified that the place where the mule was struck was outside of the city limits; that he blew his whistle for the crossings and that the mule was 25 or 30 yards from the crossing, coming up the track on which the engine was approaching; that the mule was on the edge of an embankment 15 or 18 feet high; that he could not stop within the distance from where he first saw the mule; that he did not blow the whistle, and directed the fireman not to ring the bell, which might have frightened the mule and made him run on the track; the animal did not appear to be frightened; he thought that he could pass the mule, but that the animal must have shied back, and the step of the tender struck him; that the train was running on a very fast

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schedule at the time he saw the animal, which was about 100 yards away, and he did not think that he could have stopped the train within the distance, by reversing, without injuring the passengers; that, if the mule had not stepped back, he would not have been stricken; he was not thrown down; there were signs of blood and hair on the step of the tender, which must have struck the mule as it passed. The fireman, who was on the engine, testified practically to the same facts as the engineer. There was thus conflict in the

Prejudicial Error
-New Trial.

evidence on a very material point, to wit, whether the mule was killed on a public-road crossing, or not; for, if he was, and it was outside of the city limits, the omission to signal the crossing by blowing the whistle, and the failure to check the speed of the train, as testified to by the plaintiff in the justice's court, would have been such negligence as would have authorized the owner of the mule to recover, if the animal was killed in consequence of such omission. If, however, the animal was not at the road crossing, but some distance from it, walking, on the side of the track, towards the approaching train, as testified to by the engineer and fireman, then the omission to give the signals required by law in approaching the road crossing would not, relatively to this plaintiff, be negligence. *Railroad Co. v. Golden*, 93 Ga. 512, 21 S. E. 68. And the liability of the company must be determined by the proof, or want of proof, of other negligent acts. *Railway Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550; *Railroad Co. v. Clary* (Ga.) 30 S. E. 433.

Whether the animal was killed at the crossing, or away from the crossing, was a question of fact, to be determined by the jury under the evidence; and, if nothing else appeared, their finding should stand as a proper determination of the facts of the case. *Railway Co. v. Burney*, 85 Ga. 635, 11 S. E. 1028. But on the trial the plaintiff, in the justice court, was allowed to testify, over the objection of defendant's counsel, as follows: "They killed a good many stock out in that way. They kill the mules and cows. It has not been

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a year since they killed a mule right below where they killed mine." This evidence was clearly inadmissible.

It might have been perfectly true that mules and cows had theretofore been killed by the running of trains on the same road at the place where the animal, for the killing of which damages are sought, was killed, and yet there might be no liability on the part of the company for this killing. The plaintiff was not entitled to recover at all, unless the killing was occasioned by the negligence of the employees of the company, and that question was not properly illustrated by evidence of the killing of other mules and cows. To sustain the admission of this evidence, we are cited to the case of *Railway Co. v. Flannagan*, 82 Ga. 579, 9 S. E. 471. In that case a witness was allowed to testify to the habitual high rate of speed with which a particular engine was previously run by the same engineer on the same street. In passing on the admissibility of this evidence, CHIEF JUSTICE BLECKLEY said that such evidence was of doubtful admissibility, but that, on "so doubtful a question, we think the court did not err in admitting the evidence." But the ruling in that case does not support the admissibility of the testimony which was received in this case. There the testimony was confined to the same engine, run by the same engineer, on the same street; and CHIEF JUSTICE BLECKLEY, in the *Flannagan* Case, above, cited a large number of cases *pro* and *con* on the admissibility of such evidence when it was confined to the identical same place, the identical same locomotive, and operated by the same person. The admissibility of the evidence must have been sustained alone to show the habitual negligence of the particular person who it was charged was guilty of the particular act. See, also, *Railway Co. v. Kane*, 92 Ga. 187, 18 S. E. 18.

The proposition here, in effect, would be that all of the engines of this company were, by the different engineers, accustomed to kill mules and cows in this place. The ruling in the *Flannagan* Case was quoted as authority in the case of *Railroad Co. v. Smith*, 94 Ga. 107, 20 S. E. 763, for the

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admissibility of the evidence as to the character of the plaintiff for being prudent or reckless in the conduct of his business, for the purpose of showing that he was habitually reckless; and this court, through MR. JUSTICE LUMPKIN, said: "CHIEF JUSTICE BLECKLEY said it was of doubtful admissibility; and, besides, there is some difference between proving habitual acts of recklessness or negligence at particular times and places, and proving the general character of a particular person for recklessness, or the contrary." Inasmuch as the diligence of the company to prevent killing the animal varied in character according to the fact as to where the killing did occur (that is to say, whether it occurred on a public railroad crossing, or on the embankment, where the company's track was laid away from the crossing), and this material question was closely contested, the admissibility of this illegal testimony had a tendency to prejudice the case of the defendant; and for this reason the *certiorari* should have been sustained. Judgment reversed. All the justices concurring.

Sufficiency of Evidence.

Evidence.

NOTES.

Evidence—Collateral Facts.—Collateral facts or those unconnected with the facts in issue are, as a general rule inadmissible in evidence. *Odiorne v. Winkley*, 2 Gall. (U. S.) 51; *Bunzel v. Maas*, (Ala. 1897) 22 So. Rep. 568; *Denver, etc., R. Co. v. Glasscott*, 4 Colo. 270; *Newsom v. Georgia R. Co.*, 62 Ga. 339; *Nickerson v. Gould*, 82 Me. 512; *Cutter v. Howe*, 122 Mass. 541; *Peverly v. Boston*, 136 Mass. 366, 49 Am. Rep. 37; *Marshall v. Boston & A. R. Co.*, 31 Am. & Eng. R. Cas., 18, 145 Mass. 164; *Blomgren v. Anderson*, 48 Neb. 240; *Amoskeag Mfg. Co. v. Head*, 59 N. H. 332; *Hill v. Syracuse, etc., R. Co.*, 63 N. Y. 101; *Findlay Brewing Co. v. Bauer*, 50 Ohio St. 560.

Same—Similar Acts of Negligence.—In an action for negligence, as a general rule, other similar disconnected acts of negligence by defendant are inadmissible in evidence. *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 279; *Gahagan v. Boston, etc., R. Co.*, 1 Allen (Mass.) 187, 79 Am. Dec. 724; *Baltimore Elevator Co. v. Neal*, 65 Md. 438; *Wentworth v. Smith*, 44 N. H. 419; *Louisville R. Co. v. Fox*, 11 Bush (Ky.) 493.

SINARD

v.

SOUTHERN RY. CO.

(*Supreme Court of Tennessee, Nov. 5, 1898.*)

Injuries to Stock—Duty to Fence Track*—Construction of Statute.—Under the act of 1891 of Tennessee, railroad companies maintaining unfenced tracks are made liable for the killing of stock only in cases where the stock is struck, killed or crippled by a moving engine, car or train.

Same—Same—Common Law.—And where stock is killed by a fall from an embankment to the track, the company is not liable, although the track was unfenced, such statute not being applicable, and a railroad company being under no obligation to fence its track under the common law.

APPEAL by plaintiff from Jefferson county circuit court.
Affirmed.

Park, King & Park, for appellant.

Jourolman, Welcker & Hudson, for appellee.

MCALISTER, J. Plaintiff owned a farm in Jefferson county, which was intersected by the Southern Railway. In the original construction of the road a cut was made for the tracks, which left a rather high embankment on either side. The plaintiff turned a mare into his field to graze, and the animal, being blind, walked over this embankment and was killed. This suit was to recover damages for the loss of the mare. In the circuit court verdict and judgment were in favor of the railroad. Plaintiff appealed, and assigns as error the refusal of the trial judge to charge that it was the duty of the railroad to have fenced this embankment. As already stated, this cut was made in the original construction of the road, and has been in use about 30 years. It is not insisted that the

*See notes at end of case.

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animal was struck by the locomotive or train of the company, but it is admitted that she was killed by the fall.

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Under the fence statute of 1891, railroad companies maintaining unfenced tracks are made liable for the killing of stock only in cases where the stock is struck, killed, or crippled by the locomotive or cars; that is to say, by a moving engine, car or train. There was no collision in this case, and hence the statute is inapplicable. *Elliott, R. R. § 1207; Railroad Co. v. Crider*, 91 Tenn. 489, 19 S. W. 618.

It is insisted, however, that, independent of the act of 1891, it was the duty of the company to have fenced or barricaded this embankment. We do not concur with counsel in this contention. At common law no duty rested

**Same—Same—
Common Law.**

upon a railway company to fence its track, and it was not liable for animals killed or injured upon its track merely because it failed to erect fences. The overwhelming weight of authority is that the duty to fence exists only as a result of legislative enactment. 3 *Elliott, R. R. §§ 1180, 1181; Campbell v. Railroad Co.*, 50 Conn. 128; *Clark v. Railway Co.*, 34 West Va. 200, 12 S. E. 505.

Affirmed.

NOTES.

Failure to Fence—Injuries to Stock Not Caused by Collision with Train—Liability of Company.—See *note*, 5 Am. & Eng. R. Cas., N. S., 234.

The company is not liable for an injury to cattle caused by failure to erect statutory fence, unless the animal was injured by a collision or contact with the engine or cars of the train. *Croy v. Louisville, etc., R. Co.*, 97 Ind. 126, 9 Am. & Eng. R. Cas. 608; *Burlington, etc., R. Co. v. Shoemaker*, 18 Net. 369, 22 Am. & Eng. R. Cas. 369; *Knight v. N. Y., L. E. & W. R. Co.*, 99 N. Y. 25, 23 Am. & Eng. R. Cas. 188; *Holder v. Chicago, etc., R. Co. (Tenn.)*, 11 Lea, 176, 13 Am. & Eng. R. Cas. 567; *Moore v. Burlington, etc., R. Co. (Iowa)*, 31 Am. & Eng. R. Cas. 572; *Penna Co. v. Dunlap*, 31 Am. & Eng. R. Cas. 512.

A railroad company is not liable for an injury to an animal caused by the animal running on the track through fright at the train, and

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being injured on a trestle and not by contact with the locomotive or cars. *International, etc., R. Co. v. Hughes (Tex.)*, 31 Am. & Eng. R. Cas. 569.

Where a colt belonging to plaintiff ran from the highway upon land adjoining defendant's road, which did not belong to the plaintiff, and from thence through a gap, where a length in the fence on the side of the road was down, on to the track and upon a bridge designed for the passage of railroad trains only, with the spaces between the ties open, and the colt's legs were caught in the open spaces and broken, *held*, that the defendant was not liable. *Knight v. N. Y., L. E. & W. R. Co.*, 99 N. Y. 25, 25 Am. & Eng. R. Cas. 188. *Compare Liston v. Cent. Iowa R. Co.*, 70 Iowa, 714, 26 Am. & Eng. R. Cas. 593. In this case the court held that where the defendant company has neglected to fence, the fact that the train did not strike the horse and that the horse was injured by running in front of the train into a bridge, does not relieve the company of liability.

SOUTHERN RY. CO.

v.

NEW.

(*Supreme Court of Georgia, April 12, 1898.*)

Stock Killed beyond Crossing—Failure to Observe Statutory Precautions.*—Where a cow was killed upon a railroad track at a point beyond a public crossing, and it appeared from the testimony that the killing was unavoidable after the danger became apparent, the only fact relied on by the plaintiff as evidence of negligence being a failure to observe the statutory rule in approaching the crossing, a verdict for the plaintiff was contrary to the evidence. *Railroad Co. v. Gravitt*, 20 S. E. 550, 93 Ga. 370, 376.

(Syllabus by the Court.)

ERROR by defendant from Gordon county superior court.
Reversed.

Shumate & Maddox, for plaintiff in error.

O. N. Starr, for defendant in error.

PER CURIAM. Judgment reversed.

COBB, J., absent for providential cause.

*See *Georgia Railroad & Banking Co. v. Clary*, 11 Am. & Eng. R. Cas., N. S., *abs.* 856, and *notes*, 857 *et seq.*

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ALABAMA MIDLAND RY. CO.

v.

McGILL.

(*Supreme Court of Alabama, April 19, 1899.*)

Injury to Stock on Track—Negligence.*—It is negligence in a railroad company to run its trains in the nighttime at such a rate of speed that it is impossible, by the use of ordinary means and appliances, to stop the train within the distance in which stock upon the track can be seen by the aid of the headlight on the engine and prevent injuring them; and where anything in the surrounding circumstances, such as a fog, suggests care in the operation of a train to avoid accidents, the duty to observe care on the part of the trainmen merely increases.

Same—Same.—It appeared that defendant's engineer was running the train at such a rate of speed that the animals which were killed by the train might have been so killed, through his inability to stop the train within such distance, even had the night been clear. *Held*, that it was not error to give the general charge for plaintiff.

APPEAL by defendant from Dale county circuit court. *Affirmed*.

Upon the introduction of all the evidence, the court, at plaintiff's request gave the following charges: (1) "If the jury believe from all the evidence that the speed of the train, at the time was such as to make it impossible for the engineer to stop the train within the distance the object on the track could have been seen by a good headlight, then such rate of speed was negligent, and the defendant would be liable." (2) "The defendant cannot justify upon schedule or common rate of speed; but it was the duty of the railroad company to run their trains at such speed as would enable the engineer to stop his train within the space in which an object upon the track could have been observed by the use of his headlight."

*See note at end of case.

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The defendant separately excepted to the giving of each of these charges, and also duly excepted to the court's refusal to give the following charge requested by it: "If the jury believe all the evidence they must find for the defendant."

A. A. Wiley, for appellant.

Doster & Sons, C. D. Carmichael, and Holloway & Holloway, for appellee.

HARALSON, J. Action against a railroad company for negligence in killing stock.

1. The principle is too well established to be longer questioned in this court, that it is negligence in a railroad company to run its trains in the nighttime at such a rate of speed that it is impossible, by the use of ordinary means and appliances, to stop the train within the distance in which the stock upon the track can be seen by the aid of the headlight on the engine and prevent injuring them, and if injury results from such negligence, the railroad company is liable to the owner thereof. *Railroad Co. v. Kelton*, 112 Ala. 533, 21 South. 819, and our cases there cited.

Injury to Stock
on Track—Negligence.

2. The engineer testified that he was running at the time of the accident, 45 or 50 miles an hour, which was his usual speed; that it was about 10 o'clock p. m. when it occurred; the night was very dark and foggy; that he was keeping a sharp lookout; that the road is straight for about 300 yards west of the trestle where the animals were killed, and there was a wall of fog at that point which prevented his seeing anything, more than 40 yards ahead of his train; that on an ordinary night, he could have seen 100 yards ahead of him, and after doing all he could, it was impossible to stop the train after discovering the animals before he ran on them. He also testified, that the road ran down Claybank creek for several miles, and that the fog was all along through the swamp of the creek, and at the particular point where the mule and horse were killed, there was a dense wall of fog which prevented his seeing for more than 40 yards ahead of

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him. It was also shown that the track at this point, the way the train ran, was down grade.

3. On these facts, counsel for defendant seek to have this case taken from the rule laid down in the cases referred to above, on what was said in Ingram's Case, 98 Ala. 399, 12 South. 801,—that "if the injury is not attributed to the rate of speed, in view of the ordinary darkness of the night, but resulted from the unusual natural causes, such as fog, or falling rain or snow, those in charge of the train being, in all other respects, in the exercise of due care, the injury would be excused." But, the defendant is not relieved from liability from anything said in that case, as applicable to the facts here. It is a well-settled and just principle, that where anything in the surrounding conditions and circumstances suggests care in the operation of a railroad train to avoid peril and damages to others, the higher the duty increases to observe it. Railroad Co. v. Harris, 98 Ala. 334, 13 South. 377. Here, as the undisputed facts show, the train being run at its usual speed of 45 or 50 miles an hour; that it was a dark and foggy night, and the fog was all along through Claybank swamp through which the train was running, up to the point of the accident, without any slow-up, notwithstanding the fact, that the engineer could not see animals ahead of him more than 40 yards. It was not shown that the fog was denser or more impenetrable at the point of accident, than along the road for miles before the accident occurred. The fact stated by the engineer, that at that particular point there was a dense wall of fog which prevented his seeing more than 40 yards ahead of him, does not establish its prevalence at that point in a denser form than at other places. Common prudence would have suggested the duty on the part of the engineer to run his train at a rate of speed, and to have his train under such control, as to stop it within the distance his headlight would reveal an object on the track ahead of him the size of a horse or mule. Instead of this, he plunged along at this very great and apparently reckless rate of speed, as though the

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conditions were not unusual. Peril to the train itself, the passengers on it and stock that might be on the track was thereby necessarily, and for aught appearing, very greatly enhanced. Moreover, the engineer testified that his train was a very heavy one, consisting of five or six coaches,—a mail car, two passenger and an express car and one or two sleepers. It was not shown that the train could have been stopped within a hundred yards,—the distance the engineer testified he could have seen ahead of him on an ordinary night by the aid of the headlight. It thus appears, that independent of the fog, and if it had been a clear night, he might not have been able to save the animals, and was, as for the animals on the track, guilty of negligence in running the train. The court did not err in giving the general charge for plaintiff, and refusing the like charge in favor of defendant.

Affirmed.

NOTE.

Killing Stock—Rate of Speed—Negligence.—In *Central Railroad & Banking Co. v. Ingram*, 98 Ala. 395, 12 So. Rep. 801, it was held that a railroad company is guilty of negligence where its trains are run in the night-time at such rate of speed that, by reason of the darkness of night, without any intervening unusual natural causes, such as fog or falling rain or snow, stock cannot be seen, by the aid of the headlight, in time to prevent injury by the use of the ordinary means and appliances with which trains are usually supplied.

In this case, after citing a number of opinions, the court said: "We think the rule of these decisions is a just application of the maxim '*sic utere tuo, ut alienum non laedas*.' Under the right of eminent domain the railroad company is empowered to appropriate the lands of others to the construction and operation of its road. It may locate its line of road through the farms and pastures of their owners as well as the uninclosed commons of the country. Under our system all uninclosed lands are common of pasture. The owners of stock have the right to suffer them to go not only within their own inclosures, but upon the commons. There is no principle which would require the stock-owner to fence against the railroad. That duty, if necessary to secure the railroad company the proper enjoyment of its property and franchises, with due regard to the

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rights of others, would devolve upon the company itself, and not the stock-owner. We are of opinion that if a railroad company knowingly runs its trains under such conditions as render it impossible for those in charge of them to prevent injury to stock straying upon the track, and such injury results, it ought to be held responsible for the loss. Such is undoubtedly the case when the train is run, in the night-time, at such fast rate of speed that by reason of the darkness of night stock cannot be seen, by the aid of the headlight, in time to prevent injury by the use of the ordinary means and appliances with which trains are usually supplied. We do not mean to detract from the qualification of the rule expressed in Railroad Co. v. Jones (71 Ala. 487, 15 Am. & Eng. R. Cas. 549), *supra*. If the injury is not attributable to the rate of speed in view of the ordinary darkness of night, but resulted from intervening unusual natural causes, such as fog or falling rain or snow, those in charge of the train being, in all other material respects, in the exercise of due care, the injury would be excused."

The fact that the rate was dangerous may be considered as an element of negligence. Campbell v. Missouri, K. & T. Ry., 59 Mo. App. 151.

BEATTYVILLE & C. G. R. Co.

v.

MALONEY.

(Court of Appeals of Kentucky, Feb. 18, 1899.)

Stock on Track—Degree of Care.—Where stock is killed upon a properly fenced track, by a railroad train, the railroad company is not liable if the killing could not be prevented by the exercise of reasonable care.

APPEAL by defendant from Lee county circuit court.
Reversed.

Ed. M. Wallace, for appellant.

H. L. Wheeler, for appellee.

*As to Care due from Railroads to Avoid Injuring Stock on Track, see generally extensive note, 11 Am. & Eng. R. Cas., N. S., 331 *et seq.*

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GUFFY, J. It is alleged in the petition in this case that the appellant ran its engine and cars over and killed two horses of the plaintiff, to his damage in the sum of \$150. The answer may be treated as a traverse of all the averments of the petition which show a right to recover. The testimony conduces to prove that the appellant railroad company had its track properly fenced, and that the horses escaped from a lot adjoining the road, by reason of a gate having been left open, and that appellant stopped its train, and succeeded in getting one of the horses back in the lot, there being at first three upon the track. It seems that the appellant failed to get the other two back into the lot, and that they ran down a space alongside of the track, not immediately on the railroad track, and appellant ran its train slowly along the track, believing and expecting that the horses would remain off the track, in an open and sufficient space, and thereby escape injury; but, as a matter of fact, when the train was within a few feet of the horses, one of them ran over the track, and killed itself, and the other one ran upon the track, and before the train could be checked the horse was run over and killed. The jury rendered a verdict for \$140 in favor of the plaintiff, and, appellant's motion for a new trial having been overruled, it prosecutes this appeal.

It seems to us that instruction No. 1, given by the court, is erroneous, in this: that it holds the appellant responsible for the killing, if said killing could have been prevented by defendant's agents or employees. Appellant would have been responsible if the killing could have been averted by reasonable diligence or care, but the instruction complained of simply says, in effect, that appellant is responsible if the killing could have been prevented by defendant. We are further of the opinion that the evidence introduced is not sufficient to sustain the verdict of \$140, if sufficient to sustain a verdict for any sum. Wherefore the judgment is reversed, and cause remanded for a new trial upon principles consistent herewith.

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JONES

v.

OREGON SHORT-LINE R. CO.

(Supreme Court of Idaho, Jan. 25, 1899.)

Case at Bar.—Evidence in this case examined, and *held* not to support judgment. *Kelly v. Railroad Co.* (Idaho) 38 Pac. 404, distinguished.

Injuries to Stock — Negligence—Absence of Proof.*—Railroad company *held* not liable for injury to animals, where there is an entire absence of proof of negligence on the part of the railroad company.

(Syllabus by the Court.)

APPEAL by defendant from Lincoln county district court.
Reversed.

P. L. Williams and *Joseph H. Blair*, for appellant.

Guy C. Barnum and *Hawley & Puckett*, for respondent.

HUSTON, C. J. This action was brought in justice's court to recover the value of certain animals alleged to have been killed by the defendant by running an engine and cars over and against the same. Plaintiff recovered judgment in the justice's court, and defendant appealed to the district court, where the case was tried upon the following agreed statement of facts; "It is stipulated and agreed by and between the plaintiff and defendant that the plaintiff, if personally present and sworn in court, would testify as follows, to wit: That during the latter part of April and in the early part of May, 1897, he was the owner of one steer and one bull, the same as described in his complaint herein; that he turned them (with other stock) out to run at large upon open, unfenced government land in

*See *Davis v. Florida Cent. & P. R. Co.* (S. Car., 1896), 5 Am. & Eng. R. Cas., N. S., 324, and *note*, 326 *et seq.*

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Lincoln county, Idaho, in April, 1897; that for several weeks he did not see the same, nor the herd with which said steer and bull were running at large; that some time about the middle of June, or perhaps a little thereafter, he missed said steer and bull, and made a search for them; that, upon such search made, he was unable to find them; that thereupon he went to Shoshone, and examined the record kept by the agent of the defendant, pursuant to section 2681 of the Revised Statutes of Idaho, showing the brands, marks, color, and age of stock killed by the railroad company, and there found the description of his steer and bull as having been killed by the railroad company upon its track by its locomotive on or about May 10 and June 14, 1897, at or near milepost 340. And further than this he has no knowledge of any of the facts connected with the killing, and he has no other or further evidence to offer, except that he knows that the country at and around said milepost is level country; that the railroad is not fenced there; that it is government land, lying along and abutting the defendant's right of way and railroad track for a long distance both ways from said milepost 340; that he does not know whether his stock was killed in the daytime or in the nighttime; that he does not know whether it was hit by a freight or passenger train; he does not know which way the train which hit the same was going; he has no knowledge of what care or want of care was used or exercised to prevent hitting the same, and does not know but the greatest of care was used; he knows nothing in relation to the killing except what the said record book showed to him. The value of the steer was \$20, and the bull \$25; both \$45. And he has no other evidence to offer." Respondent relies upon the case of *Kelly v. Railroad Co.*, 38 Pac. 404, decided by this court. In the *Kelly Case*, the plaintiff identified the animal killed, the time when it was killed, and proved that at the time, which was in the nighttime, there was snow upon the track; that the animal killed was of a black color; that the track at the place of killing was straight for a mile or more; that there were

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tracks between the rails for some distance to where the animal was knocked off the track,—quite a different state of facts from that presented by the record in this case. We do not think the facts shown in the agreed statement of facts in this case are sufficient to warrant the judgment. Respondent cites and relies upon section 2680, Rev. St. Idaho. This section was declared to be unconstitutional by the supreme court of the territory of Idaho in *Cateril v. Railway Co.*, 2 Idaho, 540, 21 Pac. 416, and *Railway Co. v. Holt* (Idaho) 40 Pac. 56. Judgment of the district court is reversed, with costs to appellant.

QUARLES, J., concurs. SULLIVAN, J., did not sit at the hearing of this case, on account of sickness.

KEILBACH

v.

CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of North Dakota, April 4, 1899.*)

Injury to Stock—Presumption of Negligence—Rebuttal.*—The statutory imputation of negligence arising from the fact that stock is killed by a train is overcome by uncontroverted testimony to the effect that there was no negligence in the equipment or management of the train, and it could not be stopped in time to avoid the accident after the animal in question was seen upon the track.

Trespassing Animals—Lookouts—Due Care.—It is not the engineer's duty to keep a lookout for trespassing animals; and the use of reasonable care to prevent injury after they are discovered upon the track is all that the law requires.

APPEAL by defendant from Hutchinson county circuit court. *Reversed.*

J. L. Hannett, for appellant.

W. J. Hooper, for respondent.

*See notes at end of case.

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FULLER, J. To recover the value of a calf killed by a passing freight train, this action was commenced and prosecuted to a judgment in favor of plaintiff, from which the defendant appeals. Case Stated.

Upon the theory that the statutory imputation of negligence arising from the fact that the calf was killed by the train had been clearly overcome by uncontroverted testimony, a motion was interposed, when both sides had rested, for the direction of a verdict in favor of appellant, and its assignment of error relating to the denial of such motion presents the only essentially important point, and requires a careful examination of the evidence. The engineer testified, in effect, that on account of a left-hand curve 80 rods in length, and his position on the right-hand side of the cab (being his proper post while on duty), he was unable to see the calf approaching the track at a greater distance than 30 rods; but it was observed on the right of way when 60 rods distance by his fireman, who was stationed on the opposite side of the cab, whereupon he shut off his engine, set the brake on the tank, and whistled for brakes, thereby reducing the rate of speed from 30 to 18 miles an hour before the calf was struck; and that, at the rate he was running when 60 rods from the calf, it would have been absolutely impossible to stop the train and avoid the accident. Respondent, in his own behalf, testified that the train was between 200 and 300 yards away when the calf went upon the track, while all of appellant's witnesses estimate the distance at 30 rods, and the fact that it would require about twice that space within which to stop the train, by the use of every approved means and appliance, stands proved by evidence that repels every contrary inference. If all that skillful operators could do in the exercise of reasonable care in the management of a properly equipped train, running at an authorized rate of speed, could not have averted the accident, it cannot be said that the loss was the result of appellant's negligence. *Hebron v. Railway Co.*, 4 S. D. 538, 57 N. W. 494. It is not the engineer's duty to

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buttal.

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keep a lookout for trespassing animals, and the use of reasonable care to prevent injury after they are discovered upon the track is all that the law of this state requires. *Harrison v. Railway Co.*, 6 S. D. 100, 60 N. W. 405. Such being the law, a motion to direct a verdict upon the undisputed facts above mentioned ought to prevail. The judgment appealed from is reversed, and the case remanded for a new trial.

HANEY, J., dissenting.

NOTES.

Presumption of Negligence Arising from Mere Proof of Injury to Stock.—See *Davis v. Florida Cent. & P. R. Co.*, 5 Am. & Eng. R. Cas., N. S., 324.

Stock on Track—Care Due from Railroad Companies—Lookouts.—See *Missouri, K. & T. Ry. Co. v. Ward*, 11 Am. & Eng. R. Cas., N. S., 328, and *note*, p. 331 *et seq.*

CANTRELL

v.

KANSAS CITY, M. & B. R. Co.

(*Supreme Court of Mississippi, Jan. 30, 1899.*)

Injury to Stock—Negligence—Presumption—Rebuttal.*—The presumption of negligence on the part of trainmen arising from injury to stock by the train is rebutted by evidence of the engineer and fireman to the effect that their failure to see the animals in time was due to the fact that the light in front of the engine was "killed" by the glare of the light from the firebox, which was open at the time to receive fuel.

APPEAL by plaintiff from Monroe county circuit court.
Affirmed.

Walker & Tubb, for appellant.

J. W. Buchanan, for appellee.

*See note at end of case.

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TERRAL, J. The appellant predicated his right of recovery against the railroad company, for the killing of two of his horses, and for injury to another one, upon the presumption of negligence arising from such injury by the running of the train of the defendant company. The company sought to defeat the action by the evidence of its engineer and fireman, who testified that they did not see the plaintiff's horses until the train was about to strike them, and that the killing of them was unavoidable. They gave as an excuse for not seeing the horses that the fireman had opened the door of the fire box, and was throwing in fuel, and, it being in the nighttime, that the glare of the light from the firebox "killed the light" in front of the engine, so that they were unseen until the engine was about to strike them. The court gave a peremptory instruction in favor of the appellee. We think the instruction was authorized by the decision of this court in the case of *Railroad Co. v. Deaton*, 9 South. 828.

Affirmed.

NOTE.

Killing Stock—Rebutting Presumption of Negligence.—The rule is well settled that where under the circumstances, notwithstanding the exercise of ordinary and reasonable care, the killing or injury of animals upon the track was unavoidable, the company is not liable. *Savannah, F. & W. R. Co. v. Geiger*, 21 Fla. 669, 29 Am. & Eng. R. Cas. 294; *Little Rock & Ft. S. R. Co. v. Jones*, 41 Ark. 157, 19 Am. & Eng. R. Cas. 443; *East Tennessee, V. & G. R. Co. v. Bayliss*, 74 Ala. 150, 19 Am. & Eng. R. Cas. 480; *note*, 19 Am. & Eng. R. Cas. 497; *Chicago, St. L. & N. O. R. Co. v. Packwood*, 59 Miss. 280, 7 Am. & Eng. R. Cas. 584; *Alabama G. S. R. Co. v. McAlpine*, 75 Ala. 113, 22 Am. & Eng. R. Cas. 602; *Alabama G. S. R. Co. v. Smith*, 85 Ala. 208, 35 Am. & Eng. R. Cas. 150; *note*, 42 Am. & Eng. R. Cas. 587.

The presumption of negligence on the part of a railroad arising from proof that stock were killed is sufficiently rebutted by evidence showing that the train and its appliances were in perfect condition; that the engineer was keeping a look-out; that as soon as the stock were seen the air-brakes were applied, the cattle-alarm was sounded, and everything possible was done to prevent the killing; but that by reason of the fog and the rails being wet it was impossible to stop

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the train in the distance that the cattle could be seen in time to avoid a collision. *Georgia M. & G. R. Co. v. Harris*, 83 Ga. 393, 9 S. E. Rep. 786.

Where there was no conflict in the evidence, and it showed that a railroad train killed a mule; that the night was a clear, starlight night, but that at the place where the casualty occurred the track was enveloped by a smoke or fog, so that the engineer and fireman, who were on the look-out, were unable in consequence thereof to discover the mule on the track until they were within fifty or sixty yards of it, when it was impossible to have stopped the train so as to avoid killing the mule; and that the whistle was blown, the presumption was rebutted, and a verdict finding damages against the company on account of the killing of the mule was contrary to the evidence and without evidence to support it. *Georgia R. & B. Co. v. Wilhoit*, 78 Ga. 714, 3 S. E. Rep. 698.

A company sufficiently rebuts a presumption of negligence raised by the Kentucky statute making the killing of stock *prima facie* evidence of negligence, when it shows that the stock were killed early in the morning when very foggy, near a curve in the road, and where from the speed of the train and the facts in the case it was plain that the killing could not have been avoided after the stock could have been seen. *Grundy v. Louisville & N. R. Co.* (Ky.) 2 S. W. Rep. 899.

LITTLE ROCK & FT. S. RY. CO.

v.

WILSON.

(*Supreme Court of Arkansas, April 22, 1899.*)

Injured Mare Found near Track—Presumption of Negligence.*—
It appeared that plaintiff heard an engine blowing the stock alarm twice in quick succession, and went down immediately where defendant's engine was blowing such an alarm, and found his mare standing near the track with fresh cuts in her fore legs; and that after the injury the mare was so much afraid of trains that she had to be traded off. *Held*, that, in the absence of evidence to the contrary the proper presumption was that the mare was injured by the train through the company's negligence.

*See note, 11 Am. & Eng. R. Cas., N. S., 851 *et seq.*

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APPEAL by defendant from Conway county circuit court.
Affirmed.

This suit is for damages in the sum of \$25 for injury to plaintiff's mare through the alleged negligence of the company. The proof shows that on August 17, 1896, plaintiff heard an engine blowing the stock alarm twice right close together, and went down immediately where the engine was blowing the stock alarm, and found his mare standing right at the edge of the right of way, not over three feet either way, on or off the right of way. She had two cuts on the inside of her hind legs. The cuts were about three inches long. He thought they extended to the bone. The cuts were right in the middle of the inside of the leg about eight or ten inches from the ground. The cuts extended up and down the inside of the leg, and not crossways. The cut was about as long as your finger. There was no other injury that plaintiff could find. She was his wife's buggy mare. After the injury, she was very much afraid of trains, and plaintiff had to trade her off on that account. The plaintiff did not know whether the train struck her or not. The mare was not lying down, but standing up, when plaintiff found her. The mare was not breachy. Plaintiff testified that he was damaged, by reason of the loss of the use of the mare on account of the injury, \$25. The above was the testimony. The jury returned a verdict in favor of plaintiff for \$15. Judgment was entered accordingly, and the company appeals.

Dodge & Johnson, for appellant.

Chas. C. Reid, for appellee.

WOOD, J. (after stating the facts). There was evidence to justify the verdict. While the proximity of the mare to the railway track and the nature and appearance of the injury would not, alone, furnish the basis for an inference that the injury was produced by the train, yet, when these are considered in connection with the blowing of the stock alarm, and the finding of the animal immediately thereafter at the

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place where the stock alarm was given, close to the right of way, injured as described, also in connection with the fact that after the injury the mare was very much afraid of trains, the most reasonable conclusion, we think, from all the circumstances, is that the train produced the injury. *Railway Co. v. Sageley*, 56 Ark. 549, 20 S. W. 413. The sounding of the stock alarm twice tends to show that some animal was in danger, and this was the only animal found injured there. While the plaintiff did not state that his mare was not afraid of trains before the injury, his language plainly implies that she was not. He says, after the injury she was very much afraid of trains, and he had to trade her off on that account. Taking all the evidence, there was a *prima facie* case of injury by the railway company, and, in the absence of proof to the contrary, it will be presumed that it was caused through the company's negligence. Affirmed.

BUNN, C. J., and BATTLE, J., dissenting.

ST. LOUIS, I. M. & S. RY. CO.

v.

BRAGG.

(*Supreme Court of Arkansas, March 11, 1899.*)

Injuries to Stock—Presumption of Negligence.—If plaintiff's mule was run into a culvert by a train on defendant's road and injured by the fall, the burden was on defendant to prove by a preponderance of the evidence that it used ordinary care to prevent the injury.

Same—Same—Sufficiency of Evidence.—But the presumption of negligence on the part of defendant was overcome by evidence showing that defendants' engineer was not guilty of negligence in

*See *Hardison v. Atlantic & N. C. R. Co.* (N. Car.), 11 Am. & Eng. R. Cas., N. S., 848 and note, 849; *Central of Ga. Ry. Co. v. Wood* (Ga.), *Ib.* 850 and notes, 851 *et seq.*

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not stopping or slacking the speed of the train, when he had reason to believe the animal would leave the track, and when he did not foresee, as a probable consequence of not stopping that the mule would attempt to pass over the culvert or be injured.

APPEAL by defendant from Ouachita county circuit court.
Reversed.

Dodge & Johnson, for appellant.

Smead & Powell, for appellee.

HUGHES, J. This is an appeal from a judgment for damages for the value of a mule alleged to have been killed through the negligent operation of appellant's train. The facts, briefly stated, are about as follows:

Case Stated.

"Plaintiff's mule and another animal were grazing, one on the side of defendant's track and one on the track, when a train was approaching. When within from 200 to 400 yards of the animals, the whistle was sounded, and the engineer immediately commenced to reduce the speed of his train. Plaintiff's mule started down the track, and ran into a culvert or trestle. The other left the track, and the train came to a full stop about the time the animal jumped into the culvert. Seeing that the animal was fastened in the trestle, the engineer pulled up his train until within from 10 to 50 steps of the trestle, and stopped. He and the crew alighted from the train, went to where the animal was, and pulled her out of the trestle. They found that the mule had broken one hind leg and one fore leg when she jumped into the trestle. In lifting her out of the trestle they did not injure her, but did it as best they could. The engine did not strike the animal, and was never nearer to it than two telegraph poles—some 200 yards—until after it pulled up and stopped, a short distance from the trestle."

This case is ruled by the case of *Railroad Co. v. Newman*, 36 Ark. 607. In that case this court said: "There was no proof of any hindrance or impediment in the way of the cow's getting off the track, or of any facts or circumstances from which the persons in charge of the train might have foreseen,

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as a probable consequence of not sooner stopping the train, an injury to her, or that she would, in her fright, attempt to pass over the culvert, and not go off the track, as the other cattle had done. For anything appearing to the contrary, egress from the track at the culvert was as possible and safe as where the others left it. Though the injury might not have happened if the train had been sooner stopped, yet if it was not to have been foreseen or anticipated by the person in charge of it, as a natural or probable consequence of not stopping sooner, that the cows would attempt to pass over the culvert, or be injured, and which they, as persons of ordinary care and prudence, should have guarded against, negligence cannot be imputed to them or the defendant. 'Culpable negligence is the omission to do something which a reasonable, prudent, and honest man would do, or the doing something which such a man would not do, under all the circumstances surrounding each particular case.' He who seeks a recovery for an injury caused by the alleged negligence of the defendant must not only prove that he has suffered loss by the defendant's act or omission, but also that the act or omission was a violation of a duty required of him. We do not think the evidence sustained the finding of negligence."

We are of the opinion that there was no error in instructing the jury that, if the plaintiff's mule was run into a trestle, by a train on defendant's road, and injured, and died from having been so injured, the law presumed negligence on the part of the defendant, and the burden of proving proper care devolved on it; and that if defendant failed to show, by a preponderance of the evidence, that it used ordinary prudence to prevent the injury, they should find for the plaintiff. *Railroad Co. v. Payne*, 33 Ark. 816, construing first and eighth sections of act of February 3, 1875, for recovery of damages for injury by railroads.

The engineer was not guilty of negligence in not stopping or slackening the speed of his train, when he had reason to

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believe that the mule would leave the track before reaching the culvert, and when it was not to be foreseen or anticipated by him, as a natural and probable consequence of not stopping, that the mule would attempt to pass over the culvert or be injured. Railroad Company v. Newman, 36 Ark. 607; Railroad Co. v. Trotter, 37 Ark. 593. We think there is no evidence of negligence on the part of the appellant, and that the presumption of negligence arising from the injury has been overcome. Reversed, and remanded for a new trial.

Same—Same—
Sufficiency of
Evidence.

McMILLIN

v.

SOUTHERN RY. CO.

(Supreme Court of Mississippi, Feb. 28, 1898.)

Stock Killing—Conflicting Evidence—Negligence—Presumption.*
—Where the evidence as to whether stock was killed by defendant's train is conflicting and it does not affirmatively show, if the animal was so killed, that the railroad was free from negligence, a peremptory charge for defendant should not be given.

APPEAL by plaintiff from Clay county circuit court.
Reversed.

J. J. McClellan, for appellant.

S. M. Roane, for appellee.

WOODS, C. J. The evidence offered by the appellant tended to show negligence on the part of the railway company's engineer in handling his locomotive and train at the time the injury to the animal occurred. This evidence, summarily stated, is this: A number of horses, including

*As to Presumption of Negligence Arising from the Killing of Stock by a Railroad Train, see Central of Georgia Ry. Co. v. Wood, 11 Am. & Eng. R. Cas., N. S., 850, and extensive note, 851 *et seq.*

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the mare injured, were near the track of railway, on a strip of ground between the track and a fence running parallel therewith for a considerable distance, but finally crossing the track at a cattle guard. All the horses ran down the track near the train, the engine all the time accelerating its speed, and all except the mare outran the engine, and safely crossed the track in front of the locomotive; but she, in attempting to follow the other animals, jumped on the track, and, before she cleared it, was struck and injured, from which injury she died. The evidence introduced by the railway company showed that on the day of the alleged injury only two trains were started out from Columbus in the direction of West Point, near which place the injury is alleged to have occurred, and that neither of these trains could have reached the scene of occurrence until two hours or more after the time when the accident happened, as stated by the witnesses for the plaintiff. One of these trains was sent out of Columbus, on the day in question, at 3:30 p. m., and could not have reached the scene of the injury within an hour thereafter, and the other train was sent out of Columbus after night. The contention of the railway was that it was impossible for either train to have committed the injury, since it was impossible either could have been where the injury took place at the time it was said to have occurred. It was shown by the engineer in charge of the locomotive sent out from Columbus at 3:30 p. m. that he had no accident on that day whereby any stock was injured at all. There were two questions presented, *viz.*: Did the injury occur at all, as detailed by the witnesses of plaintiff? and was the engineer in charge of the locomotive negligent in handling his train, under the circumstances disclosed in the plaintiff's evidence? That there is evidence showing that the injury did occur is manifest, and that there is conflict as to this fact between the evidence of the plaintiff and that of the defendant is also manifest. This controverted question of fact should have carried the case to the jury, unless upon examination, it can be affirmed that the evidence shows the

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company's servants in charge of the train which is said by plaintiff's witnesses to have inflicted the injury were free from negligence. It is true the witnesses for plaintiff say the mare jumped on the track in front of the engine, and it may be assumed that the engineer could not have done anything to avoid the accident. But, granting this, it may still be true that if the engineer, paying regard to the known habits and instincts of animals to try to escape from the *cul-de-sac* in which these were found by him, had slackened, instead of increasing, the speed of the train, he might, and, perhaps, would, have avoided the injury. It was not for the court to settle this question. We are of opinion that the peremptory charge should not have been given. Reversed.

PATRIE

v.

OREGON SHORT-LINE R. Co.

(Supreme Court of Idaho, Jan. 27, 1899.)

Duty to Fence Track.—Under the provisions of section 2679, Rev. St., a railroad corporation must make and maintain a good and sufficient fence on both sides of its track, where the line passes through private land.

Injuries to Stock—Liability Fixed by Place of Killing—Presumptions.*—If it fails to do so, it is liable for stock killed at the point where it is required to fence its track.

Same—Same.—Under the provisions of section 1240, Rev. St., and the act amendatory thereof (Sess. Laws 1891, p. 48), where a stallion that escapes from its owner without his fault, and is killed by a railroad at a point where the company is required by law to fence its track, and has not done so, it is liable to the owner for the value of the stallion.

(Syllabus by the Court.)

APPEAL by defendant from Fremont county [district court. Modified.

*See notes at end of case.

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P. L. Williams and Joseph H. Blair, for appellant.

E. E. Chalmers and S. C. Winters, for respondent.

SULLIVAN, J. This is an action to recover the value of five horses alleged to have been carelessly and negligently killed by the defendant railroad company. In addition to the allegation of the careless and negligent killing of said stock, the complaint alleges that the defendant had neglected and refused to make and maintain a fence along its right of way at the points where said horses were killed, as by law required, and that said horses casually, and without the fault of plaintiff, strayed upon the grounds and track of defendant, and were killed by the engine and cars of the defendant. The cause was tried by the court, with a jury, and a general verdict rendered in favor of the plaintiff for the value of said horses, to wit, \$365. The jury was required to answer certain particular questions of fact submitted to them by the court, and under one of said questions the jury found that the engineers and persons in control of the trains by which said animals were killed were using reasonable and ordinary care in running said trains. This, it is conceded, disposed of the issue of the killing of said horses by the careless and negligent running of said trains. A motion for a new trial was made, and, before it was heard, the plaintiff, who is respondent here, made an offer in writing to remit from the judgment the value of the horse and mare killed near defendant's milepost No. 204½, thus reducing the judgment for damages to \$320. The motion for a new trial was denied, and the appeal is from the order overruling the motion for a new trial, and from the judgment.

It appears that said horses were killed on three several days, and between mileposts Nos. 203 and 204½, on what is known as the "Utah & Northern Railway," north of Market Lake station, which station is situated on section 32, as per government survey. It also appears that the track of the defendant extends nearly due north from said station, and runs through sections 29, 20, and 17, as per government

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survey, and about 200 yards east of a line passing north and south through the center of said sections. Said milepost No. 203 is situated on the easterly side of said track, and near the north line or boundary of said section 29. Said milepost No. 204 $\frac{1}{2}$ stands near the northern boundary of said section 17, and at the east side of said track. The land on the east side of said track, and north from said Market Lake station, is open, uninclosed land, on which horses and other stock are free to range. The greater portions of said sections 29, 20, and 17 are owned by private parties, and those parts of said sections situated on the west side of said railroad track are inclosed with a fence. The defendant corporation has fenced its line of road and track on the west side from the south boundary of said section 29 to near the north boundary of said section 17, but has not fenced its track on the east side, where the same runs through said sections 29, 20, and 17. A Mrs. Neeb owns the south half of said section 17, and has that lying on the west side of said track fenced; Patrie, the plaintiff, owns the north half of said section 20, and has the part thereof lying on the west side of said track fenced; and other persons own the south half of said section 20, and have the part thereof lying on the west side of said track fenced. The horse killed on September 8, 1897, was killed near the south side of the north half of said section 20, and a little south of milepost No. 203 $\frac{1}{2}$; and the stallion killed November 3, 1897, was killed on the north half of said section 20, a little north of said milepost No. 203 $\frac{1}{2}$.

The controlling contention is whether, under the facts, the defendant is liable in damages because of its failure to fence its track at the points where said horses were killed. The provisions of the statute controlling this matter are found in section 2679, Rev. St., and are as follows: "Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track or property, wherever the line of their road at any time passes through or along, or abuts upon or is contiguous to private property or enclosed land in the actual

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possession of another. * * * " Counsel for appellant contend that the legislative intent in the enactment of said section 2679 was to require railroad corporations only to fence their roads whenever, on either side, the same are contiguous to private property which is enclosed, or to land which is not actually owned by the one who is using it, or is in the actual possession thereof, and has it inclosed. It appears from the record that the defendant's track and right of way run through said sections 29, 20, and 17, which sections are owned by private persons; that the greater portions of said sections lying on the west side of said track are fenced, and in the possession of the owners. It also appears that the parts of said sections lying east of said track are not fenced, and stock range thereon without let or hindrance. It appears that the horses, for the value of which plaintiff obtained judgment, excluding the mare and horse which were eliminated from this case as above stated, were ranging, if not on the owner's land east of the track, on the uninclosed land of other private parties; that said stock casually strayed on said right of way by reason of said track not being fenced, and was killed. If the provisions of said section require the defendant corporation to fence its track wherever and whenever it runs through land owned by private persons, the judgment must be sustained. The intent of the legislature in enacting said section must be arrived at from a literal construction, if such construction would not result in an absurdity or inconsistency. The statute declares that a railroad corporation must make and maintain a good and sufficient fence, on either or both sides of their track or property, wherever the line of road passes through or along, or abuts upon or is contiguous to, private property or inclosed land in the actual possession of another. The record shows that said track passes through private property, and we think the statute, as applied to the facts of this case, is too clear to require any construction. To hold that it does not require the defendant corporation to fence its track, except when and where a private person may fence his land, would

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be injecting language into said section that is not found there, and could not be put there by fair implication and reasonable construction. We think the record fairly shows that if the said track had been fenced where it passes through said sections 29, 20, and 17, said horses would not have been killed. It may be said that building a fence on the east side of said track where it passes through said private property would be no protection to stock; that stock could pass around the ends of such fence and get upon the track. The fencing of a railroad track, when required by statute, where it passes through private property, as in this case, implies the construction of sufficient cattle guards at the ends of such fences. 3 Elliott, R. R. § 1198, and notes. We think the record shows that said horses would not have been killed, where and when they were killed, if the defendant had maintained such a fence as the law requires.

It is contended by counsel for appellant that there is no proof that said horses came upon the track at a point where the company was required to fence. It is admitted that they were killed on the track at points where it was the duty to fence, and the presumption is, in the absence of proof, that the animals came upon the track at such point. 3 Elliott, R. R. § 1214.

Injuries to
Stock—Liability
Fixed by Place
of Killing—Pre-
sumptions.

It is contended that the stallion that was killed was running at large in violation of law, and for that reason the plaintiff is not entitled to recover his value. The jury found that said stallion was not running at large at the time he was killed, but had escaped from an inclosed pasture in which he had been kept. We think the finding of the jury is conclusive of the question of the stallion running at large.

Same—Same.

The judgment of the court below must be sustained, with instructions to modify the judgment, if it has not already been done, by reducing said judgment to the sum of \$320, for damages, in accordance with plaintiff's written offer above

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referred to. Costs of this appeal are awarded to respondent.

HUSTON. C. J., and QUARLES, J., concur.

NOTES.

Injuries to Stock—Failure to Fence—Presumption as to Place of Entry.—The place of killing or injury of an animal will be presumed to be the place of entrance upon the track, in the absence of evidence to the contrary. *Pearson v. Chicago, B. & K. C. R. Co.*, 33 Mo. App. 543.

In the absence of direct proof upon the subject, the presumption is that an animal came upon the railway track at a point where the railway company was required to fence but failed to do so, if the evidence shows that the animal was injured at such a point. *Duke v. Kansas City, Ft. S. & M. R. Co.*, 38 Mo. App. 105.

Prima Facie Case.—In the absence of proof to the contrary, the law presumes that an animal came on the railroad track where it was killed, and proof that the cow was killed at a place where the railroad company was required by law to fence establishes a *prima facie* case against such company. *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 332.

Liability Fixed by Place of Entry.—See *Eaton v. McNeill*, 8 Am. & Eng. R. Cas., N. S., 680, and *note* 684.

KANSAS CITY, FT. S. & M. RY. CO.

v.

KING.

(*Supreme Court of Arkansas, May 6, 1899.*)

Injury to Stock—Negligence—Sufficiency of Evidence.*—Where the evidence of the engineer of a train to the effect that he was keeping a lookout, and did everything possible to avoid injuring plaintiff's horse after seeing it upon the track is reasonable, and neither contradicted nor impeached, the statutory presumption of negligence arising from the fact that the animal was killed by the train is removed.

APPEAL by defendant from Lawrence county circuit court.
Reversed.

*See notes at end of case.

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www.libtool.com.cn*W. J. Orr*, for appellant.*R. A. King*, *pro se*.

BUNN, C. J. This is a suit for damages for the negligent killing of a horse by one of the trains of the defendant company. Judgment for plaintiff in the sum of \$65, and defendant appealed. This action was commenced before a justice of the peace, based on an account for said damages. The defendant was duly summoned, but failed to appear on the day set for trial; and, after waiting three hours, the justice of the peace took the testimony, and found for the plaintiff in the amount claimed, to wit, the sum of \$65, and rendered judgment accordingly. Thereafter, in due time and in due form, the defendant filed its affidavit, and took an appeal to the circuit court, where also judgment was rendered for plaintiff in the said amount of \$65, and the defendant, saving all proper exceptions, appealed to this court. After verdict, defendant filed its motion in arrest of judgment as follows: "The defendant moves the court to arrest the judgment herein for the reason that the statement filed with the justice and relied on by the plaintiff does not state a cause of action, or facts sufficient to constitute a cause of action."

The contention of the defendant, as more particularly stated in its brief and argument, is that the venue was not laid in the account filed, and there was no proof of the county in which the killing is alleged to have occurred, and no motion made to amend or amendment made; therefore there was nothing upon which to find a judgment. Without disposing of this question, which will not probably arise in a new trial, we proceed with the further statement of the case. The motion in arrest was overruled, and defendant excepted. The defendant filed motion for new trial on four several grounds,—the first being substantially the same as for the motion in arrest; the second, because the court read to the jury as an instruction section 6207, Sand. & H. Dig. (known as the "Lookout Statute"); the third, because the verdict is not supported by sufficient evidence; and the fourth, because the verdict is contrary to the evidence.

Notes

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The question of the sufficiency of the evidence to sustain the verdict is the only one we need to discuss or consider. There is no contention that the horse was not killed by the engine at the time and place alleged in the complaint. The plaintiff's uncontradicted evidence shows his ownership of the animal, and the value thereof, and the testimony of the engineer is the only testimony as to the circumstances attending the killing of the animal. He stated, in brief, that it was a cloudy, if not a dark, night, and that he could see the animal only about the distance of 100 yards ahead; that his headlight was an oil light; that the animal was standing on the track when he first saw it; that he was keeping a look-out, and at once he gave the stock alarm, which consisted of a succession of short whistles, and put on the brakes and the air, and did all he could to stop the train, which consisted of 23 or 24 heavily loaded freight cars besides the caboose; that he was running at a speed of 25 miles an hour, and could not have stopped his train within less than 400 yards; that the horse did not run more than 100 yards after he saw him; that he did not succeed in slowing up much, but he knew of nothing else he could have done to stop the train than he did do; and that his stock alarm aforesaid frightened the animal.

We think the statement of the engineer is altogether reasonable, and not contradictory, and fairly removes the statutory presumption of negligence when the animal is injured by the running of a train, and that therefore there is not sufficient evidence to sustain the verdict, since the evidence of the engineer is unimpeached, and cannot be arbitrarily discarded. Reversed and remanded.

NOTES.

Presumption of Negligence Arising from Mere Proof of Injury to Stock.—See *Davis v. Florida Cent. & P. R. Co.*, 5 Am. & Eng. R. Cas., N. S., 324.

Employees as Witnesses—Credibility.—See *Houston, E. & W. T. Ry. Co. v. Runnels*, 12 Am. & Eng. R. Cas., N. S., 804 *et seq.*

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DENVER & R. G. R. Co.

v.

THOMPSON.

(*Court of Appeals of Colorado, Sept. 12, 1898.*)

Injuries to Stock—Negligence—Pleading.*—Even where a statute throws the burden of proof upon the railroad to show that the death of stock killed upon its track was not due to its negligence, it is essential that plaintiff should plead negligence on the part of the company.

Same—Constitutionality of Statute.—The stock-killing act of 1893 of Colorado does not cure the defects of the various previous acts on such subject, and is itself unconstitutional.

APPEAL by defendant from Pueblo county district court.
Reversed.

Wolcott & Vaile and *Pattison, Waldron & Devine*, for appellant.

M. G. Saunders, for appellee.

BISSELL, J. This appeal comes from the district court of Pueblo county, and is based on a judgment entered on a demurrer to a complaint filed by Thompson, wherein he undertook to set up some 18 different causes of
Case Stated. action. Without attempting to state exactly the contents of the complaint, it suffices to say generally that each cause of action substantially alleged that the defendant was a railroad company, organized under the laws of this state, and that, on a date named, Carl Stanley was the owner of an animal of a definite schedule value according to the statute, which, without Stanley's fault, strayed on the tracks of the defendant, and, without his negligence, was run over and killed by a train operated by the defendant company, to his damage in a stated sum; that afterwards Stanley assigned the claim to the plaintiff, who made a demand for the schedule value of the animal; and that the defendant refused

*See note at end of case.

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to pay. This is the substance of each allegation. The animals were cows, steers, and heifers, and one or two horses, and for the value of the animals stated, together with the statutory interest allowed thereon, the plaintiff prayed judgment.

The principal question argued on the appeal by both sides is as to the constitutionality of the statute of 1893 (Sess. Laws 1893, p. 406, c. 137), which is an amendment to the acts of 1885 and 1891. There is a preliminary question suggested by the appellant, which, we think, is well raised, whereby it attacks the sufficiency of the complaint because of the failure of the pleader to allege the negligence of the railroad company. The pleader proceeded on the hypothesis that since the statute declared that the railroad company should be liable where the stock was killed by its negligence, and the burden of proof to show the absence of negligence should be on the defendant, he was thereby excused to allege negligence as part of his statement of a cause of action. We do not think this position well taken, because, if the statute be unconstitutional, in order to state a case at the common law, and permit him to recover on proper proof, it was and is undoubtedly essential to state that the stock was killed by the negligence of the defendant company, regardless of the provision that the burden of proof respecting the existence or nonexistence of this fact was put on the company. If, however, the statute is held unconstitutional, as it must be under the antecedent decisions of the supreme court and of this, the provision respecting the burden of proof would undoubtedly become inoperative.

We are wholly unable to see that the legislature has cured the difficulties which, we have decided, inhered in the acts of 1885 and 1891. These two statutes have been repeatedly before both courts for consideration, and they have concurred in their adjudications that the acts are unconstitutional in form and in principle, and cannot be upheld. *Railway Co. v. Outcalt*, 2

Injuries to Stock
—Negligence—
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Same—Constitutionality of
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Colo. App. 395, 31 Pac. 177; *Railway Co. v. Vaughn*, 3 Colo. App. 465, 34 Pac. 264; *Railway Co. v. Whitson*, 4 Colo. App. 426, 36 Pac. 159; *Wadsworth v. Railway Co.*, 18 Colo. 600, 33 Pac. 515; *Railway Co. v. Kerr*, 19 Colo. 273, 35 Pac. 47; *Sweetland v. Railroad Co.*, 22 Colo. 220, 43 Pac. 1006. Since this question of constitutionality may be finally determined by the supreme court, we deem it enough to state that, in our opinion, the defects of the various stock-killing acts of this state have not been cured by the act of 1893, and that the reasons on which the decisions respecting the unconstitutionality of the acts of 1885 and 1891 were rested are entirely applicable to the interpretation of the later act. The judgment entered on the demurrer will therefore be reversed, and the cause remanded. We deem it proper, however, to suggest to the lower court to save the plaintiff whatever rights he may have, if any, to permit him to amend his complaint so as to state a cause of action based on the negligence of the defendant company, if the facts warrant it and he be so advised. Reversed and remanded.

NOTE.

Injuries to Stock—Negligence—Pleading.—Negligence on the part of a railroad company is the basis of the right of the owner of live stock to recover, and negligence of the company or of its servants must be averred in the declaration and be proved. *Savannah, F. & W. R. Co. v. Geiger*, 29 Am. & Eng. R. Cas. 274, 21 Fla. 669, 58 Am. Rep. 697; *Stevenson v. New Orleans Pac. R. Co.*, 35 La. Ann. 498; *Orange, A. & M. R. Co. v. Miles*, 76 Va. 773; *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 Fla. 557, 11 So. Rep. 929; *Terre Haute, A. & St. L. R. Co. v. Augustus*, 21 Ill. 186; *Indianapolis, P. & C. R. Co. v. Williams*, 15 Ind. 486; *Indianapolis, P. & C. R. Co. v. Sparr*, 15 Ind. 440; *Terre Haute & R. R. Co. v. Smith*, 19 Ind. 42; *Toledo, W. & W. R. Co. v. Weaver*, 34 Ind. 293; *Baltimore, P. & C. R. Co. v. Anderson*, 58 Ind. 413; *West v. Hannibal & St. J. R. Co.*, 34 Mo. 177.

A complaint in such an action is demurrable unless it avers that the injury was negligent, or the result of negligence on the part of the defendant, its agents, or servants. *South & N. Ala. v. Hagood*, 53 Ala. 647.

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BRUNSWICK & W. R. Co.

BRUNSWICK & W. R. Co.

*v.*WEINKLE *et al.**(Supreme Court of Georgia, April 24, 1899.)*

Granting New Trial—Review.—Although a trial court may have granted a new trial upon a single ground embraced in the motion therefor, an examination of which here shows that the ruling therein complained of was not erroneous, still if it be the first grant of a new trial in the case, and the law and facts did not require the verdict, the judgment will not be reversed.

Injuries to Stock—Stipulation against Liability—Construction of Contract.—Even if it be competent and lawful for a railroad company to stipulate, in a contract between itself and another person for the construction of a side track for their mutual benefit, against liability for negligently killing or injuring live stock thereon, such a stipulation has no bearing upon a controversy arising from the killing by the company of stock elsewhere upon its line of road. (a) The stipulation of this character embraced in the contract now under review related exclusively to damaging stock on the side track, and the court erred in holding otherwise.

Same—Evidence—Declarations of Engineer.*—It was on the trial of an action against a railroad company for the killing of live stock erroneous to admit in evidence against the company sayings of the engineer not constituting a part of the *res gestæ* of the occurrence.

Same—Inference from Failure to Produce Employees as Witnesses—Instructions.*—It was also, on such a trial, erroneous to charge the jury as follows: "When an accident of this kind happens, the law makes it the duty of the railroad company to produce all of its employees who were engaged in running the train, because they are the people who were there, and ought to know how the accident happened; and it is incumbent upon them to produce before you all of the employees engaged in operating the train; and if they have employees who

*See notes at end of case.

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were engaged in the operation of the train causing and producing such an injury, and whom they do not produce upon the trial of the case, and which they could produce and introduce before the jury, or for whose absence they do not account,—do not explain why they have not such witnesses before the court,—the jury can take that as an inference that such absent witnesses, if they were present, testifying before the court and jury, would give testimony prejudicial to the defendant's defense; that is, you could take the absence of such witnesses, if there be such, as a circumstance that such witnesses, if they were here, would testify to something prejudicial to the defense of the defendant company."

(Syllabus by the Court.)

ERROR by both parties from Brunswick city court.
Judgment on main bill of exceptions affirmed; on cross bill reversed.

W. G. Brantley, Owens Johnson, and A. D. Gale, for plaintiffs in error.

Goodyear & Kay, for defendant in error.

COBB, J. Weinkle & Sons brought suit against the Brunswick & Western Railroad Company, alleging that the defendant had run and operated one of its trains in such a careless, negligent, and improper manner that four mules, the property of petitioners, had been killed, and two others had been wounded and bruised, and that petitioners had sustained damage therefrom in the sum of \$845. The defendant answered the petition, denying all the allegations of negligence therein contained, and pleaded in bar of the action that plaintiffs and defendant had entered into a contract for the construction of a side track for the mutual benefit of defendant and plaintiffs, and one of the stipulations in the contract was that in no event was the defendant to be held liable for damages of the character sued for. Upon the trial the jury returned a verdict in favor of the plaintiffs for \$500. The defendant filed a motion for a new trial which the court granted upon one ground, in effect overruling the motion on all of the other grounds. The case is here upon a bill of exceptions of the plaintiffs assigning error upon the judgment of the court granting

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a new trial, and upon a cross bill of exceptions of the defendant assigning error upon the court's refusal to grant a new trial on all of the grounds stated in the motion.

1, 2. As this is the first grant of a new trial, the main bill of exceptions must be affirmed unless it appears that the law and facts required the verdict which has been rendered in the case. Civ. Code, § 5585. This is true, notwithstanding the new trial was granted upon a single ground, and that involved a question of law only. *Johnson v. Railroad Co.*, 102 Ga. 577, 27 S. E. 681; *Railway Co. v. Higgins*, 102 Ga. 586, 27 S. E. 785. It may be now considered as settled that this court will not, under any circumstances, reverse a judgment granting a first new trial, whether the grant be general upon all the grounds of the motion or special upon one or more grounds only, or whether it be upon a ground which involved questions of evidence or upon a ground which involved purely questions of law, unless it is made to appear that no other verdict than the one rendered could possibly have been returned under the law and facts of the case. Unless the case can be brought within the exception just stated, it is useless for parties to bring before this court the judgment of a trial judge granting a first new trial. If, however, this had not been the first grant of a new trial, and we had been constrained to pass upon the question made by the judgment granting the new trial upon the ground upon which the judge below based his decision, we would be compelled to hold that the granting of a new trial upon this ground was erroneous. The defendant, to support its special plea, above referred to, offered in evidence a contract between the plaintiffs and itself, which provided for the construction of a side track for the mutual benefit of the contracting parties, and in which it was stipulated that: "As, by reason of this contract, the stock and other property [of the plaintiffs], both as a firm and as individuals, may be exposed to great liability to injury, and as a part of the con-

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sideration for the use of said side track, [the plaintiffs] will, and hereby [do], release and discharge said railway company from any and all liability for any damage done to any of the stock or other property of the [plaintiffs], or done to the stock or property of any of the members of said firm, by the running of the locomotives, or cars, or other machinery of said railway company during the existence of this contract, and also to hold said railway company harmless for any and all damage that may result to stock or other property of said persons as may be in the employ, use, control, or custody of [the plaintiffs], or to any stock that may be attracted to said side track by reason of the use of the same by [the plaintiffs]." This contract was rejected, and a new trial was granted solely upon the ground that the judge was of opinion that he had committed error in this ruling. We do not think the court erred in refusing to admit this contract in evidence. The foregoing extract contains all of the contract which relates in any way to the liability of the railroad company for damages on account of killing or injuring the live stock of the plaintiffs; and, construing this extract as a whole, it seems clear that the contract was not intended to release the railroad company from liability for the killing or injuring of the live stock of the plaintiffs at places other than the side track which was constructed under the terms of the contract. As the evidence was that the train which killed the plaintiffs' stock was not upon the side track which was constructed under this contract, but was upon another part of the defendant's line of road, the contract was irrelevant to the issue on trial, and was properly rejected. The contract being irrelevant for the reasons stated, there is no occasion to determine whether or not such a contract is invalid, as opposed to public policy, because intended to have the effect of releasing the defendant from the consequences of its own negligence.

3. One ground of the motion for a new trial was that the court erred in permitting a witness, when asked the question,

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“What, if anything, did the engineer say to you when you went out there?” to answer, “As I came up, the engineer sang out to me, ‘Hello, Cap; it looks like we have killed some of your mules,’ and I said, ‘They are not my mules,’ and he then turned to the fireman, and said, ‘We have sure played hell to-night,’ ”—the objection to this testimony being that the engineer was not clothed with authority to bind the company, and that the evidence was illegal and inadmissible, being no part of the *res gestæ*, as it appeared that the witness was at his house, some distance away, when the mules were killed, and that he walked from his house to the train before having the conversation above quoted. Unless the declarations of the engineer were made while he was engaged in the transaction of some business of the company with the person with whom he was talking within the scope of his authority, or were declarations accompanying an act done by him in discharge of some duty imposed upon him in his relation as a servant of the company, the evidence was inadmissible, and should have been rejected. It is not pretended that the statements made by the engineer were made in the course of any transaction with the witness in relation to the company’s business, and therefore such statements do not come within the reason of that rule which permits the declarations of an agent to be introduced against his principal when they are made *dum ferver opus*. Were the statements of the engineer a part of the *res gestæ* of the occurrence, so as to make them admissible for that reason? It does not distinctly appear in the record what was the lapse of time between the killing of the mules and the conversation between the engineer and the witness, but from what does appear it must have been such a lapse of time as that the declarations were not, in any true sense, contemporaneous with the act of killing the mules. The witness was not present at the time that the collision occurred, and it is to be inferred from what is stated in the motion for a new trial that when the witness arrived upon the scene such time had elapsed that the engineer was in a position

Same—Evidence
—Declarations of
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to fully realize the consequences resulting to the company from the killing of the mules, and that, therefore, the occurrence which was the subject of the conversation was in the past. This view is strengthened by the very language used by the engineer. It is the language, not of exclamation or surprise, but the language of narrative, with a full appreciation of the consequences growing out of a transaction which is passed and complete. The statements made by the engineer were not such declarations accompanying the act of injuring the plaintiff's property as to render them admissible as a part of the *res gestæ*. See, in this connection, *Sims v. Railroad Co.*, 28 Ga. 93; *Newsome v. Railroad Co.*, 66 Ga. 57; *Railroad Co. v. Varnedoe*, 81 Ga. 175, 7 S. E. 129; *Railroad Co. v. Liddell*, 85 Ga. 483, 11 S. E. 853; *Railroad Co. v. Skellie*, 86 Ga. 686, 12 S. E. 1017. In *Railroad Co. v. Smith*, 76 Ga. 634, the declarations of an agent were admitted on the ground that the agent in question was the "*alter ego*, or mouthpiece, of the corporation he represented, and acting within the scope of his authority," and that for that reason his principal was bound by his declarations. In *Krogg v. Railroad Co.*, 77 Ga. 202, the statements of the general manager, made at the scene of a wreck, that the wreck was caused by too much elevation on the curve of the track, and that he would remedy it, and have no more such accidents in the future, were admitted to show knowledge of the corporation of the improper construction and condition of the road before the accident, the general manager being the *alter ego* of the corporation; and upon the further ground that it was the duty of the general manager to investigate the cause of the disaster, and that anything said while in the discharge of this duty was a declaration *dum ferebat opus*, and a part of the *res gestæ* of that transaction,—that is, the investigation into the disaster. JUSTICE BLANDFORD, in the opinion, says: "We do not mean to say that the general rule is not as that contended for by the able counsel for plaintiff in error, to wit, that a railroad company is not bound by the admissions of an agent as to an occurrence

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after the same has taken place, but we think that that rule is subject to the qualifications already stated. If the agent be in the performance of a duty of the corporation, while thus performing that duty what he says as to any defect in the structure of the road is *res gesta* as to such defect, and his admissions are the admissions of the corporation."

4. The charge set forth in the fourth headnote was erroneous. The law does not make it the duty of a litigant to produce witnesses, and this applies to railroads as well as to natural persons. The law will sometimes allow inference unfavorable to a litigant to be drawn by the jury from the fact that witnesses who are accessible are not called and sworn. It is, however, no breach of duty on the part of a litigant to fail or refuse to produce witnesses to sustain a complaint or to prove a defense. If he fails or refuses to produce witnesses that are accessible, he must take the consequences resulting from the jury drawing an inference that such failure or refusal was caused by the fact that such witnesses would, if produced have testified to facts prejudicial to him. The Code declares that: "Where a party has evidence in his power and within his reach, by which he may repel a claim or charge against him, and omits to produce it, or, having more certain and satisfactory evidence in his power, relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim is well founded; but this presumption may be rebutted." Civ. Code, § 5163. But no presumption will ever arise prejudicial to the party failing to produce the witness, provided the jury are satisfied from the evidence before them that the party who had such witness accessible has nevertheless proven his claim or established his defense. The failure to call and have sworn witnesses who are accessible, and peculiarly within the power of a party, will authorize argument by counsel before a jury that, in case the jury be in doubt as to the truth of the transaction, they might infer that the absent witness, if in court, would have furnished evidence prejudicial to the party who has failed to produce

Same—Inference
from Failure to
Produce Employ-
ees as Witnesses
—Instructions.

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them. If a litigant sees proper to rest his case upon one witness, although many others may be accessible, he has a right to do so, and the law imposes upon him no duty to do otherwise. Therefore the law does not require a railroad company to produce all of its employees who were engaged in the running of a train, the operation of which caused damage to any one, when a suit growing out of such alleged damage is on trial. If the jury believes that the defense is established out of the mouths of the witnesses called, they should not find against the company solely on the ground that there were other witnesses to the transaction who were not produced. *Railroad Co. v. Gray*, 77 Ga. 440, 3 S. E. 158; *Anderson v. Publishing Co.*, 100 Ga. 454, 28 S. E. 216; *Railroad Co. v. Morrison*, 102 Ga. 319, 29 S. E. 104. Judgment on main bill of exceptions affirmed; on cross bill reversed. All the justices concurring.

NOTES.

Actions for Negligence—Res Gestæ—Declarations of Servants.—See *Coll v. Easton Transit Co.*, 11 Am. & Eng. R. Cas., N. S., 722, and *note*, p. 725.

When not Admissible.—In an action for negligence, statements made by a servant of the defendant in a conversation after the accident are no part of the *res gestæ*, and are inadmissible. *Chicago St. R. Co. v. Cook* (Ill., 1893), 33 N. E. Rep. 958; *Louisville & N. R. Co. v. Stewart*, 9 U. S. App. 564. *Sherman v. D., L. & W.* (N. Y.), 13 N. E. Rep. 616; *Cetrie v. C. & G. R.* (S. C.) 2 S. E. Rep. 837. See also *P., C. & St. L. R. v. Wright*, 5 Am. & Eng. R. Cas. 628; *Moore v. C., St. L. & N. O. R.*, 9 Am. & Eng. R. Cas. 40; *Dietrich v. B. & H. S. R.*, 11 Am. & Eng. R. Cas. 115; *Adams v. H. & St. J. R.*, 7 Am. & Eng. R. Cas. 414; *Patterson v. W., St. L. & P. R.*, 18 Am. & Eng. R. Cas. 130; *A. G. S. R. v. Hawk*, 18 Am. & Eng. R. Cas. 194; *McDermott v. H. & St. J. R.*, 2 Am. & Eng. R. Cas. 85; *U. P. R. v. Fray*, 29 Am. & Eng. R. Cas. 309, 316, *note*; *Devlin v. W., St. L. & P.*, 28 Am. & Eng. R. Cas. 524; see 27 Am. & Eng. R. Cas. 239.

Injuries to Stock—Presumptions from Failure to Produce Employees as Witnesses.—Where a railroad company is charged with

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the negligent killing of an animal upon the track, the absence at the trial of the agents or servants of the company who were on the train when the animal was killed, raises a presumption against the company. *Murray v. South Carolina R. Co.*, 10 Rich. (So. Car.) 227.

Employee Not Accounted for.—Where a company is sued for killing stock, if the engineer is introduced as a witness for the company, and the fireman is not accounted for, this will authorize the jury to believe that the fireman has been kept away because he knew something which might be against the interests of the company, but they are not compelled to so believe, and are authorized to believe the testimony of the engineer if they see proper; but where the fireman is in court such inference cannot be drawn because he is not sworn, as the plaintiff might have had him sworn if he had so chosen. *Davis v. Central R. Co.*, 75 Ga. 645.

Failure to Produce All Employees.—In an action for killing live stock there was but one witness for the plaintiff—the engineer, who testified that the company had used all ordinary, reasonable care and diligence. A verdict was found for the plaintiff, and it was objected that the verdict was against the evidence, as there was nothing to show negligence. The fireman was not produced as a witness, nor was his absence accounted for. *Held*, that it was the duty of the company to produce all the witnesses present to show that it was without fault, and that the absence of the engineer was a circumstance from which the jury might infer that had he been produced his evidence would have shown negligence on the part of the company. *Gainesville, J. & S. R. Co. v. Wall*, 75 Ga. 282.

Failure to Call Employees.—The failure of a company to call the engineer as a witness in a suit against it for killing stock justifies the jury in assuming that if he had been called his evidence would have supported plaintiff's. *Gulf, C. & S. F. R. Co. v. Ellis*, 54 Fed. Rep. 481, 10 U. S. App. 640, 4 C. C. A. 454.

But it has been held, however, that the failure to examine witnesses who are employees will not justify the application of the presumption of negligence, unless they were present or it be made evident that they had knowledge which the employer desired to conceal. *Peetz v. St. Charles St. R. Co.*, 42 La. Ann. 541, 7 So. Rep. 688.

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McTAVISH

v.

GREAT NORTHERN RY. CO.

(*Supreme Court of North Dakota, May 11, 1899.*)

Judgments.—An order for judgment duly entered in the judgment book does not constitute a judgment unless the wording be such that it expresses the final sentence of the court upon the matters contained in the record, and at once ends the case, and contemplates no further judicial action. *Cameron v. Railway Co.* (N. D.) 77 N. W. 1016, distinguished.

Same—Entry Nunc Pro Tunc.—In this state, where the entry of judgment in the judgment book constitutes the judgment, and not merely the evidence of the judgment, the entry of judgment on November 28th *nunc pro tunc* as of the 17th of the preceding April cannot make effective an attempted appeal from said judgment, taken during the intervening June, in the mistaken belief that there was a judgment in the case.

Fires Set by Engines—Defects—Evidence.*—When, in an action to recover damages from a railroad company occasioned by a fire which was started by one of the defendant's locomotives, the presumption of defect in the construction or equipment of such locomotive, or of negligence in its operation, which the statute raises, has been overcome by proper evidence introduced by the defendant, yet the evidence shows that the same locomotive, on the same day, and within a distance of 10 miles or less, set three different fires, it is not error to submit to the jury the question of defects in the construction or equipment of such locomotive, or negligence in its operation.

Same—Combustibles on Right of Way—Ownership of Locus in Quo—Evidence.—Where, in such an action, negligence is also charged in permitting combustible material to accumulate on the right of way, which was ignited by sparks or fire from the locomotive thus causing the fire which occasioned the damages, it is not necessary for the plaintiff to prove title or ownership of the *locus in quo* in defendant. If he show that defendant was using the

*See notes 11 Am. & Eng. R. Cas., N. S., 135 *et seq.*

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ground as a part of its right of way, that will be sufficient. The use being shown, the law will presume that the right to use has been properly acquired.

Contributory Negligence — Question for Jury. — Question of contributory negligence considered, and *held* properly submitted to the jury.

(Syllabus by the Court.)

APPEAL by defendant from Pierce county district court.
Affirmed.

W. E. Dodge and *Charles S. Albert*, for appellant.

N. A. Stewart and *Bosard & Bosard*, for respondent.

BARTHOLOMEW, C. J. Some questions of practice meet us on the threshold of this case, raised by respondent's motion to dismiss the appeal. The case has already been once in this court. See 8 N. D. —, 76 N. W. 985. At that time a motion was made by respondent to strike the statement and abstract from the files for certain alleged defects, which motion was sustained. Thereupon both parties moved to dismiss the appeal; respondent with prejudice, and appellant without prejudice. An order of this court was entered dismissing the appeal with prejudice, unless within a specified time appellant should pay respondent a sum named to cover the expenses of the appeal. Appellant declined to pay such sum, and the order of dismissal was made absolute. It now transpires that counsel for the appellant declined to pay the sum specified in the former order because, upon an inspection of the records in the trial court, he reached the conclusion that no judgment had ever been entered in the case, and consequently the former appeal had been prematurely taken, and the case was not properly in this court. After the *remittitur* was sent down, counsel procured the entry of what he regarded as a regular judgment upon the order for judgment previously made by the district court, and from such judgment he prosecutes this appeal. This judgment concededly includes respondent's taxable costs on the former appeal, in addition to the amount of the judgment originally ordered by the district court.

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After the *remittitur* was sent down, counsel for the respondent procured an order directing the clerk of the district court to enter the judgment in the case, *nunc pro tunc*, as of the date of the original order for judgment, which was done, and a regular judgment of affirmance was also entered on the *remittitur*.

Counsel for the respondent now move to dismiss this appeal, and as the first ground for the motion insist that there was a valid judgment at the time of the former appeal, and that the dismissal of that appeal affirmed the judgment, and hence this matter is *res adjudicata*. Judgments. Counsel's conclusion is conceded if the major premise be correct. The records show that on the 27th day of April, 1898, an order for judgment was made and signed by the judge of the district court, which, after the usual formal parts, declares: "And the court, overruling the defendant's motion for a new trial, made on the 17th day of March, 1898, orders that the plaintiff have and recover judgment against the defendant for the sum of two thousand six hundred and eighty-eight and 85-100 (2,688.85) dollars damages, and interest thereon from and after the 18th day of June, 1897, and ten dollars costs; and the clerk of the district court is hereby ordered to render judgment accordingly." This order was, on the 11th day of May, 1898, entered by the clerk of the district court in his judgment book, and thereafter, and on June 4, 1898, the former appeal was taken, the motion of appeal stating that the appeal was "from the judgment of the district court entered herein on the 11th day of May, 1898." It will be seen that the precise question for determination is whether or not this order for judgment, when duly entered in the judgment book, constitutes a valid judgment, or is it so entirely void that it must be wholly disregarded as a judgment? This court has held that there can be no effective judgment in this state until it is entered in the judgment book. *In re Weber*, 4 N. D. 119, 59 N. W. 523. In that case it was held that an order made in a case appealed from justice court, and which ordered "that said appeal be, and the same

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is hereby, dismissed," and which was entered in full in the order book, was neither a judgment nor a final order. But the court expressly refrained from expressing an opinion as to what it would have been had it been entered in the judgment book. This case was followed, and the principle reaffirmed, in *Field v. Elevator Co.*, 5 N. D. 400, 67 N. W. 147. But in *Cameron v. Railway Co.* 8 N. D. —, 77 N. W. 1016, we had a case where, in response to a motion to dismiss, an order was made and signed which declared, *inter alia*: "Which motion after being duly considered by the court, is allowed, and the plaintiff's action is hereby dismissed. Done in open court," etc. This order was entered in the judgment book, and we held that it constituted a final judgment. In that case some stress was laid upon the fact that the notice of appeal referred to it as a judgment, but the same fact exists in this case. In that case the court said: "The question is therefore presented whether this constitutes a judgment within the meaning of the law. We are constrained to hold that it does. It embraces the disposition made of the case by the court below, and that disposition is incorporated in the judgment book. The language of the judgment is, 'The plaintiff's action is hereby dismissed.' This is explicit, and is found written in the judgment book kept in the office of the clerk of the district court." Is the point before us ruled by this case? We think not. The distinction may be fine, but it is substantial. We must by no means confound an order for judgment with the judgment proper. The former is a writing signed by the judge, particularly indicating the terms of the judgment which the law pronounces upon the matter before the court. The latter is the formal judgment of the court, entered by its ministerial officer in the judgment book. Now, it may readily be conceived that language may be used in the order signed by the judge which is in all its formal parts sufficient to constitute a judgment, yet, unless entered in the judgment book, it has no such effect. Such was the Weber Case. But, if the language of the order be all sufficient to constitute a judgment, such

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language will, when written out in the judgment book, necessarily be a judgment; and the fact that the same language appeared in the order cannot affect the case in the least. Such was the Cameron Case. It is not every order that might be entered in the judgment book that would constitute a judgment. Necessarily, we must look to the substance, and not to the form. Ordinarily, the substance of an order for judgment will not constitute a judgment. In Black, Judgm. § 115, it is said: "A true judgment must be distinguished from a mere order or direction or permission to the clerk to enter a judgment. A document of the latter kind has not the force or characteristics of a judgment, and will not support an execution." A judgment is the final sentence of the law upon the matter contained in the record. It ends the case, and leaves no further judicial act to be performed. A glance at the order in this case shows that it did not purport to be the final act in the case. It, in terms, ordered the clerk to enter judgment, which, as stated, is the act of the court by its ministerial officer. It contemplated further judicial action. Again, a money judgment for plaintiff should always adjudge or order that plaintiff do have and recover the specified amount of money. This document does not order or adjudge the recovery of any sum of money whatever. It simply orders that plaintiff do have and recover a judgment for a specified amount; in other words, it orders that plaintiff have a judgment which shall adjudge that he recover the specified amount of money. No more apt words could have been used in ordering a judgment. Reading this entire document as a whole, we are clear that it lacks the substance of a final judgment.

The second reason assigned for dismissing this appeal is the fact that the judgment appealed from was entered pursuant to the original order for judgment made by the district court, but includes respondent's costs on the former appeal to this court. This ground for the motion is not argued in counsel's printed brief or orally, and hence is waived, and we mention it only to say that, whatever may be the disposi-

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tion of this case upon this appeal, appellant is liable absolutely for the costs upon the former appeal. The judgment of affirmance which respondent caused to be entered upon the *remittitur* is a valid judgment, so far as said costs are concerned; but, as it purported to affirm a judgment which it now transpires never existed, it is otherwise a nullity.

Respondent also urges as a ground for dismissing the appeal that the entry of the judgment after the *remittitur* went down, and on the order of the court procured November 28,

1898, *nunc pro tunc*, as of the date of the original order for judgment, cured any defect that

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Appeal.

might have theretofore existed, and created a judgment valid from the date of the original order, and for that reason the matter here involved is *res adjudicata*. A large citation of cases is presented supporting this view, and counsel, in their brief, say: "The entry of a formal judgment *nunc pro tunc*, where the clerk has neglected to enter the same properly, after appeal from the judgment actually rendered and supposed to be entered, covers the defect. * * * The authority of the clerk to make this formal entry is founded on a judgment already valid, and whose validity is not destroyed by his failure to enter it." This language of the learned counsel develops the principle upon which the cases that support their position is based. In many jurisdictions a judgment is rendered the moment the court, orally or otherwise, announces its definite and final determination. That announcement is the judgment. The formal entry is but the evidence of that judgment, and, of course, the formal evidence of that which exists in equal force and validity without such evidence can be entered as of any date that does not antedate the fact. In this state there is no distinction between the rendition and the entry of judgment. *In re Weber, supra*. The entry in the judgment book is not only the evidence of the judgment, but it is the judgment, and there can be no other valid judgment in any case. The authorities cited by counsel are not applicable here. The motion to dismiss is denied.

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This action was brought to recover damages caused by a prairie fire, which it is claimed was started by the negligence of the defendant. Damages are claimed for loss of certain property, but principally by reason of physical injuries, and sufferings, and expenses caused by being burned. The complaint alleges negligence in the equipment and operation of the engine, and also in permitting dry and combustible material to accumulate and remain upon the right of way, and in permitting the fire to escape from such right of way. The injury occurred on the 23d day of October, 1895, near the branch line of defendant's road running north, and a little west, from Rugby to Bottineau. Leaving Rugby, the first station north is Barton, the second Willow City, and the third Omemee. On said October 23d a train was being run over such branch road coming south. Soon after leaving Barton, and when between Barton and Rugby, just as the train was passing a fire started on the east side of the track in the grass, which the section foreman on that section testifies was from one to three feet high, and very dry and combustible. The witness who was nearest the fire when it started says it started about 30 feet from the track. There was a very strong wind at the time blowing from the west,—perhaps a little north of west. There was a road or trail running along the east side of the railroad track, and at a distance varying from 100 to 150 feet therefrom. There was not then, and never had been, any fire break along the east line of the right of way. With the velocity acquired by the fire in running with the wind, the road seems to have presented no obstacle to its advance. It swept across the road, and continued east over what appears to have been unbroken prairie ground. This was about 2 o'clock in the afternoon. About two or two and a half miles almost directly east from the point where the fire started the plaintiff and one Young had stopped, and put up a tent. Why they were there does not appear further than that Young testifies, "We pulled in there to feed our stock and feed ourselves." The horses had been unhitched and

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cared for, and soon thereafter, and while plaintiff was preparing something to eat, Young remarked that it looked like a prairie fire down towards the railroad. Just west of the tent, and running partially around it in a semicircle, was a low strip of ground, in which there was shallow water. The ground was covered with rank grass, which was dry above the water. On the west side of this low ground, and 15 or 20 feet therefrom, was a trail running north and south. A short distance north of the tent—the best evidence puts it about 15 rods—was a house, standing on an elevation, and in which was stored some grain belonging to one Cruden. In a very short time Cruden appeared on the scene with a team (five horses) and a plow for the purpose of plowing a firebreak to protect his grain from the approaching fire. Young at once went to help him, and three narrow strips were broken up west of the trail, commencing at a point south of the tent, and extending to a point north of the house. Meantime the advancing line of the fire had passed the house on the north, and moved on east. Other parties had also arrived to aid in saving the house and grain, and they were endeavoring to set back fires to prevent the south line of the fire that was necessarily left by the advancing flames from working south onto the house and tent. The fire was getting so near, and the smoke so dense, that Cruden deemed it prudent to get his horses on the high ground near the house, where, the evidence shows, the grass was short, making the spot much safer. Just what the plaintiff was doing all this time is not entirely clear. The testimony shows that it must have been more than 30 minutes from the time they discovered the fire until plaintiff was injured, but when the first real danger appeared is not shown. It seems that when they began the plowing plaintiff watched them for some time. He then, with the aid of a pot, scooped out a hole where the water was, and got some water, and an empty sack that he wet, evidently for the purpose of fighting fire. He then stood for some time on the trail, watching the plowing. He then took the pot, and went to the water hole for more water, but as he stooped to

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get it the dense smoke and fire came down upon him in such a manner that he deemed his only chance of saving his life was to rush through the fire, which he did, but was badly burned in so doing. Plaintiff was 64 years old. He says he had ample time to go up to the house, or to go upon the breaking. The general situation as to danger may be understood from the language of another witness, who was in that immediate vicinity. He says: "Everybody was to look out for himself in a fire of that kind, and that was the way I figured it. I know I had all I could do to take care of myself. I came out all right." The evidence shows that the fire, when it struck the furrows, was coming almost directly from the west.

The questions of negligence and contributory negligence that so often arise in cases of this character were sharply litigated on the trial, and are presented on this appeal. Our statute (section 2984, Rev. Codes) relieves a plaintiff in actions of this character, when it appears that a fire was set by fire escaping from an engine, of the burden of showing defects in the construction or equipment of the engine, or negligence on the part of the employees. Setting the fire is made presumptive evidence of such defects or negligence. But this court is fully committed to the principle that whether or not such statutory presumption is overcome by evidence introduced by the defendant is, in the first instance, a question of law for the court. *Smith v. Railroad Co.*, 3 N. D. 17, 53 N. W. 173. And also to the further position that when the proper employees of the defendant railroad company have gone upon the stand, and testified that there were no defects in the construction or equipment of the engine, and no negligence in its operation, making their testimony at all points as broad as the presumption, then, as matter of law, such presumption is overcome. Evidence of that character was introduced by the defendant in this case. The trial court fully understood the rules of law as announced in the *Smith Case*, *supra*. Nevertheless, the question of negligence in the construction, equipment,

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and operation of the engine was left to the jury in this case upon the theory that plaintiff had not rested simply upon the statutory presumption, but had introduced affirmative testimony to show such negligence. Such testimony, it was claimed, was found in the fact that this same engine, on this same day and trip, set three different fires within a distance of 8 or 10 miles. Appellant argues that such facts cannot be received in this jurisdiction as evidence of negligence, because in the Smith Case this court said, "That locomotives in operation do emit sparks which set fires is a matter of common knowledge." That was, perhaps, an inadvertent remark, and was not necessary to the decision of the case, but, as applied to the facts of that case, it did no harm. Our statute, raising a presumption of negligence from the mere fact of setting the fire, was not then in force, and the court was discussing the rule established by the decisions. Just preceding the quoted words the court said, "We do not think that an inference of negligence naturally arises from the mere fact that a single fire has been started by a passing engine." Again, in that same case, it was said, "We therefore establish it as the rule in this state that the court must, in the first instance, determine the question whether the inference of negligence arising from the mere setting out of a single fire has been fully overcome." A reading of the entire opinion will show that the court was careful to limit the rule to cases of a single fire. We have not heretofore had occasion to consider what presumption of negligence, if any, arises from setting repeated fires. But, if setting a single fire raises a presumption of defect in construction or equipment of the locomotive, or negligence in its operation, certainly setting repeated fires on the same day by the same locomotive makes that presumption very much stronger; and while, as we have seen, the courts have arbitrarily declared (though not very logically, in the opinion of the writer hereof) what *quantum* of proof would, as matter of law, overcome the presumption arising from setting a single fire, yet no court has ever presumed to make any such arbitrary

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declaration in cases of repeated fires. As early as the case of *Huyett v. Railroad Co.*, 23 Pa. St. 373, the court said: "How is it possible for the court to say, as matter of law, how many sparks, or how many fires caused by them, it takes to prove carelessness? * * * How can we say that the happening of several fires, all about the same time, along the line of the road, is no evidence of carelessness?" In *Railway Co. v. Kincaid*, 29 Kan. 654, the opinion was by BREWER, J., and approved a charge of the trial court to the effect that a single fire did not of itself prove negligence, but that from the occurrence of a series of fires of a similar nature at or about the same time, when an engine in good order, and properly handled, did not ordinarily start such fires, the jury might infer negligence. In *Henry v. Railroad Co.*, 50 Cal. 176, it is said: "We think there was no error in permitting proof that, prior and subsequent to the fire which produced the injury complained of, other fires were kindled by defendant's engine. The evidence was confined to fires caused by the same engine in the same vicinity, and about the same time. * * * We think the evidence objected to tended to prove that the fire in question was caused by sparks from the engine, and also that there was something wrong in the management, or defective in the construction, of the engine." And see, also, *Crist v. Railway Co.*, 58 N. Y. 638; *Railroad Co. v. Schultz*, 93 Pa. St. 341; *Railroad Co. v. Stanford*, 12 Kan. 354; *Railroad Co. v. Campbell*, 16 Kan. 200; *Railroad Co. v. Gantt*, 39 Md. 115; *Longabaugh v. Railroad Co.*, 9 Nev. 271. There is abundance of authority for the action of the court in submitting this branch of negligence to the jury in this case.

It is also urged that there was error in submitting the question of negligence on the part of the defendant in permitting combustible matters to accumulate upon its right of way, for the reason, as it is claimed, that there was no evidence whatever that the defendant owned any right of way at this point.

Same-Combustibles on Right of Way-Ownership of Locus in Quo-Evidence.

This assignment cannot be sustained. That defendant

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owned and operated this line of road is undisputed. We cannot conceive of the existence of a railroad without some accompanying right of way. The evidence tends strongly to show that when this line of road was constructed the tract of land whereon this fire started was government land. It was taken up as a homestead some years thereafter. The statute of the United States (Act Cong. March 3, 1875; 18 Stat. 482) gave the defendant the right to claim a right of way over public lands 200 feet in width. It might not be unreasonable to presume that defendant had availed itself of this right. But this was not a question of dispute over title. Ownership was not involved. In *Gram v. Railroad Co.*, 1 N. D. 259, 46 N. W. 974, this court said: "The practical question was and is whether, at the time the fire was thrown out by defendant's train, it fell upon and ignited dry grass standing upon right of way then in use as such by the defendant. It is, moreover, perfectly clear to this court that defendant's liability for the alleged negligence does not at all depend either upon its ownership or its right to the possession of the strip of land upon which the fire originated. If, at that time, the defendant was actually using the land for its right of way purposes, it would be none the less liable, if it was a mere trespasser upon such land." In this case the man who was then section foreman on this section of the road was a witness in the case, and he testified that on the day of this fire he was engaged in burning the grass off from the right of way on the east side of the track. This he did by starting a fire along the edge of the wagon road, which we have seen run parallel with the railroad track at a distance of 100 feet or more from the track, and permitting it to work back against the wind to the track, and he had reached a point in this work about a quarter of a mile distant from where the fire started. This shows that the defendant was using as right of way a strip 100 feet in width on the east side of the track. The duties of this witness made it incumbent upon him to know what ground was being used as right of way. He says the fire started upon the right of way. That decla-

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ration would be incompetent to show title, but it was competent as showing what he had been instructed to burn off as right of way. We think this evidence, standing uncontradicted, warranted the jury in finding that the fire started on ground used by the defendant as right of way, and, the fact of user being once established, the law will presume that the right to so use the ground has been properly acquired. *Glass v. Railroad Co.*, 94 Ala. 581, 10 South. 215; *Rafferty v. Railway Co.*, 91 Mo. 33, 3 S. W. 393.

It is urged that the evidence fails to establish any connection between the fire started by the defendant's engine and the fire that injured plaintiff. This contention tortures the evidence. The fire was set, and at once started, before a high wind, in the direction of the house where Cruden's grain was stored. It was never checked or stopped. Parties in the neighborhood, knowing that the grain was in danger, hurried to save it. The fire had passed the house to the north before some of them reached the place. It was in plain view all the time. It would be a mere idle waste of time in such a case to go to the railroad, and trace the track of the fire, to see that it was continuous. There can be no pretense of more than one fire except that an effort was made to back fire. But this back firing was all north or west of the house, and not west of the tent, while the fire that did the damage came almost directly from the west. No witness claims that the injury was caused by the back fires, while the evidence of Mr. Cruden for the plaintiff and Mr. Burns for the defendant make it reasonably certain that it was the main fire that did the damage. The jury was not left to conjecture.

The question of plaintiff's contributory negligence was properly left to the jury. From looking at the circumstances after the injury has occurred, it is easy, as it usually is, to see how it might have been avoided. But it cannot be said as matter of law that plaintiff did not act as an ordinarily cautious and prudent man would have acted under the same circumstances. Around the house the grass was shorter,

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and the position safer, and plaintiff had plenty of time to reach the house after he saw the fire coming. But, so far as the evidence bears upon the subject, it tends to show that plaintiff knew nothing of the local conditions. He and his companion, Young, were passing over the road with teams and a wagon and tent. They stopped to let the horses feed, and get something to eat themselves. They had but just stopped, when the fire was seen. Plaintiff remained in the immediate vicinity of the tent until he was injured. There is nothing to show that he knew, or had any reason to believe, that it was safer up near the house than where he was. That Cruden and those familiar with the location may have known that fact is no proof that plaintiff knew it. Nor can we say, as a matter of law, that an ordinarily cautious man may not have believed that the fire breaks that we have described would be a sufficient protection to him. This disposes of all the assignments argued by appellant in its brief or orally. We find no error, and the judgment of the district court is affirmed. All concur.

YOUNG

v.

GREAT NORTHERN RY. CO.

(Supreme Court of North Dakota, May 15, 1899.)

Companion Case.—This being a companion case to *McTavish v. Railway Co.* (decided at this term) 79 N. W. 443, the damage having occurred at the same time and place, caused by the same fire, and the same questions of law being raised in this case, they are, for the reasons stated in that case, ruled in the same manner.

Fires Set by Engines—Evidence—Subsequent Precautions.—It was not error in this case for the court to permit plaintiff to prove that after the fire defendant caused fire breaks to be constructed on both sides of its track as the statute requires they shall be constructed along the line of the right of way, for the purpose of showing what right of way had been in use by the defendant.

(Syllabus by the Court.)

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APPEAL by defendant from Pierce county district court.
Affirmed.

W. E. Dodge and Charles S. Albert, for appellant.

Bosard & Bosard and N. A. Stewart, for respondent.

BARTHOLOMEW, C. J. We find no material point in this case that is not covered by the decision in *McTavish v. Railway Co.* (decided at this term) 79 N. W.

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443¹. The cases are companion cases in almost every particular. The same motion to dismiss the appeal that was made in that case was also made in this case, and upon the same grounds. The records as to the procedure are substantially identical, and, for the reason stated in the *McTavish Case*, the motion is denied.

The action was brought to recover damages for the destruction of property by fire, which it is alleged was caused by the negligence of the defendant. It was the same fire that caused the damage in the *McTavish Case*, and the damages occurred practically at the same time and place. This plaintiff and *McTavish* were together. The evidence in this case shows that *McTavish* was in the employ of this plaintiff. The evidence as to the origin, course, and character of the fire is practically the same in both cases. We set forth the facts in detail in the *McTavish Case*, and shall not repeat them here, but will add that the evidence shows that the property destroyed was in the tent, and in wagons standing near the tent, except the horses, which were picketed out a short distance east of the tent. The evidence in this case that the damage was caused by the main fire, and that it swept over the furrows that were plowed as a fire break, is even stronger than in the other case. In this case there is no proof that other fires were set by the locomotive, and the court took from the jury the question of defects in the construction and equipment of the engine or negligence in its operation, leaving only the question of negligence in permitting combustible material to accumulate upon the

1. See preceding case.

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right of way, and in permitting the fire to escape therefrom. One point that was not treated in the McTavish Case is pressed with earnestness in this case. Our statute (section 10, c. 90, Laws 1895) made it the duty of defendant to plow a fire break at the outer edge of its right of way. Now, it is urged as an indispensable element of the negligence that must exist before defendant would be liable that it must have been negligent in permitting the fire to escape from its right of way, and that there is nothing in the evidence to show that defendant did not have, at the point where this fire escaped, the fire break required by law, and hence could not have been negligent in permitting the fire to escape. It is true that there is not in this case, as there was in the McTavish Case, positive and direct evidence that there was no fire break, at the time of this fire, at the point where it left the right of way. But the circumstantial evidence is so strong that the jury might reasonably have found that there was no fire break. None of the witnesses who saw the fire start speak of a fire break, but they do speak of the highway that ran on the east side of the track. The section foreman, who was that day burning the grass from the right of way on the east side, was setting his fire along this road, and letting it burn back against the wind to the track. Had there been a fire break, it would have been his duty to have burned the grass between the fire break and the track. Further, plaintiff undertook to prove, and, over defendant's objection, did prove, that after this fire occurred defendant caused fire breaks to be plowed on both sides of the track at that point, and at a distance of about 100 feet therefrom. From these facts it very satisfactorily appears that there was no fire break there at the time. But counsel contend that the court erred in admitting the evidence of the subsequent construction of the fire break, under the decision of this court in *Roehr v. Railway Co.*, 7 N. D. 95, 72 N. W. 1084. But that case was very different in its facts. There the evidence showed that at some time prior to the fire which occasioned

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the damage the servants of the defendant had plowed some furrows at a distance of 146 feet from the railroad track, upon land which concededly belonged to another, and which was in the inclosed possession of such other party at the time of the fire, and the fire started within such inclosure. We held, under the circumstances of that case, that plowing the furrows was no evidence of the width of the right of way, and furnished no proof that the fire started on the right of way. In this case the road was built in 1887, and had been operated since that time. The testimony tended to show that at that time the land was a portion of the public domain, and, if so, defendant might acquire a right of way 200 feet in width under Act Cong. March 3, 1875 (18 Stat. 482). It must have been using a right of way of some width, either as a trespasser or otherwise. The construction of fire breaks on either side of the track at a distance of about 100 feet therefrom would indicate the use of the ground between the fire breaks for right of way purposes, and the fact that the distance of the furrows from the track might vary a few feet at different points, to accommodate the configurations of the ground, would not destroy its force in that respect. The fact that the fire break was constructed after the fire lessens its probative force in this case, but does not entirely destroy it. Judgment affirmed. All concur.

CLEVELAND, C., C. & ST. L. RY. CO.

v.

SCANTLAND *et al.**(Supreme Court of Indiana, Nov. 29, 1898.)*

Right to Construct Inflammable Building near Right of Way.—It is not negligence to construct a warehouse upon lands adjoining a railroad right of way, and to store elm hoops therein to dry, whether before or after the building of the railroad.

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Fires Set by Engines—Contributory Negligence.*—It is not the duty of the owner of such a warehouse, though it is situated within 60 feet of a railroad track, to keep a constant watch on the building whenever an engine throwing sparks is passing.

Defective Appliance.—The jury were warranted in finding that a spark arrester was in a defective condition, it appearing that many of its wires were burned in two; that sparks of the size of large grains of corn had been thrown from the smokestack to a distance of 120 feet, and that fire was communicated thereby to plaintiff's warehouse situated 60 feet from the track; and that sparks capable of starting a fire could not pass through a proper arrester to a distance of 30 or 40 feet.

Evidence—Instructions.—Such arrester was not technically introduced in evidence, but was, in effect, so introduced, without objection, for the purpose of aiding the jury in applying evidence. *Held*, that it would have been misleading to have instructed the jury not to consider any fact which they might have observed while so examining the arrester.

APPEAL by defendant from Randolph county circuit court.

Affirmed.

Samuel O. Bayless, John T. Dye, and Thompson & Canaday, for appellant.

J. J. Cheeney and Engle & Parry, for appellees.

HOWARD, J. It is alleged in the complaint in this case that on January 20, 1896, appellees owned a large warehouse in the town of Lynn, in Randolph county, on grounds adjoining appellant's right of way. The warehouse was used principally for storing and drying "patent coil elm hoops," manufactured by appellees. It is further alleged that the appellant, "in running its locomotive and train of cars on said road, carelessly and negligently omitted to use sufficient and proper spark arresters and proper appliances to keep the same in proper repair and condition to prevent the emission of sparks from said locomotive;" that the appellant's said railroad passed to and within 66 feet of appellees' said storeroom, in which were situate, packed, and stored said patent coil elm hoops and oak lumber aforesaid, which

*See note, 10 Am. & Eng. R. Cas., N. S., 690.

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said wareroom and patent coil elm hoops were of inflammable nature, and liable to take fire, which appellant well knew; that on the evening of the day aforesaid appellant's train of cars, drawn by one of its locomotive engines, and controlled by its employees, ran on and along the railroad aforesaid near to said wareroom, and, the appellant having negligently omitted and failed to exercise due care to prevent the escape of sparks of fire from the smokestack, the said smokestack threw out streams of sparks and blazing fragments of coal and wood, which were by force and labor of the locomotive expelled high into the air in large volume at each labor and expulsion of the engine, and carried by the wind towards said warehouse, and set fire to the same and to said patent coil hoops and lumber, whereby they were consumed. The only objection raised to the complaint is that it is not sufficiently specific, in not stating whether the railroad or the warehouse was first constructed. It does not seem that this objection can be well taken. The question is, rather, whether appellant was negligent in using an insufficient spark arrester, and whether appellees were themselves chargeable with contributory negligence in relation to the destruction of the warehouse. It cannot be said to be negligence merely to construct a warehouse upon lands adjoining a railroad right of way, and to store elm hoops there to dry, whether before or after the building of the railroad. Indeed, in a subsequent part of their brief, counsel for appellant admit as much, saying: "We do not, however, insist in this case that the mere fact that appellees located their dry house adjoining the right of way, and at the time of the fire were maintaining it there, filled with dry, combustible material, is such negligence *per se* as would prevent a recovery." The facts were found by a jury, and a special verdict, by way of answers to nearly 200 interrogatories, was returned by the jury. The only question left in dispute by these answers is whether the appellees were themselves chargeable with negligence contributing to the destruction of their property. The jury find that the spark

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arrester used on the engine was of the kind known as the "extension front" spark arrester, the best and most approved in general use. They find, however, that the spark arrester in use in this case was not properly adjusted when first put in new; that it was "not properly and securely fastened at the edge of the nettings," and the "door frame at manhole not well fitted, leaving openings at corners;" that it did not "prevent sparks, coals, or cinders from being carried out of the extension front, through the smokestack;" that there were holes and broken places in the nettings; that several of the wires near the top were broken, and a part of them missing, at the time of the fire; that there were several holes near the top, caused by wires being burned or worn away, from one to two inches long and from one-fourth to three-eighths of an inch wide; that, in consequence, fire was thrown out of the smokestack while passing appellees' property, many of the sparks being of the size of large grains of corn, and some as large as the end of a man's finger; and that these sparks were thrown on top of and into appellees' building, setting fire to the patent coil elm hoops therein. Failure to properly inspect and repair the spark arrester is also found.

It is conceded that these and other findings show negligence on the part of appellant. The contention is, however, made, that appellees were also negligent, since they knew that their building was of wood, and contained dry hoop poles; knew that the building was near to the railroad,—within 59 feet of the track,—and knew that there were open ventilators on the side of the railroad; and since, a little before the fire, one of the appellees saw the engine laboring with a heavy freight train, and saw showers of sparks flying from the smokestack as the engine approached, and yet that he passed on to his supper, a short distance away. This contention seems to take it for granted that it was appellees' duty to keep a constant watch on their building whenever an engine throwing many sparks was passing. Yet the jury also find that appellant likewise

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knew all the conditions as to appellees' property. It is, besides, found that the warehouse was within the corporate limits of the town, was situated near other wooden buildings,—mills, factories, and residences,—all standing along the railroad track. It is further found that it was raining on that day, and that the ground, railroad track, and buildings were damp and wet from the recent rains. The warehouse had been built about four years, during which time there had been no material change in the grade or situation of the railroad track. No reason, therefore, appears why appellees should suppose their building in more danger of being set fire to by sparks from the engine on this occasion than at any time during the previous four years? Of course, it was barely possible that fire might be communicated to the property at any time. But, as said in *Railroad Co. v. Loop*, 139 Ind. 542, 39 N. E. 306, "all peril may not be averted; it is the immediate and probable, not the remote and barely possible, that we are called upon to guard against." The building was properly constructed for the purposes for which it was used, and was properly located for the making of shipments on the railroad. The fire was discovered almost immediately, and the jury find that appellees used "all available means to put out the fire, and save their property, when, and as soon as, they discovered the fire." If appellees should be held negligent for the reasons urged by counsel, it is difficult to see how property owners who fail to keep a constant watch upon their buildings could ever collect from insurance companies when these buildings are destroyed by fire.

The only conflict in the evidence is as to the condition of the spark arrester at the time the fire was communicated to the warehouse. Counsel for appellant use 37 closely-printed pages of their brief in arguing that the jury ought to have accepted the evidence adduced by them to show that the spark arrester had frequently been properly inspected previous to that time, and that it was then in good repair, and correctly adjusted to its place in the engine. But even appellant's witnesses, par-

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ticularly on cross-examination, gave evidence from which the jury were authorized in making the findings complained of as to the defective condition of the netting of the spark arrester. This netting was brought into court by appellant, and a great part of the evidence in regard to it was given to the jury on inspection, as it was examined in their presence by the several witnesses. One of appellant's witnesses, on having his attention called to certain wire, and being asked if it was burned in two, answered, "I don't know whether it is burned in two or broken." His attention being further called to several other wires, and being asked if they also presented "the appearance of having been burned in two," he answered: "Well, they probably came apart where it was pretty warm; that is, subject to considerable heat at all times. The heat of the smokestack under normal conditions is about 800." Asked of other wires if they were nearly in two, and still others as to being "burned off, entirely in two," he said, "Yes, there are several of them through there." Asked of six in a row, if they were not "burned in two," he replied, "Yes, you might find others throughout." It was shown that sparks of the size of large grains of corn had been thrown from the smokestack to a distance of 120 feet; and one of appellant's witnesses answered that with proper spark-arrester appliances, even with the wind blowing in the most favorable condition for carrying sparks, they could not be carried to a distance of more than 30 or 40 feet, and still retain fire enough to kindle combustible material. He further said that in damp atmosphere the tendency of sparks is to fall quicker to the ground. If to the foregoing evidence, given by appellant's witnesses, we add the testimony of appellees' witnesses relating to the same subject, we must conclude that there was competent and sufficient evidence adduced to support the findings returned by the jury. We have also given careful attention to what is said by counsel as to error by the court in its ruling on the admission of evidence, but have found the objections not well taken, and

do not deem it necessary to enter into an extended discussion of the questions so raised.

The appellant introduced the screen in question before the jury, and a large part of the evidence was in regard to the condition of this screen thus exhibited to the jury. While, technically, the screen was not introduced in evidence, it was, in effect, so introduced. Evidence—
Instructions.

Indeed, when counsel for appellant asked an expert whether, in his opinion, certain wires near the top of the screen were broken by reason of any use of it as a spark arrester, and counsel for appellees objected to the question for the reason that the screen was not identified as the defective screen in question, the court overruled the objection, and this question, and others following it, were allowed on the assumption that the screen before the jury was the same used in the locomotive from which the fire was alleged to have been communicated to appellee's building. As relating to this screen, the following instruction was asked by appellant, and refused by the court: "You have been permitted, during this trial, to personally view and examine a certain wire screen or netting, under instructions of the court. You are now instructed that it will be your duty not to consider as evidence any fact which you may have observed or seen while viewing or examining such screen or netting." Whether this instruction was abstractly correct or not, we need not say. It would certainly have been misleading to the jury to have given it. Counsel do not contend that it was error to have allowed the jury to inspect the netting, but they say that "the facts disclosed to the jury by this inspection should not have been taken by the jury as evidence in the cause, but only for the sole purpose of aiding them in applying the evidence of the witnesses who testified with reference to the screen, and the other facts and circumstances." Had the instruction included the explanation so now added by counsel, it would, perhaps, have been proper to give it; but to have given the instruction as requested would doubtless have

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left upon the mind of the jury the impression that the screen, as exhibited before them, and as inspected by them under direction of the court, was nevertheless not to be regarded by them for any purpose. The screen was brought before the jury by appellant, without objection from appellees; and the jury, under sanction of the court, were permitted to examine it. That an instruction should afterwards be given which should practically say to the jury that they must pay no attention to the screen so exhibited to and examined by them, seems very questionable. The instruction was properly refused as misleading. See *Story v. State*, 99 Ind. 413, 416; *Davidson v. State*, 135 Ind. 254, 259, 34 N. E. 972.

Other minor questions raised by counsel need not, as we think, be considered. They are not of a nature to require a reversal of the judgment. Judgment affirmed.

HACKNEY, J., took no part in the decision of this appeal.

GULF, C. & S. F. RY. CO.

v.

JOHNSON *et al.**(Supreme Court of Texas, April 17, 1899.)*

Fires Set by Engines—Negligence—Prima Facie Case.*—Proof that the injury complained of was caused by a fire started by sparks from a railroad locomotive while in operation constitutes a *prima facie* case, and, if not rebutted, entitles plaintiff to recover.

Same—Same—Burden of Proof—Instructions.—A charge, after stating what evidence would amount to a rebuttal, does not impose the burden upon the railroad to disprove negligence on its part, merely because it instructs that such *prima facie* case is not rebutted if the jury find that defendant failed to equip the engine in question with the most approved spark arresters in use, and to exercise ordinary care to prevent the escape of sparks.

Instructions.—And such charge is not subject to the objection that it is upon the weight of the evidence.

*See note, 12 Am. & Eng. R. Cas., N. S., 843 *et seq.*

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J. W. Terry and Chas. K. Lee, for appellant.
Burke, Griggs & Co., for appellees.

BROWN, J. The court of civil appeals made no finding of facts, but based its question upon the following charge given by the court: "That if, from the evidence, they believe that sparks of fire escaped from the defendant's engine, and set fire to the bed and clothing of the plaintiff, Oceana Johnson, and that said fire was communicated to said plaintiff, and injured her, then such facts constitute a *prima facie* case of negligence on the part of the defendant, and, in the absence of rebutting evidence sufficient to overcome such *prima facie* case of negligence, will render the defendant liable for the injury occasioned thereby. If, from the evidence, they believe that sparks of fire escaped from the defendant's engine, and set the fire which caused the plaintiff's injuries, but if, from the evidence, they believe that the engine from which the sparks escaped was equipped with the most improved spark arresters in use, and that the agents and employees of the defendant in charge of said engine used ordinary care in operating said engine to prevent the escape of sparks, then they are instructed that the *prima facie* case made out by proof of escape of sparks, and fire resulting therefrom, is rebutted, and, if they so believe, they will find for the defendant; but if, from the evidence, they believe that the defendant failed to equip its engine, from which the sparks escaped that caused the fire, with the most approved spark arresters in use, or that the agents and employees of the defendant engaged in operating said engine failed to use ordinary care to prevent the escape of sparks, then they are instructed that the *prima facie* case made out by proof of sparks escaping and causing the fire has not been rebutted." This charge was in no way qualified by other charges given. The following question is certified: "Was the second clause of the main charge objectionable in reference to the *prima facie* case therein mentioned, and as to rebuttal thereof? The objections to such charge are that it

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improperly shifts the burden of proof to defendant, and that it is on the weight of evidence."

The question certified by the court of civil appeals can best be considered under the following propositions: (1) Is the charge in question erroneous in stating to the jury what would constitute a *prima facie* case, and entitle the plaintiff to recover? (2) Does the charge improperly impose the burden upon the railroad company to disprove negligence on its part? (3) Is the charge obnoxious to the objection that it is upon the weight of the evidence?

It is well settled in this state that, in cases of this character, proof by the plaintiff that the injury complained of was caused from fire set out by sparks from a railroad locomotive while it was being operated upon the road constitutes a *prima facie* case, and, if not rebutted, entitles the plaintiff to recover. It was not error for the court to state to the jury that such facts, if proved, entitle the plaintiff to recover; unless rebutted by defendant.

The charge in this case did not shift the burden of proof from the plaintiff to the defendant, as is claimed, but, as in every other case where a *prima facie* right is established, it called upon the defendant to meet the case made in order to defeat the plaintiff's right of recovery.

As a general rule of practice, it is not permissible for the court to instruct the jury that the proof of certain facts will establish the fact of negligence upon which the action may be maintained; but in this class of actions a different rule has been established by the decisions of the supreme court of this state, and the charge before copied is not subject to the objection that it is upon the weight of the evidence. *Railway Co. v. Timmermann*, 61 Tex. 660; *Ryan v. Railway Co.*, 65 Tex. 13; *Railway Co. v. Bartlett*, 69 Tex. 79, 6 S. W. 549; *Railway Co. v. Benson*, 69 Tex. 407, 5 S. W. 822; *Railway Co. v. Horne*, 69 Tex.

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ligence—Prima
Facie Case.

Same—Same—
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643, 9 S. W. 440; Campbell v. Goodwin, 87 Tex. 273, 28 S. W. 273; Railway Co. v. Levine, 87 Tex. 437, 29 S. W. 466; Railroad Co. v. McDonough, 1 White & W. Civ. Cas. Ct. App. 354.

BAXTER

v.

GREAT NORTHERN RY. CO.

(*Supreme Court of Minnesota, July 1, 1898.*)

Damage from Fire Set on Right of Way—Scope of Employment—Presumptions.*—The fact that railroad sectionmen were engaged during the ordinary hours of labor in performing work ordinarily done by them on the railroad right of way at that time of year (of which courts and juries may take notice, as matters of common knowledge) is sufficient, in the absence of any rebutting evidence, to justify a jury in finding that the sectionmen were acting within the scope of their employment with the railroad company.

Case at Bar.—Evidence considered, and *held* that it did not sufficiently trace or identify the fire which destroyed plaintiff's property to or with the fire started by defendant's sectionmen on the right of way.

(Syllabus by the Court.)

APPEAL by defendant from Mille Lacs county district court. *Reversed.*

C. Wellington and *Charles Keith*, for appellant.

D. W. Bruckart, for respondent.

MITCHELL, J. This is an action to recover damages for the destruction of plaintiff's property by means of a fire alleged to have been negligently set by defendant's sectionmen on its right of way. There is evidence tending to prove that about the middle of August, 1894, defendant's sectionmen set fire to a pile of old ties and rubbish on its right of way at a point about 80 rods

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*See note at end of case.

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east of plaintiff's premises, and that this fire escaped from the right of way into a ravine immediately west of it. It is this fire which plaintiff claims spread, and finally reached his premises and destroyed his property on September 1st, the day of the well-remembered Hinckley fire. This was a timbered country, and everything was exceedingly dry. The trial resulted in a verdict for the plaintiff.

Defendant's counsel raise two points, *viz.*: First, that there is no evidence that in setting this fire the sectionmen were acting within the scope of their employment; and, second, that the fire which destroyed plaintiff's property is not identified with or traced to the fire started on defendant's right of way. The fact that defendant's sectionmen were engaged during the ordinary hours of labor in performing work usually done by railroad companies through sectionmen at that time of year (a fact of which courts and juries may take notice, as a matter of common knowledge) was sufficient, in the absence of any rebutting evidence, to justify the jury in finding that the sectionmen were acting within the scope of their employment. See *Mattoon v. Railroad Co.*, 6 S. D. 301, 60 N. W. 69. Counsel for defendants rely on what is said or implied in *Morier v. Railway Co.*, 31 Minn. 351, 17 N. W. 952; but, on reflection we are of opinion that we went too far in assuming that there is no presumption that the extinguishment of fires on the railroad right of way, however started, is within the line of duty of sectionmen.

2. But in our opinion the second point is well taken, and is fatal to plaintiff's case. It will be noted that two weeks or more intervened between the setting of the fire on defendant's right of way and the destruction of plaintiff's property. The plaintiff attempted to trace that fire during that time, in a southwesterly direction, down a ravine and through the timber, to some point on section 10 or 11 in the town immediately south of the one in which plaintiff's premises are situated (his land is in section 35), and then back, in a northerly or northeasterly direction, to

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plaintiff's land, which it reached, if at all, on September 1st. According to the evidence, it was not a sweeping, rapidly advancing fire across a prairie, but one that progressed slowly through the timber, sometimes nearly dying out, and then starting up again, according to the changes of the wind and weather; "some of it burning [to use the language of one witness] in the earth under the roots of the trees, others in old logs, and others in old stumps, and others seemed to be creeping along in the grass." It is also apparent from the evidence that during this time there were other forest fires smoldering in that part of the country, notably to the west or southwest of plaintiff's premises, for which the defendants were in no way responsible, and that finally, on the memorable 1st of September, 1894, the whole country, including plaintiff's premises, was swept over by a fire which consumed almost everything in its track. It is undisputed that this conflagration was caused, in part at least, by a fire from the west, or, to use the language of some of the witnesses, "from the direction of St. Cloud," which it is claimed united on or near plaintiff's premises with the fire alleged to have been originally set on defendant's right of way. Under such circumstances it was necessary that the fire should be carefully traced and identified by the evidence from the right of way to plaintiff's premises. The jury were not at liberty to arrive at the result by mere guess or conjecture, but must have had some substantial evidence on which to base their verdict. We have carefully read and studied the evidence, and are clearly of the opinion that there was no sufficient tracing of the fire, either by any one witness or by all the witnesses together, from the point where the sectionmen ignited the pile of ties and rubbish on the right of way, to plaintiff's premises. Neither was it traced by proof of facts and circumstances from which the inference could be legitimately drawn that it was the same fire. The most that can be claimed for the evidence is that it is possible that the fire started on the right of way might have been, in whole or in part, the fire which consumed plaintiff's property.

Note

Anything like an analysis of all the evidence would be impracticable and useless. A careful reading of it in the light of a sectional map of the country will, we think, satisfy any one that our conclusion as to its probative force is correct. It may be remarked, however, that it appeared from their cross-examination that the plaintiff and several of his apparently most important witnesses were not on or near the premises on September 1st, and hence that much to which they testified on direct examination must have been mere conjecture or inference. See *Montague v. Railway Co.* (Wis.) 72 N. W. 41.

Counsel for the plaintiff makes the point that the case does not contain all the evidence, because a map used on the trial is not made a part of it. It is true that the trial judge states in his certificate that the case is signed as containing all the evidence, "with the understanding that the map used upon the trial be attached as a part of the case." This map was used on the trial for the convenience of counsel, witnesses, and jurors, so that the evidence might be better understood. The witnesses, in their testimony, referred specifically to certain points in or parts of the government survey, according to the government subdivisions, of which the courts take judicial notice; and any sectional map would aid in understanding the evidence as well as the one used on the trial. Order reversed, and a new trial granted.

NOTE.

Scope of Employment—Presumptions.—In the absence of evidence to the contrary, it will be presumed that one discharging the duties of a railroad employee is acting within the scope of his employment.

Hughes v. New York & N. H. R. Co., 4 J. & S. (N. Y.) 222; *Lampkins v. Vicksburg, S. & P. R. Co.*, 47 Am. & Eng. R. Cas. 622, 42 La. Ann. 997, 8 So. Rep. 530.

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ATCHISON, T. & S. F. R. Co.

v.

MATTHEWS *et al.*

(*Supreme Court of the United States, April 17, 1899.*)

State Decisions—Questions of Fact—Review by Supreme Court of the United States.—When a case is brought on error from the supreme court of a state to the supreme court of the United States for review, all questions of fact are settled by the state decision.

Actions for Fires Set by Engines—Imposition of Attorney's Fee—Police Regulation—Constitutionality of Statute.*—Sec. 2 of the act of 1885 of Kansas (Sess. Laws 1885, p. 258, c. 155) provides that in case of recovery in an action against any railroad for damages by fire, caused by the operation of the railroad, plaintiff shall be allowed by the court a reasonable attorney's fee as part of the judgment. *Held*, that such provision is in the nature of a police regulation, its purpose being not to compel the payment of debts, but to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains; and that the act is not in conflict with the fourteenth amendment of the federal constitution, and must be sustained.

ERROR by defendant to the Supreme Court of the State of Kansas. *Affirmed.*

Robert Dunlap and *E. D. Kenna*, for plaintiff in error.

MR. JUSTICE BREWER delivered the opinion of the court.

In 1885 the legislature of Kansas passed the following act:

"An act relating to the liability of railroads for damages by fire.

"Section 1. Be it enacted by the legislature of the state of Kansas: That in all actions against any railway company organized or doing business in this state, for damages by fire, caused by the operating of said railroad, it shall be only necessary for the plaintiff in said action to establish the fact that said fire complained of was

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*See *note*, 6 Am. & Eng. R. Cas., N. S., 770.

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caused by the operating of said railroad, and the amount of his damages (which proof shall be *prima facie* evidence of negligence on the part of said railroad); provided, that in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration.

"Sec. 2. In all actions commenced under this act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment." Sess. Laws 1885, p. 258, c. 155.

Under it an action was brought in the district court of Cloud county, which resulted in a judgment against the railroad company, plaintiff in error, for \$2,094 damages and \$225 attorney's fees. This judgment having been affirmed by the supreme court of the state, the company brought the case here on error.

All questions of fact are settled by the decision of the state courts (*Hedrick v. Railway Co.*, 167 U. S. 673, 677, 17 Sup. Ct. 922, and cases cited in the opinion), and the single matter for our consideration is the constitutionality of this statute. It is contended that it is in conflict with the fourteenth amendment to the federal constitution, and this contention was distinctly ruled upon by the supreme court of the state adversely to the railroad company. In support of this contention, great reliance is placed upon *Railway Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 6 Am. & Eng. R. Cas., N. S. 752. In that case a statute of Texas allowing an attorney's fee to the plaintiffs in actions against railroad corporations on claims, not exceeding in amount \$50, for personal services rendered or labor done, or for damages, or for overcharges on freight, or for stock killed or injured, was adjudged unconstitutional. It was held to be simply a statute imposing a penalty on railroad corporations for failing to pay certain debts, and not one to enforce compliance with any police regulation. It is so regarded by the supreme court of the state, and its construction was accepted in this court as correct. While the right to classify was conceded, it was said

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that such classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted; that no mere arbitrary selection can ever be justified by calling it classification. And there is no good reason why railroad corporations alone should be punished for not paying their debts. Compelling the payment of debts is not a police regulation. We see no reason to change the views then expressed, and, if the statute before us were the counterpart of that, we should be content to refer to that case as conclusive,

But while there is a similarity, yet there are important differences, and differences which, in our judgment, compel an opposite conclusion. The purpose of this statute is not to compel the payment of debts, but to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains. This is obvious from the fact that liability for damages by fire is not cast upon such corporations in all cases, but only in those in which the fire is "caused by the operating" of the road. It is true that no special act of precaution was required of the railroad companies, failure to do which was to be visited with this penalty, so that it is not precisely like the statutes imposing double damages for stock killed where there has been a failure to fence. *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110. And yet its purpose is not different. Its monition to the railroads is not, "Pay your debts without suit or you will, in addition, have to pay attorney's fees;" but rather, "See to it that no fire escapes from your locomotives, for if it does you will be liable, not merely for the damage it causes, but also for the reasonable attorney's fees of the owner of the property injured or destroyed." It has been frequently before the supreme court of Kansas, has always been so interpreted by that court, and its validity sustained on that ground. In *Railway Co. v. Merrill*, 40 Kan. 404, 408, 19 Pac. 795, it was said:

"The objection that this legislation is special and unequal cannot be sustained. The dangerous element employed, and

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the hazards to persons and property arising from the running of trains and the operation of railroads, justifies such a law; and the fact that all persons and corporations brought under its influence are subjected to the same duties and liabilities, under similar circumstances, disposes of the objections raised."

And in the opinion filed in the present case that court (49 Pac. 602) observed :

"Our statute is somewhat in the nature of a police regulation, designed to enforce care on the part of railroad companies to prevent the communication of fire and the destruction of property along railroad lines. It is not intended merely to impose a burden on railroad corporations that private persons are not required to bear, and the remedy offered is one the legislature has the right to give in such cases. This is the view heretofore held by this court, which we see no reason for changing. *Railway Co. v. Snaveley*, 47 Kan. 637, 28 Pac. 615; *Same v. Curtis*, 48 Kan. 179, 29 Pac. 146; *Same v. McMullen*, 48 Kan. 281, 29 Pac. 147; *Railroad Co. v. Henning*, 48 Kan. 465, 29 Pac. 597."

It is true that the *Ellis Case* was one to recover damages for the killing of a colt by a passing train. And so it might be argued that the protection of the track from straying stock and the protection of stock from moving trains would, within the foregoing principles, uphold legislation imposing an attorney's fee in actions against railroad corporations. We were not insensible to this argument when that case was considered, but we accepted the interpretation of the statute and its purpose given by the supreme court of Texas, as appears from this extract from our opinion (page 153, 165 U. S., and page 256, 17 Sup. Ct.): "The supreme court of the state considered this statute as a whole, and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts." And again, referring specifically to this matter (page 158, 165 U. S., and page 258, 17 Sup. Ct.): "While this action

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is for stock killed, the recovery of attorney's fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the state has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and, as no duty is imposed, there can be no penalty for nonperformance. Indeed, the statute does not proceed upon any such theory; it is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the supreme court of the state." Indeed, the limit in amount (\$50), found in that statute, made it clear that no police regulation was intended; for, if it were, the more stock found on the track the greater would be the danger and the more imperative the need of regulation and penalty.

So that, according to the interpretation placed upon the Texas statute by its supreme court, its purpose was generally to compel the payment of small debts, and the fact that among the debts so provided for was the liability for stock killed was not sufficient to justify us in separating the statute into fragments, and upholding one part on a theory inconsistent with the policy of the state, while, on the other hand, the purpose of this statute is, as declared by the supreme court of Kansas, protection against fire,—a matter in the nature of a police regulation.

It may be suggested that this line of argument leads to the conclusion that a statute of one state whose purpose is declared by its supreme court to be a matter of police regulation will be upheld by this court as not in conflict with the federal constitution, while a statute of another state, precisely similar in its terms, will be adjudged in conflict with that constitution if the supreme court of that state interprets its purpose and scope as entirely outside police regulation. But this by no means follows. This court is not concluded by the opinion of the supreme court of the state. *Yick Wo v. Hopkins*, 118 U. S. 356, 366, 6 Sup. Ct. 1064. It forms its own independent judgment as to the scope and purpose of a statute, while, of course, leaning to any interpretation which

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has been placed upon it by the highest court of the state. We have referred to the interpretation placed upon the respective statutes of Texas and Kansas by their highest courts, not as conclusive, but as an interpretation towards which we ought to lean, and which, in fact, commends itself to our judgment.

That there is peculiar danger of fire from the running of railroad trains is obvious. The locomotives, passing, as they do, at great rates of speed, and often when the wind is blowing a gale, will, unless the utmost care is taken (and sometimes in spite of such care), scatter fire along the track. The danger to adjacent property is one which is especially felt in a prairie state like Kansas. It early attracted the attention of its legislature, and in 1860—long before any railroads were built in the state—this statute was passed (Laws 1860, c. 70, § 2; Comp. Laws, c. 101, § 2):

“If any person shall set on fire any woods, marshes or prairies, so as thereby to occasion any damage to any other person, such person shall make satisfaction for such damage to the party injured, to be recovered in an action.” As held in *Emerson v. Gardiner*, 8 Kan. 452, its effect was to change the rule of the common law, which gave redress only when the person setting the fire did so wantonly or through negligence, whereas by this statute the mere fact of setting fire to woods, marshes, or prairies gave a right to the party injured to recover damages. And in the years after the railroads began to be constructed, and prior to the passage of the act before us, the reports of the supreme court of that state show that nearly a score of actions had been brought to that court for consideration, in some of which great damage had been done by fire escaping from moving trains. Fire catching in the dry grass often runs for miles, destroying not merely crops, but houses and barns. Indeed, in one case (*Railroad Co. v. Stanford*, 12 Kan. 354), it appeared that the fire escaping had swept across the prairies for over four miles, and one ground of objection to the recovery was that the distance of the property destroyed from the railroad track was so great,

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and the fire had passed over so many intervening farms, that it could not rightfully be held that the proximate cause of the injury was the escape of fire from the locomotive. No other work done, or industry carried on, carries with it so much of danger from escaping fire.

In 1887 the legislature of the state of Missouri felt constrained to pass an act making every railroad corporation responsible in damages for all property destroyed by fire communicated, directly or indirectly, from its engines, and giving the corporation an insurable interest in the property along its road. This statute was, after a full examination of all the authorities, held by this court a valid exercise of the legislative power. *Railway Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243. So, when the legislature of Kansas made a classification, and included in one class all corporations engaged in this business of peculiar hazard, it did so upon a difference having a reasonable relation to the object sought to be accomplished, to wit, the securing of protection of property from damage or destruction by fire.

While, as heretofore noticed, no special act of precaution was required, no statutory duty imposed upon railroad corporations, in respect to protection against escaping fire, and a similar omission in the legislation of Texas was referred to in the opinion in the *Ellis Case* as strengthening the argument that no police regulation was intended, yet we are of opinion that such omission is not conclusive upon the question of the validity of the statute: We have no right to consider the wisdom of such legislation. Our inquiry runs only to the matter of legislative power. If, in order to accomplish a given beneficial result,—a result which depends on the action of a corporation,—the legislature has the power to prescribe a specific duty and punish a failure to comply therewith by a penalty, either double damages or attorney's fees, has it not equal power to prescribe the same penalty for failing to accomplish the same result, leaving to the corporation the selection of the means it deems best therefor? Does the power of the legislature depend on the method it pursues to accom-

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plish the result? As individuals, we may think it better that the legislature prescribe the specific duties which the corporations must perform. We may think it better that the legislation should be like that of Missouri, prescribing an absolute liability, instead of that of Kansas, making the fact of fire *prima facie* evidence of negligence. But clearly, as a court, we may not interpose our personal views as to the wisdom or policy of either form of legislation. It cannot be too often said that forms are matters of legislative consideration; results and power only are to be considered by the courts.

Many cases have been before this court involving the power of state legislatures to impose special duties or liabilities upon individuals and corporations, or classes of them, and while the principles of separation between those cases which have been adjudged to be within the power of the legislature and those beyond its power are not difficult of comprehension or statement, yet their application often becomes very troublesome, especially when a case is near to the dividing line. It is easy to distinguish between the full light of day and the darkness of midnight, but often very difficult to determine whether a given moment in the twilight hour is before or after that in which the light predominates over the darkness. The equal protection of the laws which is guarantied by the fourteenth amendment does not forbid classification. That has been asserted in the strongest language. *Barbier v. Connolly*, 113, U. S. 27, 5 Sup. Ct. 357. In that case, after, in general terms, declaring that the fourteenth amendment was designed to secure the equal protection of the laws, the court added (pages 31, 32, 113 U. S., and page 359, 5 Sup. Ct.):

"But neither the amendment,—broad and comprehensive as it is,—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state,

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develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits,—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property, under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

This declaration has, in various language, been often repeated, and the power of classification upheld, whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished. It is also clear that the legislature (which has power in advance to determine what rights, privileges, and duties it will give to, and impose upon, a corporation which it is creating) has, under the generally reserved right to alter, amend, or repeal the charter, power to impose new duties and new liabilities upon such artificial entities of its creation. *Railway Co. v. Paul*, 173 U. S. —, 18 Sup. Ct. 419. It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts

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will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power. On the other hand, it is also true that the equal protection guarantied by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney's fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed. *Yick Wo v. Hopkins*, *supra*, forcibly illustrates this. In that case a municipal ordinance of San Francisco, designed to prevent the Chinese from carrying on the laundry business, was adjudged void. This court looked beyond the mere letter of the ordinance to the condition of things as they existed in San Francisco, and saw that, under the guise of regulation, an arbitrary classification was intended and accomplished.

While cases on either side and far away from the dividing line are easy of disposition, the difficulty arises as the statute in question comes near the line of separation. Is the classification or discrimination prescribed thereby purely arbitrary, or has it some basis in that which has a reasonable relation to the object sought to be accomplished? It is not at all to be wondered at that as these doubtful cases come before this court the justices have often divided in opinion. To some the statute presented seemed a mere arbitrary selection; to others it appeared that there was some reasonable basis of classification. Without attempting to cite all the cases, it may not be amiss to notice, in

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addition to those already cited, the following: *Missouri v. Lewis*, 101 U. S. 22; *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350; *Duncan v. Missouri*, 152 U. S. 377, 382, 14 Sup. Ct. 570; *Marchant v. Railroad Co.*, 153 U. S. 380, 389, 14 Sup. Ct. 894; *Railroad Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585; *Lowe v. Kansas*, 163 U. S. 81, 88, 16 Sup. Ct. 1031; *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138; *Turnpike Co. v. Sandford*, 164 U. S. 578, 597, 17 Sup. Ct. 198; *Jones v. Brim*, 165 U. S. 180, 17 Sup. Ct. 282; *W. U. Tel. Co. v. Indiana*, 165 U. S. 304, 17 Sup. Ct. 345; *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 257, 17 Sup. Ct. 581; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383; *Savings & Loan Soc. v. Multnomah Co.*, 169 U. S. 421, 18 Sup. Ct. 392; *Magoun v. Bank*, 170 U. S. 283, 300, 18 Sup. Ct. 594; *Tinsley v. Anderson*, 171 U. S. 101, 18 Sup. Ct. 805. In some of them the court was unanimous; in others, it was divided; but the division in all of them was not upon the principle or rule of separation, but upon the location of the particular case one side or the other of the dividing line.

It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains, it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains, it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit, it must pay, not only the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock, it could, under no circumstances, recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is

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of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.

Our conclusion in respect to this statute is that, for the reasons above stated, giving full force to its purpose as declared by the supreme court of Kansas, to the presumption which attaches to the action of a legislature that it has full knowledge of the conditions within the state, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public, it must be sustained, and the judgment of the supreme court of Kansas is affirmed.

**Actions for Fires
Set by Engines—
Imposition of
Attorney's Fee—
Police Regulation
—Constitution-
ality of Statute.**

MR. JUSTICE HARLAN, dissenting.

The statute of Kansas, the validity of which is involved in the present case, provides in its first section that, in all actions against a railway company to recover damages resulting from fire caused by the operating of its road, it shall only be necessary for the plaintiff to establish the fact that the fire complained of "was caused by the operating of said railroad, and the amount of his damages (which proof shall be *prima facie* evidence of negligence on the part of said railroad): provided, that in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration." The second and only other section provides that, "if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment."

Manifestly, the statute applies only to suits against railroad companies, and only to causes of action arising from fire caused by operating a railroad. It establishes against a defendant railroad company a rule of evidence as to negligence that does not apply in any other suit for damages arising from the negligence of a defendant, whether a corporate or natural person. It does more. It imposes upon the defendant railroad corporation, if unsuccessful in its

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defense, a burden not imposed upon any other unsuccessful defendant sued upon a like or upon a different cause of action. That burden is the payment of an attorney's fee as a part of the judgment. Even if it appears that the railway company was not guilty of any negligence whatever, or that the plaintiffs were guilty of contributory negligence preventing any recovery in their favor, no such fee nor any sum beyond ordinary costs is taxed against them.

In *Railway Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, we had before us a statute of Texas declaring, among other things, that any person in that state having "claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed, or injured, against any railroad corporation operating a railroad in this state, and the amount of such claim does not exceed \$50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed \$10, to be assessed and awarded by the court or jury trying the issue. *Supp. Sayles' Rev. Civ. St. p. 768, art. 4266a.*

That was an action against the railway company to recover damages for the killing of an animal. Judgment was entered against the company, and it included a special attorney's fee. That judgment was sustained by the state court.

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The question to be decided was whether, within the meaning of the fourteenth amendment and in the cases specified, the Texas statute did not deny to a railroad corporation the equal protection of the laws, in that it required the corporation, if unsuccessful in the suit, to pay, in addition to the ordinary costs taxable in favor of a successful litigant, a special attorney's fee, but gave it no right, if successful, to demand a like fee from its adversary.

After observing that only against railway companies, and only in certain cases, was such exaction made, and considering the statute as a whole, this court said: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors, and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants, under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong, they do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

Referring to the previous decisions of this court holding that corporations were persons within the meaning of the fourteenth amendment of the constitution of the United States, this court also said: "The rights and securities guarantied to persons by that instrument cannot be disre-

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garded in respect to these artificial entities called 'corporations' any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

In response to the argument made in that case, that it was competent for the legislature to make a classification of corporations enjoying special privileges, the court said: "That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the particular business in which they are engaged—is a just classification, and not one within the prohibition of the fourteenth amendment. Thus, it is frequently required that they fence their tracks, and, as a penalty for a failure to fence, double damages in case of loss are inflicted. *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged,—a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the state, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the state, and with a view to enforce just and reasonable police regulations. While this action is for stock killed, the recovery of attorney's fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the state has not deemed it necessary for the protection of life or property to require railroads to fence

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their tracks, and, as no duty is imposed, there can be no penalty for nonperformance. Indeed, the statute does not proceed upon any such theory. It is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the supreme court of the state." Again: "Neither can it be sustained as a proper means of enforcing the payment of small debts, and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties,—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the state. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained. But arbitrary selection can never be justified by calling it 'classification.' The equal protection demanded by the fourteenth amendment forbids this."

If the opinions in the Ellis Case and in this case be taken together, the state of the law seems to be this:

(1) A state may not require a railroad company sued for negligently killing an animal to pay to the plaintiff, in addition to the damages proved and the ordinary costs, a reasonable attorney's fee, when it does not allow the corporation, when its defense is sustained, to recover a like attorney's fee from the plaintiff.

(2) A state may require a railroad company sued for, and adjudged liable to, damages arising from fire caused by the operation of its road, to pay to the plaintiff, in addition to the damages proved and the ordinary costs, a reasonable at-

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torney's fee, even if it does not allow the corporation, when successful in its defense, to recover a like attorney's fee from the plaintiff.

The first proposition arises out of a suit brought on account of the killing by the railroad of a colt. The second proposition arises out of a suit brought on account of the destruction of an elevator and the property attached to it by fire caused by operating a railroad.

Having assented in the Ellis Case to the first proposition, I cannot give my assent to the suggestion that the second proposition is consistent with the principles there laid down. Placing the present case beside the former case, I am not astute enough to perceive that the Kansas statute is consistent with the fourteenth amendment, if the Texas statute be unconstitutional.

In the former case we held that a railroad corporation, sued for killing an animal, was entitled to enter the courts upon equal terms with the plaintiff, but that that privilege was denied to it when the Texas statute required it to pay a special attorney's fee if wrong, and did not allow it to recover any fee if right in its defense; and yet allowed the plaintiff to recover a special attorney's fee if right, and pay none if wrong. Upon these grounds it was adjudged that the parties did not stand equal before the law, and did not receive its equal protection. In the present case the Kansas statute is held to be constitutional, although the parties in suits embraced by its provisions are not permitted to enter the courts upon equal terms, and although the defendant railroad corporation is not allowed to recover an attorney's fee if right, but must pay one if found to be wrong in its defense, while the plaintiff is exempt from that burden if found to be wrong.

In the former case it was adjudged that a state had no more power to deny to corporations the equal protection of the law than it has to individual citizens, in the present case it is adjudged that, in suits against a railroad corporation to recover damages arising from fire caused by the operation of

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the railroad, a rule of evidence may be applied against the corporation which is not applied in like actions against other corporations or against individuals for the negligent destruction of property by fire.

In the former case it was held that, as the killing of the colt was not attributable to a failure upon the part of the railroad to perform any duty imposed upon it by statute, there could be no penalty for nonperformance. In the present case it is adjudged that the statute may impose a penalty upon the defendant corporation for nonperformance, although the negligence imputed to it was not in violation of any statutory duty.

Suppose the statute in question had been so framed as to give the railroad corporation a special attorney's fee if successful in its defense, but did not allow such a fee to an individual plaintiff when successful. I cannot believe that any court, federal or state, would hesitate a moment in declaring such an enactment void, as denying to the plaintiff the equal protection of the laws. If this be true, it would seem to follow that a statute that accords to the plaintiff rights in courts that are denied to his adversary should not be sustained as consistent with the doctrine of the equal protection of the laws. This conclusion, it seems to me, is inevitable unless the court proceeds upon the theory that a corporate person in a court of justice may be denied the equal protection of the laws when such protection could not be denied under like circumstances to natural persons. But we said in the Ellis Case that "a state has no more power to deny to corporations the equal protection of the laws than it has to individual citizens," and that corporations are denied a right secured to them by the fourteenth amendment if "they cannot appeal to the courts as other litigants under like conditions and with like protection."

There is another aspect in which the Kansas statute may be viewed. Taken in connection with the principles of general law recognized in that state, that statute, although not imposing any special duties upon railroad companies, in

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effect says to the plaintiffs, Matthews and Trudell, the owners of the elevator property,—indeed, it says, in effect, to every individual citizen, and, for that matter, to every corporation in the state: “If you are sued by a railroad corporation for damage done to its property by fire caused by your negligence or in the use of your property, the recovery against you shall not exceed the damages proved and the ordinary costs of suit. But if your property is destroyed by fire caused by the operation of the railroad belonging to the same corporation, and you succeed in an action brought to recover damages, you may recover, in addition to the damages proved and the ordinary costs of suit, a reasonable attorney’s fee, and, if you fail in the action, no such attorney’s fee shall be taxed against you.” In my judgment, such discrimination against a litigant is not consistent with the equal protection of the laws secured by the fourteenth amendment.

I submit that any other conclusion is inconsistent with *Railway Co. v. Ellis*, as well as with many other well-considered decisions. A reference to a few adjudged cases will suffice.

The principles which in my judgment should control the determination of cases like the present one are well stated by the supreme court of Michigan in *Wilder v. Railway Co.*, 70 Mich. 382, 38 N. W. 289. That case involved the validity of a provision in a statute of that state authorizing an attorney’s fee of \$25 to be taxed against a railroad company against which judgment should be rendered in an action for injuries to stock. The court said: “But the imposing of the attorney’s fee of \$25 as costs cannot be upheld. The legislature cannot make unjust distinctions between classes of suitors without violating the spirit of the constitution. Corporations have equal rights with natural persons as far as their privileges in the courts are concerned. They can sue and defend in all courts the same as natural persons, and the law must be administered as to them with the same equality and justice which it bestows upon every suitor, and without

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which the machinery of the law becomes the engine of tyranny. This statute proposes to punish a railroad company for defending a suit brought against it with a penalty of \$25 if it fails to successfully maintain its defense. The individual sues for the loss of his cow, and if it is shown that such loss was occasioned by his own neglect, and through no fault of the company, and he thereby loses his suit, the railroad company can recover only the ordinary statutory costs of \$10 in justice's court, but, if he succeeds because of the negligence of the company, the plaintiff is permitted to tax the \$10 and an additional penalty of \$25; for it is nothing more or less than a penalty. Calling it an 'attorney's fee' does not change its real nature or effect. It is a punishment to the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist. 'The genius, the nature, and the spirit of our state government amounts to a prohibition of such acts of legislation, and the general principles of law and reason forbid them.' *Durkee v. City of Janesville*, 28 Wis. 464, 468; *Calder v. Bull*, 3 Dall. 386, 388. Here the legislature has granted special advantages to one class at the expense and to the detriment of another, and has undertaken to make the courts themselves the active agents in this injustice, and to force them to impose penalties in the disguise of costs upon railroad companies for simply exercising, in certain cases, the common right of every person to make a defense in the courts when suits are brought against them.' These principles were reaffirmed in *Lafferty v. Railway Co.*, 71 Mich. 35, 38 N. W. 660, and *Chair Co. v. Runnels*, 77 Mich. 104, 111, 43 N. W. 1006.

The validity of a statute of Alabama requiring a reasonable attorney's fee, not exceeding a named amount, to be taxed

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as part of the costs in certain actions, was involved in *Railroad Co. v. Morris*, 65 Ala. 193, 199. The supreme court of Alabama, referring to the fourteenth amendment as well as to the state constitution, said: "The clear legal effect of these provisions is to place all persons, natural and corporate, as near as practicable, upon a basis of equality in the enforcement and defense of their rights in courts of justice in this state, except so far as may be otherwise provided in the constitution. This right, though subject to legislative regulation, cannot be impaired or destroyed under the guise or device of being regulated. Justice cannot be sold, or denied, by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another, without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial, and discriminatory legislation, which secures this right to some favored class or classes, and denies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions. * * * The section of the Code under consideration (section 1715) prescribes a regulation of a peculiar and discriminative character, in reference to certain appeals from justices of the peace. It is not general in its provisions, or applicable to all persons, but it is confined to such as own or control railroads only; and it varies from the general law of the land, by requiring the unsuccessful appellant, in this particular class of cases, to pay an attorney's tax fee, not to exceed \$20. A law which would require all farmers who raise cotton to pay such a fee, in cases where cotton was the subject-matter of litigation, and the owners of this staple were parties to the suit, would be so discriminating in its nature as to appear manifestly uncon-

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stitutional; and one which should confine the tax alone to physicians, or merchants, or ministers of the gospel, would be glaring in its obnoxious repugnancy to those cardinal principals of free government which are found incorporated, perhaps, in the bill of rights of every state constitution of the various commonwealths of the American government. We think this section of the Code is antagonistic to these provisions of the state constitution, and is void. *Durkee v. City of Janesville*, 28 Wis. 464; *Gordon v. Association*, 12 Bush, 110; *Greene v. Briggs*, 1 Curt. 327, Fed. Cas. No. 5,764; *Cooley*, Const. Lim. (3d Ed.) § 393. The section in question is also violative of that clause in section 1, art. 14, of the constitution of the United States, which declares that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' This guaranty was said by JUSTICE BRADLEY in *Missouri v. Lewis*, 101 U. S. 22, 30, to include 'the equal right to resort to the appropriate courts for redress.' 'It means,' as was further said by the court, 'that no person or class of persons should be denied the same protection which is enjoyed by other persons, or other classes, in the same place and under like circumstances.' The same court, in *U. S. v. Cruikshank*, 92 U. S. 542, 555, per WAITE, C. J., used the following language in discussing the foregoing constitutional clause: 'The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states, and it still remains there.' *Ward v. Flood*, 48 Cal. 36."

Coal Co. v. Rosser, 53 Ohio St. 12, 22-24, 41 N. E. 264, involved the validity of a section of the Revised Statutes of Ohio providing that "if the plaintiff in any action for wages recover the sum claimed by him in his bill of particulars, there shall be included in his costs such fee as the court may allow, but not in excess of \$5, for his attorney; but no such attorney

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fee shall be taxed in the costs unless said wages shall have been demanded in writing, and not paid within three days after such demand; if the defendant appeal from any such judgment, and the plaintiff on appeal recover a like sum exclusive of interest from the rendition of the judgment before the justice, there shall be included in his costs such additional fee not in excess of \$15 for his attorney as the court may allow." Rev. St. § 6563a, amended by Laws 1892, p. 59. The supreme court of Ohio said: "Under the statute, to entitle the plaintiff to have an attorney's fee taxed against the defendant, he is not required to show that the debtor had funds which he willfully or arbitrarily, or even carelessly, refused to apply to pay his debt, nor that a vexatious or dilatory defense had been made to defeat or delay the judgment. No other misconduct by the defendant is required than such as may be implied from a failure to comply with the peremptory written demand made upon him. Whether the debtor interposes or shows a vexatious defense, whether he makes an honest though unsuccessful one, or whether he makes none at all, but instead suffers judgment to be taken against him by default, are all equally immaterial. In either case, the statute denounces against him a penalty called an 'attorney's fee' if an action is brought on the claim, and judgment recovered for the sum demanded. * * * The right to protect property is declared as well as that justice shall not be denied and every one entitled to equal protection. Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as sacred as the right to recover it when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific real or personal property. An adverse result, in either case, deprives the defeated party of property." Again: "Upon what principle can a rule of law rest which permits one party or class of people to invoke the action of our tribunals of justice at will, while the other party or another class of citizens does so at the peril of being mulcted in an attorney's

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fee if an honest, but unsuccessful, defense should be interposed? A statute that imposes this restriction upon one citizen or class of citizens only denies to him or them the equal protection of the law."

In *Railroad Co. v. Moss*, 60 Miss. 641, 646, 647, 650-652, which involved the validity of a statute authorizing an attorney's fee to be taxed against the appellant, "whenever an appeal shall be taken from the judgment of any court in any action for damages brought by any citizen of this state against any corporation," the supreme court of Mississippi said: "All litigants whether plaintiff or defendant, should be regarded with equal favor by the law and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law and its instrumentalities. The same rule must exist for all in the same circumstances. There may be different rules for appeals and their incidents in different classes of cases determined by their nature and subjects, but not with respect to the persons by or against whom they are instituted. The subjection of every unsuccessful appellant to a charge for the fee of the attorney for the appellee would afford no ground for complaint as unequal, for it would operate on all, and such a rule for the unsuccessful appellant in certain causes of action, tested by the nature and subject of the actions, will be equally free from objection on the ground of its discriminating character; but to say that, where certain persons are plaintiffs and certain persons are defendants, the unsuccessful appellant shall be subject to burdens not imposed on unsuccessful appellants generally, is to deny the equal protection of the law to the party thus discriminated against. It is to debar certain persons from prosecuting a civil cause before the appellate tribunals of this state. It is an unwarrantable interference with the 'due course of law' prescribed for litigants generally. * * * It is doubtless true that the act was designed for the relief of citizens who became litigants in actions against corporations, because it applies only when a citizen is plaintiff, and it was assumed that the

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corporation would be appellant, and to avoid discrimination between parties to the same action it was made to operate on either party as appellant; but it sometimes occurs, and may very often, that the citizen plaintiff is an appellant, and in such cases the discrimination may operate oppressively on him. The supreme court of Alabama declared its act violative of the constitution of that state and of the United States, because of its unjust discrimination in establishing peculiar rules for a particular occupation, *i. e.* 'such as own or control railroads.' Our objection to the act under consideration, is broader, as shown above, embracing in its scope the right of the citizen who sues a corporation, for whom we assert the right to appeal on the same terms granted to the plaintiffs in like cases, *i. e.* actions for damages, against whomsoever brought. The act was intended to deter from the appellate court corporations against whom judgments should be rendered for damages, or citizens of this state suing them for damages. It was conceived in hostility to citizens as plaintiffs or corporations as defendants in such actions. In either view, it is partial and discriminating against classes of litigants, denying them access to the appellate courts on the same terms and with the same incidents as other litigants who may be plaintiffs or defendants in actions for damages. It is not applicable to all suitors alike in the class of actions mentioned by it. * * * An act 'which is partial in its operations, intended to affect particular individuals alone or to deprive them of the benefit of the general laws, is unwarranted by the constitution and is void.' 'A partial law, tending directly or indirectly to deprive a corporation or an individual of rights to property, or to the equal benefits of the general laws of the land, is unconstitutional and void.' "

Cases almost without number could be cited to the same general effect. I refer to the following, as bearing more or less upon the general inquiry as to the scope and meaning of the clause in the fourteenth amendment prohibiting any state from denying to any person within its jurisdiction the

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equal protection of the laws: *Jolliffe v. Brown*, 14 Wash. 155, 44 Pac. 149; *Randolph v. Supply Co.*, 106 Ala. 501, 17 South. 721; *Insurance Co. v. Smith* (Tex. Civ. App.) 41 S. W. 680; *Railway Co. v. Williams*, 49 Ark. 492, 5 S. W. 883; *Railway Co. v. Outcalt*, 2 Colo. App. 395, 31 Pac. 177; *Railroad Co. v. Baty*, 6 Neb. 37; *O'Connell v. Lumber Co.* (Mich.) 71 N. W. 449; *Railway Co. v. Wilson* (Tex. Civ. App.) 19 S. W. 911; *City of Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. 128; *Pearson v. City of Portland*, 69 Me. 278; *Burrows v. Brooks* (Mich.) 71 N. W. 460; *Middleton v. Middleton*, 54 N. J. Eq. 692, 35 Atl. 1065, and 37 Atl. 1106; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285. These adjudications rest substantially upon the grounds indicated by this court in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 6 Sup. Ct. 1064, where it was said that "the equal protection of the laws is a pledge of the protection of equal laws."

I do not think that the adjudged cases in this court, to which reference has been made, sustain the validity of the statute of Kansas.

In *Railway Co. v. Humes*, 115 U. S. 512, 522, 6 Sup. Ct. 113, this court sustained a statute of Missouri requiring every railroad corporation to erect and maintain fences and cattle guards on the sides of its roads, and for failure to do so subjecting it to liability in double the amount of damages occasioned thereby. The court said: "The omission to erect and maintain such fences and cattle guards in the face of the law would justly be deemed gross negligence, and if, in such cases, where injuries to property are committed, something beyond compensatory damages may be awarded to the owner by way of punishment for the company's negligence, the legislature may fix the amount or prescribe the limit within which the jury may exercise their discretion. The additional damages being by way of punishment, it is clear that the amount may be thus fixed; and it is not a valid objection that the sufferer instead of the state receives them. * * *

The power of the state to impose fines and penalties for a

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violation of its statutory requirements is coeval with government, and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple, the actual damages. * * * The objection that the statute of Missouri violates the clause of the fourteenth amendment which prohibits a state to deny to any person within its jurisdiction the equal protection of the laws is as untenable as that which we have considered. The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability, and from each the same security, by the erection of fences, gates, and cattle guards, is exacted, when its road passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands. There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances.

In *Railway Co. v. Mackey*, 127 U. S. 205, 209, 8 Sup. Ct. 1163, this court held not to be unconstitutional a statute of Kansas making every railroad company liable for all damages done to one of its employees in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employee, to any person sustaining such damage. This court said: "Such legislation does not infringe upon the clause of the fourteenth amendment requiring equal protection of the laws, because it is special in its character. If in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons

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brought under its influence are treated alike, under the same conditions."

In *Railway Co. v. Emmons*, 149 U. S. 364, 367, 13 Sup. Ct. 871, the court held to be valid a statute of Minnesota requiring railroad companies within a named time to build, or cause to be built, good and sufficient cattle guards at all wagon crossings, and good and substantial fences on each side of their respective roads, and that failure by any company to perform that duty should be deemed an act of negligence, for which it should be liable in treble the amount of damage sustained. This court said: "The extent of the obligations and duties required of railroad corporations or companies by their charters does not create any limitation upon the state against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employees, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within the police powers of the states. No contract with any person, individual or corporate, can impose restrictions upon the power of the states in this respect."

In *Railway Co. v. Mathews*, 165 U. S. 1, 26, 17 Sup. Ct. 252, this court upheld a statute of Missouri providing that every railroad corporation owning and operating a railroad in that state should be responsible in damages to the owner of any property injured or destroyed by fire communicated, directly or indirectly, by locomotive engines in use upon its railroad; the railroad company being, however, authorized to procure insurance on the property upon the route of its railroad. It was there said: "The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the

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railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments. The very statute now in question, which makes the railroad company liable in damages for property so destroyed, gives it, for its protection against such damages, an insurable interest in the property in danger of destruction, and the right to obtain insurance thereon in its own behalf; and it may obtain insurance upon all such property generally, without specifying any particular property." Observe, that the Missouri statute gave the railroad company, for its protection against the new liability imposed upon it, the right to insure the property likely to be destroyed by fire.

I do not perceive that the judgment now rendered finds support in any adjudication by this court. The above cases proceed upon the general ground that in the exercise of its police powers a state may, by statute, impose additional duties upon railroad corporations, with penalties for the non-performance of such duties, and that such legislation is not, because of its special character, a denial of the equal protection of the laws. It is said to be of the essence of classification that "upon the class are cast duties and burdens different from those resting upon the general public." But here the state does not prescribe any additional duties upon railroad companies in respect of the destruction of property by fire arising from the operating of their roads. It simply imposes a penalty which it does not impose upon other litigants under like circumstances. It only prescribes a punishment for assuming to contest a claim of a particular kind made against it for damages. The railroad company can escape the punishment only by failing to exercise its privilege of resisting in a court of justice a demand which it deems unjust. Undoubtedly, the state may prescribe new

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duties for a railroad corporation, and impose penalties for their nonperformance. But, under the guise of exerting its police powers, the state may not prevent access to the courts by all litigants upon equal terms. It may not, to repeat the language of the court in the Ellis Case, "arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency." Arbitrary selection cannot, we said in the same case, "be justified by calling it classification." There is no classification here except one that denies the equal protection of the laws. It would seem that what was said in the Ellis Case was exactly in point, namely, "as no duty is imposed, there can be no penalty for nonperformance." Instead of prescribing some penalty for the neglect by the railroad company of duties specifically enjoined upon it, the state attempts—and by the decision just rendered is enabled—to take from the company the right which we declared in the Ellis Case was secured by the constitution, namely, the right to "appeal to the courts as other litigants, under like conditions, and with like protection."

Some stress is laid upon the fact that the statute under consideration was passed by a state in which fires caused by the operating of railroads may often cause, and are likely to cause, widespread injury to grass, crops, houses, and barns. What, in the light of the authorities, the state may constitutionally do in order to protect its people against dangers of that character, I need not stop to consider. The only question here is whether, in the absence of any statutory regulation prescribing what a railroad corporation shall or shall not do in order to guard property against destruction by fire arising from the operating of its road, the state can deny to such a corporation, when defending a suit brought against it to recover damages on the ground of negligent destruction of property, a privilege which it accords to its adversary in the trial of the issues joined. May the state meet the railroad corporation at the doors of its courts of justice, and say to it, "If you en-

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ter here for the purpose of defending the suit brought against you, it must be subject to the condition that a special attorney's fee shall be taxed against you if unsuccessful, while none shall be taxed against the plaintiff if he be unsuccessful?" Nothing has ever heretofore fallen from this court sustaining the proposition that the constitutional pledge of the equal protection of the laws admitted of a litigant, because of its corporate character, being denied in a court of justice privileges of a substantial kind accorded to its opponent. If there is one place under our system of government where all should be in a position to have equal and exact justice done to them, it is a court of justice,—a principle which I had supposed was as old as Magna Charta.

In my opinion, the statute of Kansas denies to a litigant, upon whom no duty has been imposed by statute, and whose liability for wrongs done by it depends upon general principles of law applicable to all alike, that equality of right given by the law of the land to all suitors, and consequently it should be adjudged to deny the equal protection of the laws. I dissent from the opinion and judgment.

MR. JUSTICE BROWN, MR. JUSTICE PECKHAM, and MR. JUSTICE MCKENNA concur in this dissent.

BALTIMORE & O. S. W. RY. CO.

v.

TRIPP.

(Supreme Court of Illinois, Oct. 24, 1898.)

Fires Set by Locomotives—Constitutionality of Statute.*—The Illinois statute providing that in actions to recover damages for injury to property caused by fire communicated by any railroad loco-

*See *St. Louis & S. F. R. Co. v. Mathews* (U. S.), 6 Am. & Eng. R. Cas., N. S., 381, in which the authorities are reviewed, and *note*, p. 387.

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motive, the fact that such fire was so communicated shall be taken as full *prima facie* evidence to charge the corporation or persons in charge of the road, is constitutional, it not discriminating against railroads or depriving them of the equal protection of the law.

Duty of Company—Pleading.—In such an action, the declaration sufficiently stated the duty of the railroad company by alleging that it was its duty "to so operate its road and its locomotive engines running thereon that fire should not escape and be communicated therefrom" to plaintiff's property.

Negligence—Question for Jury.—There having been evidence tending to show liability on the part of defendant, it was not error to refuse to take the case from the jury.

Instructions.—It was not error to refuse to give an irrelevant instruction, nor to refuse to instruct upon points covered by instructions already given.

Evidence.—It was not error to admit evidence to show that the engine from which it was alleged fire was communicated to plaintiff's property was seen, within 10 days after the fire, "throwing cinders from its smokestack," although there was no proof that it was in the same condition it was in at the time of the fire.

Negligence—Question of Fact.—It cannot be said, as a matter of law, that the emission of sparks from an engine is no evidence of negligence.

APPEAL by defendant from Sangamon county circuit court.
Affirmed.

Palmer, Shutt, Hamill & Lester, for appellant.

Patton, Hamilton & Patton, for appellee.

CARTER, C. J. This is an appeal from a judgment of the circuit court awarding appellee damages for the destruction by fire of lumber and an office building. The declaration alleged that the loss was caused by appellant in so negligently operating a locomotive on its road that fire was emitted and communicated to a corner building situated on its right of way, from whence it spread to and destroyed said property of the plaintiff. The appeal is taken directly to this court, because it is alleged that the validity of the act of March 29, 1869, "relating to fires caused by locomotives," is involved; it being assigned for error that the statute "is unconstitutional and void, in that it discriminates

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against railroads and deprives them of the equal protection of the law."

The statute in question provides that in actions like this, to recover damages for injury to property caused by fire communicated by any locomotive engine while upon or passing along any railroad in this state, the fact that such fire was so communicated shall be taken as full *prima facie* evidence to charge the corporation or persons who shall at the time be in the occupation and use of the railroad, etc. This statute has been in force for nearly 30 years, and has been considered and applied in many cases (*Railroad Co. v. Quaintance*, 58 Ill. 389; *Railroad Co. v. Rogers*, 62 Ill. 346; *Railroad Co. v. Clampit*, 63 Ill. 95; *Railway Co. v. Larmon*, 67 Ill. 68; *Railroad Co. v. Funk*, 85 Ill. 460; *Railway Co. v. Campbell*, 86 Ill. 443; *Railroad Co. v. Pennell*, 110 Ill. 435); but, as said in *Railroad Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, its validity has not heretofore been questioned.

It is not contended in the argument that the legislature may not establish rules of evidence, but it is insisted that by this statute companies or persons operating railroads are singled out, and a different and harsher rule is applied to them than is applied by the law to others, and that they are denied the equal protection of the laws. The argument is that to make one rule of evidence applicable to actions for losses caused by fire communicated by locomotive engines while upon or passing along any railroad, and another rule applicable where the fire is caused by other agencies,—such, for example, as a traction engine running upon a public highway,—is to discriminate arbitrarily and unjustly against companies or persons operating railroads; that the law imposes a heavy burden upon the latter, leaving all others free from it. It is also said that the statute in question does not create any right of action against, or impose any duty on, railroad companies, and that the burden is not imposed as a penalty, in the nature of a police regulation, for a violation of duty imposed by the statute itself; and counsel cite and rely with confidence upon *Railroad Co. v. Ellis*, 165

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U. S. 150, 17 Sup. Ct. 255, as sustaining their contention that the statute is void. Many authorities are reviewed in that case, including some from this state, but we perceive a radical distinction between that case and this. In that case it was held that the Texas statute, making railroad companies liable to the opposite party for his attorney's fees in certain cases, violated the equality clause in the fourteenth amendment to the federal constitution, because the classification was not based upon any reasonable ground, but was purely arbitrary in selecting railroad companies alone and fixing upon them a liability not imposed upon others, and which was not imposed as a penalty for the violation of a police regulation. But we are unable to see how the principle there applied is applicable to the case at bar. To our minds, the classification made by our statute is a reasonable and natural one. There are such obvious differences between the dangers to be apprehended from fires emanating from locomotives running at great speed upon railroads built upon rights of way, and the dangers from fires emanating from traction engines or other vehicles passing, necessarily at much slower speed, along public roads, that it would seem unnecessary to point them out. The statutes relating to the use of the two kinds of engines recognize the differences in the dangers to which they give rise. Steam engines upon public highways must be stopped by persons in control of them, when meeting persons with horses, until the latter shall have passed by, and a trusty man must be kept at not less than 50 nor more than 200 yards in advance of such engines to assist in controlling any horse being driven on such highway, and it is made unlawful to blow any whistle on such engines while they are on the public highway. Such regulations, if applied to engines running upon railroads, would be absurd. It is true, these are police regulations, and have no reference to destruction of property by fire emanating from such engines, but they indicate the dangers sought to be guarded against by the temporary use of the public highways by traction engines,

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and the statutes applicable, respectively, to the two classes of engines recognize the differences in the kind and character of the dangers to property by the use of each.

It is apparent that, as a rule, it would be much less difficult for the property owner to prove negligence where it existed and had caused the destruction of the property by fire emanating from a steam engine proceeding slowly along a public road in the neighborhood than it would in a similar case of loss by fire emitted from a locomotive engine running upon a railroad. Locomotive engines run upon the railroads at all times, day and night, in such numbers, and with such frequency and speed, that the liability to set fire to adjacent property is very great; and besides, from the very nature of the case, it is often difficult to prove that fire which may have destroyed property emanated from them, and often impossible to prove that such emanation of fire was caused by the negligence of the railroad company or its servants. It is no hardship on companies or persons operating such engines, after proof that they have set fire to the property of others to be required, in order to relieve themselves from liability, to prove that they were not guilty of negligence. Whether they exercised due care or not in the operation of the engine with reference to the danger of emitting fire therefrom, and in its equipment with the most approved appliances to prevent the escape of fire, are matters more peculiarly within their knowledge, and they can supply such proof more readily than the property owner, who, as a general thing has had no connection with the cause which operated to destroy his property, and rarely adequate proof of negligence of the company or its servants at his command. *Woodson v. Railroad Co.*, 21 Minn. 61. Besides, the law of this state prior to the enactment of the statute, so far as applicable to the facts of this case, was the same as it has been since. *Bass v. Railroad Co.*, 28 Ill. 9; *Railroad Co. v. Montgomery*, 39 Ill. 335; *Railroad Co. v. Mills*, 42 Ill. 407. In the *Mills Case* (decided in 1866) an instruction was assailed which asserted "that the escape of fire from a railroad engine raises

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a presumption of negligence on the part of the road, and, that fire having been shown to have thus escaped, the onus then devolved upon defendants to rebut the presumption of negligence," and this court said (page 410): "Experience proves that by the use of modern inventions for the purpose the escape of fire may ordinarily be prevented, and when it does escape we may safely infer that such machinery has been omitted, and require the company to show that it was employed and in proper condition." The same rule has been announced in England. *Piggot v. Railway Co.*, 3 C. B. 229.

We hold the act to be constitutional. The cases cited by

Fire Set by Loco-
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counsel for appellant are not analogous, and do not contravene the view we have taken.

It is contended by appellant that the court erred in overruling its motion in arrest of judgment because the declaration was defective. The only defect complained

Duty of Company
—Pleading.

of is that the declaration did not state the duty of appellant correctly. It charged that it was

its duty "to so operate its road and its locomotive engines running thereon that fire should not escape and be communicated therefrom" to the property of the plaintiff. This is substantially the form held sufficient in *Railway Co. v. Corn*, 71 Ill. 493. At the close of the plaintiff's evidence the de-

Negligence—
Question for
Jury.

fendant company (the appellant here) asked that the case be taken from the jury, and they be instructed to find for defendant, which mo-

tion was overruled. At the close of all the evidence the motion and instruction were renewed, and were again overruled. These rulings of the court are assigned as error. There was evidence sustaining the charge in the declaration, and, as it is the province of the jury to pass on the question whether the company has exonerated itself from the presumption of negligence, the motions were properly overruled, and the instructions to find for defendant properly refused.

Complaint is made of the refusal of three instructions offered by the defendant. The first one was in regard to a

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cause of action not stated in the declaration nor in any way referred to in the testimony, and was therefore entirely immaterial and improper. The other two were fully covered in instructions given for appellant, which are certainly as favorable to it as the law will warrant. Instructions.

Some errors are alleged in the exclusion of evidence offered by appellant, but we find no error in that regard. The testimony designed to be secured by some of the questions of the defendant which were not permitted to be answered was given in answer to other questions, and the other rulings of the court complained of did not prejudice appellant. The exclusion of the so-called inspection record was proper. It was not a book of account. Besides, witness was allowed to refresh his memory from the same, and thus its contents came before the jury.

It is also insisted that the court erred in permitting plaintiff below to prove by the witness Hopper that shortly (within 10 days) after the fire he saw the same engine passing through Farmingdale, going in the same direction as when the fire was alleged to have been set out, and saw it "throwing cinders from its smokestack." This, it is claimed, was error, in the absence of proof that the engine was in the same condition it was at the time of the fire. We are of the opinion that the evidence was admissible. The plaintiff was endeavoring to prove by circumstantial evidence that the crib was set on fire by the defendant's engine. It was a question whether the engine emitted sparks of fire or not, and, if it was seen emitting fire when going up the same grade shortly after the fire, that fact would tend to show that the engine was of such a character as to its construction and equipment as to emit fire, and it would, when the substantial and permanent character of such an engine is considered, have some relation to its condition in the respect mentioned at the time, then so recently past, when the property in question was destroyed. Testimony that the engine had emitted sparks or set out other fires near to the time of the fire complained of has been held admissible. Evidence.

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in many cases. *Railroad Co. v. Noel*, 77 Ind. 121; *Railroad Co. v. Richardson*, 91 U. S. 470; 8 Am. & Eng. Enc. Law, 9, and notes. Whether or not such testimony would come more properly in rebuttal after testimony for the defendant relative to the construction, equipment, and condition of the engine in respect to its liability to emit fire it is not necessary to decide, as that question would rest in the sound discretion of the trial court, and no point has been made upon it in this case. But if, as might have been the case, the plaintiff had been unable to prove that the engine in question emitted sparks of fire when it passed the corner a few minutes before the fire was discovered, the way would have been still open to him to prove by more remote circumstances that the defendant's engine did emit sparks and did in fact set out the fire that destroyed his property, and the fact in question was one of such more remote circumstances, and was not rendered irrelevant by proof of others having a more direct bearing on the issue. It was the privilege of the defendant to disprove the fact, or prove that the engine had gotten out of repair after the fire.

It is said, however, that it was not disputed that the engine did at times emit sparks, and it is further said that the proof was that all, even the best-equipped, engines, when laboring hard, will emit fire, and that the defendant is not liable, even if the property of the plaintiff was set on fire by defendant's engine, unless there was negligence. The defendant did not admit, but controverted, the fact that the fire was caused by its agency, as alleged, and it devolved upon the plaintiff to make the necessary proof. Besides, it cannot be said, as a matter of law, that the emission of sparks from an engine is no evidence of negligence.

It is also contended that the verdict is contrary to the weight of the evidence. It was for the jury to say whether the fire was communicated from the engine, and, if so, whether the company had observed the proper precautions for its preven-

Negligence—
Question of Fact.

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tion, or was guilty of negligence. *Railway Co. v. Pindar*, 53 Ill. 447. We cannot, from an inspection of the record, say that the verdict is not sustained by the evidence.

Finding no prejudicial error, the judgment is affirmed. Judgment affirmed.

LUMBERMAN'S MUT. INS. CO.

v.

KANSAS CITY, FT. S. & M. R. CO.

(*Supreme Court of Missouri, Feb. 15, 1899.*)

Evidence.—It was not error to admit evidence tending to show in detail how the ultimate fact charged in the petition was consummated.

Fires Set by Locomotives—Non-Abutting Property—Constitutionality of Statute.—Under section 2615, Rev. St. 1889 of Missouri, making railroads liable for damage to property along their routes caused by fires set by their locomotive engines, a railroad is liable for such damage whether the fire is so communicated directly or indirectly, or whether the property abuts upon its right of way, or is in its vicinity, so as to be exposed to danger; and the statute is repugnant to no constitutional provision, state or federal, as it gives to the railroad an insurable interest in all such property.

Same—Subrogation—Foreign Insurance Companies.*—Under the laws of Missouri, property situated in the state may be insured in another state, and where the foreign insurance company has paid a loss caused by fire set by a locomotive engine, it becomes subrogated to the rights of the insured, and may maintain an action against the railroad company in Missouri, although it has never complied with the laws of the state authorizing foreign insurance companies to do business therein.

APPEAL by defendant from Jackson county circuit court. *Affirmed.*

*See *Baltimore & O. S. W. Ry. Co. v. Tripp* (Ill.), *ante* and *foot-note*.

As to Subrogation, see *Chicago & A. R. Co. v. Glenney* (Ill.), 12 Am. & Eng. R. Cas., N. S., 839 and *note*, p. 843.

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Wallace Pratt and I. P. Dana, for appellant.

Fyke, Yates & Fyke, for respondent.

BRACE, P. J. This is an appeal by the defendant railroad company from a judgment of the Jackson circuit court in favor of the plaintiff insurance company for the sum of \$1,800.

Case Stated. Plaintiff's cause of action is thus stated in the

petition: "Plaintiff alleges: That the T. A. Miller Lumber Company is, and at all times herein stated was, a corporation duly organized and existing by law. That plaintiff, Lumberman's Mutual Insurance Company, is, and at all times herein stated was, a corporation duly organized and existing by virtue of the laws of the state of Illinois, and engaged in the business of insuring property owners against loss or damage by fire. That defendant, Kansas City, Ft. Scott & Memphis Railroad Company, is, and at all times hereinafter stated was, a corporation, and was engaged in operating a railroad through the town of Ashgrove, in the state of Missouri, and was using and operating thereon steam engines and locomotives. That at the time of the issuing of the policy of insurance hereinafter mentioned, and on the 6th day of April, 1894, the T. A. Miller Lumber Company was the owner of a certain stock of lumber, lath, shingles, sash, doors, and other stock such as is usually kept for sale in country lumber yards, also of a certain brick office building, and certain office furniture and fixtures therein contained, and also of certain lumber sheds, all situated on lots 2, 3, 4, 5, in Brok & Ralph Watkin's Railroad addition to the town of Ashgrove, Missouri. That on the 13th day of December, 1893, in consideration of a certain premium to it paid by said T. A. Miller Lumber Company, the Lumberman's Mutual Insurance Company issued to said T. A. Miller Lumber Company a certain policy of insurance, insuring it against loss or damage by fire to the property hereinbefore specified, for the period of one year from said date, to the amounts and as follows: \$2,000.00 on said described stock of lumber; \$250 on said described brick office building, and the furniture and fixtures therein contained; and \$250 on said described lumber

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sheds. That on the 6th day of April, 1893, and while said policy of insurance was in full force and effect, the said stock of lumber, lath, shingles, sash, doors, and other stock in trade, being of the reasonable cash value of two thousand five hundred and seventeen and 42-100 dollars (\$2,517.42), was wholly destroyed by fire, and said brick office building was damaged by fire to the amount of one hundred and fifty dollars (\$150), and said lumber sheds, being at the time of the reasonable cash value of three hundred and ninety-five and 60-100 dollars (\$395.60), were wholly destroyed by fire. That the fire which destroyed and damaged said property was communicated thereto by a locomotive engine being used by defendant upon its said railroad. That by reason of said fire said Lumberman's Mutual Insurance Company became liable to pay to said T. A. Miller Lumber Company the sum of twenty-four hundred dollars (\$2,400), and by virtue of the terms of said policy of insurance, which sum said Lumberman's Mutual Insurance Company has long since paid. That upon the payment of said sum the said Lumberman's Mutual Insurance Company became and was subrogated to all the rights of the said T. A. Miller Lumber Company against said defendant for the recovery of said sum of money (twenty-four hundred dollars) by reason of the destruction of said property by fire communicated thereto by a locomotive engine of defendant as aforesaid. That, by reason of all the premises aforesaid, an action has accrued to plaintiffs against defendant, and plaintiffs allege that they have sustained damages in the sum of three thousand and thirteen and 42-100 dollars (\$3,013.42), for which they ask judgment and for costs." To defeat a recovery upon this cause of action, defendant relied upon two of the defenses set out in the answer, as follows: First. "That the said Lumberman's Mutual Insurance Company seek to recover in this action under and by virtue of an act of the legislature of the state of Missouri approved March 31, 1887, which is embodied in the Revised Statutes of said state of 1889 as section 2615

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thereof, which act and section, defendant avers, is illegal, unconstitutional, and void, in that it seeks to deprive the defendant of its property without due process of law, and is contrary to the provisions of section 30 of article 2 of the constitution of Missouri; that said act and section is illegal, unconstitutional, and void, in that it denies the defendant the equal protection of the law, contrary to the provisions of section 1 of article 14 of the amendments of the constitution of the United States, and, further, in that it deprives defendant of its property without due process of law, contrary to the provisions of article 5 of the amendments to the constitution of the United States, and of article 6 of said constitution." Second. "That the plaintiff, Lumberman's Mutual Insurance Company, had not at the time it claims in said petition to have insured the property of said T. A. Miller Lumber Company, nor at the time it claims to have paid the loss thereon, nor at any time between those dates, nor has it since, complied with the provisions of the laws of Missouri, or any of them, in regard to the steps and action necessary and required therein to be taken by insurance companies organized under the laws of other states than Missouri before being allowed to do any insurance business or insure any property in said last named state; that the pretended policy of insurance issued by said insurance company on the property of said lumber company, and referred to in said petition, was issued in violation of the laws of Missouri, and contrary and in opposition to the authority and policy of said laws and of said state; and that said insurance company is not entitled to plead or prove, or take or to deprive any benefit from or under, section 2615 of the Revised Statutes of Missouri for 1889, or any other statute or law of said state." The case was tried before the court without a jury, and the refusal of the trial court to sustain either of these defenses, and the admission of some evidence alleged to be "in variance with, and contrary to, the allegations of the petition," are the errors assigned for a reversal of the judgment.

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1. On the trial the plaintiff, over the objections of the defendant, was permitted to introduce evidence tending to prove that the policy of insurance in question, dated the 13th day of December, 1893, was issued from the office of the insurance company in Chicago in renewal of a former policy issued from the same office, dated December 13, 1889, the application for which, signed by the treasurer of the lumber company, was made at the Chicago office. We do not find that this evidence is contrary to or inconsistent with the allegations of the petition, or that the court committed error in admitting it. It was simply evidence tending to show in detail how the ultimate fact charged in the petition was consummated.

2. By section 2615, Rev. St. 1889, it is provided that: "Each railroad corporation owning and operating a railroad in this state shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad, owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages." It was admitted that the property of the lumber company which was consumed and damaged by the fire was situated on the north side of Main street, in said town, about 165 feet from the main track of defendant's railroad, which was on the south side of said street; that between Main street and the railroad was a tier of lots about 70 feet deep, measuring from the street to the railroad right of way, and that on one of said lots was the building of one Schelling; that the fire was communicated to said Schelling's building by defendant's engine No. 129, and, after said building was partly consumed, shingles and other light substances from his building were blown into the lumber yard, and the fire in question resulted therefrom.

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On this state of facts, it is contended for the defendant that as plaintiff's property did not abut upon or adjoin defendant's right of way, and the fire was not communicated thereto directly from the defendant's engines, to hold the defendant

Fires Set by
Locomotives—
Non-Abutting
Property—Con-
stitutionality of
Statute.

liable therefor under said section would make the same obnoxious to the constitutional provision cited in the answer, and contrary to the reasoning of this court in *Mathews v. Railway Co.*, 121 Mo. 268, 24 S. W. 591, and *Campbell v. Railway Co.*, 121 Mo. 340, 25 S. W. 936, in which the constitutionality of this statute was sustained. We fail to find in the opinions in these cases any support for this contention. In each of these cases the point was made that this section does not authorize damages for property upon which insurance could not have been obtained, to which this court replied, in the first case: "The act under consideration is not limited to any specific property. It is broad enough to include both real and personal property. The statute is an enabling act. By its terms the property becomes a subject of insurance," 121 Mo., loc. cit. 332, 24 S. W. 601. And in the second case: "We do not think it necessary to the validity of the statute that the railroad corporations should have been given an insurable interest in the property upon the route of their roads, nor does the fact that such interest was given limit their responsibility to insurable property that may be injured or destroyed." 121 Mo., loc. cit. 352, 25 S. W. 938. In each of these cases the principle upon which the statute was upheld is specifically stated,—in the first case on page 315, 121 Mo., and page 596, 24 S. W., and in the second case in paragraph 1 of the opinion, page 344 *et seq.*, 121 Mo., and page 936, 25 S. W. Both of these cases were appealed to the supreme court of the United States, where the judgments of this court were affirmed, and the statute sustained, on the same principle. *Railroad Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243. Both cases were disposed of by one opinion, in which MR. JUSTICE GRAY, who delivered the opinion of the court, after an exhaustive review of the authorities,—citing

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with approval and quoting from, among others, *Hart v. Railroad Corp.*, 13 Metc. (Mass.) 99, in which the supreme court of Massachusetts held, under a like statute, "that the liability of the railroad company was not restricted to a building by the side of its road, which the very particles of fire emanating from the engines fell upon and kindled a flame in, but extended to a building across the street, set on fire by sparks wafted by the wind from the first building while it was burning," and from *Ingersoll v. Railroad Co.*, 8 Allen, 438, in which it was held "that it was immaterial that a building was destroyed by the spreading of a fire from other buildings on which the sparks from the engine had fallen," and other analogous cases,—in summing up states specifically the ground upon which the validity of this statute is placed, in the following language: "Fire, while necessary for many uses of civilized man, is a dangerous, volatile, and destructive element, which often escapes in the form of sparks, capable of being wafted through the air, and of destroying any combustible property on which they fall, and which, when it has once gained headway, can hardly be arrested or controlled. Railroad corporations, in order to better carry out the public object of their creation,—the safe and prompt transportation of passengers and goods,—have been authorized by statute to run locomotive engines propelled by steam generated by fires lighted upon those engines. It is within the authority of the legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused

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by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments. The very statute now in question, which makes the railroad company liable in damages for property so destroyed, gives it, for its protection, an insurable interest in the property in danger of destruction, and the right to obtain insurance thereon in its own behalf; and it may obtain insurance upon all such property generally, without specifying any particular property. *Eastern R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420. The statute is not a penal one, imposing punishment for a violation of law; but it is purely remedial, making the party doing a lawful act for its own profit liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered. *Railroad Co. v. Richardson*, 91 U. S. 454, 472; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 234. The statute is a constitutional and valid exercise of the legislative power of the state, and applies to all railroad corporations alike. Consequently it neither violates any contract between the state and the railroad company, nor deprives the company of its property without due process of law, nor yet denies to it the equal protection of the laws." The plain deduction to be drawn from the ruling and reasoning in these cases is that the statute in question makes the railroad company liable for damages communicated by its engines directly or indirectly to property along its route in the neighborhood of its road, so as to be exposed to such danger, and in doing so violates no constitutional provision, state or national, and, further, that the statute does in fact give to the railroad company an insurable interest in all such property. The property destroyed in this instance comes plainly within the meaning of the statute, as thus interpreted and upheld, although it did not abut upon the line of railroad. It was on its route and in its neighborhood, so as to be exposed to the danger; and the court

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committed no error in applying its provisions to the facts in this case.

3. It appears from the evidence: That the T. A. Miller Lumber Company is a corporation organized under the laws of Missouri, engaged in the lumber business at Ashgrove, in this state. That one S. K. Martin, a resident of Chicago, and a wholesale lumber dealer, controlling a number of retail yards, owned half the capital stock of the lumber company, and was its president, and he was also a director of the plaintiff insurance company. That about December 13, 1889, upon an application made by the lumber company, through him, to the insurance company, at Chicago, the original policy of insurance of that date was issued. The policy was for one year, but with provision for a renewal for a period of five years, and the policy was renewed from year to year until December 13, 1893, when it was renewed as before for one year, and was thus in force when the fire occurred. That the original policy was issued in duplicate, and delivered to Martin, in Chicago, one of which was retained by him, and the other copy sent by mail to the manager of the lumber company, in Missouri. The premiums were paid in the first instance by S. K. Martin, or the S. K. Martin Lumber Company of Chicago, but were ultimately paid by the T. A. Miller Lumber Company, to whom the renewal receipts were sent, and who were in possession thereof and of the policy at the time of the fire and the adjustment of the loss. The loss was adjusted in Missouri, and paid by draft drawn by the T. A. Miller Lumber Company, in Missouri, on the insurance company, at Chicago, for the sum of \$2,400, which was then paid by the insurance company; and by virtue of this payment the plaintiff claims in the petition that it became subrogated to the lumber company's right of action against the railroad company for the loss occasioned by the fire, and to recover therefor. The action was begun in December, 1894; and it is conceded that during the whole period of time covered by this transaction the plaintiff insurance company did not have an office in this

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state, or an agent soliciting insurance therein, and did not in any manner comply with the laws of this state authorizing foreign insurance companies to do business in this state, and governing the same, by reason of which facts the defendant contends the plaintiff ought not to maintain its action, and that the trial court erred in not so holding.

It is well-settled law in this country that "the insurers against fire of property which has been destroyed by fire communicated from a locomotive engine will, upon payment for the loss, be subrogated, to the extent of their payment, to the remedies of the insured, as the owners of the property insured and destroyed, against the railroad company for the loss." *Sheld. Subr. § 230*, and cases cited. And it is equally as well settled that subrogation will not be allowed "in favor of one who would thereby be permitted to derive an advantage from, or to establish his claim through, his own wrong or negligence, or inequitable or illegal conduct." *24 Am. & Eng. Enc. Law*, p. 193, and cases cited in note 1. The plaintiff here seeks to establish its claim through the policy of insurance, and the payment made thereunder, as aforesaid. The defendant contends that in the issuance of this policy, and its renewals, the plaintiff was guilty of such wrongful and illegal conduct as should preclude a recovery in this action, in that the same was so done without the authority, and contrary to the provisions of, the statute of this state regulating and governing the business of fire insurance in this state by companies incorporated or organized under the laws of this or another state of the United States, as embodied in chapter 89, § 5890 *et seq.*, Rev. St. 1889. This statute, after prescribing the prerequisites for obtaining authority to do fire insurance business in this state by such companies, prohibits any of them from transacting in this state "any insurance business unless it shall first procure from the superintendent of the insurance department of this state a certificate stating that the requirements of the insurance laws have been complied with authorizing it to do business" (section 5910), under penalty as follows:

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"Sec. 5916. Any person or persons who in this state shall act as agent or solicitor for any individual or association of individuals or corporation engaged in the transaction of insurance business, without such person or persons first having obtained from the superintendent of the insurance department of this state the certificate authorizing him to act as such agent or solicitor, as required by section 5910, * * * shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than ten nor more than one hundred dollars for each offense, or imprisoned in the county or city jail for not less than ten days nor more than six months, or by both such fine and imprisonment.

"Sec. 5917. Any association of individuals and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance department of this state so to do, * * * shall be liable to a penalty of two hundred and fifty dollars for each offense, which penalty shall be recovered by ordinary civil action in the name of the state. * * *

The statute nowhere declares contracts of insurance entered into in this state by companies organized under the laws thereof, or of another state, who have not complied with its requirements, void; and it has been held in many cases that, although such contracts may be forbidden under penalty, unless the statute does so declare, the contracts are not void, but will be enforced against the company. *Insurance Co. v. Walsh*, 18 Mo. 230; *Clark v. Insurance Co.*, 19 Mo. 54; *Ganser v. Insurance Co.*, 34 Minn. 372, 25 N. W. 943; *The Manistee*, 5 Biss. 381, Fed. Cas. No. 9,027; *Pennypacker v. Insurance Co.*, 80 Iowa, 57, 45 N. W. 408; *State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 31 S. W. 157; *Phenix Ins. Co. v. Pennsylvania Co. (Ind. Sup.)* 33 N. E. 970; *Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37; *Insurance Co. v. Curran*, 8 Kan. 1; *Insurance Co. v. Rogers (Colo. App.)* 47 Pac. 848. And this proposition is supported by the great weight of authority. On the other hand, there is a line of cases cited in the brief of

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counsel for the defendant, in which it is, in effect, held that a contract prohibited under penalty is invalidated, at least to the extent, as applied in insurance cases, of holding that such contracts will not be enforced in favor of the company. On the facts of this case, however, it is unnecessary to enter into the discussion of this question, or make a ruling thereon, as it clearly appears that the contract of insurance in question was entered into in the state of Illinois, and it is not questioned that the same was a valid and binding contract under the laws of that state. Such being the case, there is, and could be, nothing in this statute by which a citizen of Missouri, or one owning property therein, is or could be deprived of the right to insure such property in the state of Illinois, in a company authorized under its laws to insure that property there if he saw proper to do so; and, having no extraterritorial force, there is and could be nothing to deprive such company of the right to insure that property, if it saw proper to do so. *Lamb v. Bowser*, 7 Biss. 315, Fed. Cas. No. 8,008; *Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 643; *Com. v. Biddle*, 139 Pa. St. 605, 21 Atl. 134. But, as the laws of Illinois likewise have no extraterritorial force, the enforcement of a contract, made in pursuance of and under those laws, being possible in this state on the score of comity only, such enforcement may be prohibited by the laws of this state or refused on the ground that the contract is contrary to the policy of its laws. *Paul v. Virginia*, 8 Wall. 168; *Philadelphia Fire Ass'n v. People*, 119 U. S. 110. 7 Sup. Ct. 108. Generally a contract valid where made is, *jure gentium*, valid everywhere, but "no nation is bound to recognize or enforce any contracts which are injurious to its own interests or those of its own subjects." Story, *Confl. Laws* (8th Ed.) § 242; Bish. *Cont.* § 473; *Ror. Int. St. Law*, c. 2, § 1; *Carroll v. City of East St. Louis*, 67 Ill. 568; *Assurance Co. v. Rosenthal*, 55 Ill. 85; *Mor. Priv. Corp.* § 695. It is upon this principle that it is universally held "that corporations of one state have no right to exercise their

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franchises in another state, except upon the assent of such other state, and upon such terms as may be imposed by the state where the business is to be done." Insurance Co. v. Raymond, 70 Mich. 501, 38 N. W. 482, and cases cited on page 502, 70 Mich., and page 482, 38 N. W. And it is upon this principle that our statute rests. It prescribes the conditions upon which insurance companies may exercise their franchises in this state, and forbids their exercise, under penalty, except upon compliance with those conditions. It does not forbid, under penalty or otherwise, the insurance of property situate in this state, in another state, in companies organized under the laws thereof, and exercising their franchises in such state, nor declare such contracts void; and it cannot be doubted that, if the T. A. Miller Lumber Company were seeking to enforce this contract in this state, it would be upheld against the insurance company, and as that company has in good faith discharged the obligations of its contract to the lumber company, and thereby become subrogated to the rights of the lumber company against the defendant railroad company, which is the right sought to be enforced in this action, it follows that this right, tinged with no wrong, must be sustained. Insurance Co. v. Walsh, 18 Mo. 230; Insurance Co. v. Kinyon, 37 N. J. Law, 33; Lamb v. Bowser, 7 Biss. 315, Fed. Cas. No. 8,008; Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co., 41 Fed. 643; Phoenix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312, 6 Sup. Ct. 750, 1176; St. Louis, A. & T. Ry. Co. v. Fire Ass'n, 55 Ark. 163, 18 S. W. 43; Hyde v. Goodnow, 3 N. Y. 266; Foundry Co. v. Augustine, 5 Wash. 67, 31 Pac. 327; Lester v. Webb, 5 Allen, 569; Phenix Ins. Co. v. Pennsylvania Co. (Ind. Sup.) 33 N. E. 970; Insurance Co. v. Rogers (Colo. App.) 47 Pac. 848. The policy of the law is not what the court may think that policy should be, but what the legislature declares it to be. Finding no error, the judgment of the circuit court is affirmed. All concur.

Same—Subroga-
tion—Foreign
Insurance
Companies.

Omaha & R. V. Ry. Co. v. Granite State Fire Ins. Co

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OMAHA & R. V. RY. CO.

v.

GRANITE STATE FIRE INS. CO.

(Supreme Court of Nebraska, Jan. 19, 1898.)

Fires—Negligence—Rights of Insurer.—Property partially insured was burned by the negligence of a railroad company. The insurer paid to the insured the amount of the policy, and took from him an assignment of his cause of action against the railroad, to the extent of the insurance paid. The insured then sued the railroad company for the remainder of his loss. The railroad company knew of the insurance company's rights, and pleaded the assignment, but abandoned the defense, and stipulated that judgment should go against it. *Held*, that the insurance company was not precluded by its knowledge of the pendency of that suit, nor by the settlement thereof, from afterwards maintaining an action against the railroad to recover the amount of the insurance by it paid.

(Syllabus by the Court.)

ERROR by defendant to Lancaster county district court.
Affirmed.

J. M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error.

Chas. E. Magoon and Chas. O. Whedon, for defendant in error.

IRVINE, C. From admissions in the pleadings, and from the stipulation of facts whereon this case was tried, we gather the following facts: One Erickson was the owner of land along the line of the railroad owned by the plaintiff in error, on which there were certain buildings and personal property, of the value of \$3,900, which were wholly destroyed by fire set out by the negligence of the railroad company. Erickson had insurance on the property, written by the defendant in error, to the amount of \$1,000. The insurance

*See note at end of case.

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company paid the loss, and Erickson assigned to it his cause of action against the railroad company, to the extent of \$1,000. Erickson then brought suit against the railroad company, alleging the loss of his property through its negligence, its value as \$3,900, and the insurance, and payment to him of \$1,000 by the insurance company, and prayed damages for \$2,900. The railroad company answered in that case, alleging the assignment to the insurance company, and another assignment to a stranger of the remainder, and that Erickson was therefore not the real party in interest. After issues were so joined a settlement was made between the railroad company and Erickson, whereby it was agreed that judgment should be entered in favor of Erickson for \$1,750. A jury was impaneled, a verdict returned in accordance with the stipulation, and judgment entered thereon and paid. Pending this suit the railroad company had notified the insurance company of its pendency, and the insurance company had refused to intervene, notifying the railroad company at the same time of its intention to hold the railroad company under the assignment. After the judgment in favor of Erickson was entered and paid, this suit was begun by the insurance company to recover to the extent of \$1,000 and interest. The railroad pleaded the foregoing facts. The case was submitted to the court without a jury on a stipulation of facts which left no issue to be determined from evidence. The court found for the insurance company, and entered judgment accordingly. The assignments of error relied on relate to the correctness of the conclusions of law reached by the district court.

Certain propositions contended for by the railroad company are undoubtedly correct, and any consideration of the case must proceed from the starting point thereby established. At common law, a chose in action, with certain exceptions not here material, was not assignable so as to permit the assignee to sue in his own name. The right of an insurance company to recover against a wrongdoer whose negligence has subjected the insurance company to a liability, whether

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the company's right be based on an equitable subrogation or an express assignment, is traced through the insured; that is, no cause of action can exist on behalf of the insurer unless it existed in favor of the insured. Any defense available against the insured is equally available against the insurer, except as to acts of the insured after payment of the loss, and with notice to the wrongdoer of the insurer's rights. That principle goes no further. A cause of action for tort, such as this, is indivisible without the consent of the defendant. A person injured cannot, by assignments of portions of his damages, subject the defendant to a multiplicity of suits for the same wrong. The authorities cited by the railroad company really tend to establish nothing more than the foregoing principles. We take it that this case is controlled by the following considerations: Under our Code of Procedure, actions must, with a few express exceptions not relating to this case, be brought in the name of the real party in interest. Code Civ. Proc. § 29. The assignee of a chose in action may maintain an action thereon in his own name without the name of the assignor. *Id.* § 30. The original cause of action being indivisible unless by the consent of the defendant, Erickson should have joined the insurance company as a plaintiff in his action. If the company refused to so join, it might have been made a defendant. *Id.* §§ 40-42. The railroad's answer in the Erickson suit was therefore good, and stated a valid defense. Its abandonment of the defense, and stipulation for judgment against it, amounted, then, to a waiver of a good defense, and a voluntary payment. Knowing, as it then knew, of the rights of the insurance company, it is not protected, by that voluntary payment of Erickson's claim, against a valid claim of the insurance company, not included in that settlement. Its action was equivalent to express consent to a splitting of the cause of action, and it can claim no estoppel against the insurance company, because it acted with full knowledge of its rights, and of its intention to assert them.

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Not a single case cited conflicts with the views expressed. In *Assurance Co. v. Sainsbury*, 3 Doug. 245, Langdale had suffered a loss through the riots of 1780. He sued the inhabitants, under the riot act. Allowance was made in that suit for the insurance by him received, and he had judgment for the difference. The insurance company then brought suit. The case was therefore much like this. It was held by a divided court that the insurance company could not sue. LORD MANSFIELD (who with MR. JUSTICE BULLER, formed the majority) held that this was so, because the common law forbade an assignee to sue in his own name, but said: "If, by law, either Langdale or the plaintiffs might sue, I have no doubt but that it may be shown from what passed at the trial that the sum sought to be recovered was not included in the damages; otherwise the plaintiffs might recover against Langdale, and show the verdict as conclusive evidence." With us, an assignee may sue; and we have, therefore, in this case, not an authority against the insurance company, but the great weight of LORD MANSFIELD'S opinion, that, under a state of the law like ours, the action would lie under precisely similar circumstances. Some cases, such as *Ætna Ins. Co. v. Hannibal & St. J. R. Co.*, 3 Dill. 1, Fed. Cas. No. 96, and *Norwich Union Fire Ins. Soc. v. Standard Oil Co.*, 8 C. C. A. 433, 59 Fed. 984, state the rule generally, that, where the loss is greater than the insurance, the insurer may not sue. These were cases where the insurer attempted to sue before payment to the insured, and are merely authority for the proposition that the claim is indivisible, and that the railroad company should therefore have insisted on its defense against the partial action of Erickson. The former case holds that the rule applies, not only to the common law, but the statute of Missouri, but cites the statute as permitting only the assignment of actions based on contract. With us, the right of assignment extends to torts. In *State Ins. Co. v. Oregon Ry. & Nav. Co.*, 20 Or. 563, 26 Pac. 838, the rule was stated that in such case the insurance company must not sue alone. This does not conflict with our views,

Note

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as a general statement; but it is perhaps worthy of notice that that decision is based on the premise that in Oregon the distinction between actions at law and suits in equity has not been abolished, and that the statutory provision permitting an unwilling party, who should be plaintiff, to be made a defendant, applies only to equity cases. In Wisconsin it is held that the insurance companies must join in one action, and the insured with them, if he retains any interest. *Swarthout v. Railway Co.*, 49 Wis. 625, 6 N. W. 314; *Pratt v. Radford*, 52 Wis. 114, 8 N. W. 606. That the court was only deciding what we have said (that in the first case the railroad company might have defended on the ground that all were not joined, and not that a confession or settlement of the first suit would bar another by parties not included in the first) is manifest from the language of LYON, J., in *Pratt v. Radford*: "Had the defendant paid the plaintiff the damages claimed, knowing that the latter had received from the insurance companies the amounts insured, the defendants would still be liable to an action by such companies to recover the amounts so paid, and the release of the plaintiff would be no defense to the action." In *Connecticut Fire Ins. Co. v. Erie Ry. Co.*, 73 N. Y. 399, it was held that if the wrongdoer pays the assured after payment to him by the insurer, and with knowledge of that fact, it is a fraud on the insurer, and will not protect the wrongdoer from liability to him. Affirmed.

NOTE.

Fires--Subrogation of Insurer.—If insured property be destroyed by fire communicated from the engines of a railroad company, the insurance company paying the loss will be subrogated to the rights and remedies of the owner against the wrongdoers. *Connecticut F. Ins. Co. v. Erie R. Co.*, 73 N. Y. 399, 29 Am. Rep. 171; *Monmouth County Mut. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *Weber v. Morris, etc.*, R. Co., 35 N. J. L. 409; *Hartford Ins. Co. v. Pennel*, 2 Ill. App. 609; *Peoria M. & F. Ins. Co. v. Frost*, 37 Ill. 333; *Swarthout v. Chicago, etc.*, R. Co., 49 Wis. 625; *Hart v. Western R. Co.*, 13 Met. (Mass.) 99, 45 Am. Dec. 719; *Holcombe v. Richmond, etc.*, R.

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Co., 78 Ga. 776; St. Louis, etc., R. Co. v. Fire Assoc. 55 Ark. 163; Ætna Ins. Co. v. Hannibal, etc., R. Co., 3 Dill. (U. S.) 1.

Plaintiff insurance company insured buildings in the sum of \$1500, worth more than double that sum, which were afterward destroyed through the negligence of a railroad company, and the railroad company paid the owner \$1800 damages. The owner executed a release, containing a statement that the settlement was not intended to discharge the insurance company from any claim he had against it, but as a full settlement and discharge of the railroad company. The insurance company afterward paid the amount of the insurance, and sued the railroad company to recover the amount paid. *Held*, that the clause in the release was in the nature of a proviso limiting the effect to a release of the balance, retaining the claim against the insurance company; and therefore its right of subrogation was not affected by the release. Connecticut F. Ins. Co. v. Erie R. Co., 73 N. Y. 399, 29 Am. Rep. 171; reversing 10 Hun 59.

COMMONWEALTH

v.

NEW YORK, P. & O. R. Co.

(Supreme Court of Pennsylvania, Oct. 17, 1898.)

Taxation—Capital Stock.—Within the meaning of the act of 1891 of Pennsylvania, providing for the taxation of "all the property of corporations, * * * having capital stock, at the rate of five mills on each dollar of its actual value," a tax on the capital stock is a tax on the property and assets, including the corporate franchises.

Same—Same—Deduction of Indebtedness.*—Under such statute, the question of the actual value in cash of the capital stock is a question of fact, which must be determined by considering the value of the corporate property, and assets of every kind, including its bonds and mortgages, and moneys at interest, and its franchises and privileges, and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but the corporate indebtedness, though it should be considered, is not to be specifically deducted from the valuation so ascertained and determined.

*See notes at end of case.

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Findings—Presumptions.—Defendant's counsel having made no request for a specific finding as to what extent the value of its capital stock was effected by its indebtedness, it will be assumed that such element was properly considered.

Value of Capital Stock—Discrimination.—Under such statute, the actual value of capital stock being a pure question of fact, a corporation cannot complain of discrimination in the method adopted to ascertain such value, so long as its stock is not assessed in excess of such value.

APPEAL by the company from Dauphin county court of common pleas. *Affirmed.*

The findings of fact and opinion of the court below are as follows:

This is an appeal from a settlement made by the auditor general and state treasurer against the corporation defendant June 30, 1896, for tax on capital stock for the tax year 1895. It was tried by the court without a jury, as provided by the act of April 22, 1874, and, on the testimony and documentary evidence, we find the following facts:

“(1) Defendant is a corporation chartered under the laws of the states of New York, Pennsylvania, and Ohio, owning a line of railroad extending from Salamanca, New York, across the northwestern part of the state of Pennsylvania, to Dayton, Ohio, a distance of 388.04 miles. Of this line, 92.4 miles are within the state of Pennsylvania, and the remainder in either New York or Ohio. Defendant also owns a line of railroad 33.78 miles in length, known as the ‘Franklin Branch,’ extending from Buchanan to Oil City, all in Pennsylvania. It also owns a branch 7.7 miles in length in Ohio; making the total mileage owned by it 429.52 miles. It is also lessee of 168.09 miles of road, of which 34.54 miles are in Pennsylvania, and the remainder in Ohio. It connects at Salamanca, its eastern terminus, with the railroad of the New York, Lake Erie & Western Railroad Company, and by a connection at Dayton, Ohio, its western terminus, it forms, by means of leases and trackage contracts, part of the

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through line of the last-named road from the city of New York to the cities of Cincinnati and Chicago.

"(2) Defendant's capital was, in 1895, \$44,999,350, divided into 899,987 shares, of the par value of \$50 each; 200,000 shares, or \$10,000,000, being preferred stock, and 699,987 shares, or \$34,999,350, common stock. The cost of defendant's road and equipment was \$170,987,519.58. No dividends were ever paid on either the preferred or common stock.

"(3) In 1895 defendant's indebtedness amounted to \$129, - 853,080.72, as follows: Prior lien bonds, \$8,000,000; first mortgage bonds, \$44,337,000; deferred warrants converted into first mortgage bonds, representing unpaid interest on first mortgage bonds, \$27,640,345.75; second mortgage bonds, \$14,500,000; third mortgage bonds, \$30,000,000; car trust agreements, subject to which the company held its active rolling stock, \$1,950,000, and a small unsecured balance. Defendant has not for many years earned or paid any interest on its second or third mortgage bonds, and no interest was paid in 1895 on its first mortgage bonds, though some was earned. The interest on the \$8,000,000 prior lien bonds was paid. Nearly all defendant's indebtedness is due to citizens or corporations of other states and countries than Pennsylvania.

"(4) In April, 1883, it leased its line and road to the New York, Lake Erie & Western Railroad Company, for ninety-nine years, the terms of the lease requiring the lessee to pay to defendant thirty-two per cent. of the gross receipts derived from the operation of the road. The gross receipts in the tax year 1895 amounted to \$6,332,317.52, and the proportion due to defendant was \$2,062,000. In 1893 the lessee became insolvent, and passed into the hands of receivers appointed by the circuit court of the Southern district of New York; and by virtue of an arrangement not clearly explained in the evidence, and of a decree of that court, the receivers were ordered to pay to the defendant, instead of the agreed rental, only the net earnings received from the operation of its road,

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not less, however, than \$1,500,000; and defendant, during the tax year 1895, actually received as rental only \$1,411-573.96, and it had during that time receipts from other sources amounting to \$52,029.49. During its fiscal year ending June 30, 1895, its gross income from all sources was \$2,042,307.15, and during 1895 there were expended upon its road, in betterments, \$2,931,686.31. From what source the amount thus expended was derived is not definitely shown by the evidence.

“(5) During the months of April, May, and June of 1895, 4,200 shares of the preferred stock of the defendant were sold, in the city of New York, at prices ranging from 62 ½ to 87 ½ cents per share, the average price being 75 cents. There were no shares of common stock sold during the tax year 1895.

“(6) An order of sale of defendant's road was granted in January, 1896, at the suit of the holders of the bonds secured by the first mortgage on its road and franchises; and, in pursuance of this order, all of its property, leasehold and otherwise, including defendant's franchises, was on the 26th of February, 1896, sold at public auction, at the court house in Akron, Ohio, for the sum of \$10,000,000, subject to the prior lien mortgage of \$8,000,000; and the proceeds of the sale were appropriated towards the payment of the first mortgage bonds, the holders of subsequent liens receiving nothing.

“(7) On February 21, 1896, the secretary and treasurer of the defendant company, after having taken the oath prescribed by the act of June, 1891, made the report to the auditor general required by said act, and appraised the capital stock of said corporation as of no value whatever. The auditor general and state treasurer, being dissatisfied with the appraisement and valuation so made and returned, valued and appraised the capital stock of defendant for the tax year 1895 at \$34,480,577.70, stating at length in their appraisement their reason for so doing, and settled an account in accordance with said appraisement, charging defend-

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ant with a tax at the rate of five mills, amounting to \$172,402.88, from which settlement defendant appealed to this court; and, on the trial, the report and appraisal made by defendant's officers, the appraisal and settlement made by the auditor general and state treasurer, defendant's specifications of objection to the settlement, and other evidence, oral and documentary, was offered and heard.

"(8) After a full consideration of all the relevant evidence in the case, we find that the appraisal made by the defendant's officers is not correct, and that the appraisal made by the auditor general and state treasurer is excessive; and we further find that the actual value in cash of defendant's capital stock, representing its tangible property and assets and its franchises between the 1st and 15th of November, 1895, was \$15,000,000, and that defendant is taxable for the tax year 1895 at the rate of five mills on 126.18-510.20 of said fifteen millions, that being the proportion of defendant's capital stock which represents the proportion of its road, property, assets, franchises, and privileges in Pennsylvania, calculated on the mileage basis.

"Discussion.

"In *Com. v. Standard Oil Co.*, 101 Pa. St. 119, MR. JUSTICE PAXSON, delivering the opinion of the court, said: 'It has been repeatedly decided, and is settled law, that a tax upon the capital stock of a company is a tax upon its property and assets,'—citing a number of cases in this state, and many from other states. In *Appeal of Fox*, 112 Pa. St. 337, 4 Atl. 149, it was held that the mortgages owned by corporations are taxed through the tax on capital stock in substantially the same manner as the mortgages belonging to individuals are taxed by the act of 1885, which requires them to report to the assessors and pay a tax upon the par value of their mortgages, and that, if corporations were required to report and pay tax under the act of 1885, the result would be double taxation. Speaking in this case of capital stock in itself considered, JUSTICE PAXSON says: 'The capital

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stock is nothing; a myth; a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock. Hence it is that the courts have long since declared that a tax upon the capital stock of a corporation is a tax upon the assets and property of such corporation.' The opinion of the court below in *Com. v. Western Land & Imp. Co.*, 156 Pa. St. 455, 26 Atl. 1034, contains a history of this tax, and shows that it has always been assessed on the basis of the rate per cent. of dividends when the dividends during the tax year equaled or exceeded six per cent., and, when no dividend was made, on an appraisal of the capital stock; and when the dividend was less than six per cent., under some of the acts, the tax was assessed on the basis of the rate per cent. of the dividend, and, under others, on the assessed value of the capital stock. That case decides that, when the tax is measured by the rate per cent. of the dividend, that is the only test; and some of the cases there cited illustrate this very forcibly, and show that the value indicated by the rate per cent. is sometimes very different from the actual value. Thus, in *Atlantic & Ohio Tel. Co. v. Com.*, 66 Pa. St. 57, where the report of the officers of the corporation stated that a dividend of 10 per cent. had been made, it was held that the dividend reported furnished the measure of the tax, although the corporation proved that it had in reality been paid upon a part only of the stock. And in *Columbia Conduit Co. v. Com.*, 90 Pa. St. 307, where, after declaring dividends amounting to \$200,000, a loss by fire occurred to which nearly one-half of the declared dividend was applied, instead of being paid to the stockholders, the whole dividend was, nevertheless, held to furnish the measure of the tax. And in *Matson's Ford Bridge Co. v. Com.*, 117 Pa. St. 265, 11 Atl. 813, where all the property of a corporation with a capital of the par value of \$45,000 was converted into money, and amounted to \$75,000, the excess of \$30,000 above the par value of the capital stock was held to be a

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dividend, and the company was assessed thereon with a tax of one-half mill on each one per cent. amounting to \$1,500, which would be a three-mill tax upon \$500,000. And in *Com. v. Fall Brook Coal Co.*, 156 Pa. St. 488, 26 Atl. 1071, it was decided that a tax on the capital stock of the Fall Brook Railway Company was a tax on \$3,500,000, which the Fall Brook Coal Company held invested in the shares of the railway company, and that to tax that amount of the capital stock of the coal company after the railway company had paid the tax on its capital stock would be double taxation.

"It thus appears that under the acts taxing capital stock, as they stood prior and up to 1891, the amount of dividend declared during the tax year was the only test of the amount of the tax, and that this had no necessary relation to the actual value of the capital stock of the corporation. When the dividends did not amount to the rate which by the taxing acts was made the measure of the tax, the capital stock of the company was required to be appraised, and a tax at the rate of originally three mills, afterwards five, was assessed upon its appraised value. This appraisal, it is true, was formally of the capital stock, and not of the property of the corporation; and the data required to be furnished to the auditor general, by the terms of the acts, to enable him to judge of the correctness of the appraisal, related to the operations of the company during the year, the amount of its capital stock, and the value of its shares, more directly than to the quantity, quality, and value of its assets and property. The inference sought to be drawn from this by the learned counsel for defendant is that, as the value of the shares would be affected by the amount of indebtedness and incumbrances upon the property of the corporation, the practical result was that the tax, so far as it was a tax upon the property of the company, was a tax only on the value of its property, less the amount of its indebtedness and incumbrances; but it must be remembered that this basis of assessment was adopted in 1844, when the corporations to which

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it applied were mainly banks and other moneyed institutions which did not have incumbrances, and whose indebtedness was mainly for deposits that were a source of profit to the corporations. The subjects of the tax are said in the act of 1844 (P. L. 486) to be 'all banks, institutions and companies'. An appraisement of the shares of such corporations at not less than the price at which they sold in the market would furnish a fairly accurate measure of the value of the assets and property of the company. That by 'institutions', in the act of 1844, the legislature intended moneyed corporations, is shown by the act of April 16, 1845 (P. L. 507), where the subjects of the tax on capital stock imposed by the act of 1844 are styled 'banks and saving institutions.' And in the capital stock act of 1859 (P. L. 529) the subjects of the tax are styled 'banks, saving institutions and companies whatsoever.' It was not until after the passage of the act of February 23, 1866 (P. L. 82), that banks ceased to be the principal corporations subject to the tax on capital stock. By the act of May 1, 1868 (P. L. 108), the amount of the dividend declared by the corporation was made the measure of the tax on its capital stock in every case where any dividend was made, and it was only in cases where no dividend whatever was made that the officers of the corporation were required 'to estimate and appraise the capital stock of such companies at its actual value in cash.' This act contains no suggestion that the appraised value should be the value of the property and assets of the corporation less its indebtedness. The act of April 24, 1874 (P. L. 68), which superseded the act of May 1, 1868, was practically identical with it on this subject, except that the officers of the corporation were required 'to estimate and appraise the capital stock of such companies upon which no dividend had been made or declared, at its value, not less than the average price which said stock sold for during said year'; and that it also contained the proviso 'that if the auditor general or state treasurer, or either of them, is not satisfied with the valuation so made and returned, they are hereby authorized and empowered

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to make a valuation thereof, and to settle an account upon the valuation so made by them for the taxes, penalties, and interest due the commonwealth.' This proviso contains at least an implication that, even if the appraisement were not less than the average selling price, it might be too low, and no restriction was put upon the accounting officers in making the appraisement, nor did the act require them to deduct incumbrances. The act of June 7, 1879, required the capital stock to be appraised when no dividend or dividends less than six per cent. had been declared during the year and contained a further limitation of minimum value in the appraisement, by requiring not only that it should be 'not less than the average price which said stock sold for during said year,' but also that it must be 'not less than the average price or value as indicated or measured by the amount of dividends made or declared.' Under this act occurred the case of *Hamilton Steele Wheel Co. v. Com.*, 12 Wkly. Notes Cas. 328, where \$1,000,000, the whole capital of the corporation, had been invested in patent rights which would soon expire, and the officers of the company appraised the capital stock for the year 1879 at \$110,000, and for the year 1880 at \$100,000, on the theory that as the patent had only two years to run, and the whole value of the capital stock was invested in the patent, the stock was not worth more than that amount. The company, however, had made a dividend of four per cent., which, in the judgment of the accounting officers, indicated a value of at least \$500,000, and they therefore assessed it at that amount. The court below decided that under the circumstances the value of the capital stock 'must be as measured and indicated by the amount of dividends made and declared. However unjustly it might operate in particular cases, there can be no doubt of its meaning and the manner of valuing which it indicates and points out.' On appeal to the supreme court, this ruling was affirmed, on the opinion of the learned judge of the court below, PRESIDENT JUDGE PEARSON. The next act in order was the act of 1889,

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which contained the same minimum limitation of value as the act of 1879.

"We thus find that, under all the acts taxing capital stock, the amount of the tax was either fixed by the rate per cent. of the dividends (in which case that was the sole measure of the tax, regardless of the actual value of the property and assets of the corporation), or it was imposed on the appraised value of the stock, subject to the limitation, in the earlier acts, that the amount of the appraisement should not be less than the value indicated by the selling price of the stock (which would fairly indicate its value when the subjects of the tax were banks and institutions of that nature), and afterwards by the limitation that it should not be less than the value indicated by the amount of dividends or profit made. The nature of the test of value was in all cases an inquiry into the result of the activity of the corporations for the tax year, and an inference of value from these results, rather than a direct estimate of the value of the tangible property and assets of the corporation. There was, we think, ample reason for this. The value of the property and assets of a railroad corporation, for instance, cannot be ascertained by appraising its buildings, rails, bridges, cars, etc. It is all these in operation—their use as a railroad, with the franchise or right to use them, and to charge fares and freight for so doing—that really constitute the property and assets of the corporation; and this is what is represented by its capital stock. There has been, however, a large class of cases in which it became necessary to have a more direct reference to the tangible property and assets of the corporation in making the appraisement. This was so in all cases where, by the terms of the taxing act, or because of the nature or situs of the property of the corporation, some of it was subject to taxation, and some exempt. Thus, the capital stock of manufacturing corporations has been since 1885 exempt from taxation; but as this exemption was held to apply only to the proportion of the capital stock that represented property actually used in the business of manufacturing, while prop-

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erty not so used was held taxable, it became necessary to ascertain the value of the property in order to determine the proportion of the capital stock taxable and exempt. And when corporations, whose capital stock was subject to the tax, owned property which could not be taxed because of its nature,—as, for instance, patent rights or United States bonds,—or because it was located out of the state, it became necessary to ascertain the actual value of the property. *Com. v. Westinghouse Air-Brake Co.*, 151 Pa. St. 276, 24 Atl. 1111, 1113; *Com. v. Westinghouse Electric & Mfg. Co.*, 151 Pa. St. 265, 24 Atl. 1107, 1111; *Com. v. Juniata Coke Co.*, 157 Pa. St. 507, 27 Atl. 373; *Com. v. Pennsylvania Coal Co.*, 5 Co. Ct. R. 89; and *Com. v. Montgomery Lead & Zinc Min. Co.*, *Id.* 91,—are cases of this kind; as is also *Com. v. Standard Oil Co.*, 101 Pa. St. 119.

“Another like case is *Com. v. Pennsylvania Co.*, 145 Pa. St. 274, 23 Atl. 549, to which the learned attorney general has referred. This case was elaborately argued and considered in the court below, where it was conceded that if the corporation was taxable at all, which was denied, the tax was upon its property and assets, and that the value and nature and situs of these must be ascertained in order to determine the amount of the tax, and the date from which these could be ascertained was furnished by the defendant. The court below decided that the defendant was taxable on the amount of its capital stock represented by investments in real estate in Pennsylvania, personal property in Pennsylvania, stocks of foreign corporations, bonds of foreign corporations, and bonds of domestic corporations, and on the proportion of its capital stock represented by investments in equipment or rolling stock which was found to be within the state, by apportioning the whole amount invested in equipment on the basis of its mileage within and without the state, as shown by the facts and exhibits. The case was appealed to the supreme court, and error was there assigned to these rulings, and to these only; and the case was argued on the questions thus raised, but none of these questions

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were decided by the supreme court. The only point decided was, as stated at the close of the opinion (145 Pa. St. 283, 23 Atl. 552), 'that after the lapse of a year from the time of payment of the taxes of a current year, without any request for the restatement of the account of the taxpayer, the account is closed, except as to clerical mistakes, and can only be reopened by an order of the board of revision.' This was an application of the provisions of section 16 of the act of March 30, 1811, relative to public accounts (which had been applied by the court below to the settlements for 1872 and 1873, because for those years the accounts were resettlements), to the settlements for the subsequent years, which were original settlements, and not resettlements. That this was done under a misapprehension of the facts is manifest. The learned justice who wrote the opinion evidently supposed that all the state taxes to which a corporation is subject for a given year are settled and included in one account, and did not know that it is, and always has been, the uniform practice of the accounting department to require reports and settle accounts separately for each kind of tax to which a corporation is subject, and that a settlement for one kind of tax does not imply any consideration or determination of its liability or otherwise for tax of a different kind. An account or settlement is a physical, tangible thing,—a paper with figures and writing upon it, signed by the auditor general and state treasurer, indorsed, copied into a ledger, and filed away in its appropriate place. Whether such a settlement has been made against a given corporation, for a tax of a given year, is therefore a question of fact, to be ascertained by looking in the proper place for the settlement. Such inspection showed at the time this case was tried, and it would now show, that there had never been any settlement made against the Pennsylvania Company for the years from 1874 to 1887, inclusive, for tax on capital stock; and the court below found this as one of the facts in the case. The settlements then in question for those years were therefore original settlements, and not resettlements, as was supposed,

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while those for 1872 and 1873 were resettlements; and this is the reason why the court below held the latter invalid, and those for the subsequent years valid. It was not claimed by the counsel for defendant, who are experts in tax cases, that the settlements for the years subsequent to 1873 were resettlements; and therefore the ruling of the court below on this subject was not assigned for error, and hence the supreme court were not assisted by the argument of counsel in coming to the conclusion reached by them, which probably accounts for the misapprehension. The result is that we are without a decision of the court of last resort on the question decided in the court below, and discussed in the supreme court. The case is, however, valuable, as it shows that it was conceded and understood, both by the counsel and the court, that the tax in question was the tax upon the property of the corporation, the value of which it was necessary to appraise, and that the only controversy—if the corporation was taxable—was as to the method of apportionment, and that it was not even suggested by the learned counsel that the indebtedness of the corporation should be deducted in order to ascertain the value.

“We have now reviewed all the acts taxing capital stock prior to the act of June 8, 1891 (P. L. 229), and referred to many of the decisions in which these acts are construed and applied; and we have nowhere found it to be enacted or decided that, in estimating and appraising the value of the capital stock, any deduction is to be made because of the fact that the property of the corporation is incumbered. This question has, it is true, never been directly litigated and adjudicated, but the implication contained in the acts, from the fact that there is no provision on the subject, and that no claim has ever been made for a deduction on this account, is strong that such was not the intention of the acts. It remains to consider the effect of the act of 1891, under which the settlement appealed from in this case was made. The title to this act is ‘An act to provide increased revenues for the purpose of relieving the burdens of local taxation,

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* * * and providing for greater uniformity of taxation by taxing all the property of corporations, limited partnerships and joint stock associations having capital stock, at the rate of five mills on each dollar of its actual value.' We think we find here a distinct declaration that the purpose of this act is to impose a tax upon the property of the corporation to which it applies. Defendant's counsel contends that the antecedent of 'its,' in the concluding words of the title, 'five mills on each dollar of "its" actual value,' is 'capital stock.' But the plain reading of the sentence, required alike by its grammatical and logical construction, is that it declares an intention to tax 'at its actual value in cash all the property' of certain corporations, limited partnerships, and joint-stock associations, to wit, those 'having capital stock.' This construction is not in conflict with the expressions used in preamble 6, where it is evident that 'capital stock' is used as a synonym for 'bonds, mortgages and moneys at interest, and franchises and property of other kinds'; and, being so used in the preamble, we think we are warranted in assuming that it is used in the same sense in the body of the act. This act also made important changes in the method of assessing the tax. The rate per cent. of dividend is no longer the measure of the amount of tax, but in all cases the capital stock is to be estimated and appraised by the officers of the corporation 'at its actual value in cash, not less however than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund.' And the act further provides 'that if the auditor general and state treasurer or either of them, is not satisfied with the appraisement and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required, or upon any information within their possession or that shall come into their possession, and to settle an account on the valuation so

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made by them for the taxes, penalties and interest due the commonwealth thereon.' And, while it is the capital stock that is to be appraised, we have just seen that the title of the act declares that the property is to be taxed, and preamble 6 defined what is meant by 'capital stock' when it declared that the tax is to be imposed on 'their whole capital stock, including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds.'

"In settling accounts against various corporations for the first year after this act came into force, the auditor general construed the proviso that the actual value in cash was to be 'not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund,' to prescribe a hard and fast rule that the capital stock must be appraised at not less than a principal sum, six per cent. of which would equal the net earnings of the corporation for the tax year. And he settled accounts on that basis against a number of corporations, from which settlements they appealed to this court, where, on the trial of the cases, it was decided that this construction of the act was erroneous; that the net earnings constituted only one fact to be considered in determining the actual value of the capital stock, and that the amount and rate per cent. of dividends made and the amount accrued to surplus and sinking fund during the tax year do not furnish an absolute indication or measure of the actual value in cash of the capital stock of a corporation, but are to be considered with all other relevant facts in determining what is its actual value; that the prominent idea or thought of the whole act was to base taxation on the actual cash value; and that this should be determined from facts, and not theories, on all cases except the one that this value should in no case be less than the average price at which the stock sold during the year. *Com. v. Edgerton Coal Co.*, 164 Pa. St. 284, 30 Atl. 125, 129. And in *Commonwealth against Haney Transfer Co.* (141, Jan. term, 1895), decided by this court, and not reported, it was said, in the opinion by JUDGE

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MCPHERSON, that the question of actual value in cash is a question of fact, which must be determined by considering the value of defendant's tangible property, the amount of its business, the rate of dividend declared, and the extent and value of its good will and franchises and privileges, as indicated by the evidence bearing upon those subjects at that particular time. In *Com. v. Delaware, S. & S. R. R.*, 165 Pa. St. 44, 30 Atl. 522, 523, it was contended by the defendant that the franchises of a corporation were not to be included and appraised in estimating the value of its capital stock. But we decided that the franchise of the corporation was an element to be considered in ascertaining the value of capital stock; and it was said in the opinion of the supreme court, affirming this decision (page 54, 165 Pa. St., and page 523, 30 Atl.): 'In ascertaining the actual value of the capital stock, was it proper to take into consideration, as affecting that value, the franchises of the company? We think this question is affirmatively answered by the act of June 8, 1891, under which the valuation was made. The capital stock represents the franchises as well as other property of the company. In the sixth preamble of the act there appears a plain legislative purpose to include the franchises in fixing the value of the stock, and this is in harmony with the title and the provisions in respect to the taxation of it.'

"The able counsel for defendant lays great stress on the fact that, in the taxing acts and in the decisions of the courts construing them, it is the capital stock which is said to be taxed. But a careful reading of the acts and the decisions will show that the words 'capital stock' are used as a convenient term to connect property, tangible and intangible, of the corporation. This is implied when it is said that a tax on the capital stock is a tax on the property and assets of the company; and when it is enacted that the tax shall be 'at a fixed rate of five mills upon each dollar of the actual value of their whole capital stock, including as well their bonds, mortgages and moneys at interest, as their franchises

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and property of other kinds'; and more definitely still when it is declared, in the act of 1891, 'that for the purpose of this act interests in limited partnerships or joint stock associations shall be deemed to be capital stock and taxable accordingly.' That is to say, as a matter of fact, a limited partnership has no 'capital stock,' in the common acceptance of the term, but every partner has a definite proportional interest in the assets of the company, and, for the purpose of taxation under this act, this interest 'shall be deemed to be capital stock and be taxable accordingly.' Clearly, then, when nominally the capital stock is taxed, it is in reality the property and assets of the company that are taxed, and the only way in which the value of the capital stock can be ascertained is by ascertaining the value of the property and assets. This illustrates the truth of the remark made by MR. JUSTICE PAXSON, already quoted, that 'the capital stock is nothing; a myth; a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock.' In a limited partnership it is literally nothing but a name apart from the assets, and in a corporation proper it is really nothing more, although we are accustomed to conceive of it as a separate entity.

"Counsel also argues that the form of the report required to be made by the act of 1891 does not call for a statement of the amount and value of the property and assets of the corporation, and, therefore, that it is not the property that is to be appraised. But, as we have seen, the value of the property must be ascertained whenever the tax is to be apportioned or a limited partnership is to be taxed; and, while it is true that the form of the report does not call for such definite information as to the actual value of the property and assets of the corporation as it might, the reason probably is that in the main it was copied from the prior acts without careful attention to the change.

"The conclusion that the value of incumbrances should not be deducted would seem to be greatly strengthened when the

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matter is examined in the light of the doctrines declared in *Com. v. Fall Brook Coal Co.*, 156 Pa. St. 488, 26 Atl. 1071. It is there decided that the capital stock of the corporation, and the shares into which the capital is divided, are, at least for the purpose of taxation, identical, and that the shareholders are the real owners of the property and assets, which both the capital stock and the shares represent, and that they are the persons who are taxed when a tax is imposed upon either the capital stock or the shares. A corporation is (page 494, 156 Pa. St., and page 1071, 26 Atl.) said to be 'an artificial person created by law for the purpose of becoming the business representative, agent, or trustee of so many persons as may join to furnish the money with which the business to be done by the corporation may be carried on. * * * The money furnished by those whose representative it is to be, is its capital stock. The amount that each person contributes to this fund is his share in the venture, and is called his share or shares in the stock. The legal title to the whole sum so contributed is in the corporation, and so the legal title to all the property, real or personal, in which it may be invested. The equitable title—that is, the right to the profits from the business done, and to a return of the capital when the corporation is dissolved—is in the stockholders. * * * As in the ordinary case of trustee and *cestui que trust*, the real owners are the beneficiaries.' The opinion in this case also states that the principle upon which it is proper to tax land without regard to the incumbrances upon it is that there is no community of interest between the owner of the land and the owner of the money borrowed and invested in the land, and that to tax both is not double taxation; that 'in that case there are two distinct subjects of taxation, each of which is made taxable by an express provision of the law. The farm is taxable as land, against whoever may be the owner, without regard to the incumbrances upon it. The sum secured by the mortgage is taxable as money at interest, regardless of

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the use the borrower may make of it. If the owner of the land is compelled to incumber it, it may be his misfortune, but the man who lends money to him has no connection with him in title. There is in such case no double taxation. The land is taxed once to its owner. The money at interest is taxed once to its owner. They are distinctly different taxpayers, and pay taxes upon distinctly different subjects of taxation.

"We have, then, these principles: A tax on the capital stock of a corporation is a tax on its property and assets. The corporation is simply a trustee for its stockholders, and they are the real owners of the property, or, as expressed by the learned justice, it is 'the ordinary case of trustee and *cestui que trust*.' The beneficiaries are the real owners. And, whether the property is taxed in the name of the corporation or in the name of the shareholders, the ultimate burden falls on the same persons. The facts that the tax is called a tax on capital stock is therefore not of the essence of the matter. Whatever called, it is a tax on the property and assets of the shareholders, for whom the corporation is simply trustee. Neither is it vital that it is taxed in the name of the trustee. The shareholders are the real owners of the property taxed, and the tax is therefore a tax on their property. But, when the property of individuals is taxed, no reduction is made because the property is incumbered. It is therefore not easy to see why there should be any specific reduction made for individuals simply because their trustee is a corporation. As was said by MR. JUSTICE MILLER, in *State Railroad Tax Cases*, 92 U. S., at page 605: 'Individuals do not escape taxation on their real and personal property because they are insolvent. * * * No state has ventured to establish the principle of permitting its visible tangible property to escape taxation relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts.' The consequence of establishing such a principle in Pennsylvania would be so serious that we

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cannot believe the legislature has ventured so to do. There are, as is well known, many railroad corporations in the state which, like the one in question in this case, were built at an extravagant cost, met chiefly by borrowed money, which are now insolvent, and whose net earnings are not sufficient to pay the interest on their sometimes enormous funded debt; yet they have valuable franchises which have been granted by the state, as well as tangible property, which, for the uses to which it is applied, is worth in many cases millions of dollars. All these, under the construction of the act of 1891 contended for on behalf of defendant, would entirely escape taxation by the state, and are not subject to local taxation, while the property of individuals who have no franchise from the state is taxed without regard to their insolvency. And the injustice and impolicy of such a construction is presented in a yet stronger light when we remember that in many cases—and notably in the one now before us—nearly all the funded debt secured by the incumbrances on the insolvent corporation's property is held by residents of other states or foreign countries; so that, if it is not taxable against the insolvent corporation, neither can it be reached, in theory even, by taxing the evidences of indebtedness. The result would be that property within the borders of the state worth many millions of dollars would be entirely exempted from taxation.

“Conclusions of Law.

“(1) A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises. The question of the actual value in cash of the capital stock is a question of fact, which must be determined by considering the value of defendant's tangible property, and assets of every kind, including its bonds, mortgages, and money at interest, and its franchises and privileges; and the amount of the incumbrances on its property and franchise is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined.

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"(2) The commonwealth is entitled to recover from defendant in this case a tax at the rate of five mills on the dollar on the actual value in cash of 126.18-510.20 parts of the capital stock of defendant amounting to ——— with interest at the rate of twelve (12) per cent. From September 30, 1896, and attorney general's commission at the rate of five (5) per cent.

"(3) Judgment is therefore directed to be entered in favor of the commonwealth and against the defendant as follows :

Tax, five (5) mills on
Interest at twelve (12) per cent. per annum from October 1,
1896, to April 8, 1897.
Attorney general's commission, 5 per cent.

Total "

M. E. Olmsted, for appellant.

John P. Elkin, *Dep. Atty. Gen.*, and *Henry C. McCormick*,
Atty. Gen., for the Commonwealth.

DEAN, J. All the material facts of this case are stated in the opinion of the court below. The finding of a fact determines the amount of the judgment. The accounting officers of the commonwealth and the court adopt a like construction of the statute, but, differing in their views of the evidence, differ in results. The officers of the defendant corporation, putting a wholly different construction on the statute, largely differ from both as to the fact. The defendant appraises its capital stock as of no value whatever. The commonwealth appraises it at \$34,480,577.70. The court below appraises it at less than half that amount. The main dispute between the commonwealth and defendant is as to the construction of the act of 1891. It may be conceded at once that the legislative intent to levy the higher amount must be express, or result from necessary implication; for, if in a tax law the intent be doubtful, it does not exist. The title of the act declares the purpose to be to tax "all the property of corporations, limited partnerships and joint stock associations having capital stock, at the rate of five mills on

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each dollar of its actual value." Could legislative language be plainer? All the property of corporations is to be taxed at the rate of five mills on each dollar of its actual value. The words "having capital stock" are used to distinguish such corporations from beneficial, religious, and other corporations having membership, but not capital stock representing the respective interests of members in the corporate property. Then, preamble 6 of the act further declares it to be the purpose to tax "all corporations, limited partnerships and joint stock associations having capital stock, at a fixed rate of five mills upon each dollar of the actual value of their whole capital stock, including as well their bonds, mortgages and moneys at interest, as their franchises and property of other kinds." In *Com. v. Standard Oil Co.*, 101 Pa. St. 119, speaking by PAXSON, J., this court held: "It has been repeatedly decided, and is settled law, that a tax upon the capital stock of a company is a tax upon its property and assets." Then, in *Appeal of Fox*, 112 Pa. St. 354, 4 Atl. 155, it is said: "The capital stock is nothing; a myth; a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock. Hence it is that the courts have long since declared that a tax upon the capital stock of a corporation is a tax upon the assets and property of such corporation." In *Com. v. Delaware, S. & S. R. Co.*, 165 Pa. St. 44, 30 Atl. 522, 523 (opinion by McCOLLUM, J.), we said: "In ascertaining the actual value of the capital stock, was it proper to take into consideration, affecting that value, the franchise of the company? We think this question is affirmatively answered by the act of June 8, 1891, under which the valuation was made. The capital stock represents the franchises as well as other property of the company. In the sixth preamble of the act, there appears a plain legislative purpose to include the franchises in fixing the value of the stock, and this is in harmony with the title and the provisions in respect to the taxation of it." There are other

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cases to the same effect. The statute having thus, in express terms, declared the subject of taxation to be all the property of corporations having capital stock, and the settled interpretation by this court of a tax on capital stock of a corporation being that it is a tax upon all the property of the corporation, it is clear the learned judge of the court below committed no error in the first sentence of his conclusion of law, thus: "A tax on the capital stock of a corporation is a tax on its property and assets, including its franchises."

Taxation—Capital Stock.

The main contention, however, is over the last part of the conclusions, as follows: "The question of the actual value in cash of the capital stock is a question of fact, which must be determined by considering the value of defendant's tangible property, and assets of every kind, including its bonds, mortgages, and moneys at interest, and its franchises and privileges, and the amount of the incumbrances on its property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined." The contention of appellant's counsel in substance is that, to ascertain the actual value, there should be deducted the amount of the corporation indebtedness from the aggregate fairly appraised value of the corporate property. The remainder would then represent the actual value of the capital stock. This would in many cases hide the tangible property, and turn the commonwealth over to the assessment and collection of its revenues from nothing; in the face, too, of what we have repeatedly decided,—that a tax upon the capital stock of a company is a tax upon its property and assets. The legislature might have so worded the statute that such result as that contended for would follow, namely, that solvent corporations should pay taxes, and insolvent ones not; but, with our decisions in 1882 and 1886, and the declared law long preceding them, that "capital stock," in taxing statutes, meant the property and assets of the corporation, before them, they declared, in the act of 1891,

Same—Same—Deduction of Indebtedness.

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precisely to the contrary. In fact, from the wording of preamble 6 of the act of 1891, we do not doubt that, at least, the framer of the act was familiar with the opinion of this court in *Com. v. Standard Oil Co.*, *supra*.

In supporting their argument on each side, counsel have given undue significance to the indebtedness of the corporation. Strictly speaking, in view of the purpose of this statute, the debt is almost as much of a myth as the certificate of capital stock. The declared purpose is to tax the capital stock by ascertaining its value in view of the tangible assets of corporations, what was owing to them, the value of their franchises, and the rights and privileges they possessed under their grants. The commonwealth no more sought, by the act of 1891, to ascertain and tax the net assets of these artificial beings, than, by the usual tax laws, she seeks to tax the net assets of natural ones. In the latter case she rarely inquires as to what the taxpayer owes. She does ask what he is possessed of. It is only when the attempt is made to tax his creditor that, incidentally, what is owing by the debtor becomes of interest to the taxing power. We have no hesitation in holding that it would be manifest error to adopt the amount of the debt as a part of the value of the corporate property; and it would be just as erroneous to hold that it should be deducted from the aggregate value of the property, and thereby withdraw tangible property to that extent from taxation. In either case it would be dragging in a fact of but slight consequence, and making it the prominent and controlling one in issue, in the face of the declared purpose of the statute to tax the actual value of the capital stock, as indicated by the franchises and property. In the case of *Com. v. Standard Oil Co.*, *supra*, PAXSON, J., in referring to the fact that the certificates of stock were in possession of the owner in Ohio, where the corporation was domiciled, says: "It follows, necessarily, that shares of stock in a Pennsylvania corporation, held by a corporation or individual domiciled in another state, cannot be taxed here. One sufficient reason is that there is nothing here to tax.

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The capital stock—that is, the property and assets—are here, and are taxed.” In other words, the shares themselves, which represent the owner’s interest less debts, have so little to do with the subject of taxation—the capital stock—that it is immaterial where they are held, or who holds them. The property and assets—the capital stock—being in this state, that, alone, is within reach of the taxing power. Now, what change is worked in this tangible property by subjecting it to a debt of the owner? In the case cited, the certificates and owner were both in a foreign jurisdiction; yet, the property and franchise being within the jurisdiction, the authority of the commonwealth to tax the capital stock, on ascertaining its value from what was within the jurisdiction, was upheld. If he cannot withdraw his tangible property from taxation, by taking his title to it, and person, outside state boundaries, how can he do so by voluntarily pledging it for a debt? That the owner subjects it to a debt in no way changes the relation of the commonwealth to it as a subject of taxation. It constitutes precisely the same capital stock as before. His relation to his own property has been somewhat changed; for, by the mortgage debt, he has admitted others to a share of the income, and has given them a lien for their debt. His title, however, remains just the same as if the owner of the legal title to land had placed a mortgage upon it. All the indications of ownership, the possession of the deed, and dominion over the property, continue, as if no debt had been created. As is said by our Brother Williams in *Com. v. Fall Brook Coal Co.*, 156 Pa. St. 488, 26 Atl. 1071, speaking of the power of the commonwealth to tax the land as well as the mortgage upon it: “In that case there are two distinct subjects of taxation, each of which is made taxable by an express provision of the law. The farm is taxable as land, against whomsoever may be the owner, without regard to the incumbrances upon it. * * * The land is taxable once to the owner. The money is taxed once to its owner. They are distinctly different taxpayers, and pay taxes upon distinctly different subjects of taxation.” The debt as an item of evidence, may have

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bearing in fixing the value of the franchise; but from the nature of the property, and the character of the debt, its affirmative weight in establishing value is insignificant; for of all forms of debt, as an indication of actual value of the thing pledged, the ordinary railroad mortgage is the most unreliable, and especially is this the case when the mortgage is executed to carry out a reorganization plan of security holders in a bankrupt road. Without adverting further to the history of this road, it is sufficient to say that its mortgage debt is always far in excess of any possible value of the property. We do not know just what prominence was given by the learned judge of the court below to the amount of indebtedness in reducing the actual value of the capital stock. He says, in the conclusion of law already quoted, that the question of actual value in cash of the capital stock is one of fact, to be determined by considering the value of defendant's tangible property, etc. "And the amount of incumbrances on its property and franchises is also a relevant fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined." That he gave no weight whatever to it, even as affirmative evidence tending to establish the value of the stock as claimed by the commonwealth, is clear. That he treated it as a relevant fact favoring defendant, and tending to reduce the actual value, although not to be specifically deducted, is also clear. And in this he was correct. That a large debt, one largely out of proportion to the value of the property, secured by mortgage, with interest payable semiannually, constituting what is called a "fixed charge," seriously depreciates the actual value of the property, cannot be questioned. Default in any payment of interest puts the property in peril of seizure and sale, to satisfy, not only the overdue interest, but the whole debt. A property heavily incumbered, as is this one, is liable to pass into the hands of the mortgage creditors at any time. But counsel for defendant planted himself on a demand for an absolute deduction of the whole amount from

Findings—Presumptions.

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the appraised value, and made no request for a specific finding of fact in this particular. It was not therefore incumbent on the court to specify, in the finding, exactly what weight was given a particular fact; and we assume that it had all the effect it was entitled to.

The argument that different methods were adopted by the commonwealth's officers in ascertaining the actual value of the capital stock of corporations, and, therefore, there has been want of uniformity and a discrimination, is not well founded. As the learned judge of the court below shows, prior to the act of 1891 the basis of taxation value, by the taxing acts, was the net earnings; but the latter act declares that the capital stock shall be appraised "at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings, or by the amount of profit made, and either declared in dividends, or carried into surplus or sinking fund." A minimum appraisalment is here fixed for solvent corporations. In most cases, doubtless, the corporation officers and the commonwealth, in estimating the actual value of a solvent, well-managed road, would adopt it—and properly, too—as a fair basis in estimating the actual value of the capital stock. But the act of 1891 was intended to reach also the bankrupt road, which may have the same mileage, the same traffic, and the same privileges as the solvent one. The state conferred upon it the right of eminent domain, for location and extension of branches or feeders, as well as for necessary improvements. Being constructed, it now has the right, under the protection of the laws, to operate it in carrying freight and passengers. As the same rule for a fair estimate of the actual value of the capital stock cannot be adopted as in case of the solvent roads, and the commonwealth's officers being dissatisfied with the corporate officers' appraisalment, they proceed, under the authority expressly given, to make an appraisalment, upon the facts in the report, and other information within their possession. Upon appeal, the court

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differs from them in their inferences, and reduces largely the amount subject to tax. On the number of miles of road in Pennsylvania,—about 127 of a total of 430,—with a capital stock of the actual value, as a whole, of \$15,000,000, the court fixes the actual value of the capital stock of the 127 miles in this state at only a little over \$3,500,000.

Value of Capital
Stock—Discrimi-
nation.

The method of determining the proportion of stock taxable in Pennsylvania has been repeatedly decided to be the correct one. The figures, certainly, do not indicate an excessive valuation of the capital stock of 127 miles of railroad. As between the defendant and solvent roads of the same physical character, there is no discrimination as concerns results, in favor of the solvent ones; for the latter are rated as high as \$40 to \$52 per share, while this one is less than one-third that amount. The actual value being a pure question of fact, appellant has no standing to complain of discrimination in methods, so long as its stock is not assessed in excess of that value. It may be that the Reading and some other corporations are taxed on less than the actual value of their capital stock. If so, the commonwealth is not here appealing, and consequently it is not our business to inquire into the matter. We can only say that, after a most careful examination of the whole case, we find neither error of fact nor law in the judgment of the court below, and it is therefore affirmed.

MITCHELL, J. I dissent in this and the kindred cases, known as the "Capital Stock Cases," because I am of opinion that the decision is founded on a fundamental error, in confusing a tax on the property of the corporation with the tax on the property of the individual shareholder therein, which is what the statute imposes. The subject-matter of taxation under the act of June 8, 1891, is capital stock, *eo nomine*, independently and without reference to the property which it represents. It is to be taxed at its "actual value in cash, not less however than the average price which said stock sold for during said year," etc. The officers of the corporation concerned are required to make sworn returns

under 17 specific heads, all of which tend to show the value of the stock as such, and not a single one of which refers directly or indirectly to the value of the property which such stock represents. The value of the capital stock in the hands of the shareholders is the value of their resulting interest in the property of the corporation subject to its debts and incumbrances, in view of the uses to which it may be put under its corporate franchises, etc.; and the value of such resulting interest is the true subject of tax under the statute. As construed by this decision, the tax is put on the value of the property of the corporation, without regard to the value of the capital stock in the hands of the shareholders. This is a total change in the subject of taxation, without any warrant in the statute, and against its plain language and intent.

GREEN and WILLIAMS, JJ., join in this dissent.

NOTES.

Valuation of Capital Stock for Taxation.—The market value of the shares of stock does not alone furnish a proper basis for the valuation of the capital stock. *Van Allen v. Assessors*, 3 Wall. (U. S.) 584; *Albany City Nat. Bank v. Maher*, 19 Blatchf. (U. S.) 178.

Same—Indebtedness May Be Considered.—In assessing capital stock for taxation the indebtedness of the corporation may be considered. *State Railroad Tax Cases*, 92 U. S. 578.

Same—Same—Illinois.—A leading case on this subject is *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561, in which the following rules, adopted by the state board of equalization, were under consideration: "First, the market or fair cash value of the shares of capital stock and the market or fair cash value of the debt, excluding such indebtedness for current expenses, shall be combined or added together, and the aggregate amount so ascertained shall be taken and held to be the fair cash value of the capital stock, including the franchises respectively of such companies and associations. Second, from the aggregate amount ascertained as aforesaid, there shall be deducted the aggregate amount of the equalized or assessed valuation of all the tangible property respectively of such companies and associations, such equalized or assessed valuation being taken in each case, as the same may be determined by the equalization or assessment

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of property by this board, and the amount remaining in each case, if any, shall be taken and held to be the amount and fair cash value of the capital stock, including the franchise, which this board is required by law to assess respectively against companies and corporations now or hereafter created under the laws of this state." The foregoing rules were upheld, and the case was affirmed and the rules approved in State Railroad Tax Cases, 92 U. S. 578.

Same—Same—New York.—In *People v. Coleman*, 49 Hun (N. Y.) 607, it was held that where commissioners of taxes are to determine the assessed value of the capital stock of a corporation, the thing to be taxed is the capital of the company, and not the shares of the stockholders. Such capital and surplus must be assessed at its own value, and, when that is correctly known and determined, no other value can be substituted for it. When its amount and value are undisclosed and unknown, the assessors may consider the market value of the share stock and the general condition of the company, as indicative of surplus or deficiency, and of the probable amount of either. They may further resort to such means of information when the amount of capital and surplus is disclosed, but the assessors have sufficient reason to disbelieve the statement, and such reason is founded upon facts established by competent proof. Where the corporation presents to the assessors a sworn statement of its assets and liabilities, the truth of which is not questioned or doubted by the assessors, they have no discretion to assess the value of the capital stock at a larger sum independently of the established facts. *People v. Coleman*, 126 N. Y. 433.

DETROIT, G. R. & W. R. Co.

v.

COMMISSIONER OF RAILROADS.

(*Supreme Court of Michigan, Dec. 28, 1898.*)

Taxation—Income—Switching Receipts.—Under Act No. 228 Pub. Acts 1897, providing for a specific tax upon the property and business of railroad companies, computed upon their gross incomes, not exceeding certain amounts per mile of road operated within the state, sums received from other companies for switching are parts of the gross incomes of the companies earning them.

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Same—Same—Track Rentals.—A sum received by a railroad company for rental of tracks and terminals is also a part of its "gross income" within the meaning of the statute.

Same—Same—Interest.—And interest received by a railroad company on its loans and deposits is a part of its "gross income" from its business within the meaning of the statute.

Mileage.—Within the meaning of the statute, the mileage of a railroad is the road operated by the company exclusively, and not in conjunction with other companies.

ORIGINAL *mandamus* proceeding by the Railroad Company against the commissioner of railroads. *Denied.*

Smith, Mims, Hoyt & Erwin, for relator.

Fred. A. Maynard, Atty. Gen., for respondent.

MONTGOMERY, J. This is an application for *mandamus* to compel the railroad commissioner to change the assessment made against the relator for the present year. The commissioner's report showed an operation of 451 miles of road, and that its gross income was \$1,316,739.50. The respondent required a further report, which was furnished, showing gross receipts for switching of \$5,052; rental of approaches, tracks, and terminals, \$5,445.12. The report also showed that relator received during the year interest on deposits, \$5,052. These three last-named items were not included in the original amount of the gross receipts, and were added to the amount first reported in making the assessments. It further appears that the relator included, in its report of mileage operated, 4.6 miles from Detroit to Delray; 8.4 miles from Detroit to Oak; 1 mile from Lansing to North Lansing; 7.3 miles from Paines, in the county of Saginaw, to the city of Saginaw; 15.5 miles from Grand Rapids to Sparta; and 34.2 miles from Sparta to Sheridan,—a total of 71 miles over which relator ran its trains, but as to which road it did not have exclusive control. On the contrary, these lines of road were used by other railroad companies as a part of their several systems. Four questions are presented: First, whether the item for switching is a part of the gross income;

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second, whether the interest on deposits is to be so treated; third, whether rental for tracks is to be so treated; fourth, whether, in making the compilation, the mileage should be that exclusively operated by the relator, or should include other roads over which it ran any of its trains to the extent so used.

1. The act under which the assessment is made is Act No. 228, Pub. Acts 1897, which provides for a specific tax upon the property and business of railroad companies operating within the state, computed upon all such gross income, not exceeding \$2,000 per mile of road actually operated within this state, $2\frac{1}{2}$ per cent. of such gross income; on such gross income in excess of \$2,000, and not exceeding \$4,000, per mile, $3\frac{1}{4}$ per cent., etc. Was the sum received for switching a part of the gross income? We think it was. It is claimed by relator that this item, being paid or credited to relator by other railroad companies, and charged to its customers, would be included in the amount reported by such other companies as their gross earnings. There was no direct proof of this before the railroad commissioner, although it was claimed in a letter filed by the president, but we do not well understand how this could be. Certainly, the relator received the amount of \$5,000 and upward for services in switching. It was certainly a part of its gross income, and if the charges were collected by other railroad companies, and paid over to the relator, it is not quite clear why it should be treated as a part of the gross income of such other company, any more than the freight charges advanced. In relator's petition in this case it is represented that the sum set forth as received for switching was a sum received of its customers, and paid over to other companies, for switching done by such other companies, the relator simply acting as a collecting agent. If the relator had shown this by its report, we should not regard the sum so received as a part of the gross earnings, but we do not so read the report. If any mis-

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take has been made in the report, doubtless the railroad commissioner will permit a correction.

2. We are unable to see why the sum received for rental of tracks and terminals is not a part of the gross income received by relator. Same-Same-Track Rentals.

3. The report shows there was received by the relator, interest on loans and deposits, \$5,013.90. It is contended that this was not a part of the gross income received in carrying on the business, within the meaning of the statute. We think it is clearly within the language of the statute. Same-Same-Interest.

4. The most important question in the case is whether, in computing taxes, tracks over which relator runs its trains, but not exclusively controlled by relator, should be computed as a part of its mileage. Mileage. The language of the statute is "road actually operated within this state." The contention of relator is that it is immaterial whether this company operates this road exclusively, or whether it is operated in conjunction with other companies. On the other hand, while it is conceded by respondent that the statute does not require that the road should be owned by the company, yet it is contended that it does require that if not owned, but merely operated, it shall be operated exclusively, and not merely in common with other companies. This would be the ordinary meaning of the language; and, looking somewhat to the consequences, it will be seen that, if the relator's contention be allowed, two connecting roads of equal mileage might, by running trains at intervals, over the whole length of the two roads by mutual consent, each be said to be operating a road of the entire length, thereby materially reducing the rate of taxation. We think the contention of respondent's counsel should prevail. It follows that the writ will be denied. The other justices concurred.

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DULUTH, S. S. & A. RY. CO.

v.

DOUGLAS COUNTY.

(*Supreme Court of Wisconsin, April 25, 1899.*)

Appeals—Records of County Boards.—The fact that there is no record of any proceedings of the county board of the appellant county directing the taking of an appeal from a judgment declaring certain railroad property exempt from taxation, is not necessarily fatal to the appeal.

Same—Authority to Employ Counsel.—Authority to direct an appeal to be taken includes authority to employ counsel to that end.

Exemption from Taxation—Construction of Statute.—Land acquired and held by a railway corporation in good faith solely for railway purposes, and necessary to enable it to perform the duties incident to its organization to the best advantage and which it intends to put to actual use in the conduct of its business in the near future, no definite time being fixed therefor, the land since its acquirement having remained wholly unoccupied largely because of want of financial ability of the corporation to improve the same, and still awaiting use on that account, is not exempt from taxation under the statute of Wisconsin exempting from general taxation the property of railway corporations necessarily used in operating their roads, although such land is within the limits that the corporation might presently go by the exercise of the power of eminent domain in order to obtain land for its railway purposes; as, while present right of condemnation limits the kind of property to which the exemption may attach, present use for railway purposes limits the time when the exemption will attach.

APPEAL by defendant county from Douglas county circuit court. *Reversed.*

Action to avoid a tax of \$1,231.08 levied on lands of the plaintiff by the proper officers of the city of Superior, Wis., in the year 1895. The tax was contested under section 1038, Rev. St., exempting from general taxation the property of railway companies necessarily used in operating their roads. In 1888 a tract of land 300 feet

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*See notes at end of case.

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wide and about 5,500 feet long, containing 38.568 acres, lying at right angles with, and extending about 1,700 feet into, the bay of Superior and to the dock line thereof, was conveyed to the president of the plaintiff corporation in trust for its use solely to meet future needs for railway and water traffic. In 1893 the land was conveyed to plaintiff and it has ever since owned and held the same exclusively for contemplated use for terminal facilities for its line of road. It has no other terminal facilities for its railway system at the head of the lakes. Such facilities are necessary to a complete railway system in order to enable the corporation to handle business at its western terminus. Except as hereinafter stated, the entire tract of land mentioned, at the time the tax was levied, was vacant and unoccupied, and it had been that way since its acquirement by the corporation, though all the time held in good faith for terminal facilities for plaintiff's road. Plaintiff has all the time contemplated improving and using the land as soon as its financial circumstances would reasonably permit. The use of the land in 1895, when the tax was levied, was necessary for the most convenient and profitable operation of plaintiff's railway system and the conduct of its business, but lack of funds interfered with its preparation for such use and has operated the same way ever since. At the time of the trial, which was three years subsequent to the levy of the tax, plaintiff was still uncertain as to when it would be able to improve, occupy and use the land. Since 1893 a small strip of land about 120 feet wide and about 1,500 feet long, containing 3.898 acres, lying in the southwest corner of the larger tract, has been partially occupied and used, there being three railway tracks along the westerly side thereof and a roundhouse near the south end. Such small parcel of land is of ample size for all the improvements located thereon, it being actually occupied for only about one-third of its width except at the extreme south end. The tax in controversy was levied upon that portion of the land wholly unoccupied down to the time of the trial. The court below, on the foregoing facts and

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others showing that the contemplated terminal facilities for which the land was acquired were a necessary adjunct to plaintiff's railway system in order to enable it to fully perform its duties as a transportation corporation at the time the tax was levied, though not actually so used because of the financial condition of plaintiff, held as a matter of law that the land was exempt from taxation and rendered judgment accordingly, from which this appeal was taken.

When the appeal was called for argument in this court a motion was made to dismiss, based on an affidavit of the county clerk and one by an employee in the county clerk's office to the effect that there were no proceedings of record directing or authorizing the appeal, and that in their judgment no action in that regard was ever taken by the county board; also an affidavit by one of the attorneys for respondent, to the same effect, made on information and belief. The motion was opposed by affidavits of seven of the members of the county board to the effect that the subject of taking the appeal was discussed by the members of the board in session September 26, 1898; that it was determined at that time that such appeal should be taken, subject, however, to the wishes of the officers of the city of Superior, where the land was located, and that the matter was referred to the finance committee with power to carry out the views of the board. There was an affidavit by the chairman of the finance committee to the effect that, pursuant to the action of the county board had as stated, such committee consulted with the officers of the city of Superior and directed Mr. H. H. Grace to appeal the cause to this court. There was also an affidavit by Mr. Grace and one by Mr. Sloan, the district attorney, corroborating the affidavit of the chairman of the finance committee, and to the effect that the appeal was taken pursuant to the committee's direction. There was also an affidavit by the city attorney of the city of Superior to a similar effect.

H. H. Grace and H. C. Sloan, for appellant.

Catlin, Butler & Lyons, for respondent.

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MARSHALL, J. (after stating the facts). The fact that there is no record of any proceedings of the county board of the appellant, directing the taking of this appeal, is by no means necessarily fatal to it.

Appeals—
Records of
County Boards.

Proceedings of county boards in such matters are often conducted in an informal manner and the records thereof loosely kept or not kept at all. It is not a subject affected by any law making a record the only evidence of it; therefore if the board acted in the matter, it appearing that written evidence thereof was not preserved, the facts in that regard may be established by parol. Dill. Mun. Corp. § 300; Jones, Ev. § 203. If a record were kept, it would be the best evidence of the proceedings, but the omission by the proper officers to preserve written evidence of their doings does not make the subsequent proceedings, taken in good faith pursuant thereto, invalid. It follows that the proof presented here on the motion to dismiss the appeal, showing that the county board considered the subject and acted in the matter, amply establishes that it was determined that an appeal should be taken if desired by the officers of the city of Superior, and that it was referred to the finance committee of the board with power to consult with the city officers and to further act. The power with which the committee were clothed was purely ministerial and executive, so we need not spend time to vindicate the authority of the board to delegate it. Municipal boards commonly act through committees in such matters, and without judicial condemnation that we are aware of. The committee, under the circumstances, was the mere instrument of the board to carry out or execute its will, not to pass upon and determine a matter resting in its discretion,

There can be no controversy as to the authority of the committee to employ Mr. Grace to take the appeal, when it is conceded that it possessed power to direct the appeal to be taken. It was not the duty of the district attorney to attend to the litigation in this court, therefore, as a matter of course, authority

Same—Authority
to Employ Coun-
sel.

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to direct the appeal to be taken carried with it, by implication, power to employ the usual means to that end.

The result of what has been said is that the motion to dismiss must be denied with motion costs.

The question for consideration on the appeal may be stated as follows: Is land, acquired and held by a railway corporation in good faith solely for railway purposes, and necessary to enable it to perform the duties incident to its organization to the best advantage, and which it intends to put to actual use

in the conduct of its business in the near future, no definite time being fixed therefor, the land since its acquirement having remained wholly unoccupied largely because of want of financial ability of the corporation to improve the same, and still awaiting use on that account, exempt from taxation, though within limits that the company might presently go by the exercise of the power of eminent domain in order to obtain land for its railway purposes? Or, to state the proposition more concisely, by leaving out the particular circumstances that characterize this case, does the exemption from taxation of lands held for railway purposes, under the statute of this state, follow in time, actual occupancy and use, instead of the right to take by the exercise of the power of eminent domain? The learned trial court held to the latter view, supposing, no doubt, and not without good reason, that such was the law as determined by this court.

To reach a correct conclusion at this time, the scope of the rule that the right of exemption from taxation follows the right to take by condemnation proceedings and that the limit of the one is the limit of the other, the reason for such rule, the history of the subject in this state and elsewhere from whence the rule was taken by adoption, must all be considered in connection with the language of our statute, which, it will be observed when we come to that, differs materially from many statutes found in other states.

The rule under discussion was at the outset a rule of construction, restricting railway tax exemption statutes and

Exemption from
Taxation—Con-
struction of Stat-
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such exemption, in the absence of any statute on the subject, within some reasonable limits. In the early history of such legislation the public demand for encouragement for railway enterprises led to the passage of exemption statutes in such general language as to be open to harmful construction. Many laws were passed exempting, generally, all the property of railway companies from taxation, giving such companies ground to claim such exemption without reference to the location of the property or its kind, or the purposes to which it was devoted, or whether used at all. That situation was rendered peculiarly dangerous to the public interests, as was early demonstrated, because the exemption was usually embodied in the corporate charter, and after the acceptance of the charter was free from legislative interference under the constitutional inhibition against impairing the obligation of contracts. *Railroad Co. v. Reid*, 13 Wall. 264. Hence the legislative intent by, and legitimate scope of, the general exemption provisions, became of the highest importance. One of the earliest cases where the subject was presented to a court of last resort for determination is *Camden & A. R. & Transp. Co. v. Mansfield Com'rs*, 23 N. J. Law, 510, decided in 1852. The charter of the railway company considered, after providing for certain transit duties to be paid, contained this language: "No other tax or impost shall be levied or assessed upon said company." The question presented was, does such language include all property the corporation may own, without reference to location or use, or is its scope confined to such property as is necessary for the company to acquire and hold for the purposes for which it was incorporated? Upon due consideration and review of many authorities throwing considerable light on the question, the latter view was adopted by the court and the general, sweeping exemption from taxation was, by construction, confined to such property as was necessary to the exercise by the company of its franchise as a transportation corporation. In *New Jersey R. & Transp. Co. v. Collectors of East, Fifth & Ninth Wards, Newark*, 26 N. J. Law, 519,

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the question was again presented to the court, and OGDEN, J., in deciding the case, referred to the legislative policy in the infancy of railway construction, to encourage capitalists to risk their fortunes in such enterprises, as having led to the enactment of the unguarded, general exemption from taxation, and observed that the legislature must at the outset have intended some limit to such exemption and that the right should not extend to all property that a railway corporation might acquire by purchase or otherwise; that it should stop at the boundary line of what was necessary to maintain the works of the corporation and furnish suitable protection for goods and accommodation for travelers; in short, to what was necessary to fulfill the company's duties as a railway corporation. So certain property affected by the decision, which was vacant and not used at all by the railway corporation, was held subject to taxation. It will be seen that the court, up to this time, had not reached any very definite test. It had proceeded cautiously in an endeavor to do by construction what the legislature ought to have done in the first instance, and at the same time not violate the constitutional inhibition upon the impairment of contract obligations. The subject was discussed in *New Jersey R. & Transp. Co. v. Collectors of East, Fifth & Ninth Wards, Newark*, 25 N. J. Law, 315, where it was urged upon the court that the fact that the corporation paid a tax on its capital stock required a more liberal construction of the exemption statute than that adopted where no such tax was paid; and the court held that such circumstance could not vary the rule of construction limiting the exemption to property acquired and used for railway purposes; that the circumstance of convenience, or acquirement of property in anticipation of the exigencies of the corporate business in the future, could not bring the property within the exemption so long as the fact remained that it was not presently occupied, used, and necessary for corporate purposes. Later, in *New Jersey R. & Transp. Co. v. Hancock*, 33 N. J. Law, 315, the court laid down the rule quite distinctly that the

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limit of exemption from taxation is the limit of the right to take by condemnation. That has since been generally followed in other states and may be said to be established as the general rule. *Vermont C. R. Co. v. Town of Burlington*, 28 Vt. 193; *State v. Baltimore & O. R. Co.*, 48 Md. 49; *Ramsey Co. v. Chicago, M. & St. P. Ry. Co.*, 33 Minn. 537, 24 N. W. 313; *Western & A. R. Co. v. State*, 54 Ga. 428. There are cases that hold otherwise, where the language of the statute clearly indicates that a license tax or tax on capital, or some other indirect tax, shall take the place of all other taxes on the property without reference to kind or use. Such was the case in *Milwaukee Electric Railroad & Light Co. v. City of Milwaukee*, 95 Wis. 42, 69 N. W. 796, where the law was given the widest scope the fair meaning of the words would indicate, and made to cover property not used, because the words "used for railway purposes" were omitted from the act under consideration. See, also, *Osborn v. Railroad Co.*, 40 Conn. 491; *Brightman v. Kirner*, 22 Wis. 54.

The discussion of the question of the exemption of railway property from taxation commenced in Massachusetts much earlier than in New Jersey, but under somewhat different circumstances, yet the result reached may be said to have furnished the light which led to the establishment of the rule of construction putting a reasonable limit upon the early unguarded exemption statutes. It being settled that railway corporations were in some respects public and their property devoted to the public use, so that constitutional power existed to confer upon such bodies the right to exercise the sovereign power to take property by right of eminent domain, the question arose as to whether railway property was so far devoted to the public use as to be exempt from taxation without legislative exemption. That came before the supreme court for adjudication in *Inhabitants of Worcester v. Western Corp.*, 4 Metc. (Mass.) 564. It was there held that the taking of private property for railway purposes *in invitum* was consistent only with the theory that the purpose of the taking was public; that

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though the corporation was allowed to derive profit from the use of the property taken, such profit was only a mere incident to the main use, which was public, hence that the rule that public property is not subject to taxation applied to such property owned by railway corporations as they were entitled to acquire by right of eminent domain, whether acquired that way or by purchase. The rule that public property was exempt from taxation thus in Massachusetts, stood in the same relation to the subject of such exemption when the title to such property was vested in a railway company, as the general legislative exemption did later in New Jersey and other states. The subject will be found very fully discussed in a recent case in Massachusetts. *City of Boston v. Boston & A. R. Co.*, 170 Mass. 95, 49 N. E. 95. This rule, exempting railway property from taxation upon the mere ground of its public character, has no place in our system.

It will be seen by the foregoing that the reason of the rule we are discussing, as viewed at the time of its establishment, was that the exemption from taxation grew out of the public character of the use to which the property was devoted, and that the purpose of the rule was to place a reasonable limit, by judicial construction, upon general exemption statutes not containing, by express language, any limitation whatever. The idea that present use had any significance did not occur in the judicial discussions except as evidence of present right to acquire by the exercise of the power of eminent domain. In a later class of cases, which arose under statutes worded in the light of experience under the earlier enactments, so as to restrain exemptions to property used for the purposes of the corporation, we find the right of condemnation referred to only as a limit of the extent of the exemption, and the circumstance of use referred to as the test of time of the exemption. Such is *United N. J. Railroad & Canal Co. v. City of Jersey City*, 55 N. J. Law, 129, 26 Atl. 135, where it was held that an authorized right of way, used throughout its whole length for two tracks, though wide enough for additional tracks, was all in use within

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the meaning of the statute. Some substantial present use of the right of way throughout its entire course was recognized as necessary to satisfy the requirement of the words, "property used for railway purposes;" but it was said, in effect, that tracks throughout the entire length of the authorized way, though only occupying a part of it, was use of the whole, by a fair construction of the statute. That is reasonable, and doubtless the same rule applies to depot grounds, railroad and terminal yards. Such construction was given to a similar statute in Michigan (*Auditor General v. Railway Co.*, 72 N. W. 992); and also in Minnesota (*Ramsey Co. v. Chicago, M. & St. P. Ry. Co.*, 33 Minn. 537, 24 N. W. 313). In the latter case it was distinctly held that present use definitely marks the limit of exemption.

In no case outside this state, at least that we have been able to find, and certainly in no case to which our attention has been called by counsel, where the statute plainly indicates present occupancy and use as a requisite of the exemption, has it been held that the language in that regard can be extended by construction to include lands that might be presently acquired *in invitum*, by applying the rule that the limit of the right of exemption and that of the right to condemn are identical. It is quite clear that the rule was not considered to admit of any such use when the subject was first presented in this court, as what follows will amply demonstrate.

In *Milwaukee & St. P. Ry. Co. v. City of Milwaukee*, 34 Wis. 271, the court had the whole subject involved on this appeal before it, some of the property taxed being in actual use by the railway company and some not, and some being conceded to be within the limit of the right to condemn, and some the subject of contest on that ground. In that situation it will be seen the court was called upon to determine the scope of our statute, both as regards the kind of property exempt from taxation and the time when the exemption right will attach. The wording of the statute was the same then as now: "The track, right of way, depot grounds and

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buildings, machine shops, rolling stock, and all other property necessarily used in operating any railroad in this state," shall be exempt from taxation. LYON, J., in delivering the opinion, said: "In looking through the adjudged cases on this subject, we find the rule laid down, that the exemption of railroad property from taxation is co-extensive with the right of the railroad company to take land for its use by condemnation [citing the New Jersey case above referred to, where the rule was first definitely announced in that state]. This rule seems reasonable and just and it may furnish a more certain test by which to determine, in any given case, whether specific railroad property is or is not exempt from taxation. For these reasons we are strongly inclined to adopt it as the correct rule." The court then proceeded to assign reasons which seemed to give to the rule the elements of certainty desired in order to reach a correct conclusion in the case, and then to apply it to the facts in determining the kind of property in suit that the exemption from taxation covered. When the court turned to the question of time when right of exemption should attach, it excluded the property that was not in actual use by the railroad company when the taxes were levied. There were some lots located in low, marshy grounds, held by the railway company for future use and wholly unimproved, as to which the court said, in substance, such lots and blocks, though acquired for depot grounds and yards, located in the marsh and never reclaimed or used for railroad purposes, were properly taxed; the statute exempts only such property as is necessarily used in operating the railroad, and as the parcels referred to are not and never have been used, they were subject to general taxation.

In *Chicago, M. & St. P. Ry. Co. v. Bayfield Co.*, 87 Wis. 188, 58 N. W. 245, the court again had the subject up for consideration. There was, as before, property subject to controversy as regards its being within condemnation rights because of the use to which it was devoted, consisting of an elevator and some ore docks admittedly used in connection

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with the railway operations and in aid of its business, and other property not subject to controversy as regards being within condemnation privileges, but not used at the time of the tax levy or theretofore for railway purposes, but which, since acquired by the corporation, had remained wholly vacant and unoccupied, it consisting of irregular strips or parcels of land on the lake shore connected with the company's occupied and used lands. The court held that the elevator and ore docks were within the exemption because reasonably necessary to, and used in the conduct of, the corporate business, and that the outlying, unused parcels of land were also within the exemption because of the right of the corporation to take such lands by the power of eminent domain in anticipation of use therefor in the immediate future. The labor of the court was expended chiefly on the first and more important branch of the case,—the tax on the elevator and ore docks. The tax on the unoccupied parcels of land was small in amount and the question presented to the court as to that was disposed of without observing the significance of the statutory requisite of present use recognized and strictly applied in the earlier case.

The foregoing leaves no room for doubt respecting the proper construction of our railroad tax exemption statute. While present right of condemnation limits the kind of property to which the exemption may attach, present use for railway purposes limits the time when the exemption will attach. Any other construction would violate the letter as well as the spirit of the statute and our system of railway legislation, which evidently was intended to require a license tax in lieu of general taxes for property actually devoted to *quasi* public use and to leave all other property owned by the railway corporation to bear its ratable share of the public burdens. The mischief that would result from a contrary construction is well illustrated by the case before us, where it is contended for to avoid taxes for a single year of over \$1,200 on some 34 acres of very valuable land in the large and rapidly growing city of Superior, the boundaries of which

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land extend over three-fourths of a mile beyond any of the tracks or improvements of the corporation, and which is not touched by any land used by the corporation except the small tract of about three acres located at one corner, which small tract is reached by respondent's cars only by crossing the tracks of another corporation. Certainly, till property so circumstanced contributes to the public revenues indirectly by some actual use in railway operations, it should contribute directly under the system of general taxation.

It need not be supposed by the foregoing that it is necessary that every part of authorized railroad grounds not actually presently occupied for railway purposes will be subject to general taxation. Some reasonable extent of constructive occupation necessarily attaches to and becomes a part of actual occupation. The contrary would be quite as unreasonable as to entirely disregard the requisite of present occupation and use. The statute is to have a liberal construction according to the long-established policy of the state. *Burns v. Railroad Co.*, 9 Wis. 450; *Ford v. Railroad Co.*, 14 Wis. 609; *Milwaukee & St. P. Ry. Co. v. Board Sup'rs Crawford Co.*, 29 Wis. 116; *Chicago, M. & St. P. Ry. Co. v. Bayfield Co.*, *supra*. But grounds for terminal facilities over a mile long and wide enough for upwards of twenty tracks, contiguous on one corner to a tract of about three acres actually occupied by tracks to the extent of about one acre, cannot reasonably be considered in use at all merely because of such contiguity, even though the occupied and unoccupied parcels of land were acquired as a whole at the time for railway purposes.

The late decision of this court, inconsistent with the views here expressed, is deemed a sufficient justification for treating the subject before us at considerable length. If the question were entirely new and free from complications, the plain letter of the statute would easily solve it, for, giving full scope to the doctrine of liberal construction in favor of the exemption, it is limited by the inflexible rule that words cannot, by judicial construction, be read into or out of a plain

statute. It is a maxim for safe guidance that, in declaring the law where language is plain, "it is the duty of courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing." *Everett v. Wells*, 2 Scott, N. R. 525. In *Milwaukee Electric Railroad & Light Co. v. City of Milwaukee*, *supra*, where a tax exemption law was considered, expressly covering "all real estate owned by the corporation," and it was insisted that the legislative intent was only to exempt property used for railway purposes, this court said that, to decide that way would, in effect, read the words expressing the idea into the statute, in defiance of plain rules of statutory construction. Here the matter is reversed, for the words "used for railway purposes" are in the statute. In order to sustain the judgment appealed from we would have to read plain words out of the statute, expressing a contrary view.

The learned trial court made no mistake in finding the facts. He decided that when the taxes in controversy were levied, the land affected was wholly occupied; but supposing, very properly, from what was said in *Chicago, M. & St. P. Ry. Co. v. Bayfield Co.*, *supra*, that the circumstance of the land being owned and held in good faith for future use by the railway company, and that it might otherwise, *in invitum*, have been acquired for such purposes at the time the tax was levied, made it exempt from taxation, decided accordingly.

The judgment appealed from must be reversed and the cause remanded with directions to enter judgment dismissing the complaint with costs to be taxed in favor of defendant.

So ordered.

NOTES.

Taxation—Exemption of Land—Extent.—The exemption of land from taxation extends only so far as the right of the company to take land for its use by condemnation. *Milwaukee & St. P. Ry. Co. v. City of Milwaukee*, 34 Wis. 271; *Vermont Cent. R. Co. v. Burlington*, 28 Vt. 193; *Eldridge v. Smith*, 34 Vt. 484; *State v. Baltimore & O. R. Co.*, 48 Md. 49; *State v. Nashville*, etc., R. Co., 86

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Tenn. 438; Western & A. R. Co. v. State, 54 Ga. 428, 66 Ga. 563; Worcester v. Western R. Co. 4 Met. (Mass.) 564.

Same—Same—Actual Use Required.—It has been frequently decided that a general exemption of the property of a corporation from taxation is to be construed as referring only to the property held for the transaction of the business of the company. *Ford v. Delta & P. L. Co.* (U. S.), 6 Am. & Eng. R. Cas., N. S., 400; *County of Ramsey v. Chicago, M. & St. P. R. Co.*, 33 Minn. 537; *County of Todd v. St. Paul, M. & M. R. Co.*, 38 Minn. 163; *Railroad Co. v. Irvin*, 72 Ill. 452; *In re Swigert*, 119 Ill. 83; *Camden & A. R. & Transp. Co. v. Commissioners of Mansfield*, 23 N. J. L. 510; *New Jersey R. & Transp. Co. v. Collectors, etc., of Newark*, 25 N. J. L. 315; *Vermont Cent. R. Co. v. Town of Burlington*, 28 Vt. 193; *Railroad Co. v. Berks Co.*, 6 Pa. St. 70; *Inhabitants of Worcester v. Western R. Co.*, 4 Met. (Mass.) 564; *Tucker v. Ferguson*, 22 Wall. 527; *Bank v. Tennessee*, 104 U. S. 493, 497. In this latter case, after referring to several of the authorities just cited, it was said: "The doctrine declared in them, that the exemption in cases like the one in the charter before us extends only to the property necessary for the business of the company, is founded in the wisest reasons of public policy. It would lead to infinite mischief if a corporation, simply by investing its funds in property not required for the purpose of its creation, could extend its immunity from taxation, and thus escape the common burden of the government."

NEW JERSEY JUNCTION R. CO.

v.

MAYOR, ETC., OF JERSEY CITY.

(*Supreme Court of New Jersey, June 2, 1899.*)

Railroad Lands—Exemption from Taxation.*—Lands owned by a railroad company adjacent to the main right of way, and reasonably necessary or convenient for the purposes of a railway, or used incidentally for such purposes, and not actually used for other purposes, are exempt from general taxation, and are only subject to the special taxation imposed by the state board of assessors.

Same—Same.—If the lands are of such reasonable quantities as may be fairly anticipated to meet the emergencies of railroad uses,

*See *Duluth, S. S. & A. Ry. Co. v. Douglas Co.*, *ante* and *note*.

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they are subject only to state taxation although they may not at the time be wholly devoted to such use, or at the time absolutely necessary for such use, so long as they are not devoted to any other use or purpose.

(Syllabus by the Court.)

APPLICATION for summary determination of the character of certain property assessed by the city and by the state board of assessors. *Taxes imposed by the state affirmed and those imposed by the city set aside.*

Argued June term, 1898, before LIPPINCOTT, GUMMERE, and LUDLOW, JJ.

S. H. Grey, Atty. Gen., for state board of assessors.

James B. Vredenburg, for New Jersey Junction R. Co.

John W. Queen, for Jersey City.

LIPPINCOTT, J. This proceeding is taken by virtue of the 239th section of the statute concerning taxes. 3 Gen. St. p. 3332, § 239. The question is whether for the year 1896 certain lands in Jersey City belonging to the New Jersey Junction Railroad Company should be taxed by the local taxing authorities of that city as other lands and property are taxed, or only subjected to taxation by the state board of assessors, under the act entitled "An act for the taxation of railroad and canal property," approved April 10, 1884, and the supplements thereto. 3 Gen. St. p. 3324. The tests to be applied are whether these lands are now used or devoted to railroad purposes, or held for fairly anticipated railroad purposes and emergencies, and the purposes incident thereto. If these lands are either used for railroad purposes or held by the railroad company solely for fairly anticipated railroad purposes, they are then taxable only by the state board of assessors as railroad property, and are not subject to local taxation. These rules can hardly need repetition, as they have so often been adjudicated. 3 Gen. St. p. 3332, § 239; *United New Jersey Railroad & Canal Co. v. Jersey City*, 55 N. J.

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Law, 129, 26 Atl. 135; Currie v. Railroad Co., 52 N. J. Law, 378, 20 Atl. 56; United New Jersey Railroad & Canal Co. v. Jersey City, 57 N. J. Law, 563-569, 31 Atl. 1020; National Docks & New Jersey Junction Connecting Ry. Co. v. Pennsylvania R. Co., 57 N. J. Law, 637-641, 32 Atl. 274; Delaware, L. & W. R. Co. v. City of Newark, 60 N. J. Law, 60, 37 Atl. 629, and cases cited in the latter case. The testimony taken in the matter is entirely undisputed, and it is within a very narrow compass. It is extremely brief, and whether any other facts than those contained in the evidence can be shown need not now be considered; and it also must be remembered that it is only the taxation of the year 1896 which is the subject of this summary consideration and determination. The whole of the property was returned to the state board of taxation as railroad property. Upon examination of the evidence, it appears that none of the lots locally assessed are used for any purpose or use other than that of a railroad. Lot 29, block 545, contains about 10 acres, without any improvements upon it, except it adjoins the right of way of the railroad in question. It is not rented, and the railroad derives no revenue from it whatever. A large portion of it is sidehill adjoining the railroad tracks, and could not be used for any purpose, except it be connected with the railroad. The evidence shows that it is held by the railroad in anticipation of using it for railroad purposes in the future. Lot 31, so far as it appears by the evidence, has on it a railroad track connected with the main line of the New Jersey Junction Railroad Company, and the track is used for general coal delivery. Lot 33 is unimproved meadow, which adjoins the main tracks of the company, which is carried over the meadow by a trestle about 20 feet high. A contemplated filling in under the trestle would take about 30 feet of space, and the weight would uplift the whole of the lot, and the evidence is that it is held for this as well as other uses of the railroad. The evidence shows that lot E, block 439, and lot A, in block 440, are in actual use as a railroad freight yard. Lot

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17, block 446, has a railroad freight house on it, and is also used as a teaming yard to get access to the freight yard, which would be to a great extent inaccessible but for the use of this lot. The conclusion of fact reached upon the evidence is that all these lands are held and used, or Same—Same. fairly and reasonably retained for anticipated railroad purposes, and that the different lots and parcels are not severable, so that one portion could be made subject to general taxation and another to state taxation. Therefore the taxes assessed by the local taxing authorities of Jersey City are set aside and vacated, and the taxes imposed by the state board of assessors are affirmed.

BALTIMORE, C. & A. Ry. Co.

v.

MAYOR, ETC., OF OCEAN CITY.

(*Court of Appeals of Maryland, March, 14, 1899.*)

Railroads—Exemptions from Taxations—Rights of Purchasers.*—An exemption from taxation is not a right or privilege which passes with a railroad to its purchaser without express statutory direction.

Same—Same—Same—Construction of Statute.—And sections 187 and 188 of article 23 of the Code of Maryland does not refer to exemptions from taxation, but only to such rights and property as would pass under the sale of a railroad mentioned in those sections.

APPEAL by defendant from Worcester county circuit court.
Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, PAGE, ROBERTS, PEARCE, and SCHMUCKER, JJ.

Robert P. Graham, N. C. Fitch, and N. P. Bond, for appellant.

Jas. A. Ellegood, George W. Purnell and Oliver D. Collins, for appellee.

*See notes at end of case.

Baltimore, etc., Ry. Co. v. Mayor, etc., of Ocean City

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BRISCOE, J. This is a suit brought by the mayor and city council of Ocean City, Md., against the Baltimore, Chesapeake & Atlantic Railway Company, to recover certain taxes alleged to be due and unpaid by the defendant company. The case was tried upon an agreed statement of facts, and, the judgment being for the plaintiff, the defendant has appealed. It appears that the defendant is a corporation formed under sections 187-190 of article 23 of the Code of Public General Laws for the purpose of "owning, possessing, maintaining, and operating a railroad in this state" formerly known as the Baltimore & Eastern Shore Railroad; the latter road having been formed under the general incorporation laws of the state. By the act of 1886 (c. 133) the powers of the Baltimore & Eastern Shore Railroad were enlarged, and "its franchises, property, shares of capital stock, and bonds" were exempt from all state, county, or municipal taxation for the term of 30 years, accounting from the date of the completion of the road, between the termini mentioned in its charter; that is, between Eastern Bay, in Talbot county, and the town of Salisbury, in Wicomico county. This road was completed on or about the 1st of August, 1891. By section 5 of the act the Baltimore & Eastern Shore Railroad was authorized to lease or purchase and operate any railroad or railroads," either in or out of this state, for the purpose of carrying on their business; and any other railroad company in this state was also authorized to lease or sell its railroad or other property to this road. In pursuance of this power, the Baltimore & Eastern Shore Railroad, on the 30th of June, 1890, purchased the property known as the Wicomico & Pocomoke Railroad, a road about 30 miles long, extending from Salisbury to Ocean City, and thus consolidating the two roads. Afterwards, in August, 1894, these two roads, as thus consolidated, together with their property rights, were sold by a decree of the circuit court of the United States for the district of Maryland under certain mortgage foreclosure proceedings, and were purchased by Mr. Nicholas P. Bond, of Baltimore

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city, who, subsequently with others, formed the defendant corporation, the Baltimore, Chesapeake & Atlantic Railway Company. So the principal question presented by this appeal is whether the property formerly owned by the Wicomico & Pocomoke Railroad, situate in the town of Ocean City, and now owned by the appellant company, is exempt from taxation, under section 2 of chapter 133 of the Acts of 1886.

Now, as we have seen, the act of 1886, provided for the building and working of a railroad from the shores of Eastern Bay, in Talbot county, to Salisbury, in Wicomico county, passing through the counties of Talbot, Caroline, Dorchester, and Wicomico; and it is quite clear, we think, that it was only such property as is necessary for the operation of this road that the legislature intended to exempt from state, county, and municipal taxation for the term of 30 years from the date of the completion of the road. It means the railroad and its property mentioned in the act, and none other. It is admitted that the Wicomico & Pocomoke Railroad Company was entitled to no such exemption at the time of its purchase by the Baltimore & Eastern Shore road, either under its charter or by legislative exemption. It is a sound rule of construction, said this court in *State v. Railroad Co.*, 48 Md. 73, that the power of taxation is never presumed to be relinquished unless the intent to relinquish is clearly expressed. *Delaware Railroad Tax Case*, 18 Wall. 206; *Railroad Co. v. Wright*, 116 U. S. 235, 6 Sup. Ct. 375. Nor was the exemption from taxation conferred by the consolidation of the two companies. The fourth section of the act of 1886 declares that the Baltimore & Eastern Shore Railroad Company shall have power to unite, connect, and consolidate with any railroad company or companies, either in or out of this state, so that the capital stock of said companies so united, connected, and consolidated may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company, and be entitled to all the property, franchises, rights, privileges, and immu-

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nities which each of them possess, have, and enjoy under and by virtue of their respective charters. But, even if we concede the contention of the appellant that the property in question was exempt from taxation after its purchase by the Baltimore & Eastern Shore Railroad Company, this would not avail the defendant company in this case. An exemption from taxation is not such a right or privilege as passes to the purchaser of a

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railroad without express statutory direction. In *Railway Co. v. Miller*, 114 U. S. 176, 5 Sup. Ct. 818, it is said: "The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction." In *Picard v. Railroad Co.*, 130 U. S. 641, 9 Sup. Ct. 642, the court said: "Yielding to the doctrine that immunity from taxation may be granted,—that point being already adjudged,—it must be considered as a personal privilege not extending beyond the immediate grantee, unless otherwise so declared in express terms. The same considerations which call for clear and unambiguous language to justify the conclusion that immunity from taxation has been granted in any instance must require similar distinctness of expression before the immunity will be extended to others than the original grantee. It will not pass merely by a conveyance of the property and franchises of a railroad company, although such company may hold its property exempt from taxation." The cases of *Wilson v. Gaines*, 103 U. S. 417; *Morgan v. Louisiana*, 93 U. S. 217; *Mor. Priv. Corp.*

§ 935; Cook, Stock & S. § 572, are to the like effect. There is no such express statutory authority in this case. Sections 187 and 188 of article 23 of the Code, relied upon by the appellant, refer to such rights and property as would pass under the sale of a railroad mentioned in those sections, and not to an exemption from taxation, such as is presented here. We are of the opinion, therefore, that the property of the defendant company, described in the agreed statement of facts filed in this case, is liable for taxation; and for the reasons we have given the court committed no error in rejecting the appellant's prayers, so the judgment will be affirmed. Judgment affirmed, with costs.

NOTES.

Railroads—Exemptions from Taxation—Rights of Purchasers.—The exemption from taxation of a railroad company is a personal privilege of the corporation to which it is granted. It will not pass to purchasers from the railroad company or at a foreclosure sale. *Louisville & Nashville R. R. Co. v. Palmes* (U. S.), 13 Am. & Eng. R. Cas. 380; *Trask v. Maguire*, 18 Wall. 391; *Morgan v. Louisiana*, 93 U. S. 217; *Railroad Co. v. Gaines*, 97 U. S. 697; *East Tenn. V. & G. N. R. Co. v. Hamblen Co.*, 102 U. S. 273, 2 Am. & Eng. R. Cas. 652; *Wilson v. Gaines*, 103 U. S. 417, 6 Am. & Eng. R. Cas. 627.

Same—Same—When Implied.—The legislature may, of course, unless restricted by the provisions of the state constitution, confer immunity from taxation upon the corporation formed by the purchasers of a railroad at a foreclosure sale. Such a result may be inferred from the terms of a general act granting to the new corporation the rights, powers and privileges of the old one, where, from the context or surrounding circumstances, such intent may be inferred. *Humphrey v. Pegues*, 16 Wall. 244; *Atlantic & G. R. Co. v. Allen*, 15 Fla. 637; *State v. Winona & St. P. R. Co.*, 21 Minn. 315; *State v. South Minn. R. R. Co.*, 21 Minn. 344; *Louisville & N. R. Co. v. Gaines*, 3 Fed. Rep. 266; *Nicholls v. New Haven & Northampton Co. R. R. Co.*, 42 Conn. 103.

Same—Same—When not Implied.—But a general grant to the new company of the rights, powers and privileges of the old one, will not exempt it from taxation where such an intent does not clearly appear. *Maine Central R. R. Co. v. Maine*, 96 U. S. 499; *Central R. & B. Co. v. Georgia*, 92 U. S. 665; *Atlantic & G. R. Co. v. Geor-*

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gia, 98 U. S. 359; Mobile & M. R. Co. v. Steiner, 61 Ala. 559; St. Paul & P. R. Co. v. Parcher, 14 Minn. 297.

Same—Same—By Decree on Foreclosure Sale.—Where the court decrees a foreclosure sale so as to vest in the purchaser all the rights, privileges and immunities appertaining to the franchises of the charter, it seems that the new corporation, consisting of the purchasers, will be exempt from taxation. Knoxville & Ohio R. R. Co. v. Hicks, 15 Am. Ry. Reports, 197.

CITY OF YORK *et al.*

v.

CHICAGO, B. & Q. R. Co.

(*Supreme Court of Nebraska, Nov. 3, 1898.*)

Constitutionality of Statutes and Ordinances—Pleading.—When it is claimed that a statute or ordinance is invalid because it is, in its substance, violative of the fundamental law, the inference of invalidity being one following from the fundamental law as compared with the act in question, it is sufficient to generally allege that it is invalid.

Same.—When the claim is that such an act or ordinance is invalid, not because of its substance, but because not regularly passed or adopted, the defect in the proceedings must be specifically pleaded. It is not sufficient to allege generally that it was not legally adopted.

Same — Railroads—Occupation Tax—Interstate Commerce.*—A city of the second class adopted an ordinance imposing an occupation tax "on each railroad corporation or company carrying or transporting freight or passengers to or from any point or place within the limits of this city, and to or from any point or place within the limits of this city and any point or place within the limits of this state, and having a depot or place of business within the limits of this city for receiving or discharging such passengers and receiving and delivering such freight. All interstate traffic commerce or business of such companies or corporations is hereby excepted and exempted from the levy of such tax." *Held*: (1) That such ordinance was not violative of the federal constitution,

*See note at end of case.

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as imposing a burden on interstate commerce. Postal Tel. Cable Co. v. City of Charleston, 14 Sup. Ct. 1094. 153 U. S. 692 followed. (2) That the statute authorizing the imposition of such a tax was not violative of the state constitution. Magneau v. City of Fremont, 47 N. W. 280, 30 Neb. 843, followed. (3) That the ordinance was not void because imposing a tax on a business not wholly carried on within the city imposing the tax. W. U. Tel. Co. v. City of Fremont, 58 N. W. 415, 39 Neb. 692, followed. (4) That the ordinance was not an attempt to impose a tax on the depot of the complaining company, in addition to the tax arising from the general assessment of its property.

Construction of Ordinance.—The reference to depots and places of business in such ordinance is merely descriptive of the class of corporations to be taxed, and for the purpose of excluding those doing no part of their business within the city.

Constitutional Provisions.—Section 6 of article 9 of the constitution fixes the power of the legislature to authorize municipalities to impose taxes for municipal purposes, and is independent of section 1 of the same article, which authorizes the legislature to directly impose taxes for general purposes. Therefore the limitation of occupation taxes in section 1 to certain named occupations does not forbid taxes on other occupations for municipal purposes alone.

(Syllabus by the Court.)

ERROR by defendants to York county district court.
Reversed.

T. E. Bennett, for plaintiffs in error.

J. W. Deweese, *F. E. Bishop*, and *F. C. Power*, for defendant in error.

IRVINE, C. This was an action by the Chicago, Burlington & Quincy Railroad Company against the city of York and its treasurer, the object whereof was to restrain the defendants from collecting an occupation tax which the city had undertaken by ordinance to levy against the railroad company. An answer was filed, admitting certain averments of the petition and denying others, but pleading no material new matter. Next on the record appears a motion for judgment, and in one of the briefs it is stated that judgment was entered on the pleadings in pursuance of the motion; but it appears from the decree itself that the case was heard, not only on the pleadings,

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but on the "statements and admissions of the parties," and the decree contains findings for the plaintiff. An injunction was allowed as prayed. There is no bill of exceptions, and we have therefore no means of knowing what were the "statements and admissions" whereon the court found the issues for the plaintiff. We must therefore assume that these statements and admissions were sufficient to sustain the findings, and must review the case solely to ascertain whether the decree was one which might properly be entered under the pleadings. In other words, practically the only question before us is whether the petition stated a cause of action. The petition alleged that the plaintiff was a corporation owning and operating a system of railroads, one line of which runs from Chicago westerly through Iowa and Nebraska, and extending into the state of Montana; that said line runs through the city of York; that in said city the plaintiff has a depot for its use in the traffic; that plaintiff's business at York consists wholly of receiving and transporting freight and passengers to said depot in said city from points outside of said city inside and outside of the state of Nebraska, and from said depot to points outside of said city in the state of Nebraska and outside of Nebraska; that no portion of plaintiff's business is confined within the limits of the city. The petition further avers that the mayor and city council of York pretended to pass an ordinance entitled "An ordinance levying a license tax upon occupations and business within the limits of the city of York, Nebraska; to raise revenue, and providing for collection of such tax, and to repeal all ordinances and parts of ordinances in conflict with the provisions of this ordinance." The essential parts of the ordinance are then pleaded. In its first section, it levies a license tax upon the several occupations and businesses within the limits of the city "in this ordinance hereinafter enumerated, to raise revenues thereby in the several different sums on the several different businesses and occupations respectively as follows." The fourth section is as follows: "The sum of \$50.00 on each railroad corporation

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or company carrying or transporting freight and passengers to and from any point or place within the limits of this city, and to and from any point or place within the limits of this city and any point or place within the limits of this state and having a depot or place of business within the limits of this city for receiving and discharging such passengers and receiving and delivering such freight. The interstate traffic commerce or business of such companies or corporations is hereby excepted and exempted from the levy of such tax." The ordinance also provides for enforcement of the tax by distress and sale of personal property. The petition then alleges that the defendants threaten to enforce payment by plaintiff of such tax by distress of its property within the city; that the city had no power or authority to pass the ordinance, or impose a tax or license upon plaintiff in its occupation or business in said city, that the ordinance is in contravention of the constitution of Nebraska and the constitution of the United States, and, if enforced, results in double taxation of plaintiff. The petition also contains the following averment: "The plaintiff alleges that said ordinance * * * was never passed legally, and as by law provided, so as to make it a valid ordinance." So far as the last averment is concerned, it is clearly the pleading of a conclusion of law, without any pleading of any ultimate traversable facts which would lead to such conclusion. When an act is legal or illegal because of the existence or nonexistence of certain facts, those facts must be pleaded. The mere assertion of illegality is not enough. It tenders no issue. Moreover, from certain special findings it is clear that the court did not act on this averment; so that we are relegated to an investigation of the legality of the ordinance, assuming that it was regularly passed. We think this question is properly raised by general averments that it was such an ordinance as the city had no authority to pass, because, when the terms of the ordinance are pleaded, its validity or invalidity on this ground is solely an inference of law from the facts pleaded. The attack

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on the validity of the ordinance may be analyzed as follows: First, that it is in violation of the interstate commerce clause of the federal constitution; second, that it was passed under a pretended authority contained in the charter of the city, which, under the constitution of the state, the legislature had no power to confer; third, that it undertakes to tax business in part, at least, not conducted within the city; and, fourth, that it is an attempt to indirectly retax the company's station or depot property after the same had already been assessed and taxed in pursuance of the general law.

1. The argument on the first head is that the ordinance necessarily imposed a burden on the interstate business of the company. It will be observed that the ordinance contains

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~~merce.~~

an express exception from its operation of such interstate business. In this aspect the case is precisely analogous to *W. U. Tel. Co. v. City of Fremont*, 39 Neb. 692, 58 N. W. 415; *Id.*, 43 Neb. 499, 61 N. W. 724. After the decision of that case, and before a motion for rehearing was ruled upon, the supreme court of the United States announced a similar opinion in *Postal Tel. Cable Co. v. City of Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094. We must therefore hold, following those cases, that, the ordinance infringes no right of plaintiff under the federal constitution.

2. Under the second head, attention is called to sections 1 and 6 of article 9 of the constitution of Nebraska. Section 1 is as follows: "The legislature shall provide such revenue as may be needful by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law uniform as to the class upon which it operates." Section 6 is: "The

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legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, and by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." The argument on this head is that section 1 contains a special provision authorizing occupation taxes on certain occupations named in the section, without general words, and that this prohibits the imposition of any such taxes on occupations not within the classes enumerated; that the sixth section was adopted with reference to the first, and applies only to local assessments and taxes based on the general valuation of property. The argument, it must be conceded, has great force; but we do not think it is sound, and it is contrary to the past decisions of this court. In the following cases the general power of the legislature to authorize municipalities to impose occupation taxes has been recognized: *State v. Bennett*, 19 Neb. 191, 26 N. W. 714; *City of Columbus v. Hartford Ins. Co.*, 25 Neb. 83, 41 N. W. 140; *State v. Green*, 27 Neb. 64, 42 N. W. 913; *Magneau v. City of Fremont*, 30 Neb. 843, 47 N. W. 280; *Templeton v. City of Tekamah*, 32 Neb. 542, 49 N. W. 373; *W. U. Tel. Co. v. City of Fremont*, *supra*; *German-American Fire Ins. Co. v. City of Minden*, 51 Neb. 870, 71 N. W. 995. It is true that in most of these cases the tax in question was levied upon an occupation described in section 1 of article 9 of the constitution, but that is not true of *Templeton v. City of Tekamah*, or in *Magneau v. City of Fremont*. An inspection of the record in the latter case discloses that the suit was brought by a large number of persons engaged in divers lines of business, many of them not within the enumerated classes. The question here presented was there distinctly raised and argued, and by the court decided adversely to the claim of plaintiff. The decision was largely based on the similarity between our constitutional provisions and those of Illinois,

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and the construction which had been placed on the Illinois constitution by the supreme court of that state prior to the adoption of our constitution. *Wiggins v. City of Chicago*, 68 Ill. 378. It was said in the opinion that sections 1 and 6 of article 9 of our constitution "are identically the same as sections 1 and 9 of article 9 of the constitution of Illinois." Counsel now call our attention to the fact that there is a difference between section 1 of our constitution and the cognate section in Illinois, in that the Illinois constitution, after enumerating the same occupations as ours, adds certain general words. Our attention is also called to the fact that there is another section of the Illinois constitution in express terms rendering specific sections authorizing taxation not exclusive of power to impose other taxes. Still we think the error in statement in *Magneau v. City of Fremont* was verbal only, that the case cited from Illinois was justly entitled to the effect there given it, and that the construction there adopted was correct. Section 6 of our constitution and the cognate section of Illinois constitution are identical. In *Wiggins v. City of Chicago* the tax complained of was imposed upon an auctioneer who was actually within the enumerated classes upon whom an occupation tax, by the express terms of the constitution, might be imposed; and the argument there was that, inasmuch as the legislature was granted power to directly tax such occupations, it could not impose a double tax by authorizing a municipality to also tax them. The court held that taxation for general state and county purposes and taxation for municipal purposes were distinct, that the imposition of the tax for each was not a double taxation, and that the grant of power in section 1 did not prevent the legislature, under section 6, from authorizing an occupation tax for municipal purposes, whether or not the occupation taxed was one enumerated in section 1. Such, no doubt, we think, is the force of our constitution. Section 1 fixes the power of the legislature to provide general revenues. Section 6 fixes its power to authorize municipalities to raise revenue for municipal purposes. By

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section 7 the legislature is forbidden to impose taxes upon municipal corporations, or upon the inhabitants or property thereof, for corporate purposes. This section shows the distinction regarded by the constitution when it authorized the legislature directly to provide revenue by levying taxes, and gave it power to tax peddlers, etc., and when in a separate article it gave it power, not to levy a tax for municipal purposes, but to authorize the municipalities themselves to do so. The provisions of section 1 have nothing to do with those of section 6, and the reasons, aside from those already given, for holding that the levying of an occupation tax on classes not within section 1 is within the power granted by section 6, are so well stated in *Magneau v. City of Fremont* that we need not here repeat them.

Construction of
Ordinance.

3. The plaintiff contends that it does no business, either by way of transporting freight or passengers, from one point within the city of York to another point within the city of York; that its entire business connected with York is to carry freight and passengers from points without the city into the city, and from the city to points without the city; that no portion of its business can properly be considered business within the city; and that the city can therefore not properly impose a tax on such business. A precisely similar point arose with regard to the transmission of telegrams in *W. U. Tel. Co. v. City of Fremont*, *supra*, and the decision was adverse to the plaintiff's position. The writer dissented in that case from the opinion of the court, and he is still of the opinion that the position of plaintiff on that question is well taken, but the case cited was decided after full hearing and deliberation. The majority opinion in that case voiced the final and mature judgment of all the judges and commissioners, except JUDGE POST and the writer; and JUDGE POST, in the opinion denying a rehearing (43 Neb. 499, 61 N. W. 724), while expressing an inclination to the writer's views, felt compelled, after the decision of the supreme court of the United States in *Postal Tel. Cable Co.*

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v. City of Charleston, to adopt the conclusion of the majority. That view must now be adhered to.

4. So far as the plaintiff assails the ordinance on the ground that it is an attempt to doubly tax its depot, we think it clearly mistakes the effect of the ordinance. The tax is not imposed upon the depot or place of business, but it is imposed upon the occupation of carrying freight and passengers to and from the city, and is restricted to those corporations having a depot or place of business within the limits of the city for the transaction of such business. The words are used merely as defining the class to which the tax applies, and for the purpose of excluding from its operation any railroad company which might perform some part of the work of carrying freight or passengers to or from the city, but which had no place of business within the city. Such a company, so far as its part of the work is concerned, would perform no part of it within the city, and would not be amenable to city taxation. The restriction of the tax to companies actually operating within the city was all that was intended by this phrase. It does not operate directly or indirectly as a tax on the depot.

The ordinance is not invalid for any of the reasons asserted, and, the sufficiency of plaintiff's petition depending upon its invalidity, the petition stated no cause of action, and the plaintiff was not entitled to the relief granted. Reversed and remanded.

NOTE.

Power of State or Municipality to Impose License Tax on Corporations Engaged in Interstate Commerce.—Any tax which may properly be considered as a license tax or tax on business may be levied by a state on a corporation doing business within its limits, notwithstanding the fact that the corporations engaged in the business of carrying on interstate commerce. *Osborne v. Mobile*, 16 Wall. 479; *Commonwealth v. Gloucester Ferry Co.*, 98 Pa. St. 105; *State Tax on Gross Receipts*, 15 Wall. 234; *Penna. R. R. Co. v. Commonwealth*, 3 Grant's Cas. (Pa.) 128; *Walcott v. People*, 17

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Mich. 68; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 3 Am. & Eng. Corp. Cas. 482.

A municipal ordinance imposing an annual tax upon a railroad company, which passes through the corporate limits, is not a tax upon interstate commerce, nor upon the instruments employed in the transportation of such commerce, and is valid where authorized by state law. *Piedmont R. Co. v. Reidsville*, 101 N. Car. 404, 2 L. R. A. 284, 2 Int. Com. Rep. 416, 8 S. E. Rep. 124. See also *City of Anniston v. Southern Ry. Co.*, 9 Am. & Eng. R. Cas., N. S., 36, and *foot-note*.

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v.

WEBSTER *et al.*

(*Court of Appeals of Kentucky, April 27, 1899.*)

Starting Car—Injury to Female Passenger Carrying Child.*—After a woman has entered a car, although carrying a baby and a basket, the conductor is not chargeable with notice that extraordinary care is required in starting the car, where she has not requested his assistance in getting seated.

APPEAL by defendant from Bell county circuit court.
Reversed.

Sampson & Chapman, for appellant.

G. W. Saulsberry, for appellees.

DU RELLE, J. At Middlesborough the appellee Sallie Webster boarded a mixed train on appellant's railway, consisting of a combination baggage car and passenger car and a number of coal cars. According to her own statement, she got safely into the car, carrying a baby and a basket; but she complains that she was not given sufficient time to get seated, and that, the train being started with a jerk, she was thrown to the floor and injured. There is considerable

*See *Louisville & N. R. Co. v. Hale et al.*, 10 Am. & Eng. R. Cas., N. S., and *note* 76.

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doubt, under the testimony, whether she was injured on the train at all, and whether the bruises on her head were not administered by her husband the evening previous to the alleged accident. The jury fixed the amount of her damages at \$200, under instructions which required the appellant not to start its train until she had sufficient time to be seated. This, under the ruling in *Railroad Co. v. Hale*, 10 Am. & Eng. R. Cas., N. S., 73, 44 S. W. 213, was error. Judgment reversed, and cause remanded, with instructions to award appellant a new trial, and for further proceedings consistent herewith.

GUFFY, J., dissenting.

MOORE

v.

NEW YORK, N. H. & H. R. Co.

(*Supreme Judicial Court of Massachusetts, May 18, 1899.*)

Carriers of Passengers—Damage to Luggage—Liability of Last Connecting Carrier—Presumption.*—Where a passage was over several connecting roads, and the passenger's luggage, which was in a good condition when delivered to the initial carrier, is found to be in a damaged condition at the end of the passage, and it does not appear where the damage occurred, the presumption is that it occurred on the last road.

REPORT from Suffolk county superior court. *Judgment for plaintiff.*

Frank N. Nay, for plaintiff.

Benton & Choate, for defendant.

HOLMES, J. This is an action by a passenger to recover for damage to her luggage, suffered somewhere in the course of a passage from Charleston, Tenn., to Boston. The pas-

*See note at end of case.

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sage was over six connecting railroads. It does not appear where the damage was done, and the plaintiff seeks to recover upon a presumption that the accident happened upon the last road.

The so-called "presumption" was started and justified as a true presumption of fact that goods shown to have been delivered in good condition remain so until they are shown to be in bad condition, which happens only on their delivery. But it was much fortified by the argument that it was a rule of convenience, if not of necessity, like the rule requiring a party who relies upon a license to show it. 1 Greenl. Ev. § 79; Pub. St. c. 214, § 12. As we, in common with many other American courts, hold the first carrier not answerable for the whole transit, and not subject to an adverse presumption (*Farmington Mercantile Co. v. Chicago, B. & Q. R. Co.*, 166 Mass. 154, 44 N. E. 131), it is almost necessary to call on the last carrier to explain the loss if the owner of the goods is to have any remedy at all. To do so is not unjust, since whatever means of information there may be are much more at the carrier's command than at that of a private person. These considerations have led most of the American courts that have had to deal with the question to hold that the presumption exists. *Smith v. Railroad Co.*, 43 Barb. 225, 228, 229, affirmed in 41 N. Y. 620; *Laughlin v. Railway Co.*, 28 Wis. 204; *Railroad Co. v. Holloway*, 9 Baxt. 188, 191; *Dixon v. Railroad Co.*, 74 N. C. 538; *Leo v. Railway Co.*, 30 Minn. 438, 15 N. W. 872; *Railway Co. v. Culver*, 75 Ala. 587, 593; *Beard v. Railway Co.*, 79 Iowa, 518, 44 N. W. 800; *Railway Co. v. Harris*, 26 Fla. 148, 7 South. 544; *Faison v. Railway Co.*, 69 Miss. 569, 13 South. 37; *Forrester v. Railroad Co.*, 92 Ga. 699, 19 N. E. 811. In the opinion of the court the weight of argument and authority is on that side. MR. JUSTICE LATHROP and I have not been able to free our minds from doubt, because we are not fully satisfied that the court has not committed itself to a different doctrine. Still it has not dealt with it in terms. In *Darling v. Railroad Corp.*, 11 Allen, 295, the only question discussed

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was a question of contract. In *Swetland v. Railroad Co.*, 102 Mass. 276, the question was as to frozen apples. It appeared that the weather had been very cold before delivery to the defendant. The presumption was not mentioned. These are the two nearest cases.

Judgment for the plaintiff.

NOTE.

Connecting Carriers—Presumption that Injury to Goods Occurred on Last Line.—Where goods are delivered to a railroad company to be transported by it and other connecting lines to the point of destination it is enough for the shipper, in an action against the last carrier for an injury occasioned to the goods in transit, to show a delivery of them in good order to the first carrier. The defendant can then only escape liability by showing affirmatively that the injury did not occur on its line. *Savannah, etc., R. Co. v. Harris*, 42 Am. & Eng. R. Cas. 457; *Forrester v. Georgia, etc., Co.*, 92 Ga. 699, 2 Am. & Eng. R. Cas., N. S., 643, Abstr.; *Central R., etc., Co. v. Bayer*, 91 Ga. 115; *Lake Erie, etc., R. Co. v. Oakes*, 11 Ill. App. 489; *Beard v. Illinois Cent. R. Co. (Iowa)*, 42 Am. & Eng. R. Cas. 445; *Leo v. St. Paul, etc., R. Co.*, 12 Am. & Eng. R. Cas. 35; *Mobile, etc., R. Co. v. Tupelo, etc., Mfg. Co.*, 42 Am. & Eng. R. Cas., 497; *Lin v. Terre Haute, etc., R. Co.*, 10 Mo. App. 125; *Flynn v. St. Louis, etc., R. Co.*, 43 Mo. App. 424; *Smith v. New York Cent. R. Co.*, 41 N. Y. 620; *Lindley v. Richmond, etc., R. Co.*, 88 N. Car. 547, 9 Am. & Eng. R. Cas. 31; *Louisville, etc., R. Co. v. Tennessee Brewing Co.*, 96 Tenn. 677; *Texas, etc., R. Co. v. Adams*, 78 Tex. 372; *Laughlin v. Chicago, etc., R. Co.*, 28 Wis. 204, 9 Am. Rep. 493.

CENTRAL OF GEORGIA RY. CO.

v.

DORSEY.

(*Supreme Court of Georgia, March 17, 1899.*)

Waiver of Objections to Brief of Evidence.—It is too late, after a motion for a new trial has, without objection to the brief of evidence, been heard and determined upon its merits, to raise the question that the brief was not duly filed.

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Carrying Passenger beyond Station—Negligence and Contributory Negligence.*—While it is the duty of a conductor to ascertain, before reaching a flag station, whether or not there is on board a passenger ticketed thereto, there is a corresponding duty upon the passenger who has purchased a ticket to such a station, upon discovering that he has been overlooked by the conductor, to call the latter's attention to the fact, and surrender the ticket, in order that the conductor may know the passenger's destination, and have the train stopped for him to alight. The failure of a passenger to observe this duty is a material matter in determining whether or not, in a given instance, carrying the passenger beyond his station was wholly attributable to the negligence of the railway company, or whether the passenger, by exercising the proper diligence, could have avoided being carried beyond such station.

Same—Duty of Passenger—Failure to Instruct.—In the trial of a case to which, under the evidence introduced by the defendant, the rule above stated is applicable, it was erroneous to charge the jury, without explanation or qualification: "You must determine from the evidence whether, by the exercise of extraordinary diligence, the conductor could, on the occasion alleged, have ascertained the destination" of the passenger. The failure of the court to instruct the jury concerning the duty of the passenger, under such circumstances, is all the more objectionable, when it clearly appears that the latter was perfectly familiar with the situation, and must have known the train would run beyond the flag station, unless the conductor was notified to have it stopped.

(Syllabus by the Court.)

ERROR by defendant from Henry county superior court.
Reversed.

Hall & Boynton and *W. C. Beeks*, for plaintiff in error.

W. I. Dicken, G. W. Bryan, L. R. Ray, and E. J. Reagan, for defendant in error.

SIMMONS, C. J. 1. There was a motion to dismiss this case upon the ground that the brief of evidence used at the hearing of the motion for new trial had not been duly filed. This question is sufficiently dealt with in the first headnote.

Waiver of Objections to Brief of Evidence.

2. Mrs. Dorsey purchased a ticket over the defendant company's line of railway from East Point, Ga., to Lovejoy,

*See note at end of case.

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Ga.; the latter being a flag station, at which the train stopped only when it had a passenger to put off or when it was signaled to stop to take on a passenger. She boarded the train, and claims in her evidence that she had no opportunity to deliver her ticket to the conductor until after she had passed her point of destination. She testified that the conductor passed through the car in which she was seated once only between these two points, and then came from the seat where she was sitting, and passed on towards the front. She was carried beyond Lovejoy to the next station, where she alighted, and was compelled to walk from one-half to three-quarters of a mile, according to her testimony, to the house of a friend, where she spent the night. On the way she heard some negroes talking, and they followed her nearly to the house of her friend. She was much alarmed, became nervous, and, by reason of the walk and the fright, her health was impaired. The evidence for the company tended to show that the plaintiff knew that Lovejoy was a flag station only, had traveled frequently over this road for four or five years, and was well acquainted with the surroundings; that the conductor did fail to take up plaintiff's ticket because, as he passed her several times during the trip, she had her face turned towards the window, or was talking to some other ladies, and, inasmuch as she did not board the train at the end of the car where he stood to receive passengers, but at the other end, he did not know that she was a passenger whose ticket had not been inspected, and for that reason did not stop at Lovejoy. Other witnesses, who were passengers on the train and in that car, testified that the conductor passed through the car several times before the train reached Lovejoy. Under the charge of the court, the jury returned a verdict for the plaintiff. Defendant made a motion for a new trial, which was overruled by the court, and to this ruling the defendant excepted.

We think it is the duty of the conductor of a passenger train, when the company has sold tickets to passengers, to go

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through the train, and ascertain the stations at which the passengers wish to alight; but we also think that, in a case like the present, there is a corresponding duty upon the part of a passenger, when he sees that the conductor has failed to

Carrying Passengers beyond Station—Negligence and Contributory Negligence.

call for and take up his ticket, and is ignorant of his presence on the train and of his destination, to notify the conductor of his presence and of his destination, especially where the ride is a short one, and the passenger knows that the train will not stop at his station unless the conductor has notice that there is on board a passenger for that station. A passenger or any other person cannot sit still when he sees that he is about to be injured, make no attempt to avoid the injury, and rely upon recovering damages for the injury. Under the law, he must exercise reasonable and ordinary care either to prevent the injury, or, after the injury has been inflicted, to abate the damages. Here the passenger wished to leave the train at a station about 15 miles from her starting point. The conductor failed to take up her ticket or to notice her presence, and she must have known that, in a very short time, her destination would be reached. There is evidence tending to show that she nevertheless made no effort to inform the conductor of her presence or of her destination. It therefore became material, in the present case, for the jury to determine whether the railway company was entirely to blame, and to be mulcted in heavy damages, or whether the plaintiff, by the exercise of ordinary care, could have avoided being carried beyond her station, and the consequent injury to her.

3. It follows that the court erred in charging the jury, without explanation or qualification: "You must determine from the evidence, whether, by the exercise of extraordinary diligence, the conductor could, on the occasion alleged, have ascertained the destination of Mrs. Dorsey." The court should have given in charge the principle above dealt with, especially when the evidence discloses that the passenger knew of the dis-

Same—Duty of Passenger—Failure to Instruct.

Note

tance between the point where she boarded the train and the point of her destination, that the latter was a flag station for that particular train, and that the train would not stop unless the conductor had notice of her desire to leave it at that station. Judgment reversed. All the justices concurring.

NOTE.

Flag Stations—Whether Duty of Conductor to Ascertain Passenger's Destination.—Where a railroad company sells a ticket to a flag station at which its trains do not stop unless signalled to do so for the purpose of receiving passengers, or when there are on board passengers bound for such station, it is ordinarily the duty of the conductor, before reaching the station, to ascertain from the passenger holding such ticket his destination, and to stop the train there for the purpose of allowing the passenger to leave the train. This rule, under special circumstances, is subject to exceptions. *Chattanooga, Rome & Columbus R. Co. v. Lyon*, 52 Am. & Eng. R. Cas. 307.

In this case the court said: "There may be circumstances under which a passenger for a flag station is carried beyond his destination when it would not be fair or just to attribute the fact to the company's negligence. In a recent Texas case,—*Gulf, C. & S. F. R. Co. v. Ryan* (Tex. App.) 18 S. W. Rep. 866,—it appears that defendant in error bought a ticket to a flag station, knowing it was such, and that trains did not stop there 'unless some request was made upon the conductor to do so.' It would seem that he bought the ticket subject to the condition that he must notify the conductor of his destination; and, failing to do so, it was held he was not entitled to recover. Aside from instances like this, there may be other occasions, which we will not attempt now to specify or enumerate, when the conductor will be prevented, without fault on his part, from ascertaining in time the desire of a passenger to stop at a flag station, or when, under the circumstances, it is manifestly the duty of the passenger to see to it that the conductor has the necessary information."

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CLAIBORNE

v.

CHESAPEAKE & O. RY. CO.

(*Supreme Court of Appeals of West Virginia, April 15, 1899.*)

Instructions.—It is error to give an abstract proposition, as an instruction to a jury, which is calculated to mislead them.

Same—Punitive Damages.—If the compensatory damages are sufficiently punitive, it is improper to instruct the jury to allow an additional sum as punitive damages.

Same.—An instruction which sets forth the evidence as to part of the facts in issue, and ignores certain other facts proven, and on the former directs a finding in favor of the plaintiff, is erroneous.

Authority to Enter Car and Make Arrest.—An instruction that a proper officer of the state has the right to enter a train of cars, within the limits of his jurisdiction, and arrest a person guilty of a known breach of the laws of this state, and that the railroad company would not be liable for such arrest, is good, and it is error not to give it.

Carrying Weapons.—It is unlawful for any person to carry about his person a razor for any purpose except for self-defense against the known and threatened danger of death or great bodily harm from some other person.

Conductor Causing an Arrest—Liability of Company.*—If a conductor, as a conservator of the peace, causes the arrest of a person on justifiable probable cause of his guilt of an offense against the laws of the state, neither he nor the company he serves is liable for damages by reason thereof.

Exemplary Damages.†—If such an arrest is made without probable cause, and by reason of an honest mistake, without actual malice, or a design to injure or oppress, the liability is only for compensatory damages, and no additional sum can be added thereto as exemplary, punitive, or vindictive damages.

(Syllabus by the Court.)

†See *Cone v. Central R. Co.*, of New Jersey (N. J.), 12 Am. & Eng. R. Cas., N. S., 278 and *note*.

*See *note*, 12 Am. & Eng. R. Cas., N. S., 183; *Newman v. New York, etc., R. Co.*, 54 Hun (N. Y.) 335.

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ERROR by defendant to Greenbrier county circuit court.
Reversed.

Simms & Enslow, for plaintiff in error.

J. W. Arbuckle and *J. C. Canfield*, for defendant in error.

DENT, P. George Claiborne sued the Chesapeake & Ohio Railway Company in the circuit court of Greenbrier county for false imprisonment, and recovered a judgment for \$400. Defendant appeals.

The first error assigned is as to the court permitting the evidence of William B. McWhorter, R. B. Jennings, W. P. Camp, J. T. Leslie, and A. M. Nelson, as to the previous good character of the plaintiff, to go to the jury, as his character was not attacked in any manner by the defendant. The plaintiff insists that this evidence was competent, for the reason the defendant "had really attacked the character of Claiborne, or rather his race, and expected, as it did, to rely on that to prejudice the jury." This is hardly a good excuse, as the law presumes in favor of good character of either white or black, unless the contrary is shown; and although African blood is given preference over white, to the exclusion of the Indian, Mongolian, and Filipino, under the naturalization laws of the United States, and although the children of the three latter classes, unless one of their parents was an African, and not a white person, cannot be admitted to citizenship in this country (section 2169, Rev. St. U. S.; 16 Am. & Eng. Enc. Law, 225), yet all the races are entitled to the same presumption of good character, in civil trials, in the courts of this state, and therefore evidence of good character is inadmissible. Even in civil actions, in which character is in issue, the plaintiff cannot introduce evidence of his good character until it has been assailed by the defendant. 5 Am. & Eng. Enc. Law (2d Ed.) 852. On page 866, the law is stated to be that, in actions for malicious prosecution, it is generally held that evidence of the bad character of the plaintiff is admissible for either of two purposes: First, in mitigation of damages;

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second, in rebuttal of evidence showing want of probable cause. In case the defendant thus assails the plaintiff's character, he has the right to sustain it, but not otherwise. The mere fact that the plaintiff is of African descent, and as a citizen of the United States, under the naturalization laws aforesaid, enjoys a distinction over his white neighbor, does not make it necessary for him to prove his good character before it is assailed. It is hard to see, however, how the defendant could be injured thereby, as the evidence could not make plaintiff's character any better than the law presumes it, unless he wished to take advantage of prejudice against plaintiff's race to offset the prejudice against the defendant's character as a corporation. This would hardly be permissible. The evidence, however, was improperly admitted, for the reason that it tended to mislead the jury from the issue they were trying. It was not a question of the defendant's good character, but whether the conductor was sustained, by probable cause, in directing his arrest and detention.

The second ground of error is the defendant's overruled objection to the following instruction: "The court instructs the jury that in actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct, or criminal indifference to civil obligations, Instructions. affecting the rights of others, appear, or where legislative enactment authorizes it, the jury may assess 'exemplary,' 'punitive,' or 'vindictive' damages, these terms being synonymous." *Mayer v. Frobe*, 40 W. Va. 247, 22 S. E. 58. This instruction propounds the law in a proper case, but it is abstract, and makes no reference to the evidence or facts proven. The giving of such instruction, if calculated to mislead the jury, is reversible error. *Sheppard v. Insurance Co.*, 21 W. Va. 368; *Pasley v. English*, 10 Grat. 236. The instruction tells the jury in what cases punitive damages are recoverable, and leaves them to infer that the case which they are considering belongs to such class, or the court would not have given it to them. It thus becomes the means of indirectly conveying to the jury the opinion of the judge as to the character of the

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case being tried, which is error. What cannot be done directly cannot be done indirectly. A trial judge should exercise great care not to intimate in any manner his opinion upon the facts at issue. "He cannot do so directly or indirectly, neither explicitly nor by innuendo." *State v. Dick*, 60 N. C. 440; *State v. Ah Tong*, 7 Nev. 152; *Neill v. Produce Co.*, 38 W. Va. 228, 18 S. E. 563; *State v. Staley*, 46 W. Va.—, 32 S. E. 198. Nor is such an instruction proper in cases of this character, unless properly qualified. Corporations generally are not liable for the grossly fraudulent, malicious, oppressive, wanton, willful, reckless, or illegal conduct of their employees, affecting the rights of others, unless such acts are expressly or impliedly authorized or ratified by them, or are a breach of the duty of the protection owed to persons intrusting themselves to the care of such corporations, at their solicitation and for compensation. *Downey v. Railway Co.*, 28 W. Va. 742; *Ricketts v. Railway Co.*, 33 W. Va. 433, 10 S. E. 801; *Turner v. Railroad Co.*, 40 W. Va. 693, 22 S. E. 83; *Gillingham v. Railroad Co.*, 35 W. Va. 588, 14 S. E. 243. The attention of the profession is directed to the difference in the syllabus in the last case, as reported in 35 W. Va. 588, 14 S. E. 243, and 29 Am. St. Rep. 827. In the latter, the following syllabus appears: "A common carrier of passengers is liable in exemplary damages for the arrest and false imprisonment of a passenger, without reasonable or probable cause, made or caused to be made by its conductor in charge of the train during the execution of the contract to carry, although such act on the part of the conductor was entirely unauthorized by the company, and was purely personal to himself." This appears to be a compilation from the points of the original syllabus and opinion made by the reporter, and not by the court. It probably states the law correctly (except as to the use of the word "exemplary," which should be "compensatory"), as showing the duty of protection which the common carrier owes to its passengers against the willful, wanton, or malicious conduct of its servants. The conductor is placed in charge of the train, as the representative of

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the carrier, and therefore if, instead of properly discharging the duty imposed upon him, he willfully, wantonly, or maliciously injures a passenger, the law will not hear the carrier deny responsibility for his conduct for the reason that, through its authorized agent, it has been guilty of violating the duty it owed to the passenger to protect him from the misconduct of its agents in charge and of fellow passengers. When the "agent steps aside from his employment to gratify some personal animosity, or give vent to some private feeling, of his own," the principal is not generally liable, unless such acts were expressly authorized or ratified. For acts done within the scope of the agent's employment, the principal is liable.

In all cases where a corporation is liable for the willful, wanton, malicious, or illegal conduct of its employees, it is subject to exemplary or punitive damages. Indeed, in so far as the defendant is concerned in actions of tort sounding in damages, all damages are in their Same—Punitive Damages. nature punitive, although, as to the plaintiff, they may be merely compensatory. The defendant receives nothing for which he is made to compensate, but he is punished for the wrong committed by him in being compelled to make recompense to the plaintiff. If, therefore, the compensatory damages are sufficiently punitive, the defendant should not be punished twice, by being compelled to pay another sum, as so-called "punitive" damages. But if the damages allowed as compensatory are not sufficiently punitive and exemplary, then they may be increased, in a proper case, until they become so. Under the rule for ascertaining compensatory damages, since the Pegram and Stortz Case, 31 W. Va. 220, 6 S. E. 485, the damages allowed plaintiff have usually been sufficiently punitive, without the addition of any further sum to make them so. 1 Sedg. Dam. § 354. This latter is fully illustrated by the instructions given in this case. Instruction No. 2 is as follows: "The court instructs the jury that if they find the defendant, C. & O. Ry. Co., guilty, they are, in estimating plaintiff's damages, at

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liberty to consider the expense and loss of time, if any, incurred by the plaintiff, Claiborne; also the bodily and mental pain and anguish resulting from defendant's (C. & O. Ry. Co.'s) acts, as proved; and, for the outrage and indignity and humiliation put upon the plaintiff, to allow such damages as, in the opinion of the jury, will be a fair and just compensation for the injuries sustained, not exceeding the amount sued for." Such an instruction as this, while not so expressed, certainly warrants damages that would be fully punitive, so far as the defendant is concerned. And to add another instruction, to the effect that, in addition to the sum found under instruction No. 2, the jury were authorized to find a further sum, to operate as a punishment on the defendant for the wrong committed, would be erroneous, as authorizing a double punishment for the same wrong. But to add to instruction No. 2 the qualification that, if the jury found the compensatory damages as ascertained by them were not sufficiently punitive, as to the defendant's wrongful conduct, they might increase the sum or damages until they became punitive, would not be erroneous, if justified by the evidence. The giving of instruction No. 5, without proper qualification, was therefore plainly erroneous.

The third ground of error is because of the giving instruction No. 7, which is as follows, to wit: The court instructs the jury that if the raising of the windows and conduct of the plaintiff complained of occurred in the state of

same.

Virginia. and out of the state of West Virginia, and that the train upon which said plaintiff was a passenger stopped at Alleghany station, in Virginia, it was the duty of the conductor and the officers in charge of said train to put him off. And if the plaintiff, Claiborne, got off the train at Alleghany station, and the conductor in charge of said train permitted him to re-enter the same, where he rode quietly to Ronceverte, and without disturbing any one, said conductor had no authority to have him arrested, searched, and ejected from the train, and imprisoned, and, if he did, the defendant is liable for his conduct and acts, and they must find for the

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plaintiff." This was also plainly erroneous, because it ignores the evidence that the plaintiff had on his person an open knife, a bottle of whisky, and a razor,—certainly a deadly combination, and one which a person of good character and a law-abiding citizen is not in the habit of carrying around with him. It is true the conductor did not know of the razor, but he did know of the annoying conduct of the plaintiff, and of the bottle of whisky, and he had been informed by his brakeman that the plaintiff had a long knife open on his person.

The fourth ground of error is the refusing to give the following instruction: "The court instructs the jury that if they believe from the evidence that the plaintiff, while armed with dangerous or unlawful weapons, was on the train of defendant, within the corporate limits of Ronceverte, and it became known to the police of that town that he was so armed, the police had the right to arrest him on the cars, and take him therefrom, and the defendant, the Chesapeake & Ohio Railway Company, would not be liable for such arrest." This instruction, under the evidence, should have been given, although it would have been more complete if the word "unlawfully" had been used before the word "armed," so as to more plainly show that the plaintiff was not carrying such weapons for any lawful purpose. A police is a constable within the corporate limits, with all the powers of such an officer in criminal cases, and may arrest and detain any person he knows to be guilty of an offense against the laws of the state until a proper warrant can be issued, or a trial and examination can be had. *City of Charleston v. Beller*, 45 W. Va.—, 30 S. E. 152. The evidence discloses the fact that the plaintiff had a dangerous knife open on his person, and also was carrying a razor. The law on this subject, though well known, is repeated here. Code, c. 148, § 7: "If a person carry about his person any revolver or other pistol, dirk, bowie knife, razor, slung shot, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character, he shall be guilty

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of a misdemeanor and fined not less than \$25.00 nor more than \$200.00, and may at the discretion of the court be confined in jail not less than one nor more than twelve months." The razor was undoubtedly added to this section on account of the proneness of the Americanized African to carry and use the same as a deadly weapon. To such the razor is what the machete is to the Cuban. It is his implement of livelihood in time of peace, and his weapon of destruction in time of war. This is matter of common report. Under section 8, c. 153, Code, a person armed with such dangerous or deadly weapon can be required to give a recognizance for good behavior and to keep the peace. The excuse given by the plaintiff, that he was carrying such razor to shave himself while in the country, is not a legal one. Such an excuse might be given by every person thus carrying a razor, and, if allowed as sufficient, would render the law of no effect. But the carrying of a razor is not excused unless the person is a quiet and peaceable citizen, of good character and standing in the community in which he lives, and has good cause to believe that he is in danger of death or great bodily harm at the hands of another person, and that he is in good faith carrying such razor for self-defense and for no other purpose. By the provisions of the statute, the carrying of a razor about the person is forbidden for any purpose except for self-defense against the known and threatened danger of death or great bodily harm from another person. So that the plaintiff, when arrested, was violating the statute law of this state on a train within the state, and within the corporate limits of the town of Ronceverte. Those who seek its assistance to redress their grievances should show themselves obedient to the law. Public policy forbids the rewarding of public malefactors. A common carrier is under no obligation to protect a passenger from legal arrest, but only from illegal arrest.

The fifth and last assignment of error relied on is the refusal of the court to set aside the verdict as contrary to the law and the evidence. The facts are as follows: The

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conductor of one of the defendant's trains, on the 26th day of December, 1896, caused the plaintiff, George Claiborne, who was a passenger from Clifton Forge, Va., to Hinton, W. Va., on said train, to be arrested by the chief of police of the town of Ronceverte for disorderly conduct, and carrying a dangerous weapon in a threatening manner, about 10 o'clock at night. He was placed in the lockup until Sunday morning, when he was released on security until Monday morning. He was then tried before a jury for unlawfully carrying a razor on his person. The jury found him guilty, but the mayor, for some reason, released him on payment of the costs. The evidence tends to show that, while the train was in Virginia, the plaintiff was drunk, and guilty of very boisterous and offensive conduct, and certain ladies (passengers) complained to the conductor. He was in the ladies' car, although he swears he was in the smoker. He was drinking, although he swears he was not drunk. Others thought he was. He handled his whiskey bottle as though he were used to it, and did not care who knew it. The conductor, brakeman, and porter had to put down the window at different times, which he persisted in putting up, to the annoyance of other passengers. He was also continually moving around, some of the witnesses say staggering and rubbing against the lady passengers as he passed them. His conduct was highly offensive to them. After Alleghaney station was left, he put an open knife in his pocket, and the brakeman warned the conductor with regard to it. When the train reached Ronceverte, the conductor asked the chief of police to go in and arrest and search the plaintiff, who was then sitting quietly in his seat. The policeman did so, and found on him a knife with the blade open, and a razor. He then took charge of him, and removed him from the train.

The conductor, under the laws of this state, is a conservator of the peace while in charge of the train, and the question is as to whether he had probable cause to justify him in having the plaintiff arrested. If he had,

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the company is not liable; if he had not, the company is liable, and the amount of the damages depends on the willfulness or illegality of the conductor's mistreatment of the plaintiff. The plaintiff's first instruction uses the words "just cause" for "probable cause," and it is to that extent erroneous, for, while "probable cause" is "just cause," "just cause" may be and is something else; and hence is misleading, so far as the jury is concerned, for it may be taken to mean full or complete cause, such as would secure the criminal conviction of the defendant. "Probable cause" is a state of facts actually existing, known to the prosecutor personally or by information derived from others, which would lead a reasonable man, of ordinary caution, acting conscientiously upon these facts, to believe a person guilty of an offense justifying his arrest, and is a question of law for the court. *Vinal v. Core*, 18 W. Va. 2. "In determining whether the prosecution was founded on probable cause the existing state of facts must be viewed from the standpoint of the prosecutor, and not from that of the accused. *Brady v. Stiltner*, 40 W. Va. 289, 21 S. E. 729. The true question is, had the conductor reasonable grounds to believe that the plaintiff was carrying a dangerous and deadly weapon on his person, with evil intent? The conduct of the accused, as detailed by the witnesses; his having a bottle of whisky, openly drinking in the ladies' car; his opening his knife, and putting it in his pocket open,—were certainly enough to afford the conductor probable cause to believe that the plaintiff was bent on mischief. If a person would escape suspicion, he must avoid the appearance of evil. The plaintiff evinced a disposition to entirely ignore the rights of other passengers, and give them all the annoyance possible, and, while he may have been sober, he acted like a drunken man, and, when reproved for his rude conduct, he opens his knife, and places it in his pocket, as though making preparation to use it. The conductor was not bound, under such circumstances, to wait until some one was injured, but, having been informed that the

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plaintiff was armed with a dangerous and deadly weapon, he had the right, under section 8, c. 153, Code, to turn him over to the proper officers of the law, that he might be required to give recognizance for his good behavior, and, after he was searched and found carrying a razor, in violation of section 7, c. 148, Code, it was the duty of the officer to detain him, and take him before the mayor, not only to give the necessary peace bond, but also that he might be tried and punished, under the sixth clause of section 219 of chapter 50 of the Code. The mayor after he had been found guilty by a jury under said section 7, c. 148, Code, and rightly so, gave him his liberty, on payment of **Carrying Weapons.** the costs. His excuse for so doing does not appear in the record. He probably thought he had been punished sufficiently. The way to vindicate a law is to enforce it. The legislature intended that the carrying of razors should be stopped, and it did not leave any loopholes in the statute that a person might escape its wholesome effect by putting up the plea that the razor was carried for the purpose of shaving. Such excuse is no excuse, unless it be in mitigation of the fine to be imposed. To make law-abiding citizens, lawbreakers must be punished. It is unlawful, as heretofore shown, to carry a razor about one's person, except in case of a law-abiding citizen of good character, for the purpose of self-defense from threatened death or bodily hurt from another person. And it were better if this reservation were expunged, especially so far as the razor is concerned. If, however, the question of probable cause were against the plaintiff, this is not a case for punitive damages. **Exemplary Damages.** "The rule for the measure of damages, in cases where the malice necessary to sustain the action is such only as results from a groundless act, and there is no actual malice or design to injure and oppress, is to allow compensatory damages,—that is, damages to indemnify the plaintiff, including injury to property, loss of time, and necessary expenses, counsel fees, and other actual loss,—but not to allow vindictive or puni-

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tive damages, to punish the defendant." *Ogg v. Murdock*, 25 W. Va. 139. In this case there is nothing showing, on the part of the conductor, any actual malice or design to injure and oppress plaintiff. On the contrary, his whole object appears to have been to protect the passengers under his care from the rude and disorderly conduct of the plaintiff, and protect himself and the other employees of the defendant from the threatening attitude of the plaintiff. He may have mistaken plaintiff's intentions and character, but the plaintiff's conduct produced this mistake, and the conductor was justified in acting promptly. In so doing, he was not guilty of wanton, willful or malicious conduct, or criminal indifference to civil obligations, but was simply endeavoring to discharge his duty towards his employers, in obedience to the law. *Edgerly v. Railroad Co.* (N. H.) 36 Atl. 558; *Railroad Co. v. Pillow*, 76 Pa. St. 510; *Flint v. Transportation Co.*, 34 Conn. 534, 1 Fetter, Carr. Pass. § 329. If any damages could possibly be allowed, as the case now stands, they could only be compensatory. The jury allowed punitive damages, under the erroneous instructions of the court. The judgment is reversed, the verdict of the jury is set aside, and a new trial is awarded.

Note by BRANNON, J. I concur in the judgment. I do not, however, regard instruction 5 as abstract. It is general, but not abstract. I regard it as erroneous and bad law in this case, because our decisions hold that there can be no exemplary, vindictive, or punitive damages against corporations, unless the tort done by the agent was ordered or ratified by the corporation. Only compensatory damages can be given. *Ricketts v. Railway Co.*, 33 W. Va. 433, 10 S. E. 801.

PULLMAN'S PALACE-CAR CO.

v.

HALL.

(*Supreme Court of Georgia, March 16, 1899.*)

Theft of Personal Effects—Liability of Sleeping-Car Company.*— A sleeping-car company is not liable to a passenger for the loss by theft of personal effects taken into the car by the passenger for his own use, and of which he retains possession, either under the rules which apply to an inn-keeper for the loss of the goods of his guest, nor those of a carrier for the loss of baggage intrusted to it to transport. Such a company owes to a passenger the duty of exercising reasonable care to guard the property of the passenger from theft, and if, through the want of such care, the personal effects of the passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor. But if such reasonable care shall have been used, and such personal goods are stolen by one not its employee, such company is not responsible for the loss.

Same—Same—Due Care.—The company having shown in this case that after the car had gone about one mile from the station, and in crossing another road, the speed had been reduced to about five or six miles an hour, that the rear door was securely locked, that the conductor and porter were guarding the open door in front, when it appears that a thief on the outside caught onto the moving car, and, standing on a rod underneath the car, took the valise from the seat and drew it through the window, the loss of the valise is not to be attributed, under the circumstances of the theft, to the want of reasonable care exercised by the company for its protection. The company not being an insurer of the goods against theft, nor having the exclusive custody of the valise for transportation, and showing its servants to be on watch at the only open entrance to the car at the time, reasonable care would not require it also to specially guard the windows of a moving train.

Directing Verdict.—In view of the admitted facts upon which this case was tried before a jury in a justice's court, and the legitimate inferences that may be drawn therefrom, as well as in view of an

*See Exhaustive Article by Emlin McClain, 1 Am. & Eng. R. Cas., N. S., xxxviii—xliii.

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absence of proof on material points which the admission leaves in doubt, there was testimony authorizing the conclusion that the defendant company had not overcome the burden resting upon it, to show it was in the exercise of reasonable care in protecting the property of the passenger from theft. Such questions being peculiarly for the jury, and the only error assigned in the petition for *certiorari* being that the verdict was contrary to law and evidence, the judge of the superior court did not abuse his discretion in overruling the petition. Per LEWIS, J., dissenting.

(Syllabus by the Court.)

ERROR by defendant from Fulton county superior court.
Reversed.

Dorsey, Brewster & Howell and *Hugh M. Dorsey*, for plaintiff in error.

W. J. Speairs, for defendant in error.

LITTLE, J. The defendant in error brought suit in a justice's court against the car company for \$30.50, being the value of a valise and its contents. Judgment in his favor was rendered for the amount for which he sued. The car company filed its petition for *certiorari*, after hearing which, the judge of the superior court sustained the judgment rendered in the justice's court, and dismissed the *certiorari*. The car company excepted.

The case was tried in the justice's court on an agreed statement of facts, as follows: "It is agreed: That L. H. Hall, the plaintiff, was a passenger on the car Suwanee on October 25, 1894; said car leaving Cincinnati at 8 p. m. That said passenger, Hall, occupied room H, assigned him by porter; porter placing valise therein in said car. Said passenger, Hall, took on board the articles set out in the bill of particulars attached to the suit, and it is agreed that the valuation therein placed on said articles is correct and reasonable. L. H. Hall was accompanied by W. C. Rawson. They engaged two lower berths in the same state room, and, on going into the state room, found the window up, and put the window down. They together left their valises in the state room, and went forward to the smoking room, just be-

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fore the train started. Afterwards, as they were leaving the station, and as they were passing through yard, and as train No. 3 on the Q. & C. (this being train Hall was on) was slowing up at the C., H. & D. crossing, about one mile from the Central Depot, from which they started, and from where plaintiff boarded the train, the porter, Wright, caught young man taking a large and small valise from the room H. When the thief saw the porter, he dropped the large valise, but succeeded in getting away with the small valise; this being the valise of the plaintiff. At this point the porter ran forward to the smoking room and pulled the air cord, and was asked at that time by Mr. Rawson what he was doing that for, when he informed Rawson that some one had stolen a valise out of one of the state rooms. Rawson and Hall went back to see, and found that the thief had gotten Mr. Hall's, and would have gotten Rawson's but for the efforts of the porter, who caught Rawson's valise as the thief was taking it through the window. One door of the car was locked, and the conductor and the porter stood at the open end of the car; and Rawson does not know how the thief could have gotten in the car, as every one was required to show a ticket before entering station, and a sleeping-car ticket before getting on board the car. Valise was taken from open window in the side of car from room H; the thief being on outside, clinging to window, and standing on hog chain of car. The porter, Wright, was in the aisle of the car at the time and saw two tramps hanging on the outside of car, and ran them off. Conductor's attention was immediately called to same, and train was stopped, but too late to get the valise. By the time the train had stopped, the men had gotten too far away, and it was impossible to catch them. No suspicious person was noticed by the conductor or porter in the car. As train passed by Big Four yards, where the valise was stolen, it was going at the rate of from five to six miles an hour. Conductor and porter did all they could to save valise after thief was discovered.

1. Under these admitted facts, the question arises, first,

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what is the liability of a sleeping-car company to its passengers for personal baggage which the passenger takes with him in the sleeping car? This court has, in two cases theretofore considered, ruled upon the liability of a sleeping-car company for the loss of goods of a passenger, when the same were lost at night, when the passenger was sleeping. In the case of *Kates v. Car Co.*, 95 Ga. 810, 23 S. E. 186, the action was to recover the value of certain money and papers which it was alleged were taken from the pocket of the plaintiff's clothing at night. This court in that case did not undertake to define the precise relation which existed between a sleeping-car company and a passenger, but ruled that, from the character of the business in which the company was engaged, a duty on the part of the company was created, to exercise some watch and care over the passenger, and, within certain reasonable limits, over his property as well, and that, if a loss occurs, the burden of proof is on the company of showing that it exercised such reasonable care during the hours of the night as was necessary to secure the safety of the passenger's property, and that the loss was not occasioned because of the failure on the part of the employees of the company to do so. The other case to which we refer is that of *Car Co. v. Harvey*, 101 Ga. 733, 28 S. E. 989. There this court was asked to reverse the ruling made in the *Kates Case*, *supra*, but, after consideration, adhered to such ruling. CHIEF JUSTICE SIMMONS, in rendering the opinion in the case, said that: "The law as to the liability of sleeping-car companies is not well settled. Courts in different states have laid down different rules as to their liability." And he suggests that legislation should be had, defining the exact liability of sleeping-car companies to a passenger for loss of goods. In determining the question now under consideration, it seems to be necessary to define and fix the rule of liability which attaches to a sleeping-car company for the loss of goods which were stolen by some one not in the employ of the company, and while the passenger was awake.

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A fair examination of the question renders it necessary to note that the passenger whose valise was taken from his berth or state room, under the evidence in this case, had, on reaching the car, delivered to the porter of the car his valise, as is customary, and that the valise had been taken to the state room or berth which had been assigned to the passenger, and in his presence there deposited; that, finding the window to the berth or state room open, the passenger closed it, and then, leaving his valise, went forward to the smoking room; that in no other manner did the company, by its employees, have charge of such baggage. Also, the other facts, that the rear door of the car was locked, and the conductor and porter stood at the front door of the car; that while the car was in motion the valise was taken by a thief, who stood on a rod underneath the car, on the outside, and abstracted it through the window. In the case of *Blum v. Car Co.*, 1 Flip. 500, Fed. Cas. No. 1,574, as cited in *Voss v. Railway Co.* (Ind. App.) 43 N. E. 20, a number of reasons are given why a sleeping-car company is not liable as an innkeeper. Among those reasons are the following: "The peculiar construction of sleeping cars is such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections." That the innkeeper is given a lien upon the goods of his guests for the price of their entertainment. That the innkeeper is obliged to receive every guest who applies for entertainment, while the sleeping-car company receives only first-class passengers. That the innkeeper is bound to furnish food as well as lodging, and to receive and care for the goods of his guests, and, unless otherwise provided by statute, his liability is unrestricted in amount, while the sleeping-car company contracts to furnish a bed only. That the conveniences of the inn are imperative necessities to the traveler; a sleeping-car is not. That the innkeeper has a right to exclude from his house all but his guests and servants; the sleeping-car company must admit the employees of the train, to collect fares and control its

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movements. That the sleeping-car company cannot protect its guests in all particulars, because the conductor of the train has a right to put them off for nonpayment of fare or for a violation of rules. The court in that case then ruled that sleeping-car companies are not subject to a passenger, as an innkeeper. The cases of *Car Co. v. Smith*, 73 Ill. 360, and *Same v. Gaylord*, 23 Am. Law Reg. (N. S.) 788, held that a sleeping-car company is not liable for loss of the effects of a passenger, as a carrier, because it is not a carrier; that the railway company is the carrier; that the carrier's liability depends upon his possession of the goods; that a sleeping-car company does not have possession of the goods,—they are in the control of the passenger. It was also ruled in *Lewis v. Sleeping-Car Co. (Mass.)* 9 N. E. 615, that a sleeping-car company was not liable as a common carrier nor as an innholder. But each of these cases rules that it is a clear duty of the car company to use reasonable care to guard the personal effects of passengers from theft, and if, through want of such care, such as he might reasonably carry with him are stolen, the company is liable. The rule of liability is stated by the Texas supreme court in the case of *Car Co. v. Pollock (Tex. Sup.)* 5 S. W. 814, as follows: "While a sleeping-car company does not assume towards personal baggage taken into a car by a passenger the duties and liabilities which the common law imposes upon common carriers as to ordinary freight, or upon an innkeeper as to guests, it is responsible in the same way as any common carrier for a failure to perform the duties which devolve upon a common carrier in relation to baggage of a passenger which is not given into its exclusive custody; and if, through a failure of the company to exercise reasonable care, the passenger's baggage is stolen, the company is liable therefor." In 2 *Shear. & R. Neg. (5th Ed.)* § 526, the author, discussing this subject, says, "For obvious reasons, the rule of absolute liability of a carrier of goods or innkeeper is not extended to cases of theft from passengers occupying berths in a sleeping-car;" and citing *Carpenter v. Railroad Co.*, 124 N.

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Y. 53, 26 N. E. 277, says, "It is properly held, in view of such arrangements [of berths], and of the powerlessness of a sleeping passenger to defend his property from theft, or his person from assault, that it is part of the contract of hiring the privilege of occupying a berth that protection should be afforded him by the car proprietor, with a degree of care and vigilance commensurate with the danger to which he is exposed." Mr. Wharton, in his *Law of Negligence* (7th Ed., § 610), says: "It has been urged that such a proprietor [sleeping-car company] is, if not a common carrier, at least an innkeeper, and therefore an insurer of the property of his guests. But it has been ruled in several cases that such a proprietor is not either a common carrier or an innkeeper, but is a special bailee, who is not an insurer, but is charged with the duty of exercising in his business a degree of care and diligence proportioned to risks to which those engaging places in his cars are exposed." 4 Elliott, R. R. § 1623, sums up from the rules in adjudicated cases as follows: "Our conclusion is that where the passenger takes his baggage into the coach with him, and does not place it in charge of the railroad company or of the sleeping-car company, that neither company is liable, unless the loss of the baggage was caused by the negligence of one of the companies." Ray, in his work on *Negligence of Imposed Duties, Passenger Carriers* (pp. 241, 242), citing authorities, says: "While it [the sleeping-car company] is not liable as a common carrier or as an innholder, as is said by some of the authorities, * * * it is its duty to use reasonable care to guard the passenger from personal injury, and his property from theft; and if, through want of such care, * * * the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor." See, also, *Stevenson v. Car Co.* (Tex. Civ. App.) 26 S. W. 112; *Car Co. v. Smith*, 73 Ill. 360; *Chamberlain v. Car Co.*, 55 Mo. App. 474; *Henderson v. Railroad Co.*, 20 Fed. 437; *Belden v. Car Co.* (Tex. Civ. App.) 43 S. W. 22. While there are decisions of a number of

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courts which have held sleeping-car companies liable to a passenger for the loss of his baggage, as a common carrier, and others which apply the law of liability as that of innkeepers, the weight of authority, as we understand it, is that such companies are not liable as innkeepers, nor as carriers, for personal effects taken with the passenger into the car, and of which he retains possession. But it is the duty of such a company to use reasonable care to guard the property of the passenger from theft, and if, through the want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor.

2. Such being the rule, the question which next arises is, was the property of the passenger stolen through the failure of the employees of the company to exercise reasonable care for the protection of his property? It will be borne in mind that the passenger was not sleeping when his goods were stolen. A higher degree of care to protect the goods of a sleeping passenger would seem to be required than that which it is necessary to exercise when the passenger is awake and able to protect it himself; and while extraordinary diligence is not, under the law, required in either case, because the passenger does not intrust his effects to the company, but retains possession himself, for his own comfort and convenience, yet, having engaged the accommodations offered by the company for the purpose of sleep during proper hours, and paid for the same, and the company having accepted him with the implied agreement that he should do so, the care which is reasonable, to protect the goods of a sleeping passenger, must be exercised. And, while the same degree of care in the case of a passenger awake might not be required, yet in each case such care as is reasonable under the circumstances is required. For the want of it, the company is liable. Having exercised it, it is not. The court of appeals of Missouri, in the case of *Chamberlain v. Car Co.*, 55 Mo. App. 474, held that, in a case where the porter in charge of

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the car was not directed to look after the effects of a passenger in his absence, "a passenger on a sleeping car, who leaves his watch in his berth while he is in the toilet room, is, as a matter of law, guilty of contributory negligence, if it is stolen in his absence, and therefore cannot recover from the company for the loss." Whether or not the property of the passenger in the case at bar was stolen because of the failure of the company to exercise reasonable care for its protection must, of course, depend upon the manner in which, and by whom, the valise was stolen, and the precautions used to prevent the theft. The agreed statement of facts found in the record is somewhat confused. When critically examined, however, it appears: That the train to which the sleeping car was attached had left the station where the passenger boarded the car, and proceeded about a mile on its journey. The train reduced its speed to five or six miles an hour when it approached the crossing of another railroad. At that time one of the car doors was locked, and the other guarded by an employee of the sleeping-car company. That the valise was taken from the seat of the passenger on which it had been placed, through an open window, by a thief who was on the outside, clinging to the window, and standing on the hog chain of the car. The porter of the car was in the aisle, and ran off two tramps whom he saw hanging on the outside of the car, and discovered that another thief had seized two valises. The porter caught one of the valises as the thief was taking it through the window. The other one he could not recover. Immediately the employees of the car pulled the air cord, and had the train stopped, but the thief had gotten away with one of the valises. The circumstances of the theft were remarkable, and showed the perpetrator to have been a very daring lawbreaker,—willing to incur, not only the risk of violating the law, but his personal safety as well. To guard all the windows of a moving car from rogues who do not hesitate to risk their lives in catching hold of a moving train with the hope of abstracting valuables, would have required

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extraordinary diligence. Such acts ordinarily are not to be anticipated, and, without such a degree of diligence, could not have been prevented. To have securely fastened one of the doors of the car, and guarded the other, while another employee stood in the aisle, was certainly as much as any anticipated danger would have required. Such precautions, in our judgment, amounted at least to reasonable care; and no greater diligence than this being required, under the rule, the company should not be held liable for the loss.

Directing
Verdict.

For these reasons, it is our opinion that the *certiorari* should have been sustained, and the judgment rendered in the justice's court set aside. Judgment reversed.

LEWIS, J. (dissenting). Under the view I take of this case, the question decided by the first headnote is not involved. There is no error of law complained of on account of any ruling or view of the court below to the effect that a sleeping-car company is liable to its passenger for loss by theft of his baggage, to the same extent as an innkeeper would be for the loss of the goods of his guest, or a common carrier for the loss of baggage intrusted to it by a passenger for transportation. The case was tried on an agreed statement of facts before a jury in a justice's court. The petition *certiorari* complained simply that the verdict was contrary to law and evidence. The order of the judge overruling the *certiorari* does not indicate that he entertained a different view of the degree of diligence required of the company than is expressed by a majority of this court. That order is as follows: "After hearing and considering this case, the verdict and judgment in the magistrate's court are affirmed, and the *certiorari* dismissed. Negligence and diligence are peculiarly questions for the jury, and they may not only consider the facts admitted, but may draw inferences therefrom. Whether the porter was negligent in placing the valises where he did place them, whether the agents exercised due diligence in guarding the property, whether the window itself had proper catches or safeguards,—in fact, all

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questions touching the conduct of the company and its employees,—were for the jury. I think there was enough to sustain their finding.”

In addition to the suggestions contained in the above judgment, attention is directed to the following points in the evidence: The sleeping-car porter placed the two valises in the state room of the two passengers. At this room was a window in the side of the car, which was open, and the passengers closed it down,—probably to protect their goods from thieves. They then went into the smoker, and never left there till after the larceny; hence, never opened the window. The inference is reasonable that it was opened either by the porter or the thief. If by the former, he voluntarily and unnecessarily removed the protection given the baggage by the passengers. If by the latter,—the evidence negating the fact that the thief was inside of the car,—he must have opened the window by force from the outside of the car, while it was in motion,—a very improbable theory; and, if that was done, it does seem that the porter, standing in the aisle, by the exercise of ordinary diligence would have had his attention attracted to the elevation of the window by the trespasser in time to have prevented the theft,—it being admitted that the porter was at the time standing in the aisle. The train started from the Central Depot of Cincinnati. It had gone but a mile, and was running at a slow rate of speed, and the presumption is that it had not gone to the limits of a populous portion of that large city. Besides these facts, it does not appear where the conductor was at this time, and what he was doing. It is true, it is stated that he and the porter were at the door, where they were receiving passengers who were entering. If it refers to the entire time, then it contradicts other facts admitted. In one portion of the admission it is stated that the porter, at the time of the theft, was in the aisle, and seized the larger valise; thus preventing the thief from getting that also. In another portion, it is stated that at that time he saw two tramps on the outside of the car, and ran them off. It is dif-

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difficult to understand how he could do so many things at the same time, and be in different places. As I understand it, it is conceded by my brethren that the burden of proof was on the company to show the exercise of reasonable care and diligence. Could not the jury have inferred, both from the evidence and the want of evidence, that this burden had not been successfully carried? I only allude to some of these points on the facts, with a view of showing, to say the least of it, that whether the company was negligent or not is a reasonably debatable question; and this should be an end of the matter, so far as the power of this court is concerned, after the jury have passed upon that issue, and the judge of the superior court, having carefully considered their finding and the evidence upon which it was based, has approved their verdict. I therefore believe that the judgment of the court below should be affirmed, and respectfully dissent from the decision rendered by a majority of the court.

EXTON *et ux.*

v.

CENTRAL R. CO. OF NEW JERSEY.

(Supreme Court of New Jersey, Feb. 9, 1899.)

Liability for Injury to Passenger at Station.—When a person purchases a ticket at the station or depot of a railroad company, intending to be a passenger on the cars of the company, the relation of common carrier and passenger is established, and the company is required to exercise reasonable care to protect the passenger from injury in the use of the station or depot for the purposes of the journey; and if the passenger uses the usual ways and passages for the purpose of obtaining checks for baggage, and is injured by any dangers, existing in or on such ways and passages, which are known, or ought to be known, to the servants of the railroad company having charge of such station or depot, or which could have been reasonably anticipated by them, and reasonable care has not been exercised to protect the passenger from such dangers, liability exists

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on the part of the defendant company to respond in damages for such injuries.

Duty to Protect from Strangers.*—The company is liable for injuries so caused, even if the dangers arose from the acts and conduct of intruders or strangers, if such acts and conduct were so continued and so notorious that the servants of the defendant company in charge of the depot, and the passageways thereof, devoted to the use of passengers, knew of such acts and conduct, or should have known of them and of the dangers arising therefrom.

Notice of Danger—Question for Jury.—The questions whether dangers exist, and whether they were habitual and notorious, and whether the company had knowledge of them, or should have had such knowledge, where the evidence is in dispute, are questions which must be submitted to the jury for their determination.

Contributory Negligence—Question for Jury.—A passenger has the right to assume that the usual passage leading from the ticket office of a railroad station to the baggage room is safe for use, for the purpose of obtaining baggage to be checked, and the use of it cannot be contributory negligence, merely because there was another way which might have been used without injury, when the dangers of the used passageway were not perceivable or avoidable by the passenger in the exercise of ordinary care in the use of the depot and passageway for the purposes of the journey to be undertaken; and the question whether such care has been exercised, where two opposite inferences can be reasonably drawn from the evidence in this respect, is for the jury to determine.

Failure to Keep Order—Evidence—Liability of Carrier.—Where a passenger, in attempting to have her baggage checked, was knocked down and injured on a passageway leading from the ticket office or waiting room, in a railroad depot, to the baggage room therein, by cabmen on the same, awaiting incoming trains for the purpose of soliciting passengers in their cabs, and which cabmen were not in any sense the servants of the railroad company, the injury being caused by the cabmen being engaged, in sport, in scuffling on the passageway, and coming violently in contact with the passenger and injuring her, and the passageway being under the control of and part of the depot of the railroad company, *held*, that evidence of similar occurrences, to the annoyance and injury of passengers, previous to the time of the accident in question, was admissible to show the dangers to passengers existing there, and also as tending to show that the servants of the railroad company in charge of the depot had, or ought to have had, knowledge of such dangers. *Held*,

*See note at end of case.

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also, that the railroad company was bound to exercise reasonable care to protect its passengers from injury from such dangers, and that a neglect of the servants of the railroad company to exercise such care, resulting in injury to its passengers, established liability to respond in damages.

(Syllabus by the Court.)

RULE to show cause why verdict for plaintiff should not be set aside. *Rule discharged.*

Argued February term, 1899, before LIPPINCOTT, LUDLOW, and GUMMERE, JJ.

Paul A. Queen and *H. B. Herr*, for plaintiffs.

George H. Large and *John L. Conover*, for defendant.

LIPPINCOTT, J. This is an action by Joseph H. Exton and Fanny P. Exton, his wife, against the Central Railroad Company of New Jersey, to recover damages for personal injuries to Mrs. Exton and resulting damages to her husband. The declaration contains two counts,—one averring damages to the wife for her personal injuries, and the other for resulting damages to her husband. The jury returned a verdict in favor of the plaintiffs, and awarded the sum of \$500 damages to Mr. Exton, and the sum of \$1,750 to Mrs. Exton.

Case Stated. It was not contended upon the argument that the damages were excessive. An examination of the evidence as to this question does not reveal any misapplication of the law by the jury in its award of damages. The facts of the case fully warrant the verdict as to the amounts awarded.

The only discussion is whether, upon the evidence in the cause, upon the application of proper principles of law, the jury could determine, as they did, that liability of the defendant to respond in damages existed. The undisputed facts are that on November 23, 1893, Mrs. Exton was on her way from Brooklyn, where she had been making a visit, to her home at Highbridge, in this state. She proceeded to the Central Railroad depot or passenger station on West street, at the foot of Liberty street, in the city of New York. She

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entered the waiting room in which the ticket office is located, and purchased her ticket. The main waiting room and entrance to the ferry across Hudson river to the train in Jersey City lie further inside. Her trunk was in the baggage room, and, after she had purchased her ticket, she went out of one of the doors of this waiting room, upon the passageway to the baggage room or the window thereof, in order to have her baggage checked. As she proceeded along this passageway, and when near the window of the baggage room, she saw two men scuffling on or near the passageway. Instantaneously, she was run against or backed against by one of these men, and knocked down and injured. She says at the moment she saw them she was knocked down and injured, and in this assertion she is not contradicted. They were just inside an offset of the building, at the window or entrance to the baggage room, and she was knocked down just as she turned the corner of this offset, and it was only at that moment that she saw the men. It appears from the evidence that the passageway is a board walk or plank or platform about four feet wide. Outside of this is also a stone walk three feet wide. This walk ran along in front of the passenger station leading from the waiting room or ticket office to the baggage room, a little to the south of the waiting room. The baggage room sets a little back from the outside line of the passenger station or waiting room, and there a recess angle or offset is created. It was just at this recess, near the window, that the scuffling of the men and the knocking down of Mrs. Exton took place. Over these spaces in front, and extending further out, is a roof, supported, nearer the outward edge thereof, by iron columns or supports. There is no dispute in this case that this board walkway is usually used by passengers to get their baggage checked after the purchase of their tickets, or before they go to the inside or main waiting room, on their way to the ferryboats, to cross the river. The evidence also shows that the maintenance and care of this walk belongs to the defendant company as a part of its depot or station. The evidence

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also is undisputed that she was knocked down by reason of the scuffling of two hackmen on this walk. One of them stepped or jumped backwards, while engaged in the scuffle, and knocked her down. This was at or very near the angle of the walk, at the baggage room window or entrance. The cabmen engaged in this scuffle were in no sense the servants or employees of the defendant. They were engaged in waiting for passengers and baggage from incoming trains, for transportation to their destination in New York City or elsewhere.

Evidence was admitted by the trial justice, over objection by the defendant, that numerous cabmen and hackmen, including the two engaged in this scuffle, with the knowledge and permission of the officers and employees of the defendant, for a long time previously to the accident, perhaps ever since the erection of the ferry entrance or depot, had been in the habit of taking their stand near the entrance to the depot, upon these walks, and under the space roofed, for the purposes of their trade, in soliciting the carriage of passengers and baggage in their cabs and hacks. This evidence is undisputed. Evidence was also admitted, over objection, and on the defense denied, that very frequently, and covering considerable space of time, previous to the occurrence of this accident, these cabmen and hackmen, including the two engaged in the scuffle, on this walkway, and in its immediate vicinity, had indulged in scuffling of a kindred character to that which caused the injury to Mrs. Exton. Many passengers had observed it on their way to the ferry entrance and to the baggage room, and some passengers had been annoyed and incommoded, if not injured, thereby. There is evidence in the case tending to show that the general passenger agent of the defendant had been notified by one or more of the passengers of this state of affairs, and that other of the employees of the defendant had actual knowledge of these occurrences.

This evidence was properly admitted to the jury—First, as tending to show the dangers connected with the use of

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this way to the baggage room, of which Mrs. Exton could have no previous notice or knowledge, and of the character of the danger, it being such as that its existence could not be previously observed by any passenger in the use of the walk; and, secondly, as tending to show that the servants of the defendant in charge of the station had knowledge of these occurrences and dangers on that walkway, or should have had knowledge of them in the exercise of reasonable care to guard its passengers against accidents and injury from situations of danger likely to arise while under its care. The evidence was admissible for the jury to reach a conclusion whether this scuffling, in short, was a danger, to which passengers were subjected, of such frequent and notorious occurrence that a reasonable inference could be drawn that the defendant, through its employees in charge of the depot, did have, or should have had, knowledge of the dangers there existing, or should reasonably have anticipated them, and whether they were such that the defendant should guard against, and whether, in failing to do so, it was guilty of such negligence as rendered it liable to passengers injured thereby. That this class of evidence is admissible cannot now be controverted. Evidence to show existing dangers, their continuance, their notoriety, and whether observable to the plaintiff or defendant, is admissible, in the aspects which a case of this character presents, both in reason and upon authority. Adjudicated cases are numerous supporting the admissibility of this class of evidence. While exceptions were taken and allowed to the admission of this evidence, its competency on the argument of this rule seemed to be conceded.

At the close of the evidence for the plaintiffs a motion to nonsuit was made, on the grounds that the negligence of the defendant had not been established, and that Mrs. Exton, by the evidence, was guilty of contributory negligence. This motion was denied, and, after evidence for the defense, the cause was submitted to the jury. It is clear that, upon well-settled

Liability for In-
jury to Pas-
senger at Station.

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principles, the trial justice was right in denying this motion. Both questions were for the jury. *Railroad Co. v. Shelton*, 55 N. J. Law, 342-345, 26 Atl. 937; *Goldsboro v. Railroad Co.*, 60 N. J. Law, 49, 37 Atl. 433; *New York & G. L. Ry. Co. v. New Jersey Electric Ry. Co.*, 60 N. J. Law, 52, 37 Atl. 627. The principle has been laid down so often as to make repetition needless. *Traction Co. v. Scott*, 58 N. J. Law, 683, 34 Atl. 1094. In this case it was conceded that the plank walk in question was a part of the railroad station, and provided for the use of the passengers of the company. It was constructed for this purpose, and was under the exclusive control of the railroad company. No contention otherwise is made by the defendant. Every person who came upon it for the purpose of entry to the ferryhouse, or to check his baggage before entering the waiting room to the ferryboats of the defendant to continue his journey, became a passenger, and entitled, as such, to be protected from any danger of injury, so far as the defendant company could render protection by the exercise of that care required of it in the relation of common carrier and passenger. The plaintiff there, on the board walk, was as much a passenger as if she had been seated in the ferryboat or cars of the defendant company. It may be that the degree of the care required differed, depending upon the circumstances in which the plaintiff was placed, or it may be that there was required of her a greater care of herself, in order to free her from the charge of contributory negligence, but that the relation of common carrier and passenger did exist cannot be disputed. *Patt. Ry. Acc. Law*, 214; *Buffett v. Railroad Co.*, 40 N. Y. 168; *Donovan v. Railway Co.*, 65 Conn. 201, 32 Atl. 350; *Gordon v. Railroad Co.*, 40 Barb. 546; *Hansley v. Railroad Co.*, 115 N. C. 602, 20 S. E. 528; *Grimes v. Pennsylvania Co.*, 36 Fed. 72; *Railroad Co. v. Galliber*, 89 Va. 639, 16 S. E. 935; *Allender v. Railroad Co.*, 37 Iowa, 264; *Railroad Co. v. Trautwein*, 52 N. J. Law, 169, 19 Atl. 178; *Railroad Co. v. Price*, 96 Pa. St. 256; *McKernan v. Railway Co.*, 54

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N. Y. Super. Ct. 354; Ray, Neg. Imp. Dut. pp. 9, 10, and cases cited.

The walkway, therefore, being provided by the defendant company for the use of the traveling public for the purposes of travel on its ferryboats and railroad trains, the defendant company were bound to use reasonable care to keep it safe for the use of their passengers. It was one of the means which the plaintiff had the right to use for the purpose of getting her baggage checked, and obtaining her checks therefor preparatory to going across the ferry, or for any other lawful purpose connected with her journey, and she had the right to assume it was reasonably safe for her to use for any such purpose, and the company was bound to exercise reasonable care to render it suitably safe for her. Railroad Co. v. Trautwein, 52 N. J. Law, 169, 19 Atl. 178. The defendant company had the right to eject any one creating disorders or disturbance there, or annoying the passengers, or engaging in such conduct as might injure them, and to take such measures in these respects as would render it safe. Bus Co. v. Sootsma, 84 Mich. 194, 47 N. W. 667; Ray, Neg. Imp. Dut. §§ 32-46, and cases cited.

Contributory
Negligence—
Question for
Jury.

It was proper to submit to the jury the question of the dangers of this way, and whether they were habitual, customary dangers, which the defendant could reasonably anticipate might exist, and whether they were such as required precautions against accident and injury to passengers therefrom, and whether the defendant had exercised the required degree of care and caution to protect its passengers from such dangers. If the defendant had notice or knowledge of what might happen in its depot, or could reasonably anticipate what might happen there, dangerous to others lawfully there, it was bound to use care to avoid the injury which might be occasioned, and it would matter little whether the danger was habitually existing or might occur only at intervals. Nor can it matter but little whether the dangers arose from the acts of the

Notice of Danger—Question for Jury.

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servants and employees or others, so long as the dangers existing are not observable by the passenger, so as to be avoided, and they were known to, or ought to have been known to, the defendant, or anticipated by the officers of the defendant company in charge of the station. A railroad company is a common carrier, and owes to its passengers the duty of guarding them from assaults and insults from their fellow passengers and strangers when, from a high degree of care, the same might have been prevented. *Putnam v. Railroad Co.*, 55 N. Y. 108; *Holly v. Railroad Co.*, 7 Reporter, 460; *Hendricks v. Railroad Co.*, 44 N. Y. Super. Ct. 8. This duty grows out of, and is impliedly a part of, the contract between the carrier and the passenger. According to the uniform tendency of adjudications which we admit as authorities, the carrier owes to the passenger the duty of protecting him from the violence and insults and assaults of his fellow passengers or intruders, and will be held responsible for its own or its servants' neglect in this particular, when, by the exercise of proper care, the acts of violence might have been foreseen and prevented; and, while not required to furnish watchmen or servants sufficient to overcome all force or negligence, when unexpectedly happening, yet it is the duty to provide reasonable precautions to protect the passenger from assaults from any quarter at which they might reasonably be expected to occur, under the circumstances of the case and the condition of the parties. *Railroad Co. v. Burke*, 53 Miss. 200; *Railway Co. v. Hinds*, 53 Pa. St. 512; *Flint v. Transportation Co.*, 34 Conn. 554. Carriers of passengers are bound to exercise the utmost care in maintaining order and guarding those they transport against violence, from whatever source arising, which might be reasonably anticipated or naturally expected to occur. *Flint v. Transportation Co.*, 34 Conn. 554. The carrier must exercise the care required to protect the passenger from violence even by a stranger. *Sherley v. Billings*, 8 Bush, 147; *Farber v. Railway Co.*, 116 Mo. 81, 22 S.

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Note

W. 631; *Eads v. Railway Co.*, 43 Mo. App. 536. The carrier is bound to protect from the insults and wanton interference of strangers and fellow passengers. *Winnegar's Adm'r v. Railway Co.*, 85 Ky. 547, 4 S. W. 237; *Railroad Co. v. Finney*, 10 Wis. 388. The general rule is clear that, from whatever source the danger may arise, if it be known, or should have been known, care must be exercised to protect the passenger from that danger.

Duty to Protect
from Strangers.

A nonsuit could not have been justified. The evidence on the part of the defendant was confined principally to a denial that the occurrences of scuffling between the cabmen at the ferry entrance and on this walkway to the baggage room, previous to the time of this accident, as detailed in the evidence on the part of the plaintiffs, had ever occurred. This raised a clear question of disputed fact for the jury to determine.

Evidence was also produced on the part of the defendant that the officers of the defendant company and the employees in charge of the ferry had never known of the previous happening of these occurrences on this walkway. This evidence also raised a question of fact for the jury, along with the other ques-

Failure to Keep
Order—Evidence
—Liability of
Carrier.

tion of fact, whether, from the whole evidence in the case, such occurrences had ever happened, and, if so, whether they were of the character to affect the defendant with notice or knowledge of them, and whether they presented a danger which it became the duty of the defendant to guard its passengers against. The trial court would not have been justified in withdrawing these questions from the jury, and therefore the trial justice was correct in refusing to direct a verdict for the defendant. The evidence in the case justified the verdict of the jury, and therefore the rule to show cause is discharged, with costs.

NOTE.

Duty to Protect Passenger from Strangers at Station.—In *Batton v. South & North Ala. R. Co.*, 77 Ala. 591, 23 Am. & Eng. R. Cas. 514, 54 Am. Rep. 80, the court, by SOMERVILLE, J., said: "We do

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not think there is any duty to police station houses, with the view of anticipating violence to passengers, which there are no reasonable grounds to expect. The liability of a common carrier, when receiving passengers at a station for transportation, ought not to be greater than that of an innkeeper, who is never held liable for trespasses committed ordinarily by strangers upon the person of his guests." See also *Pittsburgh, etc., R. Co. v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224; *Britton v. Atlanta, etc., R. R. Co.*, 18 Am. & Eng. R. Cas. 391, and cases in Am. & Eng. R. Cas. referred to in opinion.

FOWLKS

v.

SOUTHERN RY. CO.

(Supreme Court of Appeals of Virginia, March 9, 1899.)

Injury to Passenger—False Statement by Ticket Agent—Consequential Damages.*—The negligent act of the defendant railroad company consisted in the false statement by its agent to plaintiff at the time she purchased her ticket that the train she was about to take made close connection with another train; and it appeared from a part of plaintiff's evidence that in consequence of such negligence she suffered anxiety, was compelled to hire a buggy, and, in the face of a storm, drive eight miles over a rough road to her destination, and suffered a miscarriage. *Held*, that such evidence was properly excluded from the jury, as there could be no recovery for injuries which could not have been reasonably anticipated as the result of such negligence.

ERROR by plaintiff to the city of Richmond law and equity court. *Affirmed*.

Smith, Moncure & Gordon, for plaintiff in error.

B. B. Munford and H. C. Riely, for defendant in error.

KEITH, P. Mrs. Eva C. Fowlks sued the Southern Railway Company in the law and equity court of the city of Richmond to recover damages for injuries sustained by her

*See generally *notes*, 10 Am. & Eng. R. Cas., N. S., 258 *et seq.*

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in consequence, as she alleges, of the negligent act of the defendant company.

The facts upon which she relies to support her contention are as follows: On the morning of July 22, 1896, Mrs. Fowlks, a resident of the city of Richmond, purchased of the Southern Railway Company a ticket to Skinquarter, a station on the Farmville & Powhatan Railroad, which crosses the Southern Railway at Moseley Junction, 25 miles south of Richmond. Skinquarter, her point of destination, is 8 miles east of Moseley Junction. The plaintiff had made this trip before in visiting her parents, and had always found the train of the Farmville & Powhatan Railroad made a close connection with the Southern Railway, and she could step from one train to the other. When she purchased her ticket at Richmond on the morning in question, she asked the agent whether the train which she then proposed to take would connect at Moseley Junction with the Farmville & Powhatan Railroad train for Skinquarter. He told her that it did, and she bought a ticket for Skinquarter, and boarded the train. Upon arriving at Moseley Junction, she discovered that no such connection would be made that day. It seems that she was pregnant; that the day was hot and sultry, and a storm was brewing, when she got off of the train. The Southern road had no depot there, and she failed to see a small ticket office of the Farmville & Powhatan Railroad, which had been recently constructed. She walked 300 or 400 yards from the place where the train stopped to a store, where she received such accommodations as it afforded. The Southern Railway having made no provision for getting her to her destination, she endeavored to find the means of private conveyance. After waiting in the store for about four hours, and suffering great anxiety, she succeeded in hiring a team, and set out for her father's home. It was raining at the time, but the owner of the team would not let it wait, and, as it was getting late, she thought it best to start. The road was very rough, and she was greatly jolted. Several hard showers came up during the drive, and she was

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wet through, and her baggage was also damaged. She was perfectly well when she got on the train at Richmond and when she got off at Moseley Junction. When she got to her father's house, she was suffering with abdominal pains and hemorrhage, from the womb. These pains continued till August 23, 1896, when she suffered a miscarriage. Since that time she has been in bad health, and has had another miscarriage.

After the evidence was closed, the defendant asked the court to exclude from the jury "all evidence of the plaintiff and witness Eva C. Fowlks, and which tended in any way to show that she suffered from the wetting, the cold, the jolting, the anxiety of mind, the pains, the subsequent sickness and miscarriage occasioned by her trip in the buggy from Moseley Junction to Skinquarter; and in like manner to strike out the testimony of the three medical experts tending to establish that the miscarriage complained of was the result and consequence of said wetting, cold, jolting, anxiety of mind," etc. The court sustained this motion, and struck out all of said evidence as requested by defendant's counsel, and to this action of the court the plaintiff excepted.

A number of instructions were asked by the plaintiff, which the court refused to give, and this action of the court was also excepted to. Thereupon the court gave an instruction of its own, to which the plaintiff excepted, whereupon the jury found a verdict for the plaintiff for \$150, upon which judgment was entered, and the case is before us upon the plaintiff's objection to the ruling of the trial court.

The sole question which we need to decide arises upon the action of the court in sustaining defendant's motion to exclude the plaintiff's testimony.

That the defendant was guilty of negligence is conceded, and that it is liable in damages for the direct consequences of that negligence is also conceded. The negligent act of the defendant consisted in the statement by its agent to the plaintiff at the time she purchased her ticket that the train she was about to take made close connection with the Farm-

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ville & Powhatan Railroad at Moseley Junction, and the contention of the plaintiff is that this negligence was the proximate cause of the entire sequence of events which followed, including the delay at Moseley Junction, the rough ride across the country to Skinquarter, the exposure to the rain and storm, and the subsequent miscarriage and loss of health.

"It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded. * * * In other words, the law always refers the injury to the proximate, not to the remote, cause. * * * If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. * * * To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile. * * * If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect, to support an action."

Shear. & R. Neg. §§ 28, 29, state the law as follows: "Very great difficulty has been found in determining what damages should be considered as flowing, in a 'natural and continuous sequence,' from an act of negligence, especially when it is not a matter of contract liability. On the one hand, it has been maintained that, in cases of tortious negligence, the defendant should be held responsible for all damages which do in fact result from his wrongful acts, whether

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they could have been anticipated or not. On the other hand, it has been maintained that he should not be held responsible for any damages except such as he could, in the exercise of reasonable foresight, have foreseen as the probable consequences of his act. As a middle ground, it has been asserted that he should be made responsible for such damage as is known by common experience to usually follow such a wrongful act. The weight of authority seems to be decidedly against holding the defendant liable for all the actual consequences of his wrongful acts, when they are such as no human being, even with the fullest knowledge of the circumstances, would have considered likely to occur; and, on the other hand, the best authorities seem to be quite opposed to the theory that he should be held liable only for such consequences as he ought himself to have foreseen. So much difficulty, indeed, has been felt in attempting to lay down a rule to cover all possible cases, that some of the ablest judges have declined to state any fixed rule, and have indicated a disposition to leave all doubtful cases to the jury."

Continuing, the same author says, at section 29: "The practical solution of this question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not), would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind."

In *Connell's Ex'rs v. Railway Co.*, 93 Va. 57, 24 S. E. 467, this court adopts the language of JUSTICE MILLER in *Scheffer v. Railroad Co.*, 105 U. S. 249: "To warrant the finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

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The negligent act proved in this case was committed at the time the ticket was purchased, and it seems to us manifest that a most prudent and experienced man, acquainted with all the circumstances which existed at that moment, could never have foreseen or anticipated the consequences which supervened. It might reasonably have been anticipated that a failure to make the connection at Moseley Junction would involve delay and inconvenience, but not that the plaintiff would procure a buggy, and, in the face of a storm, in her delicate condition, drive over a rough road to her father's house, and that a miscarriage would be the result.

It was the province of the court to say what evidence should go before the jury, and its action in that respect is, of course, the subject of review; but it is a question exclusively for the court, and upon it was devolved the duty of determining, in the first instance, whether the facts offered in evidence tended to prove an injury to the plaintiff too remote from the defendant's act of negligence to constitute an element in the plaintiff's recovery.

For the foregoing reasons we are of opinion that there was no error in excluding the evidence offered. This disposes of the controlling question in the case.

We do not deem it necessary to discuss the instructions, as the verdict of the jury was plainly right upon the evidence properly in the record.

Upon the whole case we are of opinion there is no error in the judgment of the law and equity court, which is affirmed.

CARDWELL, J., absent.

Texas & P. Ry. Co. v. Armstrong

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TEXAS & P. RY. CO.

v.

ARMSTRONG.

(Supreme Court of Texas, June 22, 1899.)

Selling Passenger Wrong Ticket—Damages—Mental Suffering.*—
In an action for damages sustained by plaintiff's wife by reason of the delay and vexation caused her by the negligence of defendants' agent in selling her a ticket by a wrong route, damages may be recovered for mental suffering proximately caused by such negligence.

CERTIFIED questions to Supreme Court.

T. J. Freeman, F. B. Dillard, and Head, Dillard & Muse,
for appellant.

Dudley & Moore, for appellee.

BROWN, J. The court of civil appeals for the Third supreme judicial district has certified the question herein-after stated for our consideration. The court sets out in full the evidence of the plaintiff and his wife, from which we make the following statement as being sufficient upon which to predicate our answer: H. W. Armstrong resided, with his wife and family, in the city of Paris, Tex., prior to and on July 3, 1895, and on that day he applied to the agent of the appellant at Paris for a ticket for his wife to visit her mother, who lived in Oklahoma territory, her post office being Curtis. Neither Armstrong nor his wife knew whether Curtis was in Texas or near the line, but they knew that the mother lived in Oklahoma territory, and that the nearest railroad station was called "Tucker," but did not know on what road it was. The evidence showed that Tucker and Curtis were both stations in Oklahoma territory on the Atchi-

*See *Southern Ry. Co. v. Hardin*, 10 Am. & Eng. R. Cas., N. S., 250, and *note*, 260.

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son, Topeka & Santa Fe Railroad. The evidence of the plaintiff and his wife tended to prove the following facts, which, however, were in some material points disputed by the testimony of the defendant: When Armstrong called upon the agent of the Texas & Pacific Railroad Company, he stated to him, in substance, that his wife desired to visit her mother, who lived in Oklahoma territory; that her post office was Curtis, and the nearest railroad station was called "Tucker," but that he (Armstrong) did not know whether Curtis or Tucker was in Texas or in Oklahoma. He stated that his wife was not accustomed to traveling, that she would have her children with her, and he desired to get a ticket over the best and quickest route to the point nearest to where her mother lived. The agent of the railway company examined his maps, and stated to Armstrong that there was no such station as Tucker, or it was a flag station, and not marked on the map; but that Newlin, in Hall county, Tex., was the nearest station to Curtis. Newlin was a station on the Ft. Worth & Denver City Railroad, and was a considerable distance from where Mrs. Armstrong's mother resided. Some days after this, Armstrong, with his wife and children, went to the depot of the Texas & Pacific Railroad at Paris, Tex., and told the agent that he wanted a ticket for his wife, as he had before notified him, to visit her mother in Oklahoma territory, and the agent of the railway company issued and delivered to Armstrong, for his wife, a ticket over the Texas & Pacific Railroad to Whitesboro, Tex., thence over the Missouri, Kansas & Texas Railroad to Henrietta, Tex., thence over the Ft. Worth & Denver City Railroad to Newlin, Tex. The ticket should have been issued for a route over the same roads to Gainesville, Tex., thence north over the Gulf, Colorado & Santa Fe and the Atchison, Topeka & Santa Fe to Winfield, Kan., and thence westward over the Atchison, Topeka & Santa Fe to the station known as "Tucker." Mrs. Armstrong, with her children, took the train at Paris, on the appellant's road, provided with lunch and

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money enough to carry her to the place of her destination, if she had been provided with a proper ticket, which place she would have reached on the next afternoon at 3 p. m. After passing Gainesville, and just before she reached the town of Henrietta, Mrs. Armstrong learned that her ticket was improperly issued to Newlin, and she stopped at Henrietta, where she remained from Tuesday afternoon until Sunday, during which time she succeeded in getting the rebate on the ticket not used over the Ft. Worth & Denver City Railroad, and some money from her husband. When she stopped at Henrietta, she had no money with which to pay her hotel bill, and was a stranger in the town, without any experience in traveling, and was compelled to ask a hotel man to keep her and her children until she could get money with which to pay her bill. She was greatly harassed, mortified, and annoyed by the situation, and did not know what to do to relieve herself of the embarrassment. Mrs. Armstrong finally resumed her trip, and made her visit. H. W. Armstrong brought suit in Lamar county against the Texas & Pacific Railway Company for damages occasioned to his wife by reason of the delay and vexation caused to her by the negligence of the agent of the railroad company in selling her the ticket by the wrong route. Among other things, the trial court charged the jury as follows: "If you find a verdict for the plaintiff, you will, in assessing his damages, consider any additional expenses necessarily incurred by plaintiff, and any mental pain, anxiety, or distress suffered by his wife which you may find from the evidence to have been the direct result of negligence on the part of the defendant in selling plaintiff a ticket to the wrong station, and only assess as actual damages such amount as will, in your judgment, reasonably compensate plaintiff therefor." The court of civil appeals has certified the following question: "Among other questions presented for decision, appellant has assigned as error that portion of the court's charge which allows the plaintiff to recover compensation for mental pain, anxiety, or distress suffered by his wife;

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and whether or not it was error to give this charge the court of civil appeals for the Third district certifies to the supreme court for decision. The pleadings presented this question."

The district court did not err in giving the charge set out above. If the mental pain, anxiety, and distress were caused proximately by the negligent act of the agent of the railway company, for which that company was liable, then the mental suffering, anxiety, and distress were proper elements of actual damages to be considered by the jury in arriving at the amount of their verdict. *Railway Co. v. Gilbert*, 64 Tex. 541; *Railway Co. v. Crispi*, 73 Tex. 236, 11 S. W. 187; *Railway Co. v. Terry*, 62 Tex. 380; *Railway Co. v. Kaiser*, 82 Tex. 144, 18 S. W. 305. We are not able to distinguish this case, upon principle, from the numerous cases decided by this court in which it has held mental anguish to be a proper subject of consideration in the assessment of damages under circumstances similar to those disclosed in the present case. The case of *Railway Co. v. Kaiser*, cited above, is especially similar to this case in its facts. We are not prepared to overrule these decisions.

FT. WORTH & D. C. RY. CO.

v.

CUSHMAN.

(*Supreme Court of Texas, May 9, 1899.*)

Excursion Tickets—Redemption—Statute.*—A statute of Texas provides, in substance, that the holder of a railroad passenger ticket is entitled to receive in redemption of an unused portion thereof "the remainder of the price paid for the whole ticket after deducting therefrom the tariff rate between the points for which the portion of the said ticket was actually used." Held, that the words "the tariff rate" in such statute signified the regular rate of three cents

*See note at end of case.

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per mile; and that the object of the statute was to require of an excursionist seeking to recover from a railroad company a portion of the price paid for his ticket to pay regular fare for the distance ridden, not to exceed the price of the entire excursion ticket.

CERTIFIED questions to Supreme Court.

Stanley, Spoons & Thompson and *Robt. Harrison*, for appellant.

Snodgrass & Britt, for appellee.

BROWN, J. The court of civil appeals for the Second supreme judicial district has certified to this court the following statement and question:

"In August, 1897, appellant sold appellee an excursion ticket from Vernon, Texas, via Ft. Worth, to Galveston, Texas, and return, over its own line and that of the Missouri, Kansas & Texas Railway, for \$5, which was far below the regular or maximum fare of three cents a mile, the distance to Galveston being 509 miles. The coupon from Ft. Worth to Galveston, a distance of 346 miles, was not used. Consequently, within the time prescribed by law, appellee applied to the agent who sold him the ticket to have the unused portion redeemed, and, this request being refused, brought this suit, and recovered judgment for \$1.68 as the value of the unused portion of the ticket, and the further sum of \$300 as the statutory penalty. In submitting the case to the jury, the court, in his charge, interpreted the words 'tariff rate,' as used in article 4560d, Rev. St., to mean the rate at which the excursion ticket was sold, and not the regular maximum rate of three cents per mile, as fixed by law. Appellant assigns error to this charge, contending that in the article of the statute referred to, in providing for a redemption, and declaring that the holder of the ticket is entitled to receive, in redemption, 'the remainder of the price paid for the whole ticket after deducting therefrom the tariff rate between the points for which the portion of the said ticket was actually used,' the legislature meant, by the words 'the tariff rate,' the regular rate of three cents per mile, and

not the rate per mile at which the excursion ticket was sold. According to the construction given the statute by the court on the trial of this case, the appellant was liable in this action; but, according to the construction contended for by appellant, the action is not maintainable. We deem it advisable, in order to a proper disposition of the appeal, and in order that the statute in question may receive an authoritative construction, to certify the question so raised to your honors for decision; that is, whether the words 'tariff rate,' as quoted above from article 4560d, Rev. St., refer to the reduced rate at which an excursion ticket is sold, or to the regular rate, which, in this instance, was three cents per mile."

The words "tariff rate," used in article 4560d, refer to the rate per mile which the law authorizes railroad companies to charge for transportation of passengers within this state. The word "tariff" is thus defined by the law dictionaries: "A cartel of commerce; a book of rates; a table or catalogue, drawn usually in alphabetical order, containing the names of several kinds of merchandise, with the duties or customs to be paid for the same, as settled by authority, or agreed on between the several princes and states that hold commerce together." Rap. & L. Law Dict.; Whart. Dict.; Abb. Law Dict. This definition is practically the same as that given by Webster's, Worcester's, and the Standard, Dictionaries. The interstate commerce commission, in its reports, attaches to the words "tariff rates" and "tariff charges" the meaning that they are rates which the law authorizes railroad companies to charge, and are published in their tariff sheets, made according to law. The "tariff" rates are distinguished in these reports, and in the treatment of the subject by the commission, from special rates, which are not authorized by law, but used by railroad companies to give to favored customers advantages in transportation. See Report of Interstate Commerce Commission for 1898; especially pages 8 to 17. The railroad commission of Texas, which is authorized to prescribe freight charges for railroad companies, publishes

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its rates so made under the head of "Tariffs of Charges or Rates." Tariff rates, then, by all the definitions and uses made of them to which we have had access, convey the idea of their being fixed in amount, and prescribed by lawful authority. In construing article 4560d, "tariff rates" must be given the meaning ascribed to them by common use, unless there is something in the context which shows that the legislature intended they should bear a different meaning. The following language, contained in article 4560d, gave rise to the question certified: "It shall be the duty of all railroad companies in this state * * * to provide for the redemption, from the holder thereof, of the whole, or any parts or coupons of any ticket or tickets which they or any of their duly authorized agents may have sold, if for any reason the holder has not used, and does not desire to use the same, upon the following terms: If neither the ticket nor any part thereof has been used by the holder, he shall be entitled to receive the full amount he paid therefor, and where the ticket has been used in part, the holder thereof shall be entitled to receive the remainder of the price paid for the whole ticket, after deducting therefrom the tariff rate between the points for which the portion of the said ticket was actually used." If none of the ticket has been used, then the entire price paid must be returned, under the statute. If, however, a portion of the ticket has been used, there must be a deduction from the price paid for the ticket of the rate to be charged for the distance actually used by the holder. If the price paid was subject to a deduction for that portion represented by the part of the ticket used, it would have been fully provided for by omitting the language, "after deducting therefrom the tariff rate," etc., because "the remainder of the price paid" would be construed to mean that portion of the price represented by the unused part of the ticket. The use of the particle "the" indicates one particular rate, and excludes the idea that the sum to be deducted should be based upon different rates in the settlement of different tickets. An excursion rate, which is special, and not fixed by law, is in no sense

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the "tariff rate," and the legislature must have intended by the words used to point out the rate fixed by law. It is a matter of common knowledge that it has been the custom of railroad companies to give excursions on special rates, such as was made in this case, at prices very much below the regular passenger or tariff rates, and the purpose of this law was to secure the railroad companies against the use of excursion tickets for local travel between points not covering the whole distance embraced in the excursion ticket, and then selling the remainder of it to be used by another. It was the object of the law to require of the excursionist who might seek to recover from a railroad company a portion of the price paid for his ticket to pay regular fare for the distance that he had ridden, not to exceed the price of the entire ticket.

NOTE.

Tickets and Fares—Redemption—Rate.—Under Pa. Act of May 6, 1863 (P. L. 582), requiring railroads, steamboats, and other public conveyances to redeem the unused portion of a ticket "at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket between the points for which the proportion of said ticket was actually used," and the amendatory Act of April 10, 1872 (P. L. 51), providing that the company shall "pay for such unused portion of ticket the difference between the actual fare to point used, and the amount paid for such ticket," the actual fare to the point used is not to be computed at the reduced rate contained in the ticket, but at full fare. *Smith v. Philadelphia & R. R. Co.*, 1 Pa. Dist. 322.

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CHICAGO, R. I. & P. RY. CO.

v.

LEE.

(Circuit Court of Appeals, Eighth Circuit, Feb. 20, 1899.)

Riding in Stock Car—Presumptions.*—The presumption, in the absence of evidence to the contrary, is that one who rides in a stock car is not a passenger on it, and, even if he is a passenger, is guilty of contributory negligence in riding in such car.

Same—Care Due from Railroad—Construction of Contract.*—The contract provided for the free transportation of one person to accompany and take charge of stock, and that the cars containing the stock should be under the sole control of the shipper or his agents for the purpose of taking care of the stock; and it appeared that it was customary for the men in charge of fine animals to ride in the cars with them on defendant's road; that the car in which plaintiff was riding when injured was furnished for the transportation of the stock; that the company knew plaintiff was to go in charge of it; that defendant's conductors knew that he was riding in such car before the accident, and made no objection; and that, while the rules of the company forbade passengers to ride on freight trains without special permits, there was no evidence of the existence of any rule which forbade passengers in charge of animals in transit under special contracts to ride with them in the stock cars. *Held*, that plaintiff was rightfully in such car, and had the right to rely upon the presumption that the company would use ordinary care for his protection.

Injury to Passenger Before Payment of Fare.—The fact that plaintiff was injured while riding over the last portion of the route did not affect his right to recover, although he had not paid his fare for carriage over such portion, as he was required to do under such contract, as the conductor had not demanded his fare when the accident occurred.

Limiting Liability—Contract by Principal—Minor Agent.—A stipulation in a contract of carriage that the person who receives

*See *Iseman v. South Carolina & G. R. Co.*, 11 Am. & Eng. R. Cas., N. S., 219, and notes, 227.

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free transportation under it agrees to assume all risk of personal injury, except of injuries arising from the gross carelessness of the railroad company, is invalid, where the person injured while being carried under the contract is a minor, and the contract was not his, but that of his father.

ERROR by defendant to the Circuit Court of the United States for the District of Kansas. *Affirmed.*

W. F. Evans (*M. A. Low*, on the brief), for plaintiff in error.

J. R. McClure, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge. This is an action against the railroad company for personal injuries sustained by Ray Lee, the defendant in error, through the derailment of a stock car of the company, in which he was riding with a mare of which he had the charge. This is the second appearance of the case in this court. A judgment against the plaintiff in error was reversed in 22 C. C. A. 132, 76 Fed. 212, and 40 U. S. App. 298, and a second trial has now resulted in a second judgment and verdict against the company. Several errors are assigned, but, at the conclusion of the argument in this court, the counsel for the railroad company requested us to disregard them, and affirm the judgment, unless we were of the opinion that, upon the whole case, there was insufficient evidence of negligence upon the part of the plaintiff in error to sustain the verdict, or such evidence of contributory negligence upon the part of the defendant in error as imposed the duty upon the trial court to instruct the jury that he could not recover. As the jury has rendered a verdict for the defendant in error, and has thereby found the disputed questions of fact in his favor, we must, in accordance with the settled rules in such cases, state and consider the disputed facts as they were related by his witnesses. So far as they are material to the determination of the questions presented for our consideration, they were

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these: Ray Lee, the defendant in error, was a minor. On October 6, 1894, his father, A. D. Lee, made a written contract with the railroad company whereby it agreed to transport a mare from Joliet, in the state of Illinois, to Junction City, in the state of Kansas, and at the same time he notified the company that his son, Ray Lee, was to accompany and take charge of the animal. Rock Island is a station on the road of the plaintiff in error between Joliet and Junction City. The contract contained these stipulations:

"In consideration of free transportation for one person to Rock Isld., hereby given by said railway company, such person to accompany the stock, it is agreed that the cars containing the stock of said Lee & Sons are in the sole charge of such person or his agents for the purpose of attention and protection to the stock while in transit, and the company assumes no responsibility for safety to stock in charge of shipper or his agents, whether from theft, heat, jumping from car, injury in loading or unloading, injury or damage which stock may do to themselves or which may arise from the reasonable delay of trains, or from any other cause or accident or injury, except those occurring by reason of gross negligence of the company. It is also agreed in all cases that the liability of the company for damage to valuable or common live stock shall not exceed one hundred dollars for each animal, except by special agreement; and, further, that the persons who receive free transportation in charge of said stock, in consideration of the receipt of the same, agree to assume all risk of personal injury from any cause whatever, except injuries arising from gross carelessness of the railway company."

The company furnished the car at Joliet, Ill., for the transportation of the mare. She was put into it with the sulky, blanket, and harness, and the defendant in error climbed in to take charge of and care for her. On the railroad of the Rock Island Company it was customary for men in charge of fine animals to ride with them in the cars which

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carried them. The car in question passed through the charge of two conductors between Joliet and Happy Hollow, in the state of Iowa, where the accident occurred, one east and the other west of Rock Island. These conductors knew that the defendant in error was riding in the car with the mare, but neither of them objected or warned him to go elsewhere. The rules of the company forbade passengers to ride on freight trains without special permits, but there was no evidence of the existence of any rule which forbade passengers in charge of animals in transit under special contracts to ride with them in the cars, when the agreements required them to take sole charge of the animals. The defendant in error had no transportation and paid no fare over that part of the railroad west of Rock Island, and the conductor had made no demand for any when the accident happened. As the train was passing some reverse curves at Happy Hollow, at an unusually high rate of speed, the car in which the defendant in error was riding was derailed, and he was injured, but the caboose attached to the train in which this car was hauled remained on the track, and he would not have sustained any injury if he had been riding in that car.

Under this state of facts, the unusual speed, the reverse curves, and the derailment of the car furnished sufficient evidence of negligence on the part of the company for the consideration of the jury, if the defendant in error was a passenger. The questions are, was he a passenger? and was it contributory negligence for him to ride in the stock car rather than in the caboose? The presumption, in the absence of countervailing evidence, is that one who rides in a baggage car, an express car, a stock car, or on a freight train is not a passenger on it, and, even if he is, since he is riding out of the place provided by the company for passengers, that he has assumed the increased risk resulting from riding there, and is therefore guilty of contributory negligence. *Bryant v. Railway Co.*, 4 C. C. A. 146, 147, 53 Fed. 997, 998, 12 U. S. App. 115, 123; *Player*

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v. Railway Co., 62 Iowa, 727, 16 N. W. 347; Jenkins v. Railway Co., 41 Wis. 112, 121; Railway Co. v. Miles, 40 Ark. 298; Gardner v. Northampton Co., 51 Conn. 143, 152; Powers v. Railroad Co., 153 Mass. 188, 190, 26 N. E. 446; Eaton v. Railroad Co., 57 N. Y. 382; Files v. Railroad Co., 149 Mass. 204, 21 N. E. 311; Hoar v. Railroad Co., 70 Me. 65, 72, 73; Graham v. Railroad Co., 23 U. C. C. P. 541; Sheerman v. Railway Co., 34 U. C. Q. B. 451; Railroad Co. v. Michie, 83 Ill. 427; Railway Co. v. Lee, 22 C. C. A. 132, 76 Fed. 212, 40 U. S. App. 298. But the agreement of carriage is nothing, after all, but a contract, and a railroad company may lawfully stipulate to carry a passenger in a baggage car, in an express car, a stock car, or on a freight train generally. If it makes such a contract, it is required to exercise ordinary care in the performance of it. What was the meaning of the agreement of the parties in this case? Their contract must, like other agreements, be read and construed in the light of the circumstances surrounding them when they made it; and when it is considered that it was customary for the men in charge of fine animals to ride in the cars with them on this railroad; that the car in which the defendant in error was riding was furnished at Joliet for the transportation of the mare; that the company knew that the defendant in error was to go in charge of her; that he climbed into the car at Joliet, and rode there until he was injured; that the two conductors through whose charge he passed knew that he was riding in that car before the accident occurred, and made no objection; and that the written contract expressly provided that the car containing the animal was in his sole charge, for the purpose of attention to, and the protection of, the mare during the transportation, and that the company assumed no responsibility for her safety while in his charge, whether from theft, heat, jumping from the car, or injury or damage which she might do herself,—we are constrained to hold that the fair interpretation of this agreement is that it was a contract to

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carry the defendant in error in the stock car occupied by the mare from Joliet to Junction City upon his payment of fare from Rock Island to the latter place. If this was the contract, the defendant in error was guilty of no negligence in occupying that car rather than the caboose, because he had the right to rely upon the presumption that the company would use ordinary care to carry him safely in the car in which the contract permitted him to ride.

Same—Care Due
from Railroad—
Construction of
Contract.

The fact that the defendant in error had not paid his fare from Rock Island to Junction City was immaterial, inasmuch as the conductor had not asked for it, and, if the defendant had undertaken to carry him without the payment of fare, it was bound to exercise all due care in the performance of the obligation thus voluntarily assumed. *Bryant v. Railway Co.*, 4 C. C. A. 146, 147, 53 Fed. 997, 998, 12 U. S. App. 115, 123; *Railway Co. v. Derby*, 14 How. 468; *The New World v. King*, 16 How. 469; *Waterbury v. Railway Co.*, 17 Fed. 671, 673.

Injury to Pas-
senger before
Payment of
Fare.

The stipulation in the contract that the person who receives free transportation under it agrees to assume all risk of personal injury from any cause whatever, except from injuries arising from the gross carelessness of the railroad company, is entitled to no consideration, because the defendant in error was a minor, and because this stipulation was not his contract, but the agreement of his father, A. D. Lee.

Limiting Liabil-
ity—Contract by
Principal—
Minor Agent.

As the errors assigned which have not been considered were expressly waived by the counsel for the plaintiff in error, the judgment below must be affirmed; and it is so ordered.

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FITZGIBBON

v.

CHICAGO & N. W. RY. CO.

(*Supreme Court of Iowa, May 25, 1899.*)

Degree of Negligence—Pleading—Unwarranted Instruction.—Where plaintiff only charged that he was a passenger, and simply counted upon the negligence of defendant, it was error to instruct that plaintiff, although not a passenger, might recover if defendant was guilty of gross negligence in running its train.

Excursion Trains—Whether a Passenger—Presumptions.*—Railroad companies have the right to run trains, such as excursion trains, for a particular class of persons, and if a person not of such class boards such a train, with notice of its character, he is not presumptively a passenger.

Same—Same—Same.—Plaintiff knew that the train which he boarded was a special one, run for a particular class of persons; that it did not stop at the regular stations; and that the place where he found it was not such as to constitute an invitation to the public to ride thereon. *Held*, that there was no presumption that he was a passenger.

Same—Same—Authority of Conductor—Question for Jury.—Where there is evidence tending to show that plaintiff, one of the general public, was accepted by defendant's conductor as a passenger on a train run exclusively for a particular class of persons; and there is no evidence showing that he was chargeable with notice of any limitations upon the conductor's authority, whether plaintiff was passenger is a question for jury.

APPEAL by defendant from Monona county district court.
Reversed.

Hubbard & Dawley, for appellant.

M. F. Harrington and *Frank Tamisea*, for appellee.

DEEMER, J. In his petition plaintiff alleges that on the 11th day of July, 1896, he was a passenger upon one of

*See generally *note*, 11 Am. & Eng. R. Cas., N. S., 227 *et seq.*

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defendant's trains from Logan to Loveland; that after the train started from Logan, through the carelessness and negligence of defendant, it collided with another train owned and operated by the defendant, which was coming from an opposite direction, by reason of which the plaintiff received the injuries of which he complains. All the allegations of the petition were put in issue by a general denial interposed by the defendant. It appears from the evidence that an organization in the city of Omaha, Neb., known as the "Union Pioneer Employees Association," contracted for a train of cars to carry the members of the association and their families from Omaha, by way of Council Bluffs, to Logan, Iowa, and return, on a picnic excursion, the association to pay a stipulated price for the use of the train. The train was made up at Omaha of 15 or 16 Union Pacific passenger cars and one baggage car, and with the excursionists on board, was drawn by a Union Pacific engine to the transfer in Council Bluffs, where the train was taken in charge by a crew of defendant's employees, and drawn to Logan by one of the defendant's engines. In pursuance of the contract, tickets were issued to the association for each car, and no fares were collected, it being left to the association to see that only members and their families were carried on the train. As the train was not a regular one, and did not run on schedule time, no tickets were sold for passage thereon. On arriving at Logan, the excursionists proceeded to a park in the town to hold their picnic, and the train was placed upon a side track about a quarter of a mile west of the defendant's station house, where it remained during the day. The presence of the picnic party was notorious. The number in attendance was large, and the train was readily recognizable as an excursion train by the number of cars, the decorations on the engine, and the place where it was left during the picnic. In the evening the excursionists came back to the train, with a view of starting for home, and, after they had boarded, it was started west from where it had stood during the day.

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The conductor and engineer both overlooked the fact that a freight train, running on schedule time, was about due from the west, and they negligently started west with their train, which, after proceeding a short distance, collided with a freight train, which was running at a high rate of speed, causing a number of deaths, and injuring a number of persons, among whom was the plaintiff.

No question is made but that the conductor and engineer of this special or excursion train were negligent in not waiting until the freight train had passed, and that their negligence caused the wreck and its consequences. It is not disputed that plaintiff was on the excursion train at the time of the collision, and that he received the injuries complained of in consequence thereof. It is claimed, however, that plaintiff was not a passenger on this train; that he was a mere trespasser, to whom defendant owed no duty except that of not willfully injuring him; and that it is not responsible in damages for the injuries he received. The trial court instructed the jury, in effect, that plaintiff, although not a passenger, might recover, if the defendant was guilty of gross negligence in running its train. This instruction is complained of because not justified by the issues and not supported by the evidence.

It will be observed that plaintiff alleged in his petition that he was a passenger, and that he was injured through the carelessness and negligence of the defendant. This, then, is the duty which he charges the defendant owed him. And his recovery, if recovery be had, must be based upon a breach of this duty.

Humpton v. Unterkircher, 97 Iowa, 509, 69 N. W. 776. In that case it is said: "It is essential, in any suit for negligence, that a particular duty neglected be declared upon. The recovery cannot be had for one breach on a petition counting upon another." In the case of Way v. Railroad Co., 73 Iowa, 463, 35 N. W. 525, plaintiff sought to recover, as a passenger, for negligence in making a coupling, and, on appeal to this court, it was held that he was not a

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passenger. The case being remanded, plaintiff filed an amendment to his petition, retaining the allegations of the original petition, and, in addition, alleging that the injury was caused by the gross negligence of the employees in charge of the train. On the second appeal it was contended that there could be no recovery without proof that plaintiff was a passenger. Answering that contention, we said: "But we think this position is not maintainable; for, while the defendant would have been liable if his intestate had been a passenger and the injury had been occasioned by but slight negligence on its part, it would also, under the statute (Code 1873, § 1307), be liable even though that relation did not exist, if the injury was caused by the gross negligence or mismanagement of the employees in charge of the train. So that the allegation that he was a passenger was redundant, if plaintiff relied upon the averment of gross negligence, as also was that averment if he relied upon the allegation that intestate was a passenger. The petition alleged two states of fact, upon either of which defendant would be liable; and some of its averments, while material to one of these, are redundant as to the other, and plaintiff was entitled to recover if he had established either of them, even though he had failed to prove the allegations which as to it were redundant. Possibly he could have been required, upon proper motion, to strike one of the averments or to plead the two states of fact, in separate counts. But no such motion was made. Very clearly, we think his right of recovery was not defeated alone by the failure to prove the allegation that the intestate was a passenger at the time of the injury." From this case it clearly appears that there is a marked distinction between an action by a passenger, who may recover for slight negligence, and an action by a trespasser, who may only recover for gross negligence, and that the mere charge of negligence does not carry with it a charge of gross negligence. Plaintiff's petition not only charges that he was a passenger, and that defendant owed him the duty which that relation

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imposes, but it simply counts upon negligence, and, of course, that degree of negligence which the particular duty imposes. It is not even inferentially charged that the defendant was guilty of gross negligence, and it is apparent that the court erred in submitting to the jury the question of plaintiff's right to recover as a trespasser. As there was no charge of gross negligence, we cannot say, as we did in the Way Case, that the allegation that plaintiff was a passenger may be treated as redundant. Defendant was not called upon to meet the issue of gross negligence, and therefore the court erred in giving the instruction complained of.

2. The court further instructed that the presumption was that plaintiff was a passenger upon the train at the time he was injured. That rule is no doubt correct when applied to a case where the injured party is found upon a regular passenger train, or upon a train carrying passengers in general, but, as applied to the undisputed facts in this case, it was erroneous.

**Excursion Trains
—Whether a Pas-
senger—Pre-
sumptions.**

A "passenger," in the legal sense of the term, is one who travels in some public conveyance, by virtue of a contract, express or implied, with the carrier, as to the payment of fare, or that which is accepted as an equivalent therefor. *Railroad Co. v. Price*, 96 Pa. St. 267. As a general rule, every one on a passenger train of a railroad company, and there for the purpose of carriage, with the consent, express or implied, of the company, is presumptively a passenger. *Railroad Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, and 9 N. E. 357. But there must be some form of acceptance by the company of the person as a passenger. This acceptance need not be direct or express, but may be, and generally is, implied from circumstances. And if the train be a regular passenger train, or a train carrying passengers in general, or a special train fitted for the carriage of persons in general, and a person boards such train without notice that it is reserved for particular persons, no doubt the presumption will arise that he was a passenger. But railroad companies have the right to run trains which do not carry passengers,

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or to run trains for a particular person, or for a particular class of persons, and, if one boards such a train with notice of its character, he is not presumptively a passenger. Whether he should be treated as a passenger or not depends upon the circumstances of each particular case. See *Wagner v. Railroad Co.*, 97 Mo. 512, 10 S. W. 486; *Railroad Co. v. Headland* (Colo. Sup.) 33 Pac. 185; *Eaton v. Railroad Co.*, 57 N. Y. 382; *Railroad Co. v. Black* (Tex. Sup.) 27 S. W. 118. If the train is not designed for the use of passengers in general, there is no implied acceptance of one who enters upon it without right as a passenger. But if it be fitted up for the carriage of passengers, and is placed in such a position that persons may be induced to enter upon it as passengers, then it must be shown that these persons had notice or knowledge that it is not intended for their use. *People v. Douglass*, 87 Cal. 281, 25 Pac. 417; *Railroad Co. v. Singleton*, 66 Ga. 252; *Rosenbaum v. Railroad Co.*, 38 Minn. 173, 36 N. W. 447; *Keating v. Railroad Co.*, 97 Mich. 154, 56 N. W. 346; *Wagner v. Railroad Co.*, *supra*; *Haase v. Navigation Co.*, 19 Or. 354, 24 Pac. 238. In the case before us, the evidence shows, without dispute, that the train was chartered and run at a fixed price per car for the exclusive use of the Pioneer Association and their families, and was not for the traveling public. The train was for the exclusive use of the excursionists, and no tickets were sold to the general public for use on this train. While it may be true that plaintiff had no knowledge of the terms of the contract under which the train was chartered, and it may be did not know that tickets were not sold for that train, yet he did know, or must have known, that it was a special train, run for a particular class of persons; that it did not stop at the regular stations; and that it was not left in such a place as that an invitation was impliedly extended to all persons to take passage thereon. There is no presumption, therefore, that he was a passenger upon this train. His recovery must be on the theory that he was a passenger, notwithstanding the train was a special one. In other words, it must be

Same—Same—
Same.

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shown that some agent or employee of the company, having authority, accepted him as a passenger, and permitted him to ride upon the train. The instruction that he was presumptively a passenger was therefore erroneous.

3. It is argued that there is no evidence in the record tending to show that the plaintiff was accepted as a passenger, and that the court erred in refusing to direct a verdict for defendant, and in refusing to give certain instructions asked by it to the effect that plaintiff was not a passenger, and therefore could not recover. The evidence adduced to sustain the proposition that the defendant accepted plaintiff as a passenger is as follows: Plaintiff testified that, desiring to go to Missouri Valley upon the excursion train, he went to the ticket office to get a ticket; that the agent was busy talking with some person in the baggage room, and, being admonished that there was not much time, he started to the train without asking for a ticket. He says: "As I went down to the train, I met the conductor of the excursion train. His name was Reed. I had known him to be a conductor in the service of the Chicago & Northwestern Company for two or three years. As I started down to the train, I met the conductor just about the end of the far end of the platform, and I asked him if he was going to stop in Missouri Valley, and he said he didn't know,—didn't have his orders yet. I asked him when he would start. He said, 'just as quick as he could get his orders;' and I started to the train then. After that, and before I entered the train, I saw the conductor again up near the front end of the train, near the engine, and had a conversation with him there. I was standing about the front end of the baggage car, close to it. I then again asked him if he was going to stop in Missouri Valley, and he said, 'No; he was going to stop at Loveland, and meet No. 7.' I said that would do me, and I would come back to Missouri Valley on No. 7, and I got right on the train then. The conductor was standing right there by me. There was no crowd to attract his attention. There was two or three, or a few, standing around at that time. It was

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shortly before the train started. I boarded that train in the presence of the conductor." He further said: "I could not tell a Union Pacific Pioneer excursionist from any other stranger. I was not one myself." He also said: "I intended to pay my fare on the train in which I was at the time of the collision, and had the money with which to pay it." Another witness testifies: "I saw the conductor, and heard him have a conversation with the plaintiff, right close to the engine, just after he handed his orders to the engineer. He handed him something. I couldn't say it was orders. Plaintiff asked him if he was going to stop at the Valley, and he said, 'No, they would pass No. 7 or some other train.' They was going to wait for some train. Jim said that would do him all right; that he would come back on No. 7. Then Jim got on the train. The conductor was there at the time. The conductor just hesitated, and answered the plaintiff, and then just started off, as soon as he was through with the conversation. I believe he was saying something, and didn't wait to finish it before he started off. I suppose he was busy." It also appears that a number of persons got on the train at Council Bluffs, and rode to Logan, some of whom were members of the association and their families residing in that city, and others were persons joining friends among the excursionists. A few persons got on at Missouri Valley, and were carried to Logan, and a number of persons, who had come from Missouri Valley by regular train, boarded the excursion train to return to Missouri Valley, and were injured in the collision.

We think this evidence, in connection with some other circumstances disclosed, justified the court in submitting the question as to plaintiff's being a passenger, by reason of his acceptance as such by the conductor, to the jury. Even if the train was not made up for the carriage of passengers in general, the defendant, through its conductor, had the right to accept such passengers; and, if the conductor did accept the plaintiff as such passenger, he will be treated as such, in the absence

~~Fame-Same-~~
~~Authority of~~
~~Conductor-~~
~~Question for~~
~~Jury.~~

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carried him on to Beach Haven. According to his statement, when the train was about to return to Macon he approached the conductor, and requested that on the way back the train be stopped at the intermediate station, in order that he might get off. The conductor promised him to stop, and told him to be out on the platform, ready to get off, when the train reached his station. In approaching this station, the train ran rapidly, and Hicks became apprehensive that it would not stop. He left his seat, walked to the platform, took hold of the iron railings, placed one foot on the first step, and had one upon the platform, as the train ran by the station. The train, according to the evidence of Hicks, was going at a rate of not less than 45 miles an hour at that time. When he discovered that the train would not stop, he undertook to return to the car, and in doing so he was thrown to the ground by a movement of the train, and seriously injured. Hicks brought suit against the railway company. Upon the trial of the case the above facts appeared from the evidence offered by the plaintiff, and the court granted a nonsuit.

In our opinion, the evidence of the plaintiff showed affirmatively that he was guilty of gross negligence. Although the conductor may have promised him to stop at the station where he desired to leave the train, and may have told him to be out on the platform, ready to get off, as a prudent man he must have known that when a train is going at the rate of 45 miles an hour, with no indication of a slackening of its speed, it would be exceedingly dangerous for any person to go upon the platform and commence to descend the steps, or even to remain standing upon the platform. Had the conductor been present, and told the passenger to descend the steps and jump from the train, and that it would be safe to do so, and he had jumped and been injured, he could not have recovered, because it was manifestly dangerous, and no prudent man would have considered it otherwise. Where a man has been guilty of gross negligence, and is injured by the running of a train, he is not entitled to recover, although

Injury to Passenger—Going on Platform of Moving Car—Contributory Negligence.

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the company may have been negligent. In this case the passenger relied on a promise to stop, which the conductor had no authority to make, and complied with directions to do what was obviously unsafe and dangerous.

The trial judge therefore committed no error in granting a nonsuit. See Barnett v. Railway Co., 87 Ga. 766, 13 S. E. 904. Judgment affirmed. All the justices concurring.

Same—Same—
Nonsuit.

NOTE.

Nonsuit Where Contributory Negligence Appears from the Declaration.—A declaration alleging that the conductor of a passenger train agreed with plaintiff to stop the train for him to get off at a point where there was no regular station, but at which defendant's road crossed another railroad at grade; that plaintiff paid his fare to this point, and that on reaching the same the train only slowed up and did not stop, so that plaintiff, "in order to keep from being carried beyond his destination, was compelled to get from the moving train," and in so doing was seriously injured, does not set forth a cause of action, it appearing from these allegations that plaintiff's injury was caused by his own voluntary act in taking a dangerous risk, if the train was moving so rapidly as to make leaving it unsafe; or if not, that the injury must have resulted from a mere accident, or from plaintiff's own carelessness in getting off. Barnett v. East Tenn., V. & G. R. Co., 87 Ga. 766, 13 S. E. Rep. 904.

SANDERS

v.

SOUTHERN RY. CO.

(*Supreme Court of Georgia, March 20, 1899.*)

Instructions.—A failure of the trial judge to instruct the jury on an issue not raised by the pleadings in the case is not error.

Injury to Passenger—Alighting from Moving Car—Presumption of Negligence—Due Care.*—In an action to recover damages for personal injuries sustained by a passenger in alighting from a moving car, it was not error in the presiding judge to read to the jury

*See notes at end of case.

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section 2321 of the Civil Code, which provides that a railroad company shall be liable for damages done to persons, etc., by the running of locomotives or cars, unless the company makes it appear that their agents have exercised all ordinary and reasonable care; the presumption in all cases being against the company, when in immediate connection therewith, the judge instructs the jury that duty of carriers to passengers is that of extraordinary diligence, and that the burden is on the carrier to show such diligence, when the injury has been made to appear.

Same—Same—Same—Contributory Negligence.*—In such a case it was not error for the court to charge that if, at the time, it was obviously dangerous for the passenger to alight, on account of the rapid motion of the train, without the direction of the conductor, or under the direction of the conductor, if the circumstances from such rapid motion would make it likely, or seemed likely to him, as an ordinarily prudent man, that it would be dangerous to do so, the plaintiff would not be entitled to recover.

Same—Same—Same—Same.—Where the evidence showed, in the case above indicated, that the plaintiff lived near the place where it was alleged he received the injury in attempting to alight from the train, and was more or less familiar with the locality, it was not error to charge the jury to consider the question as to whether the plaintiff was familiar with this particular place, and whether or not his familiarity with the place was such as to make it dangerous for him to alight under the circumstances which he claimed surrounded him at the time. Such a charge was proper, and the knowledge which the plaintiff had of the locality should have been considered by the jury in determining the question of whether he himself was negligent.

(Syllabus by the Court.)

ERROR by defendant from Bibb county superior court.
Affirmed.

Marion W. Harris, Chas. A. Glawson, and Harris, Thomas & Glawson, for plaintiff in error.

Hill, Harris & Birch, for defendant in error.

LITTLE, J. There are 31 grounds set out in the motion for a new trial. In connection with said grounds, we have examined the evidence in the record and the charge of the court, and our conclusion is that under the facts of this case the error complained of in the 8th, 9th, 10th, 12th, 13th, 14th, 15th, 18th, 19th, 20th, 21st, 23d,

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25th, 26th, 27th, and 28th grounds of the motion need no especial elaboration. These contain principles of law given in charge to the jury, and some of them are clearly laid down in the Code, as the statute law of this state; others are familiar principles which this and other courts of last resort have ruled to be correct, and applicable to cases involving the same issues as were tried in the case at bar, and we find no legal objection to the principles of law covered in the charges of which complaint is made by these grounds of the motion. The sixteenth ground of the motion, as it appears in the record, is, we presume from copying, so confused as to be unintelligible, and we are not, therefore, able to pass upon it. The record does not contain any twenty-fourth ground, and we cannot, of course, say what was the complaint made therein. The twenty-ninth ground is an exception to the charge as a whole, and the court committed no error in overruling the motion on that ground. The complaints made in the thirtieth and thirty-first grounds of the motion necessarily involve questions which are referred to in other grounds of the motion. The first four grounds of the motion are based on allegations that the verdict is contrary to law, decidedly and strongly against the weight of evidence, and contrary to the charge of the court. We do not think there is merit in any of said grounds. It was the province of the jury to declare what the facts were, and, in our judgment, the jury was fully authorized, under the evidence, to arrive at the verdict which was rendered; and we have been unable to ascertain from the record any reason why that verdict is contrary to the law governing the case. Nor is the verdict contrary to the charge of the court. None of the charges complained of were, in our judgment, calculated to mislead the jury. On the contrary, the charge, as a whole, seems to be a fair and legal presentation of the law of the case.

1. Complaint is made because the court erred in giving to the jury the following charge: "The relation of carrier and

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passenger continues, where one is a passenger upon the train of a railroad corporation, until the passenger has reached his destination, and has had a reasonable opportunity to alight safely from the cars." The specific assignment of error to this portion of the charge is that the relation of passenger and carrier continued until the passenger had safely alighted from the train, and because this charge, in effect, instructed the jury that the plaintiff bore the relation of passenger to the defendant only to the time he alighted from the cars, and because it was the duty of the railroad company not only to land the passenger safely, but to leave him at a place where he would be safe after being landed. We can conceive of a case or circumstances which would make this charge error because of the principles contended for by the plaintiff in error. In order, however, to ascertain whether such charge was error in the case which was tried, the circumstances which are relied on to show negligence on the part of the carrier must necessarily be considered. It is not contested that the point at which the plaintiff in error desired to leave the train, and at which he did leave the train, was not either a regular or flag station of the railroad. It was at a point on the railroad near a drawbridge over the Ocmulgee river, at which, under the regulations of the company, all trains passing over the river were required to stop, as a matter of precaution. No arrangements had been made by the company for passengers to board or leave the cars at that point, although, under the evidence, persons frequently did so when the cars came to a stop. The railroad only used a right of way there, such as it had for the safe construction of the road and the passage of its trains. The petition filed by the plaintiff did not base his right to recover on the negligence of the company in failing to afford him a safe landing place from the cars, and a safe means of egress, at the point where he was put off on its right of way, nor negligence because they did not leave him at a place where he would be safe after he landed; but the allegations set out in the petition are "that, failing to

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obey the rules of the company, the persons in charge of the train did not bring it to a full stop at this particular point, but merely reduced the speed of the train at its immediate approach to the bridge, and while the train was moving at such reduced speed the conductor directed the petitioner to jump from the train, which he did under such direction, and in so jumping, while he exercised all proper care and caution, he was injured"; and the negligence averred is the failure to bring the train to a full stop, so that he could alight in safety. It must be apparent, therefore, that under the petition the plaintiff was not seeking to recover damages for his injury on the ground that the company was negligent in not affording him a safe landing place, nor a means of egress from the point on the right of way where he was put off, and the charge excepted to was a proper one under this contention and the evidence as to his place of exit from the train. The elementary rule is that the admission of evidence will be confined to the issue being tried, and it is not necessary to cite authority to establish the principle that instructions of law by the trial judge to the jury should be confined to such issue. In the case of *Hill v. Callahan*, 82 Ga. 103, 8 S. E. 730, our present chief justice, in delivering the opinion of the court, aptly said: "The pleadings in the case are the contentions of the parties. They make the issues upon which evidence is to be admitted, and on which the court is to instruct the jury. By them the parties must stand or fall. If the court submits only these issues to the jury in his charge, it is not error, and the parties have no right to complain." The supreme court of North Carolina in the case of *Moss v. Railroad Co.*, reported in 29 S. E. 410, which was an action to recover for personal injuries by a passenger against the railroad company, the allegation being that the company was negligent in failing to stop its train at the station where she was to change cars, to allow her to get off, and in suddenly increasing the speed of the train while she was getting off, ruled that the plaintiff could not recover for the failure to show her a safe way to go

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from one train to another, nor from any train to the station, nor from the station to any train. See, also, Beach, Contrib. Neg. (3d Ed.) § 161. So that the failure on the part of the judge to charge the duty of the defendant company to afford the passenger a safe landing and a means of egress from his place of landing was not error.

2. Another ground of the motion is that the court erred in charging the provisions of law contained in section 2321 of the Civil Code, declaring that a railroad company is liable for damage done to persons by the running of its locomotives or cars, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, and that the presumption in all cases is against the company. This was objected to as inapplicable, and because it laid down the rule that ordinary care and diligence was the duty of the defendant to the plaintiff. We do not think it was error for the court to have given in charge this section of the Code. It laid down the rule as to where the burden of proof is to show negligence when the fact of injury had been established by the operation of the locomotives or cars of the railroad company. This court, in the case of Railroad Co. v. Abbott, 74 Ga. 851, ruled that the giving of this section in charge was proper on the trial of a case brought to recover damages for personal injuries occasioned by the negligence of the railroad company in the operation of one of its engines, and while the person injured, having alighted from the train on which he was a passenger, was making his way to the baggage car after his trunk. When reference is made to the full charge, which is a part of the record, it cannot justly be contended that charging this section had the effect of instructing the jury as to the care and diligence the carrier must exercise towards a passenger, for, by reference to the charge, it is found that immediately after this section of the Code was read to the jury the court further instructed the jury as follows: "A carrier of passengers is bound also to extraordinary diligence on behalf

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of himself and his agents to protect all lives and persons of its passengers, but he is not liable for injuries to persons after having used such diligence." And further on in his charge the court said: "As I have stated to you, the rule of diligence relatively to a passenger is that of extraordinary diligence. The extraordinary diligence due by a railroad company to passengers is that extreme care and caution which very prudent and thoughtful persons exercise under the circumstances." And again, in another part of his charge, he instructs the jury as follows: "The law puts upon them a duty. * * * The duty is that they shall carry their passengers safely, and deliver them safely at their destination; and the burden is that when a passenger shows that he was injured, either in being carried or in alighting from the train, the burden is upon the defendant company, and it is incumbent upon them, in order to relieve themselves from liability, to show that they exercised extraordinary diligence relatively to that passenger in his carrying and seeing that he safely alighted from the train."

3. A further ground of the motion for new trial alleges that the court erred in charging the jury that if the plaintiff alighted from a moving train obviously dangerous for him to alight from on account of the rapid speed at which the train was running, and he alighted with or without the direction of the conductor, if the circumstances of the rapid motion of the train made it likely, or seemed likely to him, as an ordinarily prudent man, that it would be dangerous to do so, he could not recover. The correctness of the principle embodied in this charge is found in section 3830 of our Civil Code, which declares that if the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. This court has repeatedly ruled that the principle charged is a correct one. See *Blodgett v. Bartlett*, 50 Ga. 353; *Covington v. Railroad Co.*, 81 Ga. 273, 6 S. E. 593; *Barnett v. Railway Co.*, 87 Ga. 766, 13 S. E. 904; and *Railroad Co. v. Dickerson*, 89 Ga. 455,

Same—Same—
Same—Contribu-
tory Negligence.

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15 S. E. 534. The charge is sustained, where it was alleged that directions were expressly given by the conductor for the passenger to jump from the train, by the case of *Railway Co. v. Hughes*, 92 Ga. 388, 17 S. E. 949; and it must be held that the charge was legal and correct. But it was complained that it was inapplicable, because there was no evidence on which to base such charge. We think differently; at least, under one of the theories of the defendant, based on the evidence introduced by it, such inferences might and could be properly drawn by the jury, if they chose to disbelieve the evidence of the plaintiff. Nor do we think such charge was calculated to cause the jury to believe that a direction given by the conductor to get off was immaterial. The charge strictly confined the act of the plaintiff to have been done under circumstances, from the rapid motion of the train, that would make an ordinarily prudent man believe it to be dangerous.

4. The charges complained of in the other grounds of the motion for new trial to which we have not before referred are

~~Same-Same-~~
~~Same-Same.~~ based on the error of the court in charging, in effect, that, as to what constituted negligence,

the jury must regard all the facts and circumstances of the case, and, among them, the question as to whether or not the plaintiff was familiar with the point upon the road at which he sought to alight, and his familiarity with the right of way at that point; and whether the injury was the result of defendant's negligence, or it resulted from the want of care and diligence on the part of the plaintiff. Because one is a passenger, and fully entitled to protection as such, affords no reason why he should, in alighting from a train, not only bring to bear his judgment as a reasonable man as to whether it would be safe for him to alight or not at a particular place, but, if he had a knowledge of the locality, and personally knew as to the conformation of the ground at that locality, or of any impediments or obstacles to his safely alighting there, it was his duty, with a due regard to his own safety, of which he is not relieved under

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any circumstances, to have acted upon such knowledge as he had; and if he had knowledge that any such defects or impediments existed, so as to make his alighting dangerous, it was negligence in him to attempt to alight at such place; and whether he had such knowledge or not, and, if he did, the extent of it, were questions for the jury; and the substance of the direction of the court was that they should consider what knowledge he had of the particular place at which he alighted. It was shown by the evidence that he lived near the place, and was to a greater or less extent familiar with it. This familiarity, if it existed, would enter largely in determining the question whether he was himself negligent in doing the act by which he was injured, and his knowledge or want of knowledge of the place was a material circumstance, to be considered by the jury. There was no error in overruling the motion for new trial. Judgment affirmed. All the justices concurring.

NOTES.

Carriers of Passengers—Degree of Care.—See *Smedley v. Hestonville, M. & F. Pass. Ry. Co.*, 9 Am. & Eng. R. Cas., N. S., 649, and extensive note 652 *et seq.*

Injuries to Passengers—Presumption of Negligence.—Is is a well-recognized doctrine that where an injury occurs to a passenger by reason of any occurrence which might be attributable to the negligence of the carrier, the occurrence of the accident itself constitutes a *prima facie* presumption of negligence. *Great Western R. R. Co. v. Braid*, 1 Moo. C. C. N. S. 101; *Carpue v. London, etc., R. Co.*, 5 Q. B. 749; *Railroad Co. v. Pollard*, 22 Wall. 341; *Bowen v. New York, etc., R. R. Co.*, 18 N. Y. 408; *Sawyer v. Hannibal & St. Jos. R. Co.*, 37 Mo. 240; *Walker v. Erie R. Co.*, 63 Barb. 260; *Meier v. Pennsylvania R. R. Co.*, 64 Pa. St. 225; *Toledo, etc., R. R. Co. v. Beggs*, 85 Ill. 80; *Pittsburgh, etc., R. Co. v. Thompson*, 56 Ill. 138; *Sullivan v. Philadelphia, etc., R. Co.*, 30 Pa. St. 234; *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534; *Galena, etc., R. Co. v. Yarwood*, 17 Ill. 509; *Romp v. Wilmington, etc., R. Co.*, 9 Rich. L. 84; *George v. St. L., I. M. & R. Co.*, 1 Am. & Eng. R. Cas. 294; *Iron R. R. Co. v. Mowbry*, 3 Am. & Eng. R. Cas. 361; *Pittsburgh, C. & St. L. R. Co. v. Williams*, 3 Am. & Eng. R. Cas. 457; *Cleveland, etc., R. R. Co. v. Newell*, 3 Am. & Eng. R. Cas. 433; *New York, etc., R. Co. v. Dougherty*, 6 Am. & Eng. R. Cas. 139; *Phila. and Reading R. Co.*

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v. Anderson, 6 Am. & Eng. R. Cas. 407; *Cleveland, etc., R. Co. v. Newell*, 8 Am. & Eng. R. Cas. 377. But see *Bird v. Great Northern R. Co.*, 28 L. I. 3; *Withers v. North Kent R. Co.*, 27 L. I. (Exch.) 417.

The rule applies equally whether the injury be occasioned by a defect in machinery or track, or by the negligence of servants. *Ohio & Miss. Packet Co. v. McCool*, 8 Am. & Eng. R. Cas. 390.

Exceptions.—The principle does not apply in the following cases :

(1) Where the injury is produced by some cause entirely outside the duty of the carrier to the passenger. *Curtis v. Rochester & Syracuse R. R. Co.*, 18 N. Y. 534; *Kansas Pacific R. Co. v. Miller*, 2 Col. 442; *Federal St. & P. V. R. Co. v. Gibson*, 11 Am. & Eng. R. Cas. 142.

(2) Where the injury is produced by some voluntary act on the part of the person injured, which, though not contributory negligence, is the sole *causa causans*. *Railroad Co. v. Mitchell*, 11 Heisk. 400; *Metropolitan R. R. Co. v. Jackson*, L. R. 3 App. Cas. 193.

(3) Where the injury is produced by an alleged defect in the equipment of the company perfectly patent to the person injured. *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312; *D. L. & W. R. R. Co. v. Napheys*, 1 Am. & Eng. R. Cas. 52.

Injury While Alighting from Car.—Where a passenger is injured in stepping from the platform of a car, and where nothing is done out of the usual course of business, negligence cannot be presumed on the part of the company. *Mitchell v. Chicago & G. T. R. Co.*, 51 Mich. 236, 18 Am. & Eng. R. Cas. 176; *Chicago, etc., R. Co. v. Trotter*, 60 Miss. 442; *Delaware, L. & W. R. Co. v. Napheys* (Pa.), 1 Am. & Eng. R. Cas. 52. Thus in *Railroad Co. v. Mitchell*, 11 Heisk. (Tenn.), 400, plaintiff's decedent in getting on the cars fell from the platform and was crushed under the wheels; it was held that no presumption of negligence arose. And in *Mitchell v. Chicago & G. T. R. Co.*, 51 Mich. 236, 12 Am. & Eng. R. Cas. 163, the plaintiff was injured by a sudden start of the train while she was alighting. The court held that in this case, as in all other cases of injury on railroads, there is no presumption of negligence on the part of the railroad. Negligence must be shown in all such cases, and it must appear to be the efficient cause of the injury.

But in *President, etc., of Balt. & Y. T. R. Co. v. Leonhardt*, 67 Md. 70, 27 Am. & Eng. R. Cas. 194, plaintiff was a passenger upon a double-decker street car. While descending he was injured by striking his elbow against a portion of a bridge which the car was crossing at the time. *Held*, that the burden of disproving negligence was on the defendant.

Leaving Moving Train on Invitation of Conductor.—See *note*, 12 Am. & Eng. R. Cas., N. S., 164 *et seq.*

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ATLANTIC CITY R. CO.

v.

GOODIN.

(*Court of Errors and Appeals of New Jersey, Jan. 20, 1899.*)

Injury to Passenger Alighting on Track at Station—Failure to Look and Listen for Trains.*—A duty to look and listen for trains, before stepping upon a railroad track lying between the station and a train discharging and receiving passengers at a regular stopping place, is not necessarily chargeable, as a matter of law, upon a passenger alighting from such train and proceeding at once towards the station.

Same—Same—Question for Jury.—Under the particular circumstances of this case, the question of negligence in such a passenger was properly submitted to the jury.

Validity of Marriage.—In this state, a valid marriage can be contracted *per verba de presenti*, without a ceremony and without a witness. *Quare*, as to nonresidents, since the act of 1897 (P. L. p. 378).

MCGILL, CH., and LIPPINCOTT and VAN SYCKEL, JJ., dissenting.
(Syllabus by the Court.)

ERROR by defendant to supreme court. *Affirmed.*

J. Willard Morgan and C. V. D. Joline, for plaintiff in error.

George J. Bergen, for defendant in error.

COLLINS, J. The writ of error in this cause removes a judgment for damages, recovered on verdict, under the death act. The chief complaint is that the trial judge refused to decide, as matter of law, that the decedent was guilty of negligence contributing to his death, but submitted the question of such negligence to the jury, as one of fact. The defendant operates a double-track railroad between Camden and Atlantic City. At Lawnside, one of its regular stopping places for accommodation trains, the station adjoins the west-bound track. Outside the east-bound

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*See *Beecher v. Long Island R. Co.* (N. Y.), 12 Am. & Eng. R. Cas., N. S., 295, and *note*, p. 302 *et seq.*

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track there is an uncovered platform, level with the track, where the conductor and trainmen stand to assist passengers; but, up to the time of the occurrence in controversy, passengers on east-bound trains had been permitted, without objection, to alight, if they wished, on the side of the train towards the station, and it was customary for those living on that side of the town, or those who wished to go to the station, to alight upon that side. Each rail of each track was planked, on both sides, the whole length of the platform, and the intervening spaces were filled in with cinders to the level of the tops of the rails. There was no special place of crossing provided. The company had published to its employees the following rule: "Any train approaching a station, when a passenger train is receiving or discharging passengers, must be stopped before reaching the station, and must not proceed until the passenger train moves away, or a signal is given to go on, except when safeguards are provided." There were no safeguards at Lawnside, and no gates on the car platforms. On July 21, 1896, John H. Goodin was a passenger on an east-bound accommodation train, scheduled to stop at Lawnside, where he lived. It did stop there. The car in which Goodin rode was carried beyond the platform, and, on that side, stood opposite a ditch and embankment beyond. Goodin alighted on the side towards the station, and was struck and instantly killed by a west-bound express train. There was nothing to prevent his seeing the train, had he looked before stepping on the track. It is contended that he was indisputably negligent.

There are adjudged cases that hold that where a railroad company provides a convenient place at which to alight from a train, and invites egress only there, a passenger takes the risk of alighting elsewhere. Those cases are pressed upon our consideration. Whether sound or not, they do not touch the point of the present inquiry, *viz.*: What is the duty of passengers where, after they have alighted, there is necessity to cross a track in order to reach the com-

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pany's station? We are asked to apply the same rule of duty to look and listen that is rigidly enforced upon the traveler on a highway. There is a plain difference between the case of such a traveler, about to cross a railroad, and the case of a passenger entitled to safe-conduct to or from the company's station. In this state, and in most other jurisdictions, this difference is recognized by the courts. VICE CHANCELLOR VAN FLEET, in *Klein v. Jewett*, 26 N. J. Eq. 474, 479, points out that the rule of duty at a public crossing has no application to a case where, by the arrangement of the company, it is made necessary for passengers to cross the track in order to reach the station or the cars. He says: "They [the railroad company] are bound to provide a way by which passengers may pass in safety. If the way provided crosses a track, no train should be permitted to pass over it, at the point where passengers are required to cross it, while a train is receiving or discharging passengers." On affirmance by this court (*Jewett v. Klein*, 27 N. J. Eq. 550), MR. JUSTICE DALRIMPLE said that a passenger, crossing a track which intervened between a station and a train standing at the station to receive passengers, was not bound to look to see whether another train was approaching. That decision would seem to be controlling in this case. A distinction is urged, because it related to a crossing from station to train, and not from train to station. This is a distinction without a difference. It is the passenger's right to go to the company's station, and a safe way for the purpose must be provided. In the later case in this court of *Railroad Co. v. Trautwein*, 52 N. J. Law, 169, 175, 19 Atl. 178, 180, MR. JUSTICE DEPUE well states the true rule thus: "The duty of a railroad company as a carrier of passengers does not end when the passenger is safely carried to the place of his destination. The company must also provide safe means for access to and from its station for the use of passengers, and passengers have a right to assume that the means of access are reasonably safe." The great current of authority elsewhere is to the effect that failure to look for trains when

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crossing a track, in passing from train to station, is not necessarily negligent. The question is always one for the jury. The New York cases are most numerous, many of them being in the court of last resort. A full citation will be found in *Van Ostran v. Railroad Co.*, 35 Hun, 590. The following decisions in other jurisdictions are clear and explicit on the subject: *Railroad Co. v. Johnson*, 59 Ark. 122, 26 S. W. 593; *Railroad Co. v. Hodgson*, 18 Colo. 117, 31 Pac. 954; *Railroad Co. v. Anderson*, 72 Md. 519, 20 Atl. 2; *Boss v. Railroad Co.*, 15 R. I. 149, 1 Atl. 9; *Railroad Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281; *Robostelli v. Railroad Co.*, 33 Fed. 796. In the case last cited, the doctrine was even applied where the crossing was not to a station building, but to a mere gate of exit, customarily used to reach the town; the stopping place being at a junction, with a single platform, on the opposite side. Some of the earlier Pennsylvania decisions were not very discriminating, and may seem to uphold the defendant's contention; but the later cases are in substantial accord with the general trend of judicial opinion. *Railroad Co. v. White*, 88 Pa. St. 327; *Flanagan v. Railroad Co.*, 181 Pa. St. 237, 37 Atl. 341. The only decision to which we have been referred, directly supporting the proposition that it is necessarily negligent for a passenger to cross from train to station without looking for a possible train on an intervening track, is *Connolly v. Railroad Co.*, 158 Mass. 8, 32 N. E. 937. That decision treats the question inadequately, without noticing the right of passengers to assume that their safety will not be imperiled by the carrier. The precedents cited are all highway cases. Massachusetts seems to stand alone on this subject.

That, in the case in hand, the passengers were invited to alight only upon a platform on the side away from the tracks, is not a controlling circumstance, but simply a fact for the jury. Such was the fact in all the cases cited. The passengers were not forbidden to alight on the other side, but, on the contrary, had always been permitted to do so. Wherever

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they should alight, they would have to cross the tracks to reach the station, where they had a right to go, and there could be no appreciable difference whether they should alight on the platform, and then walk around the train, and cross, or wait until the train should move on before crossing, or, as Goodin did, alight on the side towards the station, and cross at once. In *Railroad Co. v. Lowell*, *ubi supra*, there was a notice posted in the cars that passengers leaving a car by the front should pass to the right, and by the rear to the left (to a platform), in order to avoid trains on the other track. A passenger failed to observe this rule in alighting from a car, and, in attempting to cross an intervening track, to the opposite side of a double station, was struck and injured by a passing train. In delivering the opinion of the supreme court of the United States, MR. JUSTICE BROWN remarked: "Had the plaintiff complied with the notice, and alighted upon the platform, he would still have been obliged to cross the track, with the same possibility of being struck by a passing train that confronted him in this instance." And in *Robostelli v. Railroad Co.*, *ubi supra*, JUDGE WHEELER thus elaborates the same argument: "Passengers from West New Rochelle, stopping at this station, could not reach therefrom the train on the track which this train was on, without crossing the other track. They could get off onto the platform, and go past the end of the train, and cross, or get directly down on the other side, and cross. If they should get off on the platform, and wait for the train to leave, they would still have to cross, and there was no shelter or other convenience for waiting. The train could not pass on the other track without the liability of encountering these passengers, and, if it passed while the train was standing, and the passengers alighting, it would be quite likely to encounter them when attempting to cross by the rear of the other train." It is noteworthy that in the case in hand the company's rule forbade the passing of trains only until the train at the station should move on. Strictly construed, that rule made it more dangerous to wait for the

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train to move on than to cross at once. In the Massachusetts case it was conceded that the passenger had the right to alight on the side of the train towards the station, although there was provided on the other side a platform for that purpose. The ruling was that, wherever he alighted, he was bound to look before crossing the track. It is suggested that Goodin was not intending to go to the station, but to his home, on the same side of the tracks. That circumstance is immaterial. It existed in several of the cases above cited. Goodin had a right to rely on the assumption that no train would be allowed to come while passengers might properly be crossing the track.

One other matter deserves notice. Goodin was a daily traveler by that particular train, and presumably knew that the express was scheduled to pass Lawnside only three minutes before the accommodation was due there; and it is argued that he should have had in mind the fact that it was behind time, as the trains had not passed one another at their usual point of passing. That argument was useful for the jury, but not conclusive for the court. I know of no rule of duty for a traveler on a railroad train to keep alert to such conditions. Within a few weeks there had been a change in the timetable. Before the change, the arrival at Lawnside of the accommodation preceded the passing of the express by nine minutes. It is too much to say that, as a matter of law, Goodin should have remembered the change, and should have noticed that the express had not passed. Besides, he had the protection of the company's own rule not to permit a train to come while his train was receiving or discharging passengers. It was not proved that he knew of this rule; but several of the decisions above cited hold, and I think rightly, that knowledge of such a rule by passengers may be presumed. For this reason, also, the Massachusetts case *ubi supra* is unsatisfactory, for it declares a contrary presumption. A careful reading of the whole testimony convinces me that, under the circumstances of this

case, the question of contributory negligence was for the jury.

The only other errors assigned relate to the beneficial right of the plaintiff individually, in her suit as administratrix. Goodin left no child, or descendent of a child, and no parent. The plaintiff claimed, as widow, the entire benefit of the suit. P. L. 1897, p. 134. If she were not such, there could have been no recovery under the declaration as framed; and, while proof showed that the deceased left a sister, the case was not tried on any theory that recovery could be had in her interest. The measure of damages, of course, would have differed; and, as the judge, in his charge to the jury, put the matter of damages on the basis of a recovery by a widow, it is but fair to consider proof of that status as vital. The judge, on the motion to nonsuit or direct a verdict, rightly refused to decide that there was no such proof. There had been a ceremonious marriage between Goodin and the plaintiff many years before; but it was conceded that, soon afterwards, the plaintiff had learned that at the time of the marriage Goodin had a wife, from whom he was separated. Cohabitation was nevertheless continued, and the parties were reputed to be husband and wife. About 1892 the real wife died. Reliance is placed by the defendant upon the doctrine, declared in chancery and approved in this court, that where one of two persons, knowing of an existing bar to his or her marriage, perpetrates a fraud upon the other, by going through a marriage ceremony, such marriage is void, and that, although such bar be subsequently removed, cohabitation and reputation thereafter as husband and wife will not justify a presumption of marriage. *Voorhees v. Voorhees' Ex'rs*, 46 N. J. Eq. 411, 19 Atl. 172; *Collins v. Voorhees*, 47 N. J. Eq. 315, 555, 20 Atl. 676. If the plaintiff's case had rested on presumption, it would have failed; but such was not the fact. It rested upon the proof of an actual marriage after the first wife's death. Some proof of reputation of marriage was, indeed, admitted under objection, and its admission is now

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assigned for error. Under the Voorhees Case it was not evidential; but, as it was of no avail whatever to the plaintiff, it was immaterial, and harmless to the defendant. In the Voorhees Case, VICE CHANCELLOR VAN FLEET concedes that a contract of marriage made *per verba de presenti* amounts to an actual marriage, and is valid; and in the case of *Stevens v. Stevens* (N. J. Ch.) 38 Atl. 460, VICE CHANCELLOR PITNEY declares the law on the subject to the same effect, citing abundant authority. Dr. Bishop makes it quite plain that in this country, in the absence of prohibitive legislation, no more is required to constitute a legal marriage than that the man shall declare, in words of the present tense, that the woman is his wife, and that the woman shall assent. No witness need be present, and no particular ceremony is necessary. Bish. Mar., Div. & Sep. cc. 14, 15, especially sections 299, 313. The effect of a recent statute of this state is applicable only to nonresidents (P. L. 1897, p. 378), and need not now be considered.

The plaintiff, by her own testimony, made a *prima facie* case of such a marriage contract, made directly after the first wife's death. True, no witness was present; but there was not the slightest reason to doubt the plaintiff's story, and every reason to believe it. It had corroboration in the testimony of a niece of the plaintiff, to whom Goodin had said, in 1892 or 1893, after his first wife's death, "Your aunt now is my lawful wife." One of the exceptions assigned for error the refusal to strike out this admission of marriage, but it was clearly competent evidence. Bish. Mar., Div. & Sep. §§ 1057, 1058. The defendant called no witness, and in no way weakened the *prima facie* proof of such marriage. Of course, the jury might have disbelieved the testimony, and, doubtless, the judge, on request, would have submitted the fact of marriage to the jury, instead of assuming it as proved by undisputed testimony; but he was not asked to do so, and no exception was taken to the charge. The exception was to his refusal to charge that the "same proceeding" was necessary, "to make a common-law marriage, as was entered

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into before disability was removed." This seems to mean that a ceremonious marriage was requisite, and, of course, the judge properly refused the request. I find no error in this judgment.

MCGILL, CH., and LIPPINCOTT and VANSYCKEL, JJ., dissent.

BETTS

v.

LEHIGH VAL. R. CO.

(*Supreme Court of Pennsylvania, May 23, 1899.*)

Crossing Track to Board Train—Failure to Stop, Look and Listen—When Not Contributory Negligence as Matter of Law.*—Plaintiff was struck and injured by a train approaching on defendant's main track, while he was crossing such track at a station to board a train which he knew was standing on a side track to receive passengers, and when he knew that a rule of the company required that trains approaching a station, where a train was standing to receive passengers, should be stopped before reaching the station until the receiving train moved away. *Held*, that plaintiff's failure to stop, look, and listen before attempting to cross the main track could not be held contributory negligence as matter of law, such rule being, in effect, an invitation to plaintiff to cross the tracks.

APPEAL by defendant from Bradford county court of common pleas. *Affirmed.*

STERRETT, C. J. In 1894, the plaintiff, whose home was in the borough of Towanda, was regularly employed at Ulster, about eight miles north of the Lehigh Valley Railroad. In reaching his place of business he daily took a local train starting at 6.25 o'clock a. m. from Washington Street Station on the Bernice Branch in said borough, about a quarter of a mile from his home. He usually left home

*See *Beecher v. Long Island R. Co.* (N. Y.), 12 Am. & Eng. R. Cas., N. S., 295, and *note*, p. 302.

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about 6.15 o'clock a. m., and walked south down Main street to Washington street, and then turned east at Washington street, and went about 170 feet down this street to the station. Washington Street Station is the freight station of the Lehigh Valley Railroad Company at Towanda, and is located on the Bernice Branch, at the eastern end of Washington street, in close proximity to the Susquehanna river. There were no buildings beyond the station on Washington street, and no bridge across the river, so that the street crossing was practically limited in its use to a means of access to and from the station for teams and foot passengers. The sidewalk, which was of stone from Main street to the railroad tracks at Washington street crossing, was continued across the railroad by means of planks laid between the rails. This walk led to the platform steps at the north end of the station, where the ticket office was located. South of this walk, for the distance of about 100 feet, the tracks were filled in with earth and red shale, forming a level strip of ground where passengers were received and discharged by passing trains. Passengers on the main line necessarily used this earth platform, as it extended on both sides of this track. Plaintiff's train, popularly known as the "Geneva Train," was made up and started from this station. It occupied the side track next to and in front of the station for the reception of passengers, and the engine stood facing or upon the Washington street crossing. In order to go aboard this train, passengers were required to enter from the earth platform, or to pass around in front of the engine, ascend the platform steps, and walk south along the platform until the cars could be conveniently entered. The following rule, given in evidence, was shown to be in force at the time of the accident: "Any train approaching a station where a passenger train is receiving or discharging passengers must be stopped before reaching the station, and must not proceed until the passenger train moves away, or a signal has been given to come on, except where proper safeguards are provided between the tracks." It is admitted that there were

no safeguards in this case. The morning before the accident, the Williamsport & North Branch Railroad Company commenced running a train to Towanda station, about a mile and a half north of the Washington Street Station and the junction of the Bernice Branch with the main line, to Williamsport, leaving Towanda at 6.15 o'clock a. m., and scheduled to arrive at Washington street at 6.20 a. m., where it was to meet and pass the Geneva train, and leaving there at 6.30 a. m. On the morning of the accident it was several minutes late. It was at this point, and from the time of starting, in charge of employees of the Lehigh Valley Railroad Company. According to plaintiff's testimony, he came down Washington street, on the morning of the accident, to take his train, as usual. His attention was attracted to it by the ringing of the bell. He passed a two-seated top carriage or hack standing on the edge of the street and sidewalk, near the railroad track, and between him and the street to the north, and crossed over the first rail of the main track, when he was struck and injured by the train coming rapidly down on the main track from the north. He also testified that, knowing the rule of the company above quoted, and seeing his train still standing at the station, he did not stop, look, or listen for an approaching train; that a car was standing on a siding just south of the southern sidewalk of Washington street. This siding crossed Washington street to a coal shed, which extended for some distance along the main track, and partially obstructed the view to the north. His witnesses testified positively that plaintiff's train was not in motion at the time of the accident, and defendant's witnesses testified just as positively that it was. The learned trial judge refused defendant company's requests for binding instructions, and submitted the case to the jury in a full, fair, and adequate charge, in which the propositions of law involved were amply discussed. The care with which the case was submitted is shown in the following brief summary of the questions submitted to the jury in his charge: "You are to apply the principles which I have laid down to you as

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governing the case to the facts as you shall find them from the evidence. Determine, first, whether the company was negligent in running the train, called the 'Williamsport Train,' over the track at the time they did. If they obeyed the rule, as they claim they did, then they would not be guilty of such negligence as would make them chargeable with this accident under the testimony of the plaintiff. Next, inquire whether the plaintiff was guilty of any contributory negligence. If, when he approached the track upon which this train was coming from the north, the train which he intended to take was standing there, it would excuse him from stopping to look and listen; but it would not excuse him from exercising the care which an ordinarily prudent man would exercise under like circumstances. It is for you to determine, as I said first, whether the train was standing still, and he was excused from stopping and looking and listening. If you should find he was, then, secondly, did he otherwise exercise the care in going across that track that an ordinarily prudent man would? If he did, and was struck by the train, then he would not be guilty of any negligence which would excuse the company from the negligence which they had committed in crossing that street while the Geneva train, as it is called, was standing upon the track at its station."

The real contention in the case is whether the failure to stop, look, and listen was contributory negligence to be declared by the court as matter of law. Our cases recognize an exception to the general rule. In the recent case of *Flanagan v. Railroad Co.*, 181 Pa. St. 242, 37 Atl. 342, our BROTHER FELL said: "It is true that the duty of a person about to cross a railroad track to stop, look, and listen for an approaching train is not always applicable to a passenger at a station going to and from his train. The obligation upon him may be totally different from that of a person at a public crossing. *Railroad Co. v. White*, 88 Pa. St. 327; *Kohler v. Railroad Co.*, 135 Pa. 346, 19 Atl. 1049. If the way provided is across a track, he may rely upon the performance by

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the company of its duty to keep its track clear while passengers are in the act of passing between the train and the station. But this is when a way is provided, and the passenger is impliedly invited to take it."

That case was ruled against the passenger on the ground that "he was not invited to get off where he did, and the invitation was to alight on the other side, and in disregarding it he violated a reasonable rule, which it was his duty to observe." The same considerations controlled the decision in *Morgan v. Railroad Co.* (Pa. Sup.) 16 Atl. 353, under somewhat different facts. *Railroad Co. v. White*, *supra*, is more nearly like the case at bar. There the train came to a stop at a point opposite to a station, and the order of the company was very similar to the order here. It was there said: "This rule [to stop, look, and listen] is not always applicable to passengers leaving a train and crossing the track to reach the depot at the point of destination. There are duties which spring from the relations existing between the carrier and its passengers. It is the duty of the company to provide for the safe receiving and discharging of passengers. It is bound to exercise the strictest vigilance, not only in carrying them to their destination, but also in setting them down safely, if human care and foresight can do so. *Railroad Co. v. Aspell*, 23 Pa. St. 147. Ordinary prudence and due regard for the safety of passengers alike require that special care should be exercised at public crossings and depots by passing trains." It was further said, in discussing the plaintiff's case: "He had a right to rely on the observance of the company's rule forbidding another train while his train remained there." In *Warner v. Railroad Co.*, 168 U. S. 339, 18 Sup. Ct. 68, the facts and the rule of the company closely resembled this case, and also *Railroad Co. v. White*, *supra*. In the former the principles enunciated in the latter were adopted on the authority of that and similar cases from other states. Indeed, the doctrine of these cases may be considered as firmly established by a uniform line of decisions.

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In the case under consideration the rule adopted by the defendant company was notice to the public that the tracks on Washington street would be kept clear while the train was at the station receiving or discharging passengers. As was said by the learned trial judge in his charge: "Whether that is a public street or not, they had used the ground there for the purposes of a platform, not only where the platform was, adjoining the station, but also the ground east of the main track of defendant company. If it had been their custom to so use that ground, then, as far as the purpose of this suit is concerned, or as far as the people of that community are concerned, who had knowledge of that custom, they had made the street their platform for the purpose of receiving and discharging passengers." The jury has found that plaintiff knew of the rule prohibiting other trains from passing, and that he relied upon it, as he had a right to do. The object of stopping, looking, and listening was to avoid the dangers incident to a railroad. But the rule of the company gave notice that, as long as the train remained at the station, the tracks would be free from passing trains. This was equivalent to saying to approaching passengers, "You need not stop, look, and listen, as there will be nothing for you to see." It was, in effect, an invitation to passengers to cross the tracks. Under such circumstances, the mere failure to stop, look, and listen, without more, cannot be pronounced contributory negligence by the court.

It will be observed that the learned trial judge did not undertake to pronounce on the question of contributory negligence, otherwise than as to the rule, "Stop, look, and listen." He was careful to say that the rule of the company did not relieve the plaintiff from the exercise of ordinary care under the circumstances. It is not pretended that if he saw the approaching train, and deliberately went in front of it, he could recover. But, in view of all the facts and the evidence as to location of the trains, the obstructions on the sidings and the street, and the very material question as to whether plaintiff's train was standing still or in motion,—

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as to which the evidence was conflicting,—the case was necessarily for the jury. It was submitted with instructions in which the rights of both parties were carefully guarded. We find no substantial error in the record. Neither of the specifications of error is sustained. Judgment affirmed.

GRAVEN

v.

MACLEOD *et al.*

(*Circuit Court of Appeals, Sixth Circuit, March 27, 1899.*)

Implied Invitation to Passenger to Cross Tracks in Leaving Station—Due Care.*—Where the circumstances are such as to constitute an implied invitation to a passenger to depart from a station by crossing a track, he, while not absolutely free from the duty of exercising care and caution in avoiding danger, would be justified in assuming that, in holding out such invitation, the railroad company had not so arranged its business as to expose him to the hazard of life and limb unless he exercised the very highest degree of care and caution.

Same—Same—Failure to Look and Listen—Contributory Negligence—Question for Jury.—Where a passenger, in leaving his train, is injured by an approaching train, while crossing a track upon the implied invitation of the company, the mere fact that he attempted to cross the track without looking or listening would not necessarily be contributory negligence, but it would be for the jury to determine whether, under all the facts, such conduct was due care.

ERROR by plaintiff to the Circuit Court of the United States for the District of Kentucky. *Reversed and remanded.*

This is an action for the negligent killing of Alpha Graven, the husband and intestate of Minnie Graven, the plaintiff in error. The deceased was a passenger upon the line of electric railway operated by defendants as receivers, extending from Louisville; Ky., west to the neighboring city of New Albany, on the Indiana side

Case Stated.

*See *Betts v. Lehigh Val. R. Co. (Pa.)*, *ante* and *foot-note*.

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of the Ohio river. This line of railway consists of two parallel tracks, one of which is used exclusively by trains east bound, and the other by trains running in the opposite direction. The deceased lived in the western part of the city of Louisville, and was accustomed to travel between the city and his residence upon defendant's railway; taking and leaving the cars at its Twenty-Sixth street station, near which he lived. That station consisted of two platforms, one on each side of the right of way. Each was 118 feet in length, and each began at a point east of Twenty-Sixth street, and extended to the eastern line of that street. The platform on the south side of the railway was intended for the convenience of passengers taking or leaving trains east bound, while the opposite platform was along the side of the track used by west-bound trains, and was intended for the use of passengers taking or leaving trains bound west. On the latter was a small box house, used for the sale of railway tickets during certain hours of the day. The space between the two platforms was occupied by two parallel tracks, the space between the tracks being about eight feet. The evidence tended to show that the space between the rails was filled in smoothly with cinders, but the evidence was conflicting as to the condition of the space between the two tracks. On the afternoon of May 10, 1894, Graven took a train at Seventh street, Louisville, purposing to return to his residence. This train was due to arrive at Twenty-Sixth street at 5.58 p. m. The sun was not down, but a storm of wind and rain darkened the afternoon. This train, like all others operated on the road, consisted of a motor car and a trailer. Graven took his place in the motor car. As the train was slowing up for Twenty-Sixth street, he came out of his car, and stood under its rear hood, and, before it had come to a stop, jumped off, away from the platform, and undertook to cross the east-bound track diagonally, in the direction of Twenty-Sixth street, on which he lived. Just as he was about to step on that track, he was

struck and knocked down by the corner of a passing east-bound train, and sustained injuries resulting in death.

In respect to the negligence of the railway company, there was evidence tending to show: (1) That there was a rule of the company which provided that "all trains and engines on either track must approach Twelfth, Eighteenth, Twenty-Sixth and Twenty-Ninth streets under full control, and keep a careful lookout for passengers crossing to and from Kentucky and Indiana trains, and must not under any circumstances pass these stations while Kentucky and Indiana trains are receiving and discharging passengers." (2) There was evidence tending to show that the train from which Graven debarked was several minutes behind time, and that the schedule passing point for that train to pass the east-bound train was between Twenty-Ninth and Thirty-First streets; but, being behind time, the east-bound train was due to pass at any moment. There was also evidence that under the schedules a train bound east passed Twenty-Sixth street every 15 minutes. (3) There was evidence tending to show that the train which collided with deceased did not approach this station under "full control," but was approaching at a speed estimated as high as 15 miles per hour, and that no effort was made to check or stop until Graven's danger was observed. There was conflicting evidence as to whether any warning was given of its approach to this station. (4) There was evidence tending to show that the rule requiring trains not to pass the stations named while other trains were receiving or discharging passengers was habitually disregarded; the customary practice being to pass without stopping, unless there were passengers to put off or take on. (5) There was evidence tending to show that Graven was observed as soon as he stepped off the standing train, and every effort made to stop the train which was possible, but without avail. (6) There was evidence that when electric trains were first put on this railway the cars were provided with gates, which the trainmen were required to keep so closed that passengers could not take or leave the cars except by way

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of the platforms provided for that purpose. But the evidence also showed that these gates had been removed some time before this accident. (7) The evidence tended to show that no warning or other notice had ever been posted in the cars, or about the stations, forbidding passengers from alighting away from the platforms, or requiring them to use the platforms in getting on or off of trains. (8) There was conflicting evidence as to whether the employees had instructions to warn or forbid passengers from alighting away from the platforms, and evidence tending to show that, if employees had any duty in this respect, imposed by any rule of the company or of the receivers, the rule was generally disregarded, and passengers suffered, without objection, to leave the cars on or away from the platform, as suited their convenience. (9) Graven lived south of the station. His train came in on the northern track. There was evidence tending to show that he customarily left the train on the south side (that is, the side away from the platform provided for the use of west-bound trains), and crossed the east-bound track between the platforms to Twenty-Sixth street, and evidence tending to show that passengers living south of the railway customarily left the train away from the platform, and crossed the east-bound track diagonally to Twenty-Sixth street, as Graven undertook to do on this occasion.

Respecting the defense of contributory negligence, there was evidence as follows: (1) That, before stepping off the car, Graven pulled his coat collar up around his neck, and pulled a soft-brimmed hat down over his face, for the purpose of shielding his eyes and face from the wind and rain which was coming from the west; that being the direction in which his route took him. There was evidence tending to show that as he stepped out into the storm he bent or bowed his head, as if to shield his face. The evidence also tended to show that while standing under the hood of the car his back was to the west, but as he stepped down onto the track he was facing west, the direction from which the colliding train came. (2) The evidence conclusively established that the

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space between the train from which he debarked and the east-bound track was ample to protect him from collision, and that the distance from the spot on which he landed, when he stepped from his car, to Twenty-Sixth street, on which he lived, was from 30 to 50 feet, and that he could have safely walked between the tracks to Twenty-Sixth street, and then crossed the east-bound track at a public street crossing. By crossing diagonally to Twenty-Sixth street he saved about one-third of the distance. (3) The undisputed evidence established that when Graven started diagonally, in a southwest direction, towards Twenty-Sixth street, the east-bound train was approaching from the west, and nearly in front of him, and was not more than from 20 to 40 feet away. He had taken not more than three or four steps before he was struck by the front corner of the motor car. (4) The evidence was that this accident occurred at 6 p. m., May 10, 1894, that the sun was not down, but that the storm of wind and rain rendered it difficult to see with distinctness any distance, especially in the direction from which the wind was coming. There was also some evidence tending to show that the deceased was slightly near-sighted.

At the close of all the evidence the learned trial judge instructed the jury to find for the defendants, upon the ground that, as matter of law, the deceased had been guilty of contributory negligence.

D. Moxley, for plaintiff in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

Upon a former trial of this case there was a judgment for the plaintiff in error, which, upon a writ of error, was reversed by this court for error in refusing to instruct the jury that, upon the undisputed facts, the deceased had, as matter of law, been guilty of contributory negligence. The facts upon which our judgment was based, and our reasons

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for the conclusion then reached, will fully appear by an examination of our opinion as reported in the case of *MacLeod v. Graven*, 73 Fed. 627; *Id.*, 47 U. S. App. 573, 24 C. C. A. 449, 79 Fed. 84. While the general facts in this and the former record are much the same, the case for the plaintiff in error has been somewhat strengthened in respect to the negligence of the railway company in the matter of both the existence and enforcement of any rule forbidding passengers to leave the cars away from the platforms provided for that purpose. Upon the former record we held that the undisputed evidence justified no other inference than that Graven, after alighting from the train, had, without either stopping or listening or looking, undertaken to cross a railway track upon which a train was rapidly approaching, which he could not but have seen, if he had looked or listened before going upon the track. We reached this conclusion irrespective of the question as to whether he had violated any rule of the company, in alighting away from the platform, and based our judgment upon his failure to observe that high degree of care required of one about to cross a railway track, as announced and applied in the cases of *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125; *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85; and *Blount's Adm'x v. Railway Co.*, 22 U. S. App. 129, 9 C. C. A. 526, 61 Fed. 375. We did not regard the case of *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281, as in any way conflicting with the ground upon which we rested our judgment, because in that case the alleged contributory negligence of Lowell consisted in his conduct in leaving the train away from the station platform, in supposed violation of a rule of the company known to him, and conspicuously posted in the cars. The question as to whether Lowell had been guilty of negligence in his manner of crossing the track cut no figure in the result; for MR. JUSTICE BROWN, in announcing the opinion of the court, said:

"In his manner of leaving the train there seems to have been no negligence. He took hold of the iron railing at the

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end of the platform on the right-hand side, stepped down with the left foot first, and faced towards the west, on the south-line track, saw or heard no train coming upon that track, and supposed that he was perfectly safe in crossing, as he knew no train was then due."

But since that opinion, and since the former reversal of this case, the supreme court, in the case of *Warner v. Railroad Co.*, 168 U. S. 339, 18 Sup. Ct. 68, has drawn a distinction between the duty owing to a passenger by a railway company and that due to a traveler crossing its tracks. Upon that subject the court said:

"The duty owing by a railroad company to a passenger actually or constructively in its care is of such a character that the rules of law regulating the conduct of a traveler upon the highway, when about to cross, and the trespasser who ventures upon the tracks of a railroad company, are not a proper criterion by which to determine whether or not a passenger who sustains injury in going upon the tracks of the railroad was guilty of contributory negligence. A railroad company owes to one standing towards it in the relation of a passenger a different and higher degree of care from that which is due to mere trespassers or strangers, and it is, conversely, equally true that the passenger, under given conditions, has a right to rely upon the exercise by the road of care; and the question of whether or not he is negligent, under all circumstances, must be determined on due consideration of the obligations of both the company and the passenger. As said by the court of appeals of New York in *Terry v. Jewett*, 78 N. Y. 338-344: 'There is a difference between the care and caution demanded in crossing a railroad track on a highway, and in crossing while at a depot of a railroad company to reach the cars. No absolute rule can be laid down to govern the passenger in the latter case under all circumstances. While a passenger has a right to pass from the depot to the train on which such passenger intends to travel, and the company should furnish reasonable and adequate protection against accident in the enjoyment of this

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privilege, the passenger is bound to exercise proper care, prudence, and caution in avoiding danger. The degree of care and caution must be governed in all cases by the extent of the peril to be encountered, and the circumstances attending the exposure.' "

A peremptory instruction to find for the defendant was given upon proof that the plaintiff, who was a passenger, and who was under the necessity of crossing a track in order to reach a train standing upon another, had crossed an intervening track, on which a train was approaching, which he could not have failed to see, if he had stopped and looked before going on the track. The supreme court held that there was a view of the testimony which constituted "an implied invitation to the passenger to follow the only course which he could have followed in order to take the train; that is, to cross the track to the waiting train." Where the

Implied Invitation to Passenger to Cross Tracks in Leaving Station—Due Care.

circumstances are such as to constitute an implied invitation to depart from a station by crossing a track, the passenger, while not absolutely free from the duty of exercising care and caution in avoiding danger, would be justified in assuming that, in holding out the invitation to leave its train by crossing an intervening track, the railroad company had not "so arranged its business as to expose him to the hazard of life and limb unless he exercised the very highest degree of care and caution." *Warner v. Railroad Co.*, 168 U. S. 339-347, 18 Sup. Ct. 68. While it is true that the case before us does not show, as in the Warner Case, that there was no other course left the deceased than to make his exit from this train away from the platform, and across the east-bound track, yet there was evidence tending to show that the way taken by him was not forbidden, and was the one customarily used by passengers living, as he did, on the side away from the platform. The circuit court was obliged to take that view of the evidence most favorable to the deceased, where the question was whether there was any evidence for the jury. There was, therefore, a view of the

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evidence which might, in the absence of other circumstances, have justified the deceased in assuming that an implied invitation was extended to him to leave the station in the way he did, if that was most convenient to him, and in relying upon the obligation thereby imposed upon the company of so operating its trains as that he should not be exposed to danger "unless he exercised the very highest degree of care and caution." This view of the law, as announced in the case of *Warner v. Railroad Co.*, *supra*, requires that the question of contributory negligence should be submitted to the jury, upon all the facts and circumstances of the case. If the deceased was not justified in assuming that the company extended to him an implied invitation to leave its trains as he did, and to cross its track between the platforms on his way from the station, he would not be justified in relying upon the company so operating its trains at this station as that he might cross this track at the time and place he did without the exercise of the highest degree of care and caution. On the other hand, if the circumstances were such as to justify the deceased in assuming that the company extended to him an implied invitation to leave its train away from its platform, and to make his way from the station upon or across its east-bound track, the company would come under an obligation to so regulate the running of its trains while passengers were being discharged from trains bound west, and standing at that station, as that those accepting such invitation would not be in danger of life or limb unless they exercised the highest degree of care and caution.

If, from the facts and circumstances known to the deceased, or which, as a passenger accustomed to the use of the trains of this company, he is presumed to have known, he was justified in assuming that he might rely upon the exercise by the company of that degree of care due to a passenger crossing a track upon the implied invitation of the company, he would be chargeable only with reasonable care in avoiding danger. In such case, the mere fact that a passenger

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crosses a track to take his train, or in leaving his train, without looking or listening, would not necessarily be contributory negligence, but would be a question for the jury to determine whether, under all the facts, such conduct was due care. The right to rely upon the care and caution of the company furnishes some reason for the failure to exercise that high degree of care which one is bound to exercise when his safety depends wholly upon his own watchfulness. *Wheelock v. Railroad Co.*, 105 Mass. 203; *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. Railroad Co.*, 84 N. Y. 246.

In view of the law as announced and applied in the case of *Warner v. Railroad Co.*, 168 U. S. 339, 18 Sup. Ct. 68, and of the obligation of this court to conform its decisions to the opinion of that court, our former opinion in this case must be regarded as overruled. Reverse and remand for a new trial.

AGULINO

v.

NEW YORK, N. H. & H. R. Co.

(*Supreme Court of Rhode Island, April 7, 1899.*)

Evidence of Similar Acts of Negligence.*—Where it is charged that defendant's station was not properly lighted at the time of the accident, evidence to show that it was not well lighted on other nights before and after the night of the accident is inadmissible.

Same.—In an action for negligence, evidence is not admissible to show facts and circumstances connected with other accidents or other occasions, which were merely *res inter alios*, and would therefore tend to raise collateral issues,—even for the purpose of showing that plaintiff might have been injured as alleged while in the exercise of due care.

Evidence—Harmless Error.—Where a witness had testified that she had seen a certain occurrence, it was not prejudicial, even if erroneous, to allow her to state that she had called her husband's attention to it, as it was taking place.

*See notes at end of case.

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Same—Same.—The mere fact that the court, in charging the jury, materially misstated the evidence on an unimportant matter, is not ground for a new trial, where attention was not called to the error at the time.

Alighting from Moving Train—Negligence—Proximate Cause—Question for Jury.*—While it may not be negligence *per se* to go out upon the platform of a moving railroad car, or to alight from a slowly moving train, it is competent for the jury to find in a given case that either of such acts would constitute such negligence on the part of the passenger as to bar a recovery, notwithstanding that the railroad company was also guilty of negligence in leaving the platform gate open, or otherwise negligently managing the train.

A. B. Crafts, for plaintiff.

David S. Baker and *John W. Sweeney*, for defendant.

TILLINGHAST, J. The plaintiff was seriously injured while alighting from a passenger train on the defendant's railroad at Westerly, in this state, on the evening of December 6, 1898, and this action was brought to recover damages for the alleged negligence of the defendant, whereby it is claimed the injury was occasioned. At the trial of the case in the common pleas division the jury found in favor of the defendant, and the case is now before us on the plaintiff's petition for a new trial on the ground of certain alleged erroneous rulings of the court during said trial.

Case Stated.

The first error alleged is the refusal of the court to allow George F. Wells, a witness called by the plaintiff, to answer the following question, *viz.*: "Whether or not the station at Westerly was well lighted evenings last fall, before and after this accident." We think the ruling was correct. It was immaterial whether the station was well lighted at the indefinite times stated in the question, before and after the happening of the accident. The allegation in the declaration is that it was not properly lighted at the time of the accident, and the evidence offered was too remote and indefinite to have any bearing upon that question. Moreover, the evidence fails to show that the

Evidence of Similar Acts of Negligence.

*See notes at end of case.

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condition of the station with regard to its being well lighted or otherwise had anything to do with the accident. The testimony of the plaintiff is that when Westerly was called she got up, and went to the door, and opened it, and went out upon the platform, when a sudden move of the train threw her off on the right side, which was the side opposite to the station; that it was "between dark and light" at the time; and that she did not look for or see the station at all. She also testified that the train was at a standstill, or that she thought it was, when she went out upon the platform, and attempted to alight; but the jury have found that the train was in motion at that time.

The second exception taken was to the refusal of the court to permit the witness George F. Wells to answer the following question, *viz.*: "Whether you have been on that train when, same. by the way the brakes were put on and taken

off, you were deceived, and went to the door, thinking the car was still." This was clearly inadmissible, both as being wholly indefinite as to time and also that it had relation to other occasions than the one in question. In support of the admissibility of the testimony offered, the plaintiff's counsel argues that he had a right, as bearing upon the question of the defendant's negligence, and also upon that of the contributory negligence of the plaintiff, "to show all the facts connected with and surrounding the accident," namely, that it was dark, that the station was poorly lighted, and that it had been poorly lighted both before and after the accident. His general proposition is, doubtless, correct. He had the right to show all the facts and circumstances surrounding and connected with the accident. But he had no right to show facts and circumstances connected with other accidents or other occasions, as they were merely *res inter alios*, and would therefore tend to raise collateral issues, to the inevitable prolongation of the trial and the probable confusion of the jury. *Robinson v. Railway Co.*, 7 Gray, 92; *Collins v. Inhabitants of Dorchester*, 6 Cush. 396; *Railway Co. v. Woodruff*, 4 Md. 243; *Anderson v.*

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Taft, 20 R. I. —, 39 Atl. 191; *Sullivan v. Salt Lake City*, 13 Utah, 122, 44 Pac. 1039. That which happened at another time and to another person cannot properly be said to be a fact connected with the happening of the accident in question. But the plaintiff's counsel further argues that whether or not a car is in motion is determined by the eye of a passenger, by looking at external objects, and, if these cannot be seen, motion cannot be determined by the eye; that it can only then be determined in the dark, or by a blind man, by the feeling,—the jar communicated to the body by the motion; that sometimes the brakes are put on too soon, and when it is discovered that the train will stop short of the station they are taken off, and the result is a smooth glide of the car that is imperceptible by the feeling. He therefore claims that, in view of the allegation in the second count that the plaintiff supposed the train had stopped, he should be permitted to show that, even though the train was in fact in motion when the plaintiff went out upon the platform and attempted to alight, other passengers at other times had been deceived in the same way, and hence that the evidence offered tended to prove that the plaintiff might, while in the exercise of due care, yet believe the train to have stopped, when it had not. But, as already intimated, what other passengers had done or experienced at other times while traveling on the defendant's railroad had nothing to do with this case. The evidence must be confined to the time and place and circumstances of the particular injury, and the negligence then and there existing. *Parker v. Publishing Co.*, 69 Me. 173. In *Maguire v. Railroad Co.*, 115 Mass. 239, which was tort for an injury sustained by plaintiff while a passenger in one of defendant's horse cars by being thrown from it by the alleged carelessness of the driver, the court held that the admission by the court below of testimony that the driver had been seen on several previous occasions to stop the car suddenly was error, because such a fact could have no legitimate bearing upon the question as to the care or skill exercised at the time in controversy. To

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the same effect are *Aldrich v. Inhabitants of Pelham*, 1 Gray, 510; *Hinckley v. Inhabitants of Barnstable*, 109 Mass. 126; *Whitney v. Gross*, 140 Mass. 232, 5 N. E. 619; *Railway Co. v. Evansich*, 61 Tex. 3; and numerous other cases which might be cited. And if acts of the defendant on other occasions cannot be shown as tending to prove negligence at a given time, it would seem to be very clear that acts and experiences of third parties at other times cannot be shown as tending to prove that the plaintiff was free from negligence at a given time by acting in a given way.

The third exception is to the ruling of the court in permitting the witness Mary H. Card, called by defendant, to state whether she called the attention of her husband to the plaintiff as she was leaving the car. The

**Evidence—
Harmless Error.**

witness had testified that she was a passenger in the car with plaintiff; that while the train was moving quite fast the plaintiff got up, and went out of the car, and went off or down the steps at the right side, and that the reason witness took particular notice of her was the fact that the train was moving quite fast, and that "she got off so quick." Witness' husband had testified that he noticed that when the station was called plaintiff got right up and went to the door, and opened it, and went down the steps on the right side of the car, and that she seemed to be in a hurry to get out. It is to be observed that the witness was not asked for any conversation which took place with her husband, but simply as to the fact whether she called his attention to the plaintiff. So that it can hardly be said, we think, that plaintiff's contention that it was hearsay testimony is correct. The truth or falsity of the statement or suggestion made by witness to her husband was not the point in question, but simply the fact that it was made. 1 Greenl. Ev. (13th Ed.) § 123. But even conceding that it was hearsay, and that the court erred in admitting it, yet we fail to see that the plaintiff was prejudiced thereby, or that it is sufficient ground for a new trial.

The fourth ground relied on in the plaintiff's petition is

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untenable. The mere fact—if it be a fact—that the court, in charging the jury, materially misstated the evidence in an important matter, is not a ground for a new trial unless the attention of the court is called Same—Same.

to the error at the time, so that, if a misstatement has been made, the court may have an opportunity to correct it. And it is not contended that the attention of the court was called to this matter, or that an exception was taken to the charge in this particular. The plaintiff's neglect to have the error corrected at the time was a waiver of her right to subsequently make objection thereto. *Wheeler v. Schroeder*, 4 R. I. 383, 394. A party is not allowed to stand by and permit what he may deem objectionable instructions to be given, or incorrect statements of the testimony to be made, and await the verdict of the jury, before excepting to the one or calling attention to the other. *Sarle v. Arnold*, 7 R. I. 582; *Hamilton v. Hamilton*, 10 R. I. 538; *Meyers v. Briggs*, 11 R. I. 180; *McCusker v. Mitchell*, 20 R. I. 14, 36 Atl. 1123.

The fifth exception is to the refusal of the court to charge the jury "that, if the defendant was guilty of negligence in leaving the gate of the platform open, and in consequence the plaintiff was thrown off of the car, she is entitled to recover, even if she was thrown off by the ordinary jolting of the car, if she was not guilty of contributory negligence, as already explained." Plaintiff's counsel argues that, even if the plaintiff was guilty of negligence, the accident would not have happened but for the negligence of the defendant in leaving the gate of the platform open; citing *Prue v. Railway Co.*, 18 R. I. 360, 27 Atl. 450. We do not think the case at bar falls within the decision of that relied on by plaintiff. In that case there was evidence tending to show that the plaintiff, who was in the act of crossing the track with his team, might have escaped injury from the approaching train if the gate tender had not closed the gates at the crossing, thereby penning the plaintiff in after he got upon the track; and the court held that, notwithstanding the plaintiff's negligence in going upon the track while the electric bell was ringing, and

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without first stopping or looking to ascertain whether a train was approaching, yet if, after seeing the plaintiff's imminent peril, the defendant could, by the exercise of reasonable care, have avoided causing the injury, it would be liable, and hence that the case should have gone to the jury. The principle upon which that case proceeds is that it is only that negligence on the part of the plaintiff which bars his recovery which is the proximate cause of the injury; and that it is not a proximate, but only a remote cause of the injury, when the defendant, notwithstanding the plaintiff's negligence, by the exercise of ordinary care might have avoided the doing of the injury. In the case at bar the proximate cause of the injury was clearly not the act of the defendant in leaving the gate open on the right side of the platform, if it was left open, which is denied by the conductor, but it was the act of the plaintiff in attempting to alight while the car was in motion. So that, even conceding that the gate on the right side of the platform was open when plaintiff went out, and also that it was negligence on the part of defendant in opening it, or allowing it to remain open, while the train was in motion, yet, as this was not the proximate cause of the injury, the defendant cannot be held liable. And while it may not be, and probably is not, as contended by plaintiff's counsel, negligence *per se* to go out upon the platform, or to alight from a slowing, moving train (Elliot, R. R. § 1628, and cases cited in note 1, p. 2548; Doss v. Railroad Co., 21 Am. Rep. 378; Banking Co. v. Miles, 88 Ala. 256, 6 South. 696; Swigert v. Railway Co., 9 Am. & Eng. R. Cas. 322; Rathbone v. Railroad Co., 13 R. I. 709), yet it is certainly competent for the jury to find in a given case that either of said acts would constitute negligence on the part of the passenger, and hence be a bar to recovery, notwithstanding the fact that the railroad company was also guilty of negligence in leaving the gate open, or otherwise carelessly managing its train. As to the refusal of the court to charge as requested, we observe that, while

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we fail to see any objection to the request as framed, yet, as the jury have found that the injury to plaintiff was caused by her negligence in attempting to alight from the train while it was in motion, we fail to see that the refusal could have prejudiced her case, and hence it is not a ground for new trial. *Goodell v. Fairbrother*, 12 R. I. 233; *Coillier v. Jenks*, 19 R. I. 493, 34 Atl. 998. Petition for new trial denied, and case remitted to the common pleas division, with direction to enter judgment on the verdict.

NOTES.

Negligence—Evidence of Similar Disconnected Acts.—In an action for negligence, as a general rule, other similar disconnected acts of negligence by defendant are inadmissible in evidence. *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 279; *Gahagan v. Boston, etc., R. Co.*, 1 Allen (Mass.) 187, 79 Am. Dec. 724; *Baltimore Elevator Co. v. Neal*, 65 Md. 438; *Wentworth v. Smith*, 44 N. H. 419; *Louisville R. Co. v. Fox*, 11 Bush (Ky.) 493.

But such evidence is admissible where it appears that it was defendant's duty to have knowledge of them, and they would have put him on his guard against the danger of such accidents as the one experienced by plaintiff. *Cleveland R. Co. v. Wynant*, 114 Ind. 525, 35 Am. & Eng. R. Cas. 328; *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, *note*, 28 Am. & Eng. R. Cas. 341, *ante*; *Hoyt v. Jeffers*, 30 Mich. 181; *Hinds v. Barton*, 25 N. Y. 544; *Randall v. Northwestern Tel. Co.*, 54 Wis. 140. Thus, in an action against a railway company for an injury caused by the car running off the track, evidence is admissible to show that the same line of cars ran off the track on the same road, since such runnings off ought to have advised defendant of the bad condition of the track. *Mobile R. Co. v. Ashcraft*, 48 Ala. 15, Texas, etc., *R. Co. v. Suggs*, 62 Tex. 323, 21 Am. & Eng. R. Cas. 475. See also *Simson v. London, etc., Co.*, L. R., 8 C. P. 390.

Same—Standing on Platform—Question for Jury.—Chicago, etc., *R. Co. v. Fisher*, 141 Ill. 614; *Woods v. Southern Pac. Co.*, 9 Utah 146; *Gerstle v. Union Pac. R. Co.*, 23 Mo. App. 361; *Merwin v. Manhattan R. Co.*, 48 Hun (N. Y.) 608; *Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62.

See also *Zemp v. Wilmington, etc., R. Co.*, 9 Rich. L. (S. Car.) 84, 64 Am. Dec. 763.

WARD

v.

CHICAGO, M. & ST. P. R. CO.

(Supreme Court of Wisconsin, Feb. 21, 1899.)

Riding upon Platform—Contributory Negligence—Question for Jury.*—Where the car was so crowded that a reasonably prudent man would have concluded that he could not get inside without using unreasonable force, whether a passenger was guilty of contributory negligence in riding upon the platform is a question for the jury.

Same—Injury to Passenger—Proximate Cause—Sufficiency of Evidence—Instructions.—Where plaintiff claimed that he was injured, while riding from necessity upon the platform of defendant's car, by reason of a coupling having been negligently made, it was error to refuse to instruct, as requested, that the jury must find that such alleged negligence was not the proximate cause of his injury, unless they were satisfied to the contrary, to a reasonable certainty, from the preponderance of evidence.

Proximate Cause—Definition.†—In such action, it was error to instruct, as requested, that proximate cause means the "immediate and inducing cause" of an injury.

Excursion Trains—Due Care.‡—A passenger does not assume any additional risk in riding upon a crowded excursion train, nor is a less degree of care due by the company to a passenger on such a train than to a passenger on an ordinary train.

Special Verdicts.—The purpose of a special verdict is to obtain separate findings upon the material, controverted issues, but not to settle every question upon which witnesses differ in the course of the trial; and it is also its purpose to obtain such findings in answer to a few questions, rather than in answer to many, and the form of the questions must rest largely in the discretion of the trial court.

Same—Contributory Negligence.—In such action, while the trial court might properly have submitted to the jury the question whether plaintiff voluntarily stood upon the platform, or whether by ordinary effort and diligence he could have found room in the car, it cannot

*See notes at end of case.

†See *note*, 12 Am. & Eng. R. Cas., N. S., 168.

‡See *extensive note*, 9 Am. & Eng. R. Cas., N. S., 652 *et seq.*

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be held that it was error to cover such questions by the general question concerning contributory negligence.

Same—Submission of General Verdict in Connection.—In such action, while the court did not decide that it is error to submit a general verdict in connection with a special verdict, where there is no objection, and there is no general charge given, it held that such a course is error in a case where objection is duly taken to the submission of a general verdict in connection with the special verdict, and where the court gives full instructions on the general propositions of law involved, and thereby informs the jury of the effect of their answers to the special questions.

APPEAL by defendant from Rock county circuit court.
Reversed.

This was an action to recover for personal injuries suffered by the respondent while riding upon a passenger train of the appellant. The evidence showed that on the 10th day of June, 1896, the respondent, who lived at Orfordville, Rock county, in this state, bought a ticket entitling him to passage over the defendant's railway to Janesville, and return. The ticket was sold at excursion rates because upon that day there was a picnic of the association known as the "Modern Woodmen" at Janesville, and the defendant company advertised excursion rates therefor. Upon the day in question one train, comprising several cars, passed through Orfordville without stopping; but it was followed by another train, of four or five cars, which stopped, and the plaintiff got upon that train. The evidence shows that he got upon the last car of the train, and that it was somewhat crowded, both in the seats and in the aisle, but that he succeeded in getting in the inside of the car at first. After he got in, he claims that others came in, and that he gave up his place to ladies, and was forced to stand in the front doorway of the car. He further claims in his testimony that, when the train arrived at Hanover and stopped, some people came out of the car and forced him onto the platform, and that he could not return into the car; that while he was so standing upon the platform the conductor came along and took his ticket, and just after he had taken

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his ticket another passenger car was attached to the end of the train with such great force that it threw him from his feet, and a part of his foot was caught between the bumpers of the car on which he was standing and the car immediately ahead of it, whereby he lost several toes. The grounds of negligence claimed by the plaintiff were that the railroad furnished an insufficient number of cars, and also that the coupling was negligently and carelessly made. On the other hand, the defendant claimed contributory negligence on the part of the plaintiff in standing on the platform of the car, and denied any negligence on its part. At the close of the evidence the defendant demanded a special verdict, and submitted questions therefor; and the court, while granting the request, decided that a general verdict should be found, also, to which decision the defendant excepted. Thereupon the court submitted five questions to the jury as and for a special verdict, with some instructions adapted to each question, and then proceeded to give the jury a separate and independent charge, comprising more than eight printed pages of the record, and applicable only to a general verdict. The verdict rendered by the jury was as follows: "Were the employees of the defendant company guilty of any negligence in coupling on the car at Hanover? Ans. They were. (2) If you answer the first question in the affirmative, then was such negligence the proximate cause of the injury which the plaintiff received on the occasion in question? Ans. It was. (3) Was the plaintiff in the exercise of ordinary care at the time he received the injuries complained of? Ans. He was. (4) Was the plaintiff guilty of any negligence directly contributing to the injuries which he received? Ans. He was not. (5) What damages did the plaintiff sustain in consequence of the injuries which he received? Ans. Five hundred dollars (\$500). (6) We, the jury duly impaneled to try the issue in the above-entitled action, find for the plaintiff, and assess his damages at the sum of five hundred dollars (\$500)." Upon this verdict judgment was rendered for the plaintiff, and the defendant appeals.

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Burton Hanson and Jackson & Jackson, for appellant.

E. D. McGowan, for respondent.

WINSLOW, J. (after stating the facts). 1. It was argued in the present case that the evidence conclusively showed the plaintiff guilty of contributory negligence, because he was on the platform of the car when the accident occurred. It has been frequently held that a passenger who voluntarily and unnecessarily rides upon the platform of a railway car assumes the risks which necessarily attend that exposed position; but, on the other hand, it has also been held that a passenger is not, as matter of law, guilty of negligence in standing on the platform of cars, even while in motion, if there is no room inside; nor is such passenger required to totally disregard the courtesies of life, by violently pushing and crowding his way by main force through a crowd of people in order to reach the inside of the car. *Fetter, Carr. Pass. § 167.* Such a rule would make the question of negligence depend upon the brute strength of the passenger. If the car be so crowded that a reasonably prudent man would conclude that he could not get inside without unreasonably pushing and crowding his way by main force, and so would conclude to ride upon the platform, the question as to whether he is guilty of contributory negligence, or has assumed the extraordinary risks of that position, is one for the jury, under proper instructions. The evidence was sufficient in the present case to carry the question to the jury, under the above rule.

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Platform—Con-
tributory Neg-
ligence—Question
for Jury.

2. The second question of the special verdict was whether the negligence of the defendant's servants in coupling the car (if any such negligence had been proven) was the proximate cause of the plaintiff's injuries. In connection with this question the defendant asked an instruction to the effect that the jury must answer it "No," unless they were satisfied, to a reasonable certainty, from the greater weight of evidence, that it should be answered "Yes." This instruc-

Same-Injury
to Passenger—
Proximate
Cause—Suffi-
ciency of
Evidence—
Instructions.

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tion was refused; nor was its substance given in the general charge. The instruction was correct, and its refusal was error. *Pelitier v. Railway Co.*, 88 Wis. 521, 60 N. W. 250.

3. In connection with the same question the court charged the jury as follows: "The second question is: If you answer the first question in the affirmative, then was such negligence

Proximate
Cause—
Definition.

the proximate cause of the injury which the plaintiff received on the occasion in question?

The word 'proximate' means the direct cause, and the words 'direct cause' are equivalent to the words 'proximate cause.' And, if you answer the first question in the affirmative, then you are to say whether that negligence was the proximate cause of the injury which the plaintiff received on the occasion in question. If you find that was the proximate cause, you will say it was. If you find it was not the proximate cause, you will say it was not." Plaintiff's counsel thereupon addressed the court as follows: "I ask the court to charge the jury that the words 'proximate cause' have a settled legal definition, in connection with actions for negligence, and mean the immediate and inducing cause of the injury. Court: That is correct. 'Proximate cause' means the immediate or inducing cause of the injury. I used the word 'direct,' but that means the immediate and inducing cause." The defendant duly excepted to the definitions of "proximate cause" so given, and it is clear that, under the long line of decisions in this court on that subject, such definitions were erroneous. The subject has been so recently and fully discussed by MR. JUSTICE MARSHALL in *Deisenrieter v. Malting Co.*, 97 Wis. 279, 72 N. W. 735, that further discussion here is unnecessary.

4. The third and fourth questions asked the jury whether the plaintiff exercised ordinary care, or was guilty of contributory negligence. In connection with these questions

Excursion
Trains—Due
Care.

the defendant asked the following instruction,

which was refused: "A passenger taking a crowded excursion train takes it with the increased risk and diminution of comfort incident thereto, and

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you are to consider this proposition of law in determining your answers to the third and fourth questions." We have been referred to no case which holds that a passenger on an excursion train is not entitled, as matter of law, to expect just as much care to be exercised for his safety as a passenger upon a regular train, and we do not think such is the law. This instruction is capable of being so construed, and hence we think it was properly refused. Doubtless a passenger, when he rides upon a crowded train, assumes the inconveniences resulting from its crowded condition, but he cannot properly be said to assume any increased risk; nor can the company be held to any less degree of care from the mere fact that the train is crowded, or the fact that it is an excursion train and not a regular train.

5. Error is assigned because the court did not submit to the jury a large number of questions presented by the defendant as a part of the special verdict. As will be seen by reference to the special verdict, the questions submitted by the court were five in number, and covered the following points: (1) Was the coupling negligently made? (2) was it the proximate cause of the injury? (3) was the plaintiff exercising ordinary care? (4) was he guilty of contributory negligence? and (5) what damages did he suffer. The court told the jury in his general charge that the only ground of negligence claimed by the plaintiff was negligence in the coupling of the cars, thus eliminating the question of the negligent furnishing of an insufficient number of cars from the case. Reference to the pleadings and evidence shows that the five questions above set forth fully cover the material issues of fact in the case. The plaintiff's claim was negligence in the coupling of the cars, proximately causing his injury. The defendant's claim was that there was no negligence in the coupling, but that the plaintiff was negligent in standing on the platform, and thereby contributed to his own injury. All these questions are covered by the verdict, beyond doubt. It is true that the questions are quite general in their nature, and require careful instructions

Special Verdicts.

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to be given in connection with them, in order to insure intelligent answers; but, as said in *Lee v. Railway Co.* (Wis.) 77 N. W. 714, the form of the questions must rest largely in the discretion of the trial court, and, as in other cases of discretionary action, the ruling of the court below will not be reversed, save for abuse of such discretion. Now, while the trial court in the present case might with propriety have submitted to the jury the question whether the plaintiff voluntarily stood upon the platform, or whether by ordinary effort and diligence he could have found room in the car, we cannot say that it was error to cover these questions by the general question concerning contributory negligence. *Schumakher v. Heine-mann*, 99 Wis. 251, 74 N. W. 785; *Raymond v. Keseberg*, 98 Wis. 317, 73 N. W. 1010. The defendant submitted 20 questions covering very minutely the conduct of the various trainmen, and what they ought to have anticipated, and what the plaintiff ought to have anticipated, some of the questions being quite long and complicated. It would have been nearly or quite a cross-examination of the jury, and such is emphatically not the purpose of the special verdict. The purpose of the special verdict is to obtain separate findings upon the material, controverted issues, but not to settle every question upon which witnesses differ in the course of a trial; and it is also its purpose to obtain these findings in answer to a few questions, rather than in answer to many. The greater the number of questions, the greater opportunity for inconsistency in answers, resulting in mistrials and miscarriages of justice. While such results may gratify the defendant, they are not the results which the court and the law seek. We find no reversible error in the form of a special verdict, nor in the refusal to incorporate the questions submitted by the defendant in it.

6. A question remains to be considered which is of greater importance and difficulty than those previously discussed in this opinion. After the special verdict was requested and allowed, the court announced that a general verdict would

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be required, also, to which ruling of the court the defendant's counsel excepted. The court, then, after submitting the questions of the special verdict, with some special instructions as to each question, gave to the jury an independent charge, covering some eight pages of the printed case, and going over the legal questions arising in the case, in a form suitable only to a general verdict, and telling the jury under what circumstances the plaintiff could recover, and under what circumstances he could not recover; and to many of these propositions exception was taken. That this is the very thing which the special verdict is intended to prevent is evident from the law itself. The special verdict was expressly intended to submit to the jury for answer certain questions of fact, which they are to answer from the evidence, guided by instructions appropriate to the questions only, without regard to the legal effect of their answers upon the ultimate question of the rights of the parties. Thus, it was expected and intended to relieve the jury from all consideration as to whether their answers are consistent with a general recovery by either party, and thus to obtain a result as far as possible free from sympathy or prejudice. With the wisdom of the law we have nothing to do. Properly used, it secures to parties a valuable right, and it should be carried out by the courts in such manner as to effectuate its purpose, if possible. That the submission of general propositions of law, suitable only to the case of a general verdict, tends to defeat the purpose of the law, has been frequently held by this court. *Ryan v. Insurance Co.*, 77 Wis. 611, 46 N. W. 885; *Reed v. City of Madison*, 85 Wis. 679, 56 N. W. 182; *Coats v. Town of Stanton*, 90 Wis. 130, 62 N. W. 619; *Conway v. Mitchell*, 97 Wis. 290, 72 N. W. 752; *Kohler v. Railway Co.*, 99 Wis. 33. The question of the propriety of submitting a general verdict side by side with a special verdict has been quite frequently referred to, and it must be admitted that the previous expressions of the court are not in entire harmony. Thus, it was said in *Davis v. Town of Farmington*, 42 Wis. 425, very correctly, in sub-

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stance, that a party is entitled, as matter of right, to have a special verdict containing a specific finding on every material issue, and that a want of this cannot be cured by a general verdict. But it was also said in that case that, where a special verdict is returned, there may be a general verdict also; citing Rev. St. 1858, c. 132, § 14, and *Lemke v. Railway Co.*, 39 Wis. 449. This latter question does not seem to have been raised by any objection or exception in that case, nor does the proposition seem to be supported by the authorities cited. In the *Lemke Case* it was simply held that a special verdict inconsistent with the general verdict would control, no question being raised as to the propriety of submitting a general and special verdict together. The section of the statute cited (section 14, c. 132, Rev. St. 1858, now the last sentence of section 2860, Rev. St. 1898) provides that, "when a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter." It seems to us very plain that this provision refers, not to a special verdict, but to those special findings of fact which may or may not cover the whole case, and which the court may, of its own motion, submit to a jury, in connection with the general verdict. Rev. St. 1858, c. 132, § 11; Rev. St. 1898, § 2858. But while this proposition seems not to have been called for in the case, and not founded upon sound authority, still it is not to be denied that it has been repeated in various cases, in substantially this form: that, while a general verdict is unnecessary in connection with a special verdict, the mere fact of its submission is not error, as it harms neither party. If it is inconsistent with the special verdict, the special verdict prevails; if consistent, it is a mere harmless legal conclusion. Thus, in either case it is useless. *Ault v. Manufacturing Co.*, 54 Wis. 300, 11 N. W. 545; *Hoppe v. Railroad Co.*, 61 Wis. 357, 21 N. W. 227; *Cooper v. Insurance Co.*, 96 Wis. 362, 71 N. W. 606. The practical inconsistency of these decisions is manifest. It is held that instructions on general legal propositions are not proper, and may be error; but it is also held that the sub-

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mission of a general verdict in connection with the special verdict is not error. Certainly, if it is not error to submit a general verdict, it ought not to be error to give appropriate instructions upon it, and yet this very action has been held error. The present case is a striking instance of the effect of submitting a special and general verdict together. The special verdict is briefly disposed of by the charge of the court, with a few general propositions, while the general verdict is made the principal feature of the case, and completely dwarfs the special. While this course finds implied, if not direct, support in decisions of this court, it is certainly plain that the whole purpose and intent of the law are liable to be thwarted by it; and we have, after mature deliberation, determined that it ought not to be tolerated. We do not decide that it is error to submit a general verdict in connection with the special verdict, where there is no objection, and there is no general charge given, though such practice is not to be encouraged, and is not in harmony with the intent of the law; but we hold that such a course is error in a case where objection is duly taken to the submission of a general verdict in connection with the special, and where the court gives full instructions on the general propositions of law involved, thus plainly informing the jury of the effect of their answers to the special questions, and how to make such answers consistent with the general verdict, especially where exception is taken to such general instructions. So far as this rule is inconsistent with expressions contained in previous decisions of this court, they must be considered as overruled or modified in accordance herewith.

Same—Submission of General Verdict in Connection.

In connection with this subject, it may be proper to notice a class of cases in this court which seem to intimate that a defective special verdict may be helped out by a general verdict. Of this class is *Hutchinson v. Railway Co.*, 41 Wis. 541, where it is said that, "in the absence of a general verdict, the special findings should include all the material issues made by the pleadings." See, also, *Eilert v. Railway*

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Co., 48 Wis. 606, 4 N. W. 769. There is also another class of cases which hold or intimate that where a special verdict is demanded, and all the issues are not covered by the special questions, but no objection is made on that ground, and a general verdict is returned under correct instructions, the irregularity is waived; thus holding, in effect, that a general verdict may help out a defective special verdict. *Schultz v. Railway Co.*, 48 Wis. 375, 4 N. W. 399; *Sherman v. Lumber Co.*, 77 Wis. 14, 45 N. W. 1079; *Klatt v. Lumber Co.*, 92 Wis. 622, 66 N. W. 791. How far these cases can be harmonized with the statute and the cases which hold that a party demanding a special verdict has an absolute right to a special finding on each material question (*Davis v. Town of Farmington*, *supra*; *Dohmen Co. v. Insurance Co.*, 96 Wis. 38, 71 N. W. 69), or with the propositions determined in this case, seems a question of considerable difficulty. This question is not before us, and hence we cannot decide it; but we call attention to the seeming difficulty, in order that it may be avoided in future cases, as it may easily be by the exercise of care in covering all material issues by the questions of the special verdict.

We find no other questions that require discussion. Judgment reversed, and action remanded for a new trial.

NOTES.

Riding on Platform of Railroad Car—Where Act Is Unnecessary.—No recovery can be had by a passenger for injuries received through voluntarily and unnecessarily riding on the platform of a railroad car. *Beach*, Contrib. Neg., § 149; *Hickey v. Boston, etc., R. Co.*, 14 Allen (Mass.) 429; *Blitch v. Central R. Co.*, 76 Ga. 333; *Memphis & L. R. R. v. Salinger*, 46 Ark. 528; *Kentucky & I. B. Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. Rep. 338; *Fisher v. West Virginia & P. R. Co. (W. Va.)*, 4 Am. & Eng. R. Cas., N. S., 86. And likewise where he stands, without necessity, on the platform when the train is about to be started. *Torrey v. Boston, etc., R. Co.*, 147 Mass. 412; *Rockford, etc., R. Co. v. Coultas*, 67 Ill. 393. Or during the switching and coupling of cars. *Smotherman v. St. Louis, I. M. & S. R.*

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Co., 29 Mo. App. 265; *De Mahy v. Morgan's L. R., etc., Co.*, 45 La. Ann. 1329, 58 Am. & Eng. R. Cas. 448.

Same—Same—Violation of Rule.—A regulation forbidding passengers to stand on the platform of a car while the train is in motion being reasonable and proper, a passenger who is injured while standing on the platform, in violation of such regulation, is guilty of contributory negligence, and cannot maintain an action to recover damages for such injuries. *Alabama G. S. R. Co. v. Hawk*, 18 Am. & Eng. R. Cas. 194, 72 Ala. 112, 47 Am. Rep. 403; *McCauley v. Tennessee C., I. & R. Co.*, 47 Am. & Eng. R. Cas. 580, 93 Ala. 356, 9 So. Rep. 611; *Macon & W. R. Co. v. Johnson*, 38 Ga. 409.

But a passenger who goes upon a platform for the purpose of leaving the train, and who remains there only long enough to ascertain that the train would not stop again, does not violate a regulation prohibiting passengers from traveling upon platforms. *Central R. & B. Co. v. Miles*, 41 Am. & Eng. R. Cas. 149, 88 Ala. 256, 6 So. Rep. 696.

Section 484 of the Cal. Civil Code, protecting a company from damages for an injury to a passenger received on or from the platform of a car, in violation of printed regulations posted in the car, or of verbal instructions to the passenger, is intended to prevent the imprudent act of standing or riding on the platform, and neither the statute nor the regulation has any application where a passenger is justifiably entering or leaving the cars when injured. *Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62, 25 Pac. Rep. 245.

Where a company has a printed regulation in accordance with N. Y. act 1850, ch. 140, § 46, posted inside of the car, warning passengers not to ride on the platform, the mere fact that a conductor does not object to a passenger standing on the platform when there is sufficient room inside, will not justify the presumption that the company thereby waived the protection given by the statute, especially where the notice expressly declares that the company would claim the benefit of the act. *Higgins v. New York & H. R. Co.*, 2 Bosw. (N. Y.) 132.

Same—Same—After Being Requested to Enter.—A passenger who remains on the platform of a car, after a request or order from the employees to enter the car, voluntarily occupies a place of danger, and assumes the risk of being thrown from the car and injured by the sudden jerk of the train on being put in motion. *Louisville & N. R. Co. v. Bisch*, 41 Am. & Eng. R. Cas. 89, 120 Ind. 549, 22 N. E. Rep. 662; *Graville v. Manhattan R. Co.*, 34 Am. & Eng. R. Cas. 375, 105 N. Y. 525, 12 N. E. Rep. 51, 8 N. Y. S. R. 20; *reversing* 13 Daly 32; *Fisher v. West Virginia & P. R. Co.* (W. Va.), 53 Am. & Eng. R. Cas. 337, 19 S. E. Rep. 578.

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Same—Same—By Permission of Carrier.—If the servants of the company knowingly permit a passenger, drunken to unconsciousness, to ride sitting on the car steps, from which he falls and is killed, the company will be liable. *St. Louis, A. & T. H. R. Co. v. Carr*, 47 Ill. App. 353.

A passenger who is told by an employee of the train to remain on the platform of the car until a more suitable place for alighting is reached, is not guilty of contributory negligence in failing to attempt to return to her seat when the car is started, if the danger is not so obvious that a reasonably prudent person would not have obeyed the employee. *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. Rep. 338.

Plaintiff was riding in defendant's caboose, and was asleep, and so failed to get off at his destination when the station was called. After the station had been passed, and the train was moving too fast for plaintiff to leave it safely, the conductor told him if he wanted to get off at that station to get off quickly, whereupon he placed himself upon the steps in readiness to get off if the train should stop. While so standing, on account of a sudden jerk in taking up the "slack" of the train, he was thrown to the ground and injured. *Held*, that his position was a dangerous one, voluntarily taken, and that, if there was negligence on the part of defendant, still, on account of his own contributory negligence, he could not recover. *Lindsey v. Chicago, R. I. & P. R. Co.*, 18 Am. & Eng. R. Cas. 179, 64 Iowa 407, 20 N. W. Rep. 737.

Same—Same—Where There Are Unoccupied Seats.—A passenger who voluntarily and unnecessarily stands or rides upon the platform of the car when there are unoccupied seats in the car, is guilty of such negligence as will prevent a recovery for injuries received while so on the platform. *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. Rep. 338; *Memphis & L. R. R. Co. v. Salinger*, 46 Ark. 528.

Same—Same—No Vacant Seats.—In New York it is held that passengers are not to be deemed guilty of negligence for standing on the platform of cars in motion, when there are no vacant seats for them within the cars. *Willis v. Long Island R. Co.*, 34 N. Y. 670; *affirming* 32 Barb. 398.

And if they are injured the company will not thereby be relieved from damages. *Morris v. Eighth Ave. R. Co.*, 52 N. Y. S. R. 61, 22 N. Y. Supp. 666.

The fact that a passenger, failing to find a seat, and having none pointed out to him by an employee of the company, takes a position on the platform of the car, where other passengers are riding, and without objection from any employee, and is thrown from the car

by a sudden lurch given it by the great and increased speed with which the train is run when turning a curve, does not, as matter of law, establish contributory negligence. *Werle v. Long Island R. Co.*, 21 Am. & Eng. R. Cas. 429, 98 N. Y. 650.

But in *Worthington v. Central Vt. R. Co.*, 52 Am. & Eng. R. Cas. 384, 64 Vt. 107, 23 Atl. Rep. 590, 15 L. R. A. 326, it was held that the fact that all the seats in the car are occupied and the aisles crowded to that extent that the position of a passenger standing in the aisle is one of "positive discomfort to himself and evident annoyance to others," does not excuse a passenger who goes upon the platform voluntarily and remains there while the train is in rapid motion.

A passenger was unable, in consequence of the crowded condition of the cars, to obtain a seat. Although there was standing-room inside, he placed himself on or near the edge of the outside platform, and rode there for some distance, with his back against the end car window, holding on by a little iron rail. While in this position a jolt occurred, by which he was thrown upon the track and injured. *Held*, that plaintiff was guilty of such contributory negligence as to defeat a recovery. *Camden & A. R. Co. v. Hoosey*, 6 Am. & Eng. R. Cas. 454, 99 Pa. St. 492, 44 Am. Rep. 120.

Same — Prima Facie Negligence. — For a passenger to be upon the platform of a rapidly moving steam-car is, as matter of law, *prima facie* negligence, and no recovery can be had for an injury which was contributed to by the fact of his being in that position, unless his presence there was excused by the occasion. *Worthington v. Central Vt. R. Co.*, 52 Am. & Eng. R. Cas. 384, 64 Vt. 107, 23 Atl. Rep. 590, 15 L. R. A. 326; *Goodwin v. Boston & M. R. Co.*, 52 Am. & Eng. R. Cas. 380, 84 Me. 203, 24 Atl. Rep. 816.

And it is no excuse that he was on the platform for the purpose of sending a message to his family. *Torrey v. Boston & A. R. Co.*, 147 Mass. 412, 7 N. Eng. Rep. 148, 18 N. E. Rep. 213.

Same — Not Negligence Per Se. — See *note, ante p. 321*.

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EDMUNSON

v.

PULLMAN PALACE-CAR CO.

(Circuit Court of Appeals, Fifth Circuit, March 14, 1899.)

Injury to Passenger—Leaving Open Window of Sleeper—Right to Recover.—An occupant of the upper berth of a sleeping car, who is familiar with the arrangement of such cars, cannot recover for the consequences of rain dripping upon him through the ventilating window of the sleeper, where such window was sound and properly constructed, but, it being summer time, had been left open by the sleeping car employees for ventilation, and such employees were not chargeable with notice that plaintiff was in bad health, and required special attention.

ERROR by plaintiff to the Circuit Court of the United States for the Western District of Texas. *Affirmed.*

James N. Edmunson filed his suit in the district court of El Paso county, Tex., against the Pullman Palace-Car Company, claiming damages in the sum of \$15,000. The suit was removed by the defendant company to the United States circuit court for the Western district of Texas. Edmunson alleged that on the evening of July 3, 1896, he became a passenger on the Chicago, Rock Island & Pacific Railroad from Colorado Springs, Colo., to Chicago, Ill.; that he purchased a regular ticket for passage over said railroad; that he purchased from the agent of defendant an upper berth in one of its sleeping cars, to ride in and sleep in from Colorado Springs to Belleville, in the state of Kansas; that the defendant company was then engaged in the business of supplying passengers on said railroad with accommodations for sleeping during the night; that it was the duty of the defendant company to have had the roof and ventilating windows of the sleeper in which he rode and slept in a good, safe, and secure condition, so as to prevent water or rain

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from coming into the berth that plaintiff occupied; that, after occupying the berth during the night, he was awakened in the morning by water dripping in on his arm from the place above him, and he discovered that there was a wet place in his berth, near the head of the same, which had been caused by the water dripping into and upon the same, it having rained during the night (said wet place being about two feet long and two feet wide), and he found himself, when he awoke, lying in said wet place, and as soon as he rose he discovered that he had, on account of said water having come into his berth, caught a severe cold; that the cold so contracted from the water having dripped into and having run into his berth continued to grow worse from day to day, and settled on his lungs; that he was finally prostrated by a high fever and severe coughing, and a pneu-monic condition set in, and he continued to suffer exceedingly, and about the night of July 11, 1896, while he was coughing violently as the result of his becoming wet in said berth, a blood vessel was burst in his left lung, and he was attacked with a hemorrhage of the lungs; that he had hemorrhages for the next five days whenever an attack of coughing came; that he was confined to his bed until about August 8, 1896, and was dangerously ill; and on several occasions was at the point of death, but about August 8, 1896, through constant care and medical attention, he was able to leave his bed, and since that time he has been sufficiently strong and well to travel, and the general condition of his health is somewhat improved, but that through said exposure, and through his becoming wet in said berth, and through the negligence and carelessness of the defendant company in allowing the roof or the ventilating window of said sleeper to be in such an unsound, unsafe, and leaky condition, or in such a condition as to permit the coming in of water, he has been made an invalid for life, and has contracted and become permanently afflicted with consumption; and that since the night of July 3, 1896, he has suffered at times, as a result of the injuries

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mentioned, intense pain, and has suffered from repeated attacks of weakness and sickness, and has been compelled to expend large sums of money for the services of physicians and for medicines for his proper treatment, and has suffered great mental anguish. Subsequently Edmunson filed a supplemental petition, in which he set forth in detail the moneys expended by him for medical attendance and medicines.

The Pullman Palace-Car Company filed its answer in the United States circuit court. It pleaded a general demurrer, several special exceptions, a general denial, and special answers, in which it was alleged "that the car which plaintiff occupied on the night of July 3, 1896, which he claims was defective, whereby he was damaged, was not a leaky or defective car, but sound and in good condition, as were also the ventilating windows, and that, if any water or rain came in on the plaintiff's bed (which is denied), same was only such as, with the best of appliances, will enter when the wind strikes the car or window at certain angles, which cannot at all times be controlled without shutting off the air, or doing otherwise, to the great discomfort of the passenger, and which matter is always within the control of the passenger, and by custom and usage left to his discretion and direction, and that if plaintiff had exercised his right and prerogative, or used the proper precaution incumbent on him, he could and would have prevented the wetting he complained of,—in other words, if he or his bedding got wet on the occasion complained of, it was his own fault and want of proper care and precaution, and not that of defendant; that plaintiff was accustomed to traveling in sleeping cars, and knew the fact that in the summer months the ventilating windows were left open, for the comfort of the occupants of the berths, and knew, also, that he could have had same closed, if he so desired, and could have any proper attention for his protection in this regard, by notifying the porter or conductor in attendance. Defendant further denies that plaintiff's cold was contracted from the causes claimed by

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him, or that his maladies, sickness, or consumption was generated, created, or caused by said defective car, or the water dripping in on him and wetting him, as claimed by him. On the contrary, defendant says that the germ of said disease (he being then in a generally delicate condition) was in existence at and long before the 3d day of July, 1896, which fact was at the time he purchased his said ticket at Colorado Springs, as claimed by him, on said date, well known to him, but unknown to defendant. Defendant charges that plaintiff had suffered from pleurisy, and was a consumptive, long before the 3d day of July, 1896, and that this said disease was inherited by him, other constituents of his family being afflicted with the same trouble, and that defendant was at said time traveling for his health, and endeavoring to overcome said disease and prevent its further development, but that he negligently and carelessly took and accepted an upper berth, with windows open, knowing the condition of the weather, and knowingly took the risk attending such, if any there be." Defendant further answered that its business is not that of a carrier of any kind, but it only undertakes to furnish sleeping and toilet conveniences, and is under no obligations to furnish conveniences or accommodations of any particular class or kind, and did not on the occasion obligate itself or contract that no water would or could enter into the car, as claimed by plaintiff, and that, if any person was liable for the injuries received by plaintiff, the Chicago, Rock Island & Pacific Railway was liable.

The cause was tried in the United States circuit court, and resulted in a verdict and judgment in favor of the Pullman Palace-Car Company, defendant below. During the trial, Edmunson, the plaintiff below, reserved three bills of exceptions. The first bill brings up all the evidence and testimony in the cause, and preserves the exceptions of the plaintiff below to the trial judge's general charge,—these exceptions being that the general charge "requires of the plaintiff a greater degree of proof than the law demands, or than is reasonable, and ignores the doctrine of the presumption of

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negligence which arises in this cause from the facts and circumstances established by the evidence; and the same is erroneous in the statement that, 'if, at the time of the occurrence, the plaintiff was afflicted with the disease known as "consumption" or "pulmonary tuberculosis," then he would not be entitled to recover.''' The second bill of exceptions preserves the refusal of the trial judge to give a special instruction requested by the plaintiff below, to the effect that proof on the part of the plaintiff that during the night water leaked into his berth and wet him, and that he was thereby injured, would entitle him to recover, unless the defendant should prove that it was without negligence in the matter complained of by the plaintiff. The third bill of exceptions preserves the refusal of the trial judge to grant a special instruction requested by the plaintiff below to the effect that, if the jury found for the plaintiff, he would be entitled to recover for all the sickness, loss, and injury which he may have suffered in consequence of getting wet in the berth, notwithstanding he may have had the consumption when he got wet. The fourth bill of exceptions relates to the granting by the trial judge of a special instruction requested by the defendant below to the effect that "the fact that water came into the car and wet the plaintiff is not in itself sufficient to prove negligence on the part of the defendant." James N. Edmunson, the plaintiff below, has sued out this writ of error.

P. S. Benedict, Max Dinkelspiel, W. O. Hart, and Millard Patterson, for plaintiff in error.

J. D. Guinn, for defendant in error.

Before PARDEE and MCCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge, after stating the facts, delivered the opinion of the court.

The entire evidence adduced in the lower court is before us, having been embodied in one of the bills of exceptions. The

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view which we entertain of this cause on the evidence makes it unnecessary to pass on the assignment of errors. The alleged errors relate to certain charges given to the jury by the trial judge, and to his refusal to give certain other charges. Even if there be merit in these complaints,—and we are not to be understood as expressing any opinion on that matter,—Edmunson, the plaintiff below, who is the plaintiff in error here, could not have been injured by erroneous charges, if it is clear that under the evidence he could not have recovered. The negligence which the plaintiff below seems to have charged against the sleeping-car company, as the basis of the action, is that it allowed the roof of the ventilating window of its coach, above the berth occupied by him, to be in “an unsound, unsafe, and leaking condition,” whereby water dripped upon and wet him; the result being that he contracted consumption, and incurred certain expenses for medical attendance and medicines. The evidence adduced on the trial by the plaintiff below, the charges asked for by him, the errors assigned, and the argument of the cause, all show that the alleged negligence upon which he based his case was that the roof or ventilating window of the coach was defective. If the plaintiff below wished to raise the issue whether the rain dripped in, not because of any defect in the roof or window, but because the servants of the sleeping-car company did not close the ventilating window, that issue should have been plainly made in the pleadings. The allegations of negligence were “that it was the duty of the defendant to have had the roof and ventilating windows * * * in a good, safe, and secure condition, so as to prevent water or rain from coming into the berth,” and that the defendant below was negligent “in allowing the roof or the ventilating window * * * to be in an unsound, unsafe, and leaking condition, or in such a condition as to permit of the coming in of water.” We say again that, even if these allegations were sufficient to raise an issue as to whether, the roof and window being sound, it was the duty of the defendant below to have the window

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closed by its servants, the whole conduct of the case on the part of the plaintiff below shows that he was not relying upon such an issue. However this may be, we have carefully examined the cause as if both of the issues just mentioned had been fairly presented, and we are of opinion that under neither issue was the plaintiff below entitled to recover on the undisputed evidence. The uncontradicted proof showed that the roof and the ventilating window were sound and properly constructed; that, even with the best construction, if a ventilating window of a sleeper is left open, rain may enter and drip down on the upper berth, when the wind is high and blows the rain against the window, and the train is running rapidly,—especially when turning curves. The mother and sister of Edmunson occupied the lower berth, he himself taking the upper one. It rained very hard during the night. After sleeping during the night, he was awakened in the morning, about 6 or 7 o'clock, by water dripping on his arm, and he found that his bed was wet. He testified that the water seemed to come from about where the ventilating window was. He is a lawyer, and has traveled to a great extent in sleeping cars. He usually occupied a lower berth. A brother and sister of his died of consumption, as also a brother and sister of his mother. He had always had some little apprehension about having lung trouble, on account of his family history. It was shown, without denial, that his lungs were always weak and delicate, and that he was in danger of tuberculosis at any time. It was proven, without denial, that in the summer time the ventilating windows are generally left open, and that they are always opened or closed at the request of the occupants of the upper berths, and that a person occupying an upper berth can open or close the ventilating window. The occurrence complained of took place in midsummer. There was no proof that the defendant below was notified that Edmunson required any special care or attention, or that there was anything in his appearance which indicated that he needed such care or

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attention. On the contrary, he contended at the trial that he was well before the night on which he was wet, except that he was "a little run down."

It is clear that there was no proof that the defendant below was negligent, and that, under the undisputed facts in this cause, the plaintiff below could not recover. Therefore the judgment of the lower court is affirmed.

CHICAGO, R. I. & P. RY. CO.

v.

YOUNG.

(*Supreme Court of Nebraska, June 8, 1899.*)

Review—Sufficiency of Record.—Alleged errors occurring at the trial of a law action cannot be reviewed unless there is in the record authentic evidence that a motion for a new trial was overruled by the district court.

Injury to Passenger—Negligence—Pleading.—In an action to recover for injuries sustained by a person in consequence of the derailment of a railroad train upon which he was being transported as a passenger, it is not indispensable that the petition should allege that the injury was the result of the wrongful act or omission of the carrier.

Same—Same—Presumptions.*—The presumption in such case is that the accident was caused by the carrier's negligence, and it is unnecessary to plead what the law presumes.

Same—Constitutionality of Statute Making Railroad Liable in Absence of Contributory Negligence.—The act of June 22, 1867 (Sess. Laws 1867, p. 88), making railroad companies liable, in the absence of negligence, for injuries to passengers on their trains, is justifiable legislation under the police power of the state. It aims to promote safety in travel, and neither deprives such companies of

*See *Sanders v. Southern Ry. Co.*, *ante* and *notes*; *McCurrie v. Southern Pac. Co.*, 12 Am. & Eng. R. Cas., N. S., 170, and *note*, p. 173 *et seq.*; *Philadelphia, W. & B. R. Co. v. Anderson*, 44 Am. & Eng. R. Cas. 345, and extensive *note*, p. 351 *et seq.*

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their property without due process of law nor denies them the equal protection of the laws.

Death by Wrongful Act—Right of Action.—Under chapter 21, Comp. St. 1897, known as "LORD CAMPBELL'S Act," the legal representative of a person who has died in consequence of an injury sustained through the wrongful act, neglect, or default of another, has a right of action in all cases where the injured party might have maintained an action had he survived the injury.

Same—Action—Beneficiaries—Damages.—Such action is for the benefit of the widow and next of kin of the deceased, and the recovery authorized is compensation for the pecuniary loss suffered. If the facts alleged in the petition do not show that the persons for whose benefit the suit was instituted had a pecuniary interest in the life of the deceased, the pleading is defective in substance.

(Syllabus by the Court.)

ERROR by defendant to Lancaster county district court.
Reversed.

W. F. Evans, L. W. Billingsley, R. J. Greene, and M. A. Low, for plaintiff in error.

Strode & Strode and Stewart & Munger, for defendant in error.

SULLIVAN, J. Halleck C. Young, as administrator of the estate of Ellsworth H. Morse, deceased, recovered judgment against the Chicago, Rock Island & Pacific Railway

Case Stated.

Company in an action brought under the provisions of chapter 21, Comp. St. 1897. The first section of the act is as follows: "That whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." The petition alleges the representative character of the plaintiff; that

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Morse was instantly killed by the derailment of defendant's train, upon which he was being transported as a passenger between Fairbury and Lincoln, in this state; that the deceased was at the time of the accident earning an annual salary of \$1,800; and that he left, surviving him, as next of kin, his mother, brothers, and sister, who have sustained damages to the amount of \$5,000.

At the threshold of the case counsel for plaintiff challenge our right to consider and decide some of the questions raised by the defendant, on the ground that there is in the record no authentic evidence that the motion for a new trial was ever ruled on, or brought to the notice of the district court in any way. Turning to the clerk's certificate, we find that this objection is entirely valid, and must, under the authorities cited, be sustained. *Hake v. Woolner*, 55 Neb. 471, 75 N. W. 1087; *Romberg v. Fokken*, 47 Neb. 198, 66 N. W. 282; *Burlingin v. Baders*, 47 Neb. 204, 66 N. W. 288. It is not certified, either in general or in specific terms, that there is in the transcript brought here any order of the court upon the motion. We are therefore precluded from reviewing the alleged errors occurring at the trial. The sufficiency of the petition to support the judgment is the only question properly before us for decision. This pleading is vigorously assailed on various grounds.

Review—Sufficiency of Record.

Injury to Passenger—Negligence—Pleading.

Counsel first contend that it is defective, because it contains no direct averment that the death of Morse was the result of any wrongful act or omission of the railroad company. To this proposition we cannot assent. It is unnecessary to allege what the law presumes. *Bliss*, Code Pl. § 175; 1 *Boone*, Code Pl. § 11.

Same—Same—Presumptions.

In *Bishop v. Middleton*, 43 Neb. 10, 61 N. W. 129, it was held that a pleading which alleges facts from which the law presumes another fact sufficiently pleads that other fact. To the same effect is *Engle v. Railway Co.*, 77 Iowa, 661, 37 N. W. 6, and 42 N. W. 512. An admission of the facts stated in the petition would be, of course, an admission of the fact

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supplied by implication of law. In this state the presumption is that one who has been injured while being transported as a passenger by a common carrier was injured in consequence of the carrier's negligence. *Spellman v. Transit Co.*, 36 Neb. 890, 55 N. W. 270; *Railway Co. v. McClellan*, 54 Neb. 672, 74 N. W. 1074. Construed in the light of these decisions, the petition plainly shows that defendant's culpable conduct was responsible for the accident in which Morse lost his life.

It is next insisted that the action cannot be maintained because the statute imposing a liability on railroad companies in the absence of negligence is unconstitutional and void.

Same—Constitutionality of Statute Making Railroad Liable in Absence of Contributory Negligence.

As we have already shown, the petition, by legal implication, charges the defendant with negligence, and therefore states a cause of action entirely independent of the statute. But we do not rest our decision upon that ground alone.

The third section of the act of June 22, 1867, is as follows: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers, while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or where the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." Comp. St. 1897, c. 72, art. 1, § 3. The validity of this law has been assumed in many cases decided by this court. *Chollette v. Railroad Co.*, 26 Neb. 159, 41 N. W. 1106; *Railroad Co. v. Chollette*, 33 Neb. 143, 49 N. W. 1114; *Railway Co. v. Baier*, 37 Neb. 235, 55 N. W. 913; *Railroad Co. v. Landauer*, 39 Neb. 803, 58 N. W. 434; *Railroad Co. v. Hedge*, 44 Neb. 448, 62 N. W. 887; *Railroad Co. v. Hague*, 48 Neb. 97, 66 N. W. 1000; *Railroad Co. v. Hyatt*, 48 Neb. 161, 67 N. W. 8; *Railroad Co. v. French*, 48 Neb. 638, 67 N. W. 472. In *Railway Co. v. Porter*, 38 Neb. 226, 56 N. W. 808, the section quoted was assailed on the ground that it violated the constitution, but the court expressly held that its enactment was not an

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unwarranted exertion of legislative power. The point was again raised in *Railway Co. v. Chollette*, 41 Neb. 578, 59 N. W. 921, and the constitutionality of the act was again distinctly affirmed. Whether these decisions are altogether sound in principle, we will not now stop to inquire. Their silence opposition by their mere numerical strength; and, without acknowledging a servile submission to precedent, we feel bound to accept them as conclusive evidence of what the law is.

It is further contended that the petition does not show any liability on the part of the defendant, because the statute above set out was intended to apply only to cases where the party injured survives the injury, and sues in his own behalf for indemnity. This contention cannot be sustained. It was decided in *Railway Co. v. Chollette*, *supra*, that a husband might, under this statute, sue for and recover consequential damages which he had suffered in consequence of an injury inflicted upon his wife. And in *Railroad Co. v. Hague*, *supra*, it was held that an administrator was entitled to maintain an action for the benefit of the widow and next of kin of his intestate, who was killed while being carried as a passenger on a railroad train. By the act of 1867, one who has been injured while being transported as a passenger on a railroad train is entitled to recover damages from the carrier, unless the injury was the result of his own gross negligence, or the violation of some express rule or regulation of the company of which he was cognizant. The legislature, by this act, defined the duty of railroad corporations to their passengers, and created a new right of action. The act of 1873 (Comp. St. 1897, c. 21), commonly known as "LORD CAMPBELL'S Act," also created a new right of action. It gives to the legal representative of a person who has died in consequence of an injury sustained through the wrongful act, neglect, or default of another a right of action in all cases where the injured party might have sued had he survived the injury. Obviously, the decisive test of the right of an executor or

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administrator to sue under the provisions of chapter 21 is this: Would the deceased be entitled to sue with respect to the injury if he had not died in consequence of it? There is nothing whatever to indicate an intention on the part of the legislature to except from the operation of the act of 1873 cases arising under the act of 1867, and we are therefore not warranted in limiting by construction the ordinary import of the language employed in the later act. Discussing a question similar to the one here under consideration, MARSHALL, J., in *Ean v. Railway Co.*, 95 Wis. 69, 69 N. W. 997, said: "There is nothing either in the terms or the spirit of the act from which the court can say the legislative idea was to confine its effect to rights of action in favor of injured persons as the law existed on the subject at the time section 4255 was passed. On the contrary, it is too plain to be open to serious discussion that the legislative intent was to give a right of action to the personal representatives of a deceased person in all cases where such person would be entitled to recover damages for his injury if death had not ensued."

The final ground upon which defendant assails the petition is that the persons for whose benefit the action was instituted do not appear to have suffered any pecuniary injury by the death of Ellsworth H. Morse. We think this objection is valid, and that it must be sustained.

Same—Action—
Beneficiaries—
Damages.

In *Regan v. Railway Co.*, 51 Wis. 599, 8 N. W. 292, which was an action to recover for wrongfully causing the death of plaintiff's intestate, a general allegation of damages was held to be insufficient. In *Railway Co. v. Baier*, 37 Neb. 235, 55 N. W. 913, the holding in the Wisconsin case was approved by the author of the opinion, although the precise point was not before the court for decision. In *Electric Co. v. Laughlin*, 45 Neb. 390, 63 N. W. 941, the petition alleged that the deceased left, surviving him, a widow and several minor children, who were dependent upon him for support. It was held that a general averment of damages was sufficient, but in the course of the opinion it was said: "It is not doubted that the petition based on this

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statute must aver facts showing that the persons for whose benefit the action was brought have, by reason of the death of the intestate, sustained pecuniary loss, injury, and damages." In *Orgall v. Railroad Co.*, 46 Neb. 4, 64 N. W. 450, the petition alleged that the deceased was a single woman, and the daughter of the plaintiff. The court expressly decided, citing *Hurst v. Railway Co.*, 84 Mich. 539, 48 N. W. 44, and two English cases, that a cause of action for even nominal damages was not stated. In *City of Friend v. Burleigh*, 53 Neb. 674, 74 N. W. 50, the petition disclosed that the deceased left surviving him a widow and six children, and that at the time he was injured he was engaged in a lucrative business. The averment was held sufficient to show a pecuniary injury to the persons for whose benefit the case was prosecuted; but *RAGAN, C.*, after citing the earlier cases in this court, said: "The rule deducible from these cases, as well as from the weight of cases elsewhere, is that the petition must show facts from which a pecuniary loss is inferable." In *Railway Co. v. Crow*, 54 Neb. 747, 74 N. W. 1066, it was held, following the *Burleigh Case*, that, where the petition disclosed that the deceased left a widow or other relatives, whose support devolved upon him as a legal duty, it would be presumed that pecuniary loss resulted from his death. In *Railroad Co. v. Van Buskirk*, 57 Neb. —, 78 N. W. 514, it was held that a petition alleging that the deceased left as his heirs and next of kin a father, mother, brother, and sister, did not state facts sufficient to constitute a cause of action. The question was again presented in *Railroad Co. v. Bond*, 57 Neb. —, 78 N. W. 710. The averments of the petition relative to damages were practically the same as in the *Van Buskirk Case*. In an opinion holding the pleading defective in substance, the present chief justice, after referring to the earlier cases, said, "A re-examination of the matter has produced no change in our views on the subject of the sufficiency of the statement which was attacked." These decisions and *dicta* must be regarded as settling the rule of pleading in this state. Whether, upon this question, we are in line with the current

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of authority in other jurisdictions, is not important. The rule we have adopted is not contrary to sound principle. It is reasonable and just, and, after mature deliberation, we have concluded to adhere to it. The judgment of the district court is reversed, and the cause remanded for further proceedings. Reversed and remanded.

NORVAL, J. (concurring). Upon principle, I am persuaded that, while some of the averments of the petition might have been successfully assailed by a motion to make more definite and specific, it sufficiently appears from the facts pleaded and the inferences properly to be drawn therefrom that by the death of Morse his next of kin sustained a pecuniary loss, and that a cause of action is stated. I concede that *Railroad Co. v. Van Buskirk*, 57 Neb. —, 78 N. W. 514, and *Same v. Bond*, 57 Neb. —, 78 N. W. 710, cited in the foregoing opinion, fully sustain the proposition that the petition filed in the cause in the court below does not state sufficient facts to constitute a cause of action. The writer dissented from the denying of motion for rehearing in those cases, believing the decisions were unsound, and against the great weight of the authorities in this country; but, the opinions in those cases having become the settled law of this state, I am constrained, although reluctantly, to agree to the entry of a judgment of reversal herein.

STEELE

v.

SOUTHERN RY. CO.

(Supreme Court of South Carolina, June 27, 1899.)

Injury to Passenger—Presumption of Negligence.—Where a passenger is thrown from his seat and injured by a violent collision between portions of the train which in some way became uncoupled while running, a presumption of negligence on the part of the carrier is raised.

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Carrying Passengers on Freight Trains—Degree of Care.*—A carrier of a passenger on a freight train is bound to exercise the highest degree of care consistent with the practical and efficient use of the train for its primary purpose of transporting freight; and a passenger thereon assumes such risks as usually attend the operation of such trains with all reasonable skill and caution as freight trains.

Same.—Same.—In the management of a freight train carrying passengers the highest degree of care may not require the use of a bell cord, or a brakeman on each car, or automatic brakes.

APPEAL by defendant from common pleas circuit court of Richland county. *Reversed.*

John P. Thomas, Jr., for appellant.

Moore & Thomson, for respondent.

JONES, J. The judgment of the circuit court in this case awarded plaintiff \$200, as damages for injuries received while traveling as a passenger in the "caboose car" of defendant's freight train. While this train was on its way from Ridgeway to Columbia, August 5, 1898, the caboose and another car became detached from the remainder of the train, and then overtook and collided with the rear end of the forward part of the train, throwing plaintiff from his seat across the caboose, inflicting injury. The collision was of such force as to break the couplers of the two cars that had been detached from the rest of the train, and knock one pair of trucks of the caboose from off its center plate. Case Stated.

The appeal presents two general questions: (1) The rule as to presumption of negligence in a case like this; (2) the degree of care to be exercised by a carrier of passengers on a freight train, and the risks assumed by such passengers.

1. The circuit court refused to charge appellant's request as follows: "The burden is upon the plaintiff to show that the railroad in this case was negligent. Negligence must rest upon the actual facts as shown by the evidence, and must not depend upon conjecture or surmise; and, in the case of a railroad accident, where the evidence discloses the

*See note, 9 Am. & Eng. R. Cas., N. S., at p. 657.

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facts and circumstances thereof, there is no presumption of negligence." The court charged as follows: "When a passenger is injured on a railroad, there is from that fact alone *prima facie* evidence of neglect in the management of the road, which evidence the railroad company is bound to rebut. This refusal to charge, and charge, are the bases of the first and second exceptions.

In reference to this subject, the circuit court explicitly charged the jury that the presumption was rebuttable, and that the jury must determine the question of negligence from the facts and circumstances of the case. It will be noted that the charge complained of is in the exact language quoted from the case of *Hegeman v. Railroad Corp.*, 16 Barb. 353, by JUDGE O'NEALL, with entire approval, in *Zemp v. Railroad Co.*, 9 Rich. Law, 89, wherein it was held that proof that a passenger has been injured on a railroad is *prima facie* evidence of neglect. This learned judge, referring to *Danner's Case*, 4 Rich. Law, 334, said: "Surely, if a *prima facie* case of negligence is made out by showing the fact that stock was killed or injured on the railroad, much more ought the same result to follow from a passenger being injured; for as to him the company undertake to carry safely, as far as human care and foresight will go. This liability can only be discharged by showing that all reasonable skill and diligence have been employed. *McClenaghan v. Brock*, 5 Rich. Law, 17." While this rule is regarded as too broad by some courts of high authority, we believe it is sustained by reason and the weight of authority. See cases collated in note, 5 Am. & Eng. Enc. Law (2d Ed.) p. 623. The reasons for the rule are: (1) The contract relation between the carrier and passenger, by which it is incumbent on the carrier to transport with safety; hence the burden of explaining failure of performance should be on the carrier. (2) The cause of the accident, if not exclusively within the knowledge of the carrier, is usually better known to the carrier, and this superior knowledge makes it just that the carrier should explain. (3) Injury to a passenger by a carrier is something

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that does not usually happen when the carrier is exercising due care; hence the fact of injury affords a presumption that such care is wanting. But if it should be granted that, as stated in *Id.* p. 624, "the better rule is that the presumption does not arise from mere proof of an injury to a passenger, but must be limited to

Injury to Passenger—Presumption of Negligence.

injuries caused by some act on the part of the servants of the carrier, which may be either acts of omission or commission, or from defects in the instrumentalities of transportation," then the circuit court committed no error on this point. By the pleadings and the undisputed facts in this case, plaintiff was thrown from his seat and injured by a violent collision between portions of the train which in some way became uncoupled while running. By all the authorities, proof of injury, under such circumstances, would raise a presumption of negligence, casting upon the carrier the burden of explaining that the accident happened from a cause for which it is not responsible, or that it was not due to its negligence.

2. As to the degree of care to be exercised by the carrier to a passenger on a freight train and the risks assumed by such a passenger. The circuit court refused to charge the following requests by the defendant: "(2) In boarding a freight train, passengers assume the increased risks and diminution of comfort incident thereto, and, if the train is managed with the care usual and requisite for such trains, it is all that those who voluntarily board them have a right to expect. (3) A passenger upon a freight train is presumed to assume the risks of jolts and jars not caused by the negligence of the railroad employees; and in this case, if you find that it was such a jolt or jar which threw the plaintiff from his seat, he cannot recover in this action." On this subject the court charged as follows: "Now, while they [carriers] are not insurers of passengers, yet the law enjoins upon them the highest degree of care in the management and conduct of their cars to insure the safety of the passenger. Now, whether he boards a freight train, mixed train, or passenger

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train does not make any difference, so far as the liability of the carrier is concerned. His contract is fixed when he receives the passenger's money. Whether he receives him on a freight train, passenger train, or mixed train matters not. He assumes the obligation, as soon as he takes the passenger's fare, to carry him—transport him—to his point of destination, with that degree of care which the law contemplates he should exercise; and he would not be permitted to excuse himself from care by reason of the fact that he was operating a freight train at that time. Now, the law does not compel a common carrier to convey passengers on freight trains. That is optional with them. But, if they undertake to do it, the law then fixes upon them that degree of care that attaches to common carriers of passengers; and it says, in the transportation of a passenger, the carriers must use the highest degree of skill and care in so conducting the carriage or the train of cars as to not injure the passenger." We think the general charge above should have been modified or qualified substantially in accordance with the above requests to charge.

Carrying Passen-
gers on freight
Trains—Degree of
Care.

A carrier of a passenger on a freight train is bound to exercise the highest degree of care consistent with the practical and efficient use of the train for its primary purpose of transporting freight, and a passenger thereon assumes such inconvenience and risks as usually attend the operation of such train with all reasonable skill and caution as a freight train. Whatever the mode of conveyance, whether by passenger, mixed, or freight train, the carrier is liable for any negligence resulting in injury to a passenger, and in that sense the law requires the highest degree of care in all cases; but, in applying this rule, the jury should take notice of the particular mode of conveyance. For illustration, in the management of a regular passenger train the highest degree of care may require the use of a bell cord, or a brakeman on each car, or automatic brakes, but in the management of a freight train the same degree of care may not require these things. To require of freight trains all the safeguards against

Same—Same.

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danger which is required of a passenger train might render the operation of freight trains impracticable in many localities. These views are supported by the authorities. Railroad Co. v. Arnal (Ill. Sup.) 33 N. E. 206; Olds v. Railroad Co. (Mass.) 51 N. E. 451; Dunn v. Railway (Me.) 4 Am. Rep. 272; Wallace v. Railroad Co., 98 N. C. 494, 4 S. E. 503; Crine v. Railway Co. (Ga.) 11 S. E. 557; McGee v. Railway Co., 92 Mo. 208, 4 S. W. 739; Railroad Co. v. Ashley, 14 C. C. A. 373, 67 Fed. 209; Railroad Co. v. Horst, 93 U. S. 291; Railroad Co. v. Bisch (Ind. Sup.) 22 N. E. 664.

There is force in the view that, since the undisputed fact is that the injury resulted from the violent colliding of detached portions of the train while moving on its journey, such a collision, as matter of law, is not usually and reasonably incident to the management, with proper skill and caution, of a freight train, having due regard to its primary uses and purposes, and so was not one of the risks assumed by the passenger. Inasmuch as the court left it to the jury to determine the issue as to negligence under other instructions, that negligence is the want of "the care and caution that would be exercised by a reasonable and prudent person under the circumstances of the situation," the failure to instruct the jury as requested was not prejudicial. But as we cannot be sure, from the brief before us, that the jury may not have found the issue of negligence against defendant because of the absence of some safeguard against danger which the highest degree of care would require in the management of a regular passenger train, we think there should be a new trial, under unequivocal instructions, in accordance with the views herein announced. The judgment of the circuit court is reversed, and the case remanded for a new trial.

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SPRAGUE *et ux.*

v.

SOUTHERN RY. CO.

(*Circuit Court of Appeals, Fourth Circuit, Feb. 7, 1899.*)

Negligence—Question for Jury.—If from the evidence there is uncertainty as to the existence of negligence, the question is one of fact, and must be settled by the jury; and such is the case even if there be no testimony save that offered by plaintiff and in which there is no conflict, if different conclusions can be reasonably drawn therefrom.

Duty to Passengers on Freight Trains.*—A railroad company is liable for the negligence of its servants, resulting injuriously to its passengers, whether they are traveling in the cars of a regular passenger train, or in the caboose of a freight train, for in all such cases the law requires that the highest degree of care that is practicable be exercised.

Injury to Passenger—Presumption of Negligence.†—Injury to a passenger, without contributory negligence on his part, is *prima facie* evidence of the carrier's liability.

ERROR by plaintiffs to the Circuit Court of the United States for the Western District of North Carolina. *Reversed.*

James H. Merrimon (*M. Silver*, on the brief), for plaintiffs in error.

Charles Price, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and PAUL, District Judge.

GOFF, Circuit Judge. The plaintiffs in error, who are husband and wife, instituted this action at law to recover

*See generally extensive *note*, 9 Am. & Eng. R. Cas., N. S., 652 *et seq.*

†See *Sanders v. Southern Ry. Co.*, *ante* and *note*.

damages from the defendant in error on account of personal injuries sustained by the wife, claimed by them to have been caused by the negligence of the employees of the Southern Railway Company. It is set forth in the complaint that on the 7th day of July, 1897, the *feme* plaintiff purchased of the defendant company a first-class ticket over its railroad, from the station at Hickory to the station at Morganton, and that she entered and took a seat in the caboose car attached to a freight train on said road (as she was directed to do by the agent of said company), for the purpose of making said trip, and that while doing so, and when she was still in said car, she was injured by the negligence of the defendant's employees. The answer of the Southern Railway Company denies the charge of negligence, and sets up contributory negligence on the part of the said *feme* plaintiff, in substance as follows: That she contributed to her injury by her own negligence, in standing up in the car while the same was in motion, when the defendant had provided a seat for her, in which she might have remained in perfect safety; that she knew she was on a freight train, and that it was not as safe as a regular passenger train, and that it required greater care on the part of passengers, which she failed to exercise, but that she assumed the risk of injury by standing up in the caboose car during the time the same was in motion; that she did not wait in her seat until the train stopped at Morganton, but she arose and stood up while said car was being moved, and before it had reached the station, thereby contributing to her injury.

The case came on to a trial before a jury, on the following issues: First. Was the *feme* plaintiff injured by the negligence of the defendant company? Second. Did the *feme* plaintiff contribute to her injury by her negligence? Third. What damages, if any, is the *feme* plaintiff entitled to recover?

After the plaintiffs had offered their evidence, the defendant moved the court to dismiss the complaint and enter judgment of nonsuit. The court below ruled that the plaintiffs

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were not entitled to recover, and entered a judgment of nonsuit. To such judgment this writ of error was sued out.

It is claimed by the plaintiffs in error that it was error in the court below to dismiss their complaint and enter said judgment of nonsuit. The supreme court of North Carolina, in construing the statute of that state relating to nonsuits, has held that such a motion is, in effect, the same as a demurrer to the plaintiffs' evidence. *Purnell v. Railroad Co.*, 29 S. E. 953, 122 N. C. 832. Therefore, under said statute, when the motion for nonsuit is submitted, the court should dispose of the same in the light of the rule that admits everything which a jury could reasonably infer from the evidence.

The plaintiffs' testimony tended to prove that they had purchased first-class tickets over the defendant's road from the station at Hickory to the station at Morganton; that they entered the caboose car, and traveled in it, the same being attached to a freight train composed of 12 or 13 cars; that they were both aware of the fact that they were to go on a freight train, being so advised when their tickets were purchased; that they traveled safely to Morganton, where the engine stopped in front of the depot building, thereby leaving the plaintiffs, who were still in the caboose on the end of the train, some little distance from the station; that in the said car was a sofa or settee, some chairs, a table, and a stove; that after the car reached Morganton, and when it was not in motion, and was at a point where it had been for some minutes, the *feme* plaintiff arose from her seat, and walked across the car, for the purpose of looking out of the window, and, while she was standing near it and by a table, the engine suddenly moved up, and thereby the slack of the train was taken out, and the car given a sudden lurch or jerk, by which the said *feme* plaintiff was thrown to the floor, causing her great bodily injury and pain, the result being a fractured thigh bone and permanent injury; that she was in her 67th year at the time of such injury; that, when the train stopped for the first time at Morganton, it remained still for a few minutes, then moved up,

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and then stopped again, and that when it so moved up it made a heavy jerk, when the engine again stopped suddenly, and that considerable jar was caused thereby; that, by the time the slack is taken out of a train as long as that was, the end of the train has a pretty heavy jerk; that the movements of said train at Morganton were the same as they usually were at that place, it stopping and starting as it had often done before; that during the trip, and before the train reached Morganton, the husband plaintiff, who had gone out on the platform of the car, was admonished by the brakeman that it was dangerous for him to be there, as the sudden jerk of the car might throw him off, and that he returned to his seat inside the car, at the same time advising his wife of the warning he had received; that they were not warned by any of the train officials, at Morganton or elsewhere, that the car would be suddenly or violently moved, and that it would be best for them to be careful during the time it was being so moved.

Negligence is in some cases a question of law to be determined by the court, and in others a matter of fact to be found by the jury. In this case the court below held it to be a question of law, and directed a nonsuit. We think this was error, as we are of the opinion that the jury should have been directed to find from the evidence whether or not the defendant so managed its engine and so moved its car at the time that Mrs. Sprague was injured as to make it liable for injuries caused thereby to those who were passengers in said car; or, in other words, if the defendant's conduct at that time constituted "negligence," in the sense such word was used in the issues submitted to the jury.

Negligence—
Question for
Jury.

We are unable to conclude, after carefully considering the testimony offered by the plaintiffs, that the facts shown by it are such that all reasonable men must draw the same conclusion from them, and hence we hold that, if such facts constitute negligence, the same must be found by the jury from the testimony, and not by the court as a matter of law.

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Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679; Railway Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104. If from the evidence there is uncertainty as to the existence of negligence, then the question is one of fact, and must be settled by a jury, and such is the case even if there be no testimony save that offered by the plaintiff, and in which there is no conflict, if fair-minded men, in an honest effort to do right, would reach different conclusions from it. This is a case peculiarly for the jury, for the reason that it is from all the circumstances incident to the injury to the *feme* plaintiff—such as the movement of the train, the stopping and starting of the same, whether the car was properly and safely handled, or carelessly and dangerously pushed and jerked about—that the question of negligence and the matter of responsibility can be intelligently found and fairly determined. It is now so well settled that if, in any case, the facts are such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of that matter is for the jury, that we deem a further discussion of the question unnecessary, and, as the case is again to go to a jury, we think it best not to further consider the testimony.

The court below seems to have founded its conclusion on the fact that the plaintiffs were traveling in a caboose car, and not on a regular passenger train. But we are of the opinion that as the defendant sold tickets to the plaintiffs to be used in said car, which was provided for the accommodation of passengers in general, the plaintiffs were entitled to demand and have of and from the defendant the highest possible degree of care and diligence, regardless of the kind of train they were on. A railroad company is liable for the negligence of its servants, resulting injuriously to its passengers, whether they are traveling in the luxurious cars of the modern train, or in the uncomfortable caboose of the local freight; for in

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sengers on
Freight Trains.

all such cases the law requires that the highest degree of care that is practicable be exercised.

The reasons for this rule are well known, and are based upon wise public policy and the plainest prin-

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ciples of justice. The supreme court of the United States, in alluding to this matter (*Railroad Co. v. Horst*, 93 U. S. 291, 296), said :

"Life and limb are as valuable, and there is the same right to safety, in the caboose as in the palace car. The same formidable power gives the traction in both cases. The rule is uniformly applied to passenger trains. The same considerations apply to freight trains. The same dangers are common to both. Such care and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise. There is no reason, in the nature of things, why the passenger should not be as safe upon one as the other. With proper vigilance on the part of the carrier, he is so. The passenger has no authority upon either, except as to the personal care of himself. The conductor is the animating and controlling spirit of the mechanism employed. The public have no choice but to use it. * * * The rule is beneficial to both parties. It tends to give protection to the traveler, and warns the carrier against the consequences of delinquency. A lower degree of vigilance than that required would have averted the catastrophe from which this litigation has arisen. *Dunn v. Railway Co.*, 58 Me. 187; *Tuller v. Talbot*, 23 Ill. 357; *Railway Co. v. Thompson*, 56 Ill. 138."

It was held in *Railroad Co. v. Pollard*, 22 Wall. 341, a suit for an injury to the person against a railroad company, that "if the passenger is in the exercise of that degree of care which may reasonably be expected from a person in his situation, and injury occur to him, this is *prima facie* evidence of the carrier's liability." Such is also the doctrine of *Stokes*

Injury to Passenger—Presumption of Negligence.

v. Saltonstall, 13 Pet. 181, a leading case on this question. See, also, to like effect, the case of *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653; *Gleeson v. Railroad Co.*, 140 U. S. 435, 11 Sup. Ct. 859. Applying this principle to the case we are now considering, and it will follow that the jury should have been permitted, in the absence of explanation

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by the defendant of the circumstances under which the injury occurred, to ascertain the plaintiffs' damages, provided they did not also find that the *feme* plaintiff contributed to the accident by her own negligence.

The contention of counsel for defendant in error that the supreme court in *Transportation Co. v. Downer*, 11 Wall. 129, held that a presumption of negligence does not arise from the simple occurrence of an accident, will not be sustained by a careful examination of the opinion in that case. It will be well to remember that the plaintiff in that case was suing to recover for the loss of personal property, and not for damages occurring to him while a passenger; and yet the court said that if the accident was caused by the mismanagement of a thing over which the defendant had immediate control, and for the management of which he was responsible, that the presumption of negligence did arise. We agree with counsel for the defendant in error that if, looking at all the evidence, and drawing such inferences therefrom as are just and reasonable, the court below could have said, as matter of law, that the plaintiffs were not entitled to recover, then the order of nonsuit was properly entered. *Pleasants v. Fant*, 22 Wall. 116; *Montclair v. Dana*, 107 U. S. 162, 2 Sup. Ct. 403. But, as we have already shown, the court below, under the circumstances of the case as developed by the plaintiffs' testimony, could not have properly so said as matter of law, and the issues should have been submitted to the jury, under appropriate instructions as to the law by which they were to be guided in reaching a conclusion.

The judgment complained of will be reversed, and this case will be remanded, with instructions to proceed with a new trial under the principles of law as herein announced. Reversed.

MEANS

v.

CAROLINA CENT. R. CO.

(*Supreme Court of North Carolina, May 5, 1899.*)

Failure to Have Conductor for Freight Train—Negligence as Matter of Law.*—Where the custom of attaching a passenger car to a freight train is for the purpose of, and has resulted in establishing a passenger business by a schedule so arranged as to enable and encourage the people along the route to seek transportation on such car, the failure to have a conductor for such train is negligence as matter of law.

Declarations—Res Gestæ.—In an action for the death of a passenger on such a train, alleged to have resulted from the failure to have a conductor therefor, a declaration made by deceased, immediately before his death, as he was hurriedly going from the passenger coach at the rear end of the train to the engine in front, to the effect that he wished to give the engineer certain tickets before the speed became too great was a part of the *res gestæ*.

Evidence.—In such action, testimony of the engineer to show that he would have stopped the train, if he had been requested to do so, in order that the deceased might have returned to the coach, was inadmissible, being immaterial.

APPEAL by plaintiff from Mecklenburg county superior court. *Reversed.*

Osborne, Maxwell & Keerans, for appellant.

Burwell, Walker & Cansler, for appellee.

MONTGOMERY, J. When this case was here at February term, 1898 (29 S. E. 939), a new trial was ordered because of an error committed by his honor on the trial below in instructing the jury that "it is the duty of a railroad company to have a conductor when there are passengers, and it is negligence not to have one." In reference to that instruction we said: "The rule would

Case Stated.

*See note at end of case.

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apply where the trains are passenger trains, or where a considerable part of the train was for the accommodation of passengers, and the passenger fare would be a considerable part of the inducement to run the train. But where the train is a freight train, with a passenger car attached, it is a fair presumption that the passenger coach is purely for the accommodation of the public; and we cannot say, as a matter of law, that it would be negligence (nothing else appearing) in a railroad company not to furnish a conductor on such trains." In the case as it was made up for this court at the first hearing, nothing appeared as to the nature or destination of the train, except that it was one which consisted of an engine and eleven cars, including one passenger coach and a shanty car, and that it left Charlotte at 4 p. m. Nothing was said of the extent of the passenger traffic. We thought the charge of his honor to broad too fit the facts of that case. The case as presented now has some new features, and important ones. The train, a local one, was operated between Charlotte, by Lincolnton and Shelby. Its schedule time for departure from Shelby was 6 a. m. and for arrival at Charlotte 10 a. m. It left Charlotte at 4 p. m. The engineer testified that "at ordinary times we carried a good many passengers." It is apparent, from the facts above stated, that in the running of that train the passenger traffic was a matter of business consideration to the company; that the inducement to attach the passenger coach was not simply to oblige a passenger now and then who might wish to make an emergency trip or to visit some obscure station, but to establish a passenger business by a schedule so arranged as to enable and encourage the people along the route, and especially those in Shelby and Lincolnton, to visit the city of Charlotte for several hours, and return to their homes at a reasonable hour on the night of the same day; and that the result was what was anticipated,—a considerable passenger business. His honor, after the conclusion of the testimony, was of opinion that the plaintiff could not recover, and, upon intimating so much to the plaintiff's counsel, the plaintiff

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submitted to a nonsuit, and appealed. His honor thought the case as developed did not differ materially from the case as brought out on the first trial. We think, however, that there was a substantial difference between the two cases in the respects pointed out by us. It was the duty of defendant company to have had a conductor for such a train as that of the defendant's was shown to have been by the undisputed evidence, and the defendant was negligent in not having provided one. What might be a sufficient crew to manage a train would ordinarily be a question for the jury; but whether or not it is negligence in a railroad company not to furnish a conductor in a case like the one before the court, the evidence being undisputed, must be a question of law. The conductor need not have been purely and entirely a passenger conductor. A freight conductor might have been sufficient, under the circumstances, to have discharged the duties of a passenger conductor and his own at the same time. Whether or not the intestate's death was caused, without his fault, by the failure of defendant company to furnish a conductor, is a question for the jury, under proper instructions as to the law from the court.

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Conductor for
Freight Train—
Negligence as
Matter of Law.

There were only two exceptions on points of evidence. The plaintiff was permitted, over the objection of the defendant, to introduce a declaration or statement made by the intestate while he was hurriedly going from the coach at the rear end of the train to the engine in front. The declaration was, "Get out of my way: I want to get to Mr. Hall [the engineer], to give him these tickets, before the train gets too fast." The evidence was competent as a part of the *res gestæ*. It was contemporaneous with the main subject,—the alleged killing of the intestate through the negligence of the defendant. It was made without forethought or design, and it helped to explain the main fact in the case. *Carter v. Buchannon*, 3 Ga. 513; 21 Am. & Eng. Enc. Law, p. 99; Best, Ev. 446. The declaration of the intestate was the natural and inartifi-

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cial concomitant of a probable act which itself was a part of the *res gestæ*. Hunter v. State, 40 N. J. Law, 540.

The defendant offered to show by the engineer that he would have stopped the train in order that the intestate might have returned to the coach, if he had been so requested to do.

Evidence. We do not see how the evidence was material, as the case was then constituted, and it should not have been admitted, for it threw no light upon the matter. There was error in the ruling of his honor, and there must be a new trial.

NOTE.

Carriers of Passengers—Sufficient Force of Employees.—As to the carrier's duty to have a sufficient force of employees for the safe and proper conduct of its business, see International, etc., R. Co. v. Halloren, 3 Am. & Eng. R. Cas. 343, 53 Tex. 46, 37 Am. Rep. 744; Ingalls v. Bills, 9 Met. (Mass.) 1, 43 Am. Dec. 346; Grey v. Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729.

WALKER *et al.*

v.

GREEN.

(Supreme Court of Kansas, March 11, 1899.)

Injury to Shipper—Unnecessarily Riding in Freight Car by Permission of Trainmen.*—A passenger on a freight train, who voluntarily and unnecessarily rides in a freight car containing a horse and household goods which he is shipping over the line of road, instead of riding in the caboose attached to the train, which is provided for the accommodation of passengers, and who is injured by the negligent handling of the car, will be deemed guilty of contributory negligence; and the permission of the trainmen to ride in the freight car will constitute no excuse for his act.

(Syllabus by the Court.)

ERROR by defendants from Sedgwick county district court.
Reversed.

*See notes at end of case.

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A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiffs in error.

Holmes & Haymaker and Rohrbaugh & Rauch, for defendant in error.

DOSTER, C. J. This was an action brought by A. B. Green against the receivers of the Atchison, Topeka & Santa Fe Railroad Company to recover damages for injuries received by him as a passenger on one of the company's trains prior to the appointment of the receivers. A phase of the controversy recently came before us in another action. *Walker v. Green* (Kan. Sup.) 55 Pac. 281. In that case it was held, construing the orders of the United States circuit court appointing and controlling the receivers, that they were liable notwithstanding the injuries were received previous to their appointment, and at a time when the company itself was in the operation of its line of road. The main case is now before us for consideration. The jury returned a verdict and special findings of fact in favor of the plaintiff, and upon which judgment was rendered for him. The findings, aided in some particulars by the evidence, to which we have referred for a fuller understanding of the case, show the following facts: Green shipped a car containing a horse and household goods over the line of the railroad from Kansas City, Mo., to Caldwell, this state. The car was loaded during the day, and the train started in the evening. A part of the agreement of shipment was as follows: "Release. In consideration of the free transportation granted me by the Atchison, Topeka & Santa Fe Railroad Company for the purpose of accompanying the stock shipped on the within contract, and of being permitted to go in, over, and about the cars in the train in which said stock is carried, and of being furnished return transportation free over said company's line to the point of shipment, as stipulated by the within company, we hereby release said company from all liability to us as to a passenger carried for compensation, assuming for ourselves all the risks of accident, injury, or damage from any cause whatever while upon the trains or premises of

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said company in charge of said stock, and while being returned free to the point of shipment as aforesaid (if entitled to return transportation free as per rules printed below). Signed this 30th day of October, 1893. A. B. Green. Fred C. Adams, Witness."

The train was an ordinary one, with a caboose or way car attached for the convenience of the trainmen and passengers. Green did not ride in the caboose. He rode in the freight car, with his horse and household goods. He did so, as he said, in order to look after his property. Just before starting from Kansas City, he was seen in this car by the train conductor and station agent there, under circumstances reasonably indicating to them an intention on his part to ride in it. It was not unusual, though not the rule, for men shipping household goods to ride in the car with them. However, the trainmen on the train in question did not know that Green was in the car. He did not surrender or exhibit his pass or contract of shipment. The trip from Kansas City to Newton occupied about 18 hours. Upon arriving at the latter place, the car containing the horse and goods was taken out of the train in which it had that far been brought, and was made up with other cars into a different train destined for Caldwell and other points south. In making up the new train in the yards at Newton, another car was bumped with considerable violence against the one containing Green and his property, so much so that the horse was thrown partly down, and some of the household goods moved or slid a foot or more along the car floor; and, upon arrival at Caldwell, a table and some kitchen utensils were found broken, supposedly as a result of the jar received by the bumping together of the cars at Newton. The car in which Green rode was a grain car, with side doors constructed to slide upward a certain distance on iron rods. When raised to the proper height, the lower part of the door could be pulled inward, and raised up and fastened to the roof of the car by a hook. Before the loading of the car at Kansas City, this door had been raised, and the end of it hooked upward

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as just described. It was seen in that position by Green at the time of starting, although he did not specially inspect it to see how it was fastened. The mechanical device of raising, hooking up, and lowering the door was very simple. It could have been readily comprehended by Green, and he could have easily unhooked and lowered the door had he desired. He placed a wagon box in the centre of the car between the two side doors. Inside this box he put a sleeping cot, upon which he slept during the night, and sat, if he so desired, during the day. This cot was immediately beneath the hooked-up and overhanging door before described. At Newton the train on which Green had ridden was turned over to the yard workmen there, the men who had brought it from Kansas City leaving it in their charge. There was no evidence that any of the workmen knew that Green was in the car. In making up the new train, the impact of the two cars mentioned caused the door to become unfastened, and to fall, striking Green, and injuring him, to recover for which this action was brought. It cannot be maintained.

Freight cars are not designed for passenger travel; nor are they used for such, except as the exigencies of particular cases require. A railroad company discharges its full duty to the public when it provides trains composed of passenger coaches, and cabooses to its freight trains for the convenience of such passengers as have occasion to accompany their live stock or other property. It is not required, in the management of its freight trains, in making them up, in coupling its freight cars together, and in switching them about in its yards, to exercise that degree of care which is necessary in handling its passenger coaches and trains, for the obvious reason that no passengers are supposed to be in its freight cars. To hold railroad companies, as to passengers voluntarily and unnecessarily riding in their freight cars, to the same degree of care required of them as to passengers in their regular coaches or in their cabooses, would be preposterous. Carefulness it required of railroad com-

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panies, as of individuals, with relation only to that which may be injured or destroyed by the lack of it, and with relation to their knowledge of what has been committed to their care. With relation to passengers whom they have undertaken to transport, the highest degree of diligence which human skill and foresight can exercise is required of them. With relation to freight they have undertaken to transport, a less degree of care and prudence is exacted. For example, the receivers may be liable for the negligent handling of the cars in the yards at Newton, which resulted in damage to the goods of the defendant in error; but they are not liable to him for the injuries he received, because he voluntarily exposed himself to the hazards of riding in a freight car. It is no sufficient answer to say that the trainmen knew the defendant in error was in the freight car. In all probability, they were unaware that he was in fact in it; nor were they bound by the usual course of their duty or their observation to know that he or other passengers would be liable to ride in such unusual place, but, had they known him to be in the car, the case would be nowise different. The increased dangers of riding in such car were as well known to him as to the trainmen; and their knowledge that he was exposing himself to the increased perils of such kind of passage, or their permission to him to do so, constitutes no justification for his act. He was of mature years and discretion, and needed no one to warn him against the hazards he was taking. He, as well as they, was charged with notice that freight cars are not fit and safe vehicles for travel. The principles applicable to this case have been heretofore declared by this court in *Railroad Co. v. Lindley*, 42 Kan. 714, 22 Pac. 703. In that case it appeared that a live-stock shipper was directed by the conductor to go upon the top of the train hauling his stock, so as to assist in watering it. He did so, and was injured by the negligent act of the engineer in violently bumping together detached portions of the train. It was ruled that riding upon the top of the cars was negligence upon his part, and also that the direction or request of

the train conductor to do so constituted no excuse for his assumption of the risk. In the opinion by CHIEF JUSTICE HORTON, many of the cases elucidating the rules in question are cited and quoted from. No cases involving a state of facts entirely like those under consideration have been called to our attention, but many of an analogous character are cited in Ray, Neg. Imp. Dut. § 123. The rule collectible out of these cases fully supports the decision made in this case and in that of Lindley, *supra*.

It is true that the portion of the written contract of shipment made by the defendant in error recites that he was "permitted to go on, over, and about the cars in the train in which said stock is carried." This, however, was not a permission to ride throughout the entire journey on other parts of the train than the caboose; but it was, as the language reads, a permission to go on, over and about the train, and was, of course, designed to enable him to make such inspection *en route* of his horse and other property, as might be thought necessary to properly care for it. There was no occasion for him to ride continually in the car with his horse and household goods in order to care for them, nor does the contract of shipment presuppose a necessity for doing so, and therefore confer upon him a corresponding right. The demurrer to the evidence of the defendant in error (plaintiff below) should have been sustained; so, likewise, judgment should have been rendered against him on the special findings of the jury. The judgment of the court below is reversed, with directions that these be done. All the justices concurring.

NOTES.

Passenger Injured While Riding in Dangerous Position—Right to Recover.—Where a passenger, without necessity, selects a place to ride which is obviously not intended for that purpose, and receives an injury which is in part due to hazards peculiar to that position, he has no cause of action. Little Rock, etc., R. Co. *v.* Miles, 40 Ark. 298, 48 Am. Rep. 10, 13 Am. & Eng. R. Cas. 10; Hickey *v.* Boston, etc., R. Co., 14 Allen (Mass.) 429; Carroll *v.* Inter-State Rapid

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Transit Co., 107 Mo. 653, 52 Am. & Eng. R. Cas. 273; Ashbrook v. Frederick Ave. R. Co., 18 Mo. App. 290; Tuley v. Chicago, etc., R. Co., 41 Mo. App. 432; Jackson v. Crilly, 16 Colo. 103.

Same—Baggage Car.—It is contributory negligence for a passenger to ride in the baggage car; unless indeed he does so with the permission and at the invitation of the officers in charge of the train. O'Donnell v. Allegheny, etc., R. R. Co., 59 Pa. St. 239; Carroll v. N. Y., etc., R. Co., 1 Duer, 571; Watson v. Northern R. Co., 24 Upp. Can. Q. B. 98; Jacobus v. St. Paul, etc., R. R. Co., 1 Cent. L. J. 375; Higgins v. Hannibal, etc., R. R. Co., 36 Mo. 418; Kentucky, etc., R. R. Co. v. Thomas, 1 Am. & Eng. R. Cas. 79; Houston & T. C. R. Co. v. Clemmons, 8 Am. & Eng. R. Cas. 396.

And in some cases a passenger is not held justified in assuming such a position even with the consent and by permission of the conductor or brakeman. Hickey v. Boston, etc., R. R. Co., 14 Allen, 429; Penna. R. Co. v. Langdon, 1 Am. & Eng. R. Cas. 87. And see B. & M. R. R. Co. v. Rose, 1 Am. & Eng. R. Cas. 253.

Same—Effect of Direction or Consent of Conductor or Other Employee—General Rule.—It is generally held that where the passenger assumes a position of danger by the invitation of the conductor, and is injured while in that position, he is not held to be guilty of contributory negligence. Burns v. Bellefontaine R. Co., 50 Mo. 139; Clark v. Eight Ave. Co., 36 N. Y. 135; Kentucky R. Co. v. Thomas, 1 Am. & Eng. R. Cas. 79; O'Donnell v. Allegheny, etc., R. Co., 59 Pa. St. 239; Jacobus v. St. Paul, etc., R. Co., 20 Minn. 125; L. R. & Ft. S. R. v. Miles, 40 Ark. 298; Kentucky Cent. R. Co. v. Thomas, 79 Ky. 160, 165; Lawson v. Chicago, etc., R. Co., 24 N. W. Rep. 618; Dunn v. Grand Trunk R. Co., 58 Me. 187.

In Kentucky Cent. R. Co. v. Thomas, 79 Ky. 160, the court say: "If the nature of the accident be such that the danger of injury was not enhanced in consequence of the position occupied by the passenger, or if the accident was of such a nature as was likely to occur in one portion of the train as another, or if he occupied the place with the knowledge or consent of the conductor, his right of recovery will not be affected by the fact that he was at an improper place."

Passengers are warranted in obeying the directions of the agents and servants of the carriers, unless such obedience leads to known danger, which a prudent man would not encounter. Penna. R. Co. v. Houghland, 78 Ind. 206; Louisville, etc., R. Co. v. Kelley, 13 Am. & Eng. R. Cas. 1; Pool v. Chicago, etc., R. Co., 56 Wis. 227.

In Nashville, etc., R. Co. v. Erwin, 3 Am. & Eng. R. Cas., 465, E. and a friend arrived at the station just after the train departed. An employee of the company who had charge of the trains, trainmen and rolling-stock, invited them to get on an engine which was at

the station, and would take them to the train which would stop at a bridge a short distance from the station. The engine overtook the train and ran into it, and E. to avoid the danger jumped from the engine and was injured. *Held*, that the company was liable for the injuries he received.

Contra.—But it has been held that a conductor cannot in violation of a known rule of the company, intended for the safety of passengers, license a passenger to occupy a place of danger, so as to make the company responsible in case of injury. *Penna. R. Co. v. Langdon*, 92 Pa. St. 21, 1 Am. & Eng. R. Cas. 87; *Robertson v. Erie R. Co.*, 22 Barb. (N. Y.) 91; *Railroad Co. v. Jones*, 95 U. S. 439; *Hickey v. Boston, etc., R. Co.*, 14 Allen (Mass.), 429; *Downey v. Hendrie*, 46 Mich. 498, 501.

In *Railroad Co. v. Jones*, 95 U. S. 439, the plaintiff was one of a party of men employed by the company in repairing its roadway. They were usually conveyed to and from their work in a box-car assigned to their use. One evening, when returning from work, being told by the director of the laborers to jump on anywhere, he rode on the pilot of the engine, where previously he had been forbidden to ride, and was injured through the negligence of the company. *Held*, that as he had not used ordinary care he could not recover, MR. JUSTICE SWAYNE said: "The plaintiff had been warned against riding on the pilot and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-car. He should have taken his place there. He could have gone in the box-car in as little if not less time than it took to climb to the pilot. The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive. The company, although bound to a high degree of care, did not insure his safety. He was not an infant, nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box-car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly.

In *Rucker v. Mo. Pacific R.*, 61 Texas, 499, 21 Am. & Eng. R. Cas. 245, a colored man coming to the station of the railroad company to take passage upon a train, seated himself upon the pilot of the

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engine, and when asked by the conductor what he was doing there, replied that he had not enough money to pay his fare, but had given fifty cents to the fireman for permission to ride there. After the train started he was thrown off and injured by the engine running over a hand-car. The man was of ordinary intelligence. By the rules of the company employees were prohibited from allowing passengers to ride in such a place. In a suit for damages against the company, *held*, that plaintiff had been guilty of such contributory negligence as precluded all right of recovery. See also *Doggett v. Illinois Cent. R. Co.*, 34 Iowa, 284, where a passenger, who voluntarily got upon the tender of the engine to ride when there was a "caboose" car attached to the train for passengers, was held guilty of contributory negligence.

Rule in Alabama.—The following rules were laid down in *S. & N. Ala. R. Co. v. Schaufler*, 75 Ala. 136, 21 Am. & Eng. R. Cas. 405: First. The advice or direction of the conductor cannot be held to excuse an act of negligence on the part of the passenger, which would be so opposed to common prudence as to make it an obvious act of recklessness or folly. Second. Where the act advised to be done is one where the danger would not be apparent to a person of reasonable prudence, and the passenger acts under the influence of such advice, given by the conductor in the line of his ordinary duties, it is for the jury to say how far the plaintiff's negligence may be excused.

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v.

SOUTHERN PAC. CO.

(*Supreme Court of Utah, Dec. 7, 1898.*)

Jury Commissioners.—The law fixing the time for the appointment of jury commissioners, as well as section 1306, Rev. St., providing for the selection of jurors by them, is directory as to time.

Findings of Fact—Review.—Under section 9, art. 8, Const., an appellate court cannot review findings of fact further than is necessary to determine questions of law.

Negligence and Contributory Negligence.—The question of negligence on the part of the appellant and contributory negligence on the part of deceased was properly submitted to the jury.

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Stockman Killed by Low Snowshed—Negligence.*—It was negligence on the part of the appellant not to maintain its snowsheds high enough for a person to pass beneath them safely while walking on top of the refrigerator cars; but if, for any reason, a shed of insufficient height was maintained, then the exercise of ordinary care requires the railroad company to give warning in some way, either by word or other proper method, of the train's approaching the same, to all persons whose duties expose them to danger because of the structure.

Same—Evidence.—Evidence of what was usual and customary among stockmen as to going upon the tops of cars under the circumstances and conditions surrounding deceased when he was killed was properly admitted as tending to prove deceased simply in discharge of his duty, as indicated by a usage among stockmen known by railroad men, and not guilty of contributory negligence.

Parole Evidence.—The written contract delivered to deceased by appellant, showing his right to be on the train as an attendant on sheep in transit, having been lost, it was competent to prove its contents by parole.

BARTCH, J., dissenting.

(Syllabus by the Court.)

APPEAL by defendant from Weber county district court.
Affirmed.

Marshall, Royle & Hempstead, for appellant.

David Evans, L. R. Rogers, and A. G. Horn, for respondent.

ZANE, C. J. This was an action to recover damages in consequence of the death of Charles A. Nelson, caused, as alleged, by the negligence of the defendant in placing 3 refrigerator cars between the caboose and 11 cars loaded with sheep in charge of deceased and two other men, and in constructing and maintaining a snowshed so low that deceased was killed by it while passing over a refrigerator car from the sheep cars to the caboose, the refrigerator car being about 18 inches higher than other freight cars. The trial of the cause commenced on January 11, 1898. When the jurors were called, the defendant challenged the array because the commissioners who selected them were not appointed prior to the first day of the preceding December.

Case Stated.

Jury Commissioners.

*See note at end of case.

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as directed by section 1302, Rev. St. 1898. In the case of Kennedy v. Railroad Co. (decided at this term) 54 Pac. 988, we held the time for appointing commissioners, as well as the time for selecting jurors by them under section 1306, is directory. The time named in a law for an act should be held directory, when not forbidden at another time, unless the doing of it at another time would unjustly affect private or public interests. We find no language in the statute expressly denying the power to appoint the commissioners, or their power to select jurors later than the time mentioned in the law. Therefore we are of the opinion the court did not err in denying defendant's challenge to the array.

When this cause was before us at a former term we held, as we have also held in other cases, that under section 9 of article 8 of the constitution this court cannot review findings

Findings of Fact
—Review.

of fact further than is necessary to determine questions of law. Regarding that question as settled, we must recognize all facts as to which the evidence is conflicting as settled by the lower court. 15 Utah, 325, 49 Pac. 644. One Philander V. Saunders was with the deceased when killed, and he was also injured, though not fatally. His case against the same defendant was before us on appeal from a judgment of nonsuit at a former term. 13 Utah, 275, 44 Pac. 932. The evidence in

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that record was in effect, the same as the evidence in this, and some of the questions of law now raised we must regard as having been determined by us then. This being an action at law, we must assume facts to exist which the evidence tends to prove, as upon a motion for a nonsuit. In either case the same rule applies. After stating the evidence at length in the case of Saunders v. This Defendant, *supra*, the court said: "Assuming these facts to be true,—which is the rule for the purposes of a nonsuit,—the question is, do they present such a case of negligence on the part of the defendant, and such a want of contributory negligence on the part of the plaintiff, as will render the defendant liable?" And later, in the

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same opinion, the court said: "Being on the train, it was the plaintiff's duty to care for the sheep. After having attended to his duty in this regard, he was, of necessity, compelled to return to the caboose, because there was no place provided for him in the sheep cars to remain there, and to do so would disturb the sheep, and produce the very effects which it was his duty to prevent. He could not return through the cars on account of the refrigerator cars, through which he could not pass, having been placed next to the caboose, and therefore attempted to return over the tops of them, as stockmen had been accustomed to do. The conductor knew he was somewhere on the train, and was compelled to go over the tops of the cars to get to the caboose, but gave him no warning of its approaching the snowshed, which was of insufficient height to permit him to pass through safely while walking on the running boards. Under these existing facts and circumstances, it is not absolutely necessary or material to decide whether or not it was negligence *per se*, on the part of the railroad company, to maintain the snowshed in question at an insufficient height to allow a person to pass through safely while walking on top of the moving cars, although we are inclined to the affirmative of this view, as founded on both reason and justice. If, however, for any reason, an overhead structure, which exposes persons who are rightfully on a moving stock train, as was the plaintiff, to unusual risks, may be unlawfully maintained at such height, then every principle of justice, as well as the exercise of ordinary care, requires that the company which maintains such structure shall give warning in some way, either by word or other proper method, of the trains approaching the same, to all persons whose duties may expose them to the danger of being injured because of the structure. The giving of such warning is a duty which such company cannot fail to perform, and escape liability for injuries which result as a natural sequence because of such failure; and in the performance of such duty it is bound to exercise due care." Finally, the court used

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this language: "We conclude that the appellant was right-fully on the train, and had the right to assume that the snowshed was a safe structure, having received no notice to the contrary; that the respondent, on the occasion of the accident, was guilty of negligence, under the circumstances indicated by the proof; and that there was presented a question for the jury, and not one of law for the court. Whether or not the appellant, under the peculiar facts and circumstances of this case, was himself guilty of a want of ordinary care which contributed to the injury, was also a question for the jury. The court was not warranted, under the circumstances shown by the record, in deciding as a matter of law that the appellant was guilty of such contributory negligence as precluded a recovery, and therefore was not warranted in granting the nonsuit, or denying the motion for a new trial."

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shed—Negli-
gence.**

The evidence in the record now at hand, as to the right of the deceased to be upon the defendant's train, and as to the circumstances in view of which he attempted to go from the sheep cars over the refrigerator cars to the caboose, for the purposes of this appeal, is, in effect, the same as in the case of *Saunders v. Same Defendant, supra*. The evidence of *Saunders'* right to be upon the train, and of the circumstances under which he was injured, is substantially the same as that of the right of the deceased to be upon the train, and of the circumstances under which he was killed. The reason for putting the refrigerator cars between the sheep cars and the caboose appears to be frivolous, and the evidence fails to show any justification for maintaining the snowshed so low as to endanger the lives of persons rightfully on top of these cars. It appears that the sheds recently built are high enough to allow cars with persons standing upon them to pass safely through them. It is no sufficient excuse to say the raising of the sheds would involve additional expenditures of money. If it may be in any case impracticable to build any overhead structure not sufficiently high to permit persons rightfully upon its cars to pass under them safely,

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the company should take all reasonable precautions to prevent injury by giving timely warning of danger. The sound of a whistle might be sufficient to a person understanding it to mean overhead danger; but to another, not informed of its meaning, it would not be sufficient. The warning should be timely and reasonable, and calculated to give warning to all persons rightfully on top of its cars of the particular danger ahead. *Railway Co. v. Carpenter*, 5 C. C. A. 551, 56 Fed. 451; 1 *Shearm. & R. Neg.* (4th Ed.) § 198; *Railroad Co. v. Johnson*, 116 Ill. 206, 4 N. E. 381; *Railroad Co. v. Horst*, 93 U. S. 291.

Defendant's counsel assigns as error the rulings of the court admitting proof that persons in charge of stock usually pass over the tops of cars between their stock and the caboose in attending to it while in transit, and Same—Evidence. insists that the proof, if admitted, should be sufficient to establish a common-law custom. The evidence was not offered to prove a common-law custom having effect of a law. Evidence that deceased, in passing over the top of the car, was doing what other stockmen similarly situated were in the habit of doing, was proper. Such evidence was admitted as tending to prove deceased was rightfully on top of the car when killed, and not guilty of contributory negligence in being there; that he was simply in the discharge of his duty as indicated by a usage among stockmen recognized by railroad men. It is not necessary that such a practice shall possess all the elements of a common-law custom. In *Morningstar v. Cunningham*, 110 Ind. 328, 11 N. E. 593, the court said: "In such case, evidence of the known and usual course of a particular trade or business is competent with a view of raising a presumption that the transaction in question was according to the ordinary and usual course of the business to which it related. * * * It is not essential that such a usage should be shown to be so ancient 'that the memory of man runneth not to the contrary,' nor that it should contain all the other elements of a common-law custom as defined in the books." *Carter v. Coal Co.*, 77 Pa.

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St. 286. Further, we are of the opinion the court did not err in permitting evidence of what was usual and customary among stockmen as to going upon the tops of cars under the circumstances and conditions surrounding the deceased when he was killed. In the case of *Railway Co. v. Carpenter*, *supra*, the court said: "In determining the question of negligence in a given case (where the quality of the act in the respect of its being negligent or otherwise is not obvious) it is always proper to consider what other persons of ordinary prudence, who are engaged in the same calling, under like circumstances, are in the habit of doing or ordinarily do. This is the universal test of negligence. In view of these considerations, we have reached the conclusion that the testimony relative to the custom in vogue among persons having charge of live stock on freight trains was properly admitted, both for the purpose of rebutting the charge of contributory negligence and for the purpose of showing that railway companies permit stockmen to pass over the tops of freight trains on the running boards provided for that purpose, when the vicissitudes of the journey render it necessary to do so, to reach their stock, and attend to it, or to reach the caboose. As there was considerable testimony on the trial which tended strongly to show that persons in charge of live stock on freight trains frequently find it necessary, in attending to their stock properly, to get on the top of a train, and to walk back to the caboose, or to ride on the top of a car for some distance till the train stops; and as it further tended to show that it was a common practice on the defendant company's road, as well as upon other railroads, for stockmen to get on the top of a train, and to walk back to the caboose, when it becomes necessary to do so; and as it also tended to show that the company had never made any objections to such practice on the part of persons in charge of stock,—we are constrained to hold that it was the province of the jury to decide, in the light of all the evidence, as to the existence of the custom, and as to whether it was necessary for Carpenter, in the proper

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discharge of his duty, on the occasion in question, to get on top of the train, and whether he went there rightfully in view of the existing usage, and in so doing exercised ordinary care and circumspection."

It appears from the evidence that one copy of the contract under which the sheep were shipped was given to the deceased, and the other was retained by the defendant. The one retained was introduced in evidence, but the other, after diligent search, could not be found. The name of the deceased was not on the one retained by the company, and a witness who saw the one delivered testified, over the defendant's objection, that the name of the deceased was on it. The ruling of the court in admitting this testimony the defendant assigns as error. It was proper to establish that deceased was rightfully on the train by proving his name was on the contract delivered to him by defendant as one who had a right to attend the sheep, and, the written contract held by him being lost, it was competent to prove its contents. Parole Evidence.

The rulings of the court in overruling objections to a number of other questions are assigned as error, but upon a careful consideration of them we are unable to find any reversible error. The same may be said of the errors assigned upon exceptions to the charge of the court, and the refusal of requests asked by defendant's counsel. The judgment is affirmed, with costs.

CHERRY, District Judge, concurs.

BARTCH, J. (dissenting). I am of the opinion that under the facts and circumstances as they appear in this record the question of custom ought to have been withdrawn from the jury on the ground that, even if, under the conflicting evidence respecting the custom, it be held to have existed, it was unreasonable. I therefore dissent.

NOTE.

Warning of Overhead Structure—Negligence.—Railway companies are under an obligation to all persons who have a right to be on top of their trains in the discharge of any duty, to so construct

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overhead bridges, or other overhanging structures, that they will not expose such persons to any risk or peril that can easily, and without any great outlay, be avoided; and if any such structure is for any reason maintained, it is the company's duty, in the exercise of ordinary care, to give warning, either verbally or by suspended "whip lashes." *Chicago, M. & St. P. R. Co. v. Carpenter*, 56 Fed. Rep. 451.

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HINE.

(Supreme Court of Alabama, May 9, 1899.)

Injury to Passenger—Actions—Ex Delicto and Ex Contractu.*—For an injury to a passenger caused by a breach of the common carrier's duty, as such, an action will lie in favor of the former in tort, as well as upon the contract of carriage.

Riding on Freight Train—Written Permits—Representations of Ticket Agents.—In the absence of notice of an absolute rule requiring a passenger on a freight train to exhibit to the conductor, in addition to his ticket, a written permit to ride thereon, a passenger has a right to board a freight train relying upon defendant's ticket agent's representations on the subject, and his undertaking to give the permit to the conductor.

Ejection of Passenger.—Mistake of Ticket Agent—Liability.†—A carrier cannot shield itself from the consequences of misconduct or mistake on the part of its ticket agent, acting within the scope of his duties, which has naturally betrayed its conductor into wrongfully ejecting a passenger.

Demurrers.—A demurrer does not lie to part of the complaint in an action for negligence.

Elements of Damages.*—In an action for the ejection of a passenger, expense, inconvenience, humiliation, and indignity may all be elements of the damages recoverable.

*See *Atlantic & P. Ry. Co. v. Laird* (U. S.), 8 Am. & Eng. R. Cas., N. S., 365, and *notes*, p. 375.

†See *Alabama & V. Ry. Co. v. Holmes* (Miss.), 10 Am. & Eng. R. Cas., N. S., 270, and *notes*, p. 272 *et seq.*

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Same—Subsequent Duty of Passenger.*—It is the duty of an ejected passenger to use ordinary care to make his damage no greater than is necessary; and this rule, in order that he may recover for the consequences of the ejection, may require him to resume his journey when invited to do so.

Same—Ridicule—Sufficiency of Evidence.—In an action for the ejection of a passenger, there can be no recovery on account of ridicule to which the passenger was subjected, where it is not shown that the persons by whom he was ridiculed were present at the ejection, or that the passenger alone did not inform them of it, or that their conduct was in any sense approximate upon the wrong.

APPEAL by defendant from Limestone county circuit court.
Reversed.

The complaint was as follows: That "it became necessary for the plaintiff to make, on the defendant's freight train, then near due, a hasty trip from Athens to Decatur, stations on the defendant's railroad in this state about fifteen miles apart, on opposite sides of the Tennessee river; the urgent purpose of this trip being to bring from Decatur to Athens the already delayed wedding garments of a lady to whom he was engaged to be married on the next evening. That thereupon, about five o'clock p. m., October 7, 1896, the plaintiff applied to George L. Sherrell, as the defendant's depot, ticket, and telegraph agent at Athens, for a regular ticket, and a special permit to go and ride on such freight train to Decatur, then explaining to him the necessity and importance of such trip. That thereupon the plaintiff paid for and received from such agent such ticket, signed, and delivered to such agent twenty-five cents for such permit, to be obtained by such agent by telegraph from the defendant's general superintendent, at Nashville, Tennessee. That thereupon such agent informed the plaintiff that he need not wait for such permit; that he (such agent) would give such permit, when it came, to the conductor of such freight train when he arrived; such permit being generally, if not universally, given to male passengers, such as the plaintiff, when asked for. That such freight train arrived at Athens about 7 o'clock p. m., Octo-

*See notes at end of case.

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ber 7, 1896, when the plaintiff, with such ticket, in reliance upon such agent as to such permit, boarded such freight train where it had stopped, over one hundred yards from defendant's depot in Athens, therein took his seat as one of the passengers thereon; and, after such freight train had proceeded several hundred yards on its way to Decatur, the conductor demanded of the plaintiff, in addition to such ticket, such permit, which the plaintiff then did not have, stopped the train, and expelled the plaintiff therefrom, after the plaintiff had informed him of all that was said and occurred between him and such agent about such permit. And that such agent had received such permit from the superintendent before the train arrived at Athens. And the plaintiff avers that, in consequence of all which, he lost the money he thus paid, was grievously disappointed in reference to the preparations for his wedding, was humiliated, was subjected to ridicule, and was subjected to indignity, whereby he suffered damage to the amount of one thousand dollars; hence this suit." To the complaint defendant interposed the following demurrers: "(1) To that portion of the complaint in these words: 'It became necessary for plaintiff to make on defendant's freight train, then near due, a hasty trip from Athens to Decatur, stations on the defendant's railroad in this state about fifteen miles apart, on opposite sides of the Tennessee river; the urgent purpose of his trip being to bring from Decatur the already delayed wedding garments of a lady to whom he was to be married on the next evening,'—because (a) It is immaterial, on the averments of the complaint, what plaintiff's object or purpose was; (b) the matter stated is not an element of damages for which a recovery could be had against this defendant; (c) said matter is a conclusion of the pleader, and not a statement or allegation of a traversable fact. (2) To that portion of the complaint which seeks a recovery of defendant because plaintiff 'was grievously disappointed in reference to the preparations for his wedding, was humiliated, was subjected to ridicule, and was subjected to indignity,' (a) because, under the averments of

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the complaint in this cause, said matters are not elements of damages for which a recovery could be had against this defendant; (b) because it is immaterial, under the averments of said complaint, whether the results of plaintiff's failure to obtain passage on said train were as stated in said paragraph or not, not being such character of damages or injuries as would entitle plaintiff to recover therefor. (3) Because, upon the allegations of said complaint, the remedy of the plaintiff, if any, is an action upon the contract, and was not an action sounding in damages. (4) Because, upon the allegations of said complaint, if a remedy exists, it is an action *ex contractu* and not *ex delicto*." This demurrer being overruled, defendant filed the general issue and the following special plea: "Second. On October 7, 1896, there was in existence and in force a rule of the defendant company to the effect that passengers must not be carried on freight trains without permission from the general manager or the superintendent, except as provided for upon the timetables, and by special instructions that might from time to time be issued; that under this rule, which was known to the plaintiff at the time, the defendant company, before accepting any one as a passenger, required a ticket for passage, with a permit from the general manager or the superintendent to ride upon such particular train, all of which was known to plaintiff at the time, and plaintiff thereupon tendered to the conductor a ticket for transportation from Athens to Decatur, but he did not accompany said ticket with a permit from the general manager or superintendent, nor exhibit to said conductor such permit. Wherefore defendant says plaintiff is not entitled to recover, and puts itself upon the country." The court granted plaintiff's motion to strike the second plea from the file and defendant excepted.

In its general charge, the court instructed the jury as follows: (1) "If you find for the plaintiff, in estimating his damages you can look to the fact, if it be a fact, that he was

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humiliated by being put off the train; that he suffered ridicule and was subjected to indignity; that he was disappointed in his arrangements for the wedding, and the same postponed. If you find that such was the fact, you can look to these things as elements of damages to which the plaintiff is entitled, in making up your verdict." To this portion of the court's general charge the defendant duly excepted, and also duly excepted to the court's refusal to give, at the request of the defendant, the following written charge: (1) "As I told you in my general charge, you cannot give punitive damages in this case. Punitive damages are such as are given as a penalty or punishment to deter or prevent the party from again committing a similar offense. But I now charge you again that, if you find the plaintiff is entitled to recover at all in this case, then damages for the 'indignity, humiliation, and ridicule,' if such there were, are actual damages to be allowed by you in such sum as you may think right, not exceeding one thousand dollars." The defendant then requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1) "If the jury believe the evidence, you will find for the defendant." (4) "I charge you, gentlemen of the jury, that, under the undisputed evidence in this case, the conductor had the right to refuse to carry the plaintiff as a passenger from Athens to Decatur, Ala., and the plaintiff is not entitled to recover in this action." (6) "If the jury believe from the evidence that the rules of the defendant require the plaintiff to have a permit to ride on the freight train going from Athens to Decatur on the evening of October 7, 1896, it was the duty of the plaintiff to furnish to the conductor evidence, beyond his own statement, of his right to passage on the said freight train; and if the jury further believe from the evidence that the plaintiff had sent a telegram, and in response thereto the superintendent had telegraphed a permit for the plaintiff to ride on the said freight train, yet, if the plaintiff did not have the said permit in his possession, to exhibit to the conductor

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when requested so to do, your verdict should be for the defendant." (7) "If the jury believe from the evidence that the rules and regulations of the defendant required the plaintiff to have a permit from the general manager or superintendent to ride on a freight train going from Athens to Decatur on the evening of October 7, 1896, it was the duty of the plaintiff to furnish the conductor evidence beyond his own statement that he had such permit; and if the jury believe from the evidence that he failed to furnish such evidence, and the plaintiff got off said train when informed by the conductor that he could not permit him to ride on such freight train, then your verdict should be for the defendant, notwithstanding the fact that he had a ticket from Athens to Decatur." (8) "It is the duty of a passenger undertaking to ride on freights, when the rules and regulations of the railroad require him to obtain permits from the superintendent and general manager, to see to it before he takes a train that he has such a permit as will carry him on that train." (9) "I charge you, gentlemen of the jury, that under the law in this state a passenger is not allowed to ride on freight trains, where the rules and regulations of the railroad company require passengers to obtain permits to so ride from the general manager or superintendent, unless the passenger produces and tenders to the conductor a permit from the general manager or superintendent, accompanied with a ticket or legal pass; and if, upon demand for a permit from the conductor or proper official of the road, the passenger fails or refuses to produce it, he may lawfully be expelled from the cars." (10) "A railroad company is not liable for damages for ejecting a passenger from a freight train, riding without a permit, when the rules and regulations of the railroad company require persons traveling on freight trains to have a permit from the general manager or superintendent." (13) "If the jury believe the evidence, then the plaintiff can recover nothing in this case but nominal damages." (16) "I charge you, gentlemen of the jury, that the fact that the plaintiff was humiliated, if such was the fact, is not an

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element of damages in this case." (17) "I charge you, gentlemen of the jury, that the disappointment of the plaintiff in reference to the preparations for his wedding, if such was a fact, is not an element of damages in this case." (18) "I charge you, gentlemen of the jury, the fact that the plaintiff was subjected to ridicule, if such was the fact, is not an element of damages in this case." (19) "I charge you, gentlemen of the jury, that the fact that the plaintiff was subjected to indignity, if such was the fact, is not an element of damages in this case."

Thos. G. Jones, Chas. P. Jones, and Alex. C. Birch, for appellant.

McClellan & McClellan, for appellee.

SHARPE, J. A breach of the duty which a common carrier, as such, owes to its passengers, involves misfeasance as well as nonfeasance; and for an injury caused by such breach an action lies in favor of the passenger in tort, as well as upon the contract of carriage. 2 Sedg. Dam. (8th Ed.) § 859; 5 Am. & Eng. Enc. Law [2d Ed.] 691; *Railroad Co. v. Gaines* (Ky.) 36 S. W. 174, 59 Am. St. Rep. 465; *Sheldon v. The Uncle Sam*, 18 Cal. 527.

A passenger is bound to conform to the reasonable and proper regulations of the carrier respecting the time and mode of transportation, and it may be conceded that ordinarily the conductor of a freight train may require of one attempting to take passage thereon evidence, beyond his own statement and the production of a ticket, that he has conformed to a regulation requiring special permission as prerequisite to his right to do so. It does not appear from the complaint, however, that there was any rule of the defendant which required absolutely one who has actually obtained such permission to himself exhibit to the conductor the written evidence of such permission. In the absence of notice to the plaintiff of such absolute requirement, he had a right to

Injury to Passenger—
Actions—
Ex Delicto and
Ex Contractu.

Riding on
Freight Train—
Written Permits—
Representations
of Ticket
Agents.

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assume that the defendant's ticket and telegraphing agent knew his duties, and would perform them. If, therefore, as appears from the complaint, the plaintiff was induced to board the train, and begin the journey, disarmed of the written permit, by the conduct of the defendant's agent, and in reliance upon his advice, and his undertaking to give the permit to the conductor, the defendant could not rightfully eject him from the train for failure to exhibit a written permit to the conductor.

The carrier cannot shield itself from the consequences of misconduct or mistake on the part of one of its agents, acting within the scope of his duties, which has naturally betrayed another of its agents into the final act of injury to the passenger. *Murdock v. Railroad Co.*, 137 Mass. 293, 50 Am. Rep. 307; *Railroad Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Hufford v. Railroad Co.*, 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859; *Head v. Railroad Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; *Railroad Co. v. Gaines*, *supra*.

Ejection of Passenger—Mistake of Ticket Agent—Liability.

Upon such considerations, it appears that the demurrers to the whole complaint were properly overruled. For the reasons last stated, it also appears that the plea numbered 2 contained no sufficient answer to the complaint, and the action of the court in striking it out was without error.

A demurrer does not lie to part of a complaint unless the suit be one upon a bond, assigning breaches. To rid it of objectionable parts, the remedy is by motion to strike them out. *Hester v. Ballard*, 96 Ala. 410, 11 South. 427; *Kennon v. W. U. Tel. Co.*, 92 Ala. 399, 9 South. 200; *Pryor v. Beck*, 21 Ala. 393.

Demurrers.

The issue being found in favor of the plaintiff, he was entitled to recover the damages proximately resulting to him from the wrong, including the expense and inconvenience to which he was put. Humiliation and indignity, if suffered by him from the ejection, are also elements of actual damages. Such damages may arise from a sense of injury and outraged rights

Elements of Damages.

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engendered by the ejection alone, without regard to the manner in which it was effected, and though done only through mistake. *Head v. Railroad Co.*, *supra*; *Railroad Co. v. Flagg*, 43 Ill. 364; *Railroad Co. v. Hoefflich*, 62 Md. 300, 50 Am. Rep. 223; *Smith v. Railroad Co.*, 23 Ohio St. 10.

We think that, under the undisputed facts appearing in the record, the plaintiff was not entitled to recover for disappointment in respect of arrangements for his wedding, or for

Same—Subse-
quent Duty of
Passenger.

any ridicule to which he may have been subjected, so far as is shown by the proof. It is an undisputed fact that, after plaintiff had left the train for a short distance only, he was invited by the conductor, through a special messenger, to board the train and resume his journey, and that he refused to do so, except upon condition that the train should be backed to him. While by refusing such offer the plaintiff did not forfeit his right of action for the ejection, he could not be allowed to aggravate his injury or to enhance his damages by a voluntary abandonment of the trip. On the contrary, it was his legal duty to use ordinary care to make his damage no greater than was necessary, and to adopt reasonable and convenient means to that end; and the application of that rule would certainly have required of plaintiff his return to the train, if the accomplishment of the journey was important. *Railroad Co. v. Fullerton*, 79 Ala. 298; 5 Am. & Eng. Enc. Law. 693; *Car Co. v. Blum*, 109 Ill. 20; *Sedg. Dam.* (7th Ed.) 56. Under such circumstances, it cannot be held that the failure of plaintiff to make the trip, or a consequent postponement of arrangements for his marriage, was the necessary or proximate result of the wrong complained of.

There was no proof that plaintiff was subjected to ridicule, other than his statement that he "was guyed by some of the boys about town for being put off and not being permitted to ride." It is not shown that the persons who did the "guying" were present when plaintiff was ejected, or that he alone did not inform them of

Same—Ridicule—
Sufficiency of
Evidence.

it, or that their conduct was in any sense approximate upon the wrong.

From what we have stated as the law controlling the case, it follows that charges numbered 17 and 18 requested by the defendant should have been given, and that the remainder of those charges were properly refused; and also the written charge requested by plaintiff, because it affirmed the mentioned ridicule to be an element of damage, should have been refused. The part of the oral charge excepted to was correct, so far as it affirmed that humiliation could be the subject of plaintiff's damage; and the exception thereto, covering too much, was not well taken. For the errors indicated, the judgment must be reversed, and the cause remanded.

NOTES.

Carriers of Passengers—Ejection—Elements of Damages.—See *note*, 2 Am. & Eng. R. Cas., N. S., 164 *et seq.*

Inconvenience. Georgia R. Co. *v.* Olds, 77 Ga. 673; Central R., etc., Co. *v.* Strickland, 90 Ga. 562; City, etc., R. Co. *v.* Brauss, 70 Ga. 380.

Delay and annoyance. Chicago, etc., R. Co. *v.* Flagg, 43 Ill. 364, 92 Am. Dec. 133.

Indignity and humiliation. Willson *v.* Northern Pac. R. Co., 5 Wash. 621; Pennsylvania Co. *v.* Bray, 125 Ind. 229; McGinnis *v.* Missouri Pac. R. Co., 21 Mo. App. 399; Chicago, etc., R. Co. *v.* Conley, 6 Ind. App. 9; Baltimore, etc., Turnpike Road *v.* Boone, 45 Md. 344; Hoffman *v.* Northern Pac. R. Co., 45 Minn. 43.

And indignity is an element whether the ejection was through mistake or negligence or was wilful and wanton. Louisville, etc., R. Co. *v.* Wilsey (Ky.), 39 Am. & Eng. R. Cas. 418; Smith *v.* Pittsburgh, etc., R. Co., 23 Ohio St. 11; St. Louis, etc., R. Co. *v.* Trimble, 54 Ark. 354; Philadelphia, etc., R. Co. *v.* Hoeflich, 62 Md. 300, 50 Am. Rep. 223; Lake Erie, etc., R. Co. *v.* Christison, 39 Ill. App. 495; Chicago, etc., R. Co. *v.* Flagg, 43 Ill. 364, 92 Am. Dec. 133. But not where the passenger's purpose in entering the train was to be ejected. St. Louis, etc., R. Co. *v.* Trimble.

Additional expense. Pennsylvania R. Co. *v.* Connell, 112 Ill. 295, 54 Am. Rep. 238, 127 Ill. 419; Delaware, etc., R. Co. *v.* Walsh, 47 N. J. L. 548; Gorman *v.* Southern Pac. Co., 97 Cal. 1, 33 Am. St. Rep. 157.

Duty of Injured Party to Avoid Increase of Damages.—Reasonable care is required of the injured party to avoid an increase of the

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damages. *Cherry v. Thompson*, L. R. 7 Q. B. 573; *Roth v. Taysen*, 73 L. T. 628; *Frost v. Knight*, L. R. 7 Exch. 111; *Stewart v. Sculthorp*, 25 Ont. Rep. 544; *Gordon v. Brewster*, 7 Wis. 355; *Galveston, etc., R. Co. v. Ware*, 67 Tex. 635; *Buffalo Bayou Ship Channel Co. v. Milby*, 63 Tex. 492, 51 Am. Rep. 668; *Watson v. Kirby*, 112 Ala. 436; *Talley v. Courter*, 93 Mich. 473; *Heavilon v. Kramer*, 31 Ind. 241; *St. Louis, etc., R. Co. v. Neel*, 56 Ark. 279; *St. Louis, etc., R. Co. v. Ritz*, 33 Kan. 404; *Sherman Center Town Co. v. Leonard*, 46 Kan. 354, 26 Am. St. Rep. 101; *Chicago, etc., R. Co. v. Metcalf*, 44 Neb. 848; *Borden Min. Co. v. Barry*, 17 Md. 419; *Wing Chung v. Los Angeles*, 47 Cal. 531; *Watkins v. Rist*, 67 Vt. 284; *Barclay R., etc., Co. v. Ingham*, 36 Pa. St. 194; *Chamberlain v. Morgan*, 68 Pa. St. 168; *Harrison v. Missouri Pac. R. Co.*, 88 Mo. 625; *Haysler v. Owen*, 61 Mo. 270; *Mack v. Johnson*, 9 Colo. 536; *New Orleans, etc., R. Co. v. Echols*, 54 Miss. 264; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Northrop v. Hill*, 57 N. Y. 356, 15 Am. Rep. 501; *Costigan v. Mohawk, etc., R. Co.*, 2 Den. (N. Y.) 609, 43 Am. Dec. 758; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 484, 7 Am. Rep. 469; *Gibson v. Carlin*, 13 Lea (Tenn.) 440; *Akridge v. Atlanta, etc., R. Co.*, 90 Ga. 232; *Brant v. Gallup*, 111 Ill. 487, 53 Am. Rep. 638; *Fitzpatrick v. Boston, etc., R. Co.*, 84 Me. 33; *Grindle v. Eastern Express Co.*, 67 Me. 325, 24 Am. Rep. 31; *Hodges v. Fries*, 34 Fla. 63; *Eastman v. Sanborn*, 3 Allen (Mass.) 594, 81 Am. Dec. 677; *Scott v. Boston, etc., Steamship Co.*, 106 Mass. 468; *Campbell v. Miltenberger*, 26 La. Ann. 72; *Davis v. Fish*, 1 Greene (Iowa) 406, 48 Am. Dec. 387; *Little v. McGuire*, 43 Iowa 447.

See generally 8 Am. & Eng. Enc. Law (2nd Ed.) *sub tit.* Damages, at p. 605.

JACKSON

v.

ALABAMA & V. RY. CO.

(*Supreme Court of Mississippi, April 3, 1899.*)

Ejection of Female Passenger in Perilous Locality.*—A declaration alleging that a female passenger was put off a railroad train in a swamp on a dark, cold and rainy night, at a place remote from any known habitation, when the train was within three miles of the next station, states a cause of action, although it also appears therefrom that she was ejected for having neither a ticket nor the means of paying fare.

*See notes at end of case.

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APPEAL by plaintiff from Hinds county circuit court.
Reversed.

Brame & Brame, for appellant.

McWillie & Thompson, for appellee.

WOODS, C. J. Very briefly stated, the declaration filed by the appellant in the court below alleges that she boarded, at a switch or flag station on the line of appellee's railway, about four miles west of the town of Clinton (a regular station), soon after nightfall on November 20, 1898, a passenger train, as a passenger in good faith, bound for Jackson; having, as she believed, largely more money than was requisite to pay her fare on the train. No ticket was purchased before boarding the train, as there was no station house or ticket office kept by the railway company at said flag station or switch. Soon after the train had pulled out from the flag station, appellant was approached by the conductor, and requested to pay her fare, when she vainly made search for the money which she had upon her person when she started to board the train. The conductor was informed by her that she had lost her money in getting on the train, or had lost it in the car after entering. Failing to find her money, she was immediately ejected from the train, at a point about one mile east of the said flag station, and about three miles west of Clinton. The night was dark, cold, and rainy, and the place of her ejection was in a swamp, with water on the sides of the track, and remote from any habitation. The appellant earnestly and tearfully besought the conductor not to eject her, but in vain. She made her way back on foot to the flag station, chilled by winds, drenched by rains, and through the darkness. Reaching the flag station, she found no one there, and no place of shelter. She then continued her walk to her father's house, three or more miles away, reaching that shelter about midnight. As the result, she became sick and disabled, and has not yet fully recovered. Her money was found the next morning at the point where she got upon the train the night before, and where she had

Notes

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inadvertently dropped it in her effort to board the car. The question is not whether a railway company has the right to eject one from its train who has neither a ticket, nor the means of paying fare. That is universally conceded. The question is whether, at the time and place, and under the circumstances, the right of ejection in this instance was properly exercised. The appellant was within three miles of Clinton, where shelter and protection could have been had, when she was put off the train in a swamp, on a dark, cold, and rainy night, remote from any known habitation, and exposed to the discomfort and peril of an ejection under the then known conditions surrounding her. The demurrer of the railway company admits all the material allegations of the declaration, and should have been overruled. The case presented by appellant's declaration demanded an answer, and a jury should have passed upon the evidence, under proper instructions. Reversed and remanded.

NOTES.

Ejection of Passengers—Place of Ejection.—In the absence of statutory provisions on the subject, a conductor may put off a passenger who has no ticket and fails to pay fare at any point on the road where the passenger will not be injured or endangered. *Gallena v. Hot Springs R. Co.*, 13 Fed. Rep. 116; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1; *Everett v. Chicago, etc., R. Co.*, 27 Am. & Eng. R. Cas. 98, 69 Iowa 15; *Southern Kansas R. Co. v. Hinsdale*, 34 Am. & Eng. R. Cas. 256, 38 Kan. 507, 16 Pac. Rep. 937; *Louisville, C. & L. R. Co. v. Sullivan*, 16 Am. & Eng. R. Cas. 390, 81 Ky. 624; *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532; *Great Western R. Co. v. Miller*, 19 Mich. 305; *Wyman v. Northern Pac. R. Co.*, 22 Am. & Eng. R. Cas. 402, 34 Minn. 210; *Cincinnati, etc., R. Co. v. Skillman*, 13 Am. & Eng. R. Cas. 31, 39 Ohio St. 444; *Moore v. Columbia, etc., R. Co.*, 58 Am. & Eng. R. Cas. 493, 38 S. Car. 1; *Rio Grande Western R. Co.*, 52 Am. & Eng. R. Cas. 351, 8 Utah 165. See also *notes*, 2 Am. & Eng. R. Cas., N. S., 162 *et seq.*

Same—Failure to Produce Commutation Ticket—Place of Ejection.—It was held in *Maples v. New York & New Haven Railroad Co.*, 38 Conn. 557 (1871), which was an action for damages for the ejection of a passenger from defendant's cars, and in which it appeared that

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plaintiff purchased of defendant a commutation ticket, which plaintiff, in order to be entitled to carriage, was bound to produce when requested, or when required by the rules of the company, and one of defendant's rules required the holders of such tickets to show them to conductors when required; that plaintiff at the time in question had his ticket, but was unable to find it when required to do so, and so told the conductor; that the conductor knew that plaintiff was a commuter, and that his ticket had not expired; and that the conductor, acting according to defendant's instructions, ejected plaintiff for refusal to pay fare. *Held*, that defendant had no right to eject plaintiff at a place other than a regular station, even if he could, under the circumstances, be rightfully ejected.

MASTERSON

v.

CHICAGO & N. W. RY. CO.

(*Supreme Court of Wisconsin, April 4, 1899.*)

Ejection of Passenger—Issues.—In an action for wrongful ejection from a train, at a place not a usual stopping place, nor near a dwelling house, contrary to section 1818 Rev. St. 1893 of Wisconsin, the fact that plaintiff claimed to be riding on a ticket purchased on Sunday is immaterial.

Same—Excessive Verdict.—A verdict for \$850 is excessive for ejection from a train, where the conductor believed that plaintiff had not paid his fare, and ejected him in a reasonably considerate manner, and the only consequences of the ejection were that plaintiff had to walk a short distance in the outskirts of the city, and was robbed of \$12.50, without violence, by two tramps.

Remarks of Counsel.—It is the duty of the trial judge to interpose with some vigor, when counsel indulge in inflammatory remarks not warranted by the evidence, and calculated to prejudice the jury.

APPEAL by defendant from La Crosse county circuit court.
Reversed.

This is an action for unlawful ejection from a railway

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train. The evidence showed that the plaintiff boarded the defendant's passenger train at the station of Trempealeau, Sunday evening, June 20, 1897, intending to

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ride to La Crosse. The plaintiff claims that he purchased a ticket at Trempealeau station, and that it was taken up by the conductor soon after he got upon the train, and that afterwards, and just before the train reached La Crosse, the conductor demanded his ticket again, and insisted that he had received no ticket from him, and, upon his refusal either to give the conductor another ticket or pay fare, the train was stopped about one mile from the La Crosse depot, in an uninhabited region, and the conductor put him off the train, at about half-past 10 in the evening, and he had to walk into the city. The defense was that the plaintiff had no ticket, and refused to pay his fare, and was put off from the train on that account, and that the place where he was put off was close to the inhabited part of the city. A general verdict for the plaintiff, fixing the damages at \$850, was rendered, and from the judgment thereon the defendant appeals.

Fish, Cary, Upham & Black, for appellant.

Higbee & Bunge, for respondent.

WINSLOW, J. (after stating the facts). This is a tort action for wrongful ejection from the train at a place not a usual stopping place, nor near a dwelling house, contrary to the provisions of section 1818, Rev. St. 1898, as construed by the case of *Phettiplace v. Railroad Co.*, 84 Wis. 412, 54 N. W. 1092. Hence the fact that the plaintiff claimed to be riding upon a ticket purchased on Sunday is not important. The action is not for breach of a Sunday contract, but for tortious ejection from the train.

The damages awarded seem to us excessive. The conductor was evidently honest in his belief that the plaintiff

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had not paid his fare or surrendered a ticket, and it seems he was acting, as he believed, in discharge of his duty. The plaintiff was put off in the outskirts of the city of La Crosse, and does not claim to have ~~been made~~ sick or disabled, nor to have suffered in any way, except that he claims to have been robbed in a gentlemanly manner by two tramps while he was walking along the track. There does not seem to have been any serious insult offered to the plaintiff by the conductor at the time of his ejection. In fact, many of the passengers did not, apparently, know that anything unusual was happening. In the case of Phettiplace v. Railroad Co., *supra*, a verdict of \$300 was said to be very liberal for an ejection fully as heinous as the one before us; and it was said that a less sum would have been more satisfactory. In the Boehm Case, 91 Wis. 592, 65 N. W. 506, the verdict was but \$350, and the plaintiff in that case was compelled to walk a number of miles to get to his destination.

We should, perhaps, feel inclined to send the case back, with permission to the plaintiff to remit from the verdict, and enter judgment for a specified sum, were it not for some other matters in the record, now to be stated.

It seems that an effort to settle the plaintiff's claim was made by the defendant's claim agent after the matter had been placed in the hands of attorneys, and without their presence. It appears, also, that the defendant claimed on the trial that the plaintiff's attorneys were prosecuting the action under a champertous agreement. These two charges seem to have been bandied back and forth by the attorneys until considerable ill feeling was aroused; and the plaintiff's attorneys upon the closing argument certainly went far outside of the record, and indulged in inflammatory language, calculated to stir the prejudices of a jury, without cause. Thus, one of the plaintiff's attorneys said, in substance, that railroad corporations, by means of the immense force at their nod and beck, are able to accomplish the prostitution of justice; that in this

Same—Excessive
Verdict.Remarks of
Counsel.

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case "you [the jury] have witnessed a proceeding which, in my judgment, is a prostitution of the usual and ordinary proceedings in a court of justice"; that there had been attempts on the part of the defendant which point strongly to subornation of perjury; that "reputation is cheap, weighed against the money of this company,—counsel does not consider it as that" (snapping thumb and finger); and more in the same strain. Careful examination of the case does not disclose any excuse for such statements and insinuations. The case seems to be one honestly defended by honorable counsel, and no good reason appears for such attempts to import into it mere abuse and appeal to prejudices, which are always easily aroused. Nor were these remarks rebuked with any degree of vigor by the circuit court. Again we say, as was said in the Sutton Case, 98 Wis. 157, 73 N. W. 993, "A case that cannot be fairly won upon the evidence, by the use of legal and lawyer-like methods, presumably does not deserve to be won at all." And we say, in addition, that it is the duty of the trial judge to interpose with some vigor when counsel so abuse their privilege, and stop it. The mere statement by the judge that a remark is subject to criticism, or that it is rather a strong statement, is entirely insufficient to correct the evil.

The plaintiff proved, without objection, that after his ejection from the train, and while walking along the track, he was met by two tramps, who relieved him of \$12.50 in money, without violence. It seems doubtful whether such an event could form any ground for the recovery of any increased damages, and it is argued that the testimony was immaterial; but as there was no objection or exception to the testimony, and the charge of the court is not preserved, the question is not before us, and we cannot rule upon it. Judgment reversed, and action remanded for a new trial.

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PRICE

v.

CHESAPEAKE & O. R. CO.

(*Supreme Court of Appeals of West Virginia, April 22, 1899.*)

Right to Eject Passenger.*—A passenger upon a railroad train must show his ticket, or "conductor's check" given in the ticket's place, when called upon by the conductor, and, if he fail to do so, whether willfully or because he has forgotten having the ticket or check, and refuses to pay fare, he cannot recover damages for his ejection, if unnecessary force is not used.

Instructions.—An instruction which singles out certain facts, and makes the case turn on them, ignoring other material facts of the case, is erroneous.

(Syllabus by the Court.)

ERROR by defendant to Fayette county circuit court. *Reversed.*

Simms & Enslow, for plaintiff in error.

C. R. Summerfield and *J. W. St. Clair*, for defendant in error.

BRANNON, J. This is a writ of error from a judgment of the circuit court of Fayette county in an action of trespass on the case by William M. Price against the Chesapeake & Ohio Railroad Company, which writ of error. Case Stated. was obtained by said company. In July, 1895, Price came to Charleston from some point below that city, and, being utterly without any means, and desiring to get to Virginia, he applied to the county court of Kanawha for transportation to Hinton. The sheriff, under the direction of the court, procured for Price a ticket from Charleston to Hinton, 90 miles. Price showed his ticket to the conductor who conducted the train as far as Handley, and the ticket

*See note, 3 Am. & Eng. R. Cas., N. S., 287.

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was punched by the conductor and given back to Price. The next conductor beyond Handley took up Price's ticket, and gave him a conductor's check in place of the ticket, which check was commonly used, and intended to show that the passenger was entitled to ride to the end of the next section. The train was an accommodation train, stopping at all the stations, where passengers would leave and get on the train. After going about 25 miles from the point where the conductor had taken up the ticket, the train stopped at Hawk's Nest, and the conductor, supposing that Price had gotten on at that point, having forgotten that he had taken up his ticket and given him a check, inquired of Price about his fare, and Price told him that he had already given a ticket to him. The conductor asked him if he had a check. Price said he had not, and denied that he had one, as the conductor says. Price did not show the check, or say that he had one, and said, as a witness, that he had forgotten that he had one. The conductor told Price that he did not remember having taken up any ticket from Charleston to Hinton, but he would look among his tickets in another car, and if he found such a ticket it would be all right. The conductor says he looked among his tickets, and found no such ticket, and, after some time, he returned to Price, and informed him that he had found no such ticket, and was satisfied that the plaintiff had given him no such ticket, and demanded fare, which Price refused to pay, but was allowed to go on to the next station; and the plaintiff failing or refusing to show any conductor's check or pay fare, which was demanded of him, he was told to get off of the train, which he did, without the use of force. After he got off the train, a person standing by observed the conductor's check under Price's hatband, but the train was gone. The next day the conductor, having learned of the check, offered to carry Price to Hinton, but Price refused, saying he was going to sue the company, and at once brought this suit.

Upon the trial, the court gave for the plaintiff an instruction (No. 2), saying to the jury that "if they believe from

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the evidence that the plaintiff, on 25th day of July, 1895, had a ticket on defendant's road from Charleston to Hinton, which ticket was purchased and given him by the deputy sheriff of Kanawha county, and that while the plaintiff was on his journey between these stations a conductor of the train, upon which the plaintiff was a passenger, ejected him before he reached the said station at Hinton, then the defendant company is liable to the plaintiff in this action for such actual damages as the jury may believe he sustained." It will be at once seen that this instruction says that if the plaintiff had a ticket, and was ejected before reaching his destination, the company must answer in damages; binding the jury to impose damages. Right to Eject Passenger. utterly ignoring, not even mentioning, the fact that Price had this check to show his right of passage and identify him as the passenger, and that he failed or refused to show it when lawfully asked for it. This is plainly error, provided those facts, in law, have a material effect upon the case. That instruction gave only the plaintiff's case, and on it bound the jury to a verdict for the plaintiff, and never mentioned the defendant's case as proper to be considered along with the plaintiff's case. Both Price and the conductor say that the conductor gave Price that check, and that the conductor demanded fare or ticket, and that Price did not show that check, though it was upon his person. He says the conductor gave him the check, or, rather, that he put it under Price's hatband. The conductor says he gave it to him in his hand. Price only says that he had forgotten the check. The conductor says he also had forgotten the check. Now, what is the law pertinent to the subject? That late and very excellent work, Elliott on Railroads, says (volume 4, § 1594): "As a general rule, a ticket (or a pass) is the only evidence, as between the conductor and the passenger, of the latter's right to transportation. He must produce it when demanded, and if he has no ticket, or fails to exhibit it in accordance with the rules of the company, and refuses to

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pay fare, he may be expelled. The fact that he may have had a ticket, but lost it, makes no difference." Hutchinson (Carr. § 572) says: "A regulation by which passengers are required to show their tickets to the conductor whenever called upon to do so, and making it the duty of such conductor to remove from the train all passengers who refused to do so, or pay their fare, has also been held to be reasonable and proper; being necessary to prevent imposition upon the carrier by making one ticket serve as a passport for more than one passenger. And it will not matter that the conductor may know that the passenger has paid for a ticket, or that he has already seen it, or that it has been shown to him more than once, or that the passenger may offer to prove that he has it. He must show it; otherwise, the conductor will be justified in expelling him, in obedience to the regulation. And when a regulation of this kind exists, if the passenger should be so unfortunate as to lose his ticket, he may be required to pay his fare again." In *Jerome v. Smith*, 48 Vt. 230, the plaintiff bought a ticket with coupons attached, and a conductor detached one of the coupons, and gave him instead a conductor's check, and, before reaching the point for which the check was given, another conductor took the train, and demanded the check, which the plaintiff could not find, but tendered the ticket, with the remaining coupons, which was refused, and the plaintiff was ejected, without unnecessary force. The ejection was held justifiable. The opinion says: "As the plaintiff did not know what the symbols on the check meant, so probably he did not know what those on the ticket and coupon meant; but, however that may have been, such checks are in common use among conductors on railroads as evidence of the right of passage, and the case not only does not show but that he understood what the purpose and effect of this one was, as persons ordinarily would, but does impliedly show that he did so understand, because it appears that he searched for it to pay his fare with when he saw the next conductor approaching him collecting fares. Though it was delivered to him only by placing it in

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his hatband, as he did not object, that was as much a delivery to him as placing it in his lap or hand, and was sufficient to invest him with the ownership of it, and to bind him to take care of it. While he held that check, he had not paid his fare beyond where that conductor was to go, but had what would pay it, or that of any other person, the rest of the way."

I remark that Price's evidence showed that he knew what was the purpose of the check. The Vermont court says that it was the passenger's duty to keep the check safely, and, if lost, the loss was his, and he was situated as he would have been if the coupon had been returned to him, and he had lost that, and as any one would be who had bought a ticket to an opera or lecture and had lost it. Having lost it, he was called upon by the conductor to pay his fare, and had no ticket or check to pay with, and refused to pay it in money, and thus he refused to pay at all, and was thus rightly ejected. Fetter (Carr. Pass. § 279) says: "The loss of a ticket by a passenger falls on him, not on the carrier. The reason is obvious. Passage tickets, in the absence of restrictive conditions, are assignable, and good in the hands of any one. If the loss of a ticket were a sufficient excuse for non-payment of fare, the carrier might be subjected to the burden of carrying two or more persons for a single fare." Of course, the same rule applies to conductor's checks. In *Hibbard v. Railroad Co.*, 15 N. Y. 455, it was held that a passenger who had a ticket in his pocket, and had exhibited it once to the conductor, and refused to exhibit it again when called on, was properly ejected. In *McKay v. Railway Co.*, 34 W. Va. 65, 11 S. E. 737, this court held that a conductor may demand a ticket, and on failure to produce it may demand fare, and on failure to pay it may lawfully eject the passenger, using no more force than necessary.

Now, if this conductor had not forgotten that he had given this check, but well remembered it, the law gave him the right to call on Price to see it; but, in such case, there would

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be some pretense to say the conductor was in the wrong. But, in fact, the conductor had forgotten it, and did not identify Price. No human being on an accommodation train, stopping at every station, the passengers changing all along the route, can remember all of them, or recollect about their tickets. He need not remember them, as the law gives him right to call upon the passengers to show their tickets whenever he becomes uncertain, and it is a small burden upon the passenger to show his ticket or check. The conductor had dozens of tickets to remember; Price, only one. It was the duty of Price to remember his check, rather than of the conductor. How can he say that the company is responsible for the conductor's bad memory, when his own was bad, especially as the law cast upon him the duty to remember his check, and present it when asked for, or, if forgotten or lost by him, then to pay his fare? The fact stands out, undenied and unalterable, that when called upon to produce this check, and after the conductor gave him a considerable time to produce it, he presented no evidence of his right of passage. Moreover, it seems quite unlikely that Price had forgotten this check. It would rarely occur. The evidence of the deputy sheriff who bought the ticket for Price at Charleston shows that Price was eager to stop over at some place before reaching Hinton, and this induces the impression that Price did not forget his check, but, desiring to stop over, retained it, and refused to produce it, in order that he might use it when he wanted to go on to Hinton. I repeat that under these principles of law, which seem to be well settled, that instruction ignoring all facts upon which the defense rested, and thereby virtually saying to the jury that they constituted no defense, was erroneous; for an instruction cannot single out certain facts, and say that, if they exist, the party is liable, ignoring facts which are material in law for the decision of the case. *McCreery's Adm'x v. Railroad Co.*, 43 W. Va. 110, 27 S. E. 327; *Webb v. Packet Co.*, 43 W. Va. 800, 29 S. E. 519.

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Instruction No. 1, asserting the general duty of a railroad to carry its passengers safely and land them at their places of destination, and that any failure of the employees to do so renders the railroad liable, as a general proposition, may be unobjectionable. If it were a binding instruction, it would be bad for reasons given against instruction No. 2; but it is very abstract, as applied to this case, or, rather, too restrictive, and may be objectionable, because, as applied to the case, misleading to the jury. *Fisher v. Railroad Co.*, 42 W. Va. 183, 24 S. E. 570. For these reasons we reverse the judgment, set aside the verdict, and grant a new trial.

CENTRAL OF GEORGIA RY. CO.

v.

CANNON.

(Supreme Court of Georgia, March 17, 1899.)

Carriers of Passengers—Right to Eject—Burden of Proof.*—The burden of showing that the expulsion of a person from a passenger car was lawful does not devolve upon a railway company until it be shown that this person was rightfully in the car.

Excursion Tickets—Conditions—Identification of Purchaser.—When the purchaser of a reduced rate excursion railway ticket, by signing a special contract thereon, agrees with the company issuing the ticket that "it shall not be good for returning passage unless the holder identifies himself * * * as the original purchaser to the satisfaction of" a designated agent of the company in the town or city to which the purchaser is to be transported on his "going passage"; that, when officially signed and stamped by said agent, this ticket shall then be good for return passage"; and that "the holder will identify himself * * * as the original purchaser of this ticket by writing his name, or by other means, if necessary, when required by conductor or agents,"—it is incumbent upon such purchaser, as a condition precedent to having the ticket so signed and stamped, to furnish such proof of his identity, and of the fact

*See notes at end of case.

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that he was the original purchaser, as would be sufficient to satisfy a reasonable man. Under such a contract the validating agent is entitled to call for other proof of identity than that afforded by the holder's writing his name.

Same—Same—Same.—It was, on the trial of a case involving the determination of the question whether or not there had been due compliance with the terms of such a contract, erroneous to instruct the jury that, if the proof furnished to the validating agent by the ticket holder as to his identity, etc., was satisfactory to them, he was entitled to have the ticket validated.

Same—Same—Same.—It was, in such a trial, also erroneous to give in charge to the jury language authorizing them to infer that, if the ticket holder produced to the validating agent evidence sufficient to show that the former "was the man he represented himself to be," this would identify him as the original purchaser of the ticket.

Same—Same—Same.—When, in such a trial, it was apparent that the manner in which the purchaser's name was written at the time of obtaining the ticket was peculiar and unusual, and therefore a matter of much consequence upon the question of identification at the time the ticket was presented for validation, it was erroneous to charge that, "if the plaintiff signed said ticket in the presence of the validating officer, it is immaterial as to the nature and character of this signature."

Same—Refusal to Validate—Liability for Ejection.*—The court ought not, in such a trial, to have given a charge to the effect that, if the validating agent refused to sign and stamp the ticket, and the holder boarded a train, tendered the ticket to the conductor, identified himself as the man he represented himself to be, and as the original purchaser of the ticket, at the same time informing the conductor that the ticket had been offered for validation, and the conductor thereupon refused to accept the ticket and ejected the holder, he was entitled to recover.

Same—Identification of Purchaser.—If the purchaser of such a ticket, at the time of buying the same, intentionally adopted, as the method of signing his name, the making of the letters thereof in the form of printed characters, and thus rendered it impossible to identify himself as the original purchaser by reproducing his signature, the burden was on him to find other means of satisfactory identification. Merely proving by witnesses that his name was the same as that "printed" upon the ticket would not in every case, and under all circumstances, be sufficient or satisfactory proof that he was the original purchaser.

(Syllabus by the Court.)

*See notes at end of case.

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www.libtool.com.cnERROR by defendant from city court of Griffin. *Reversed.**Hall & Boynton* and *W. C. Beeks*, for plaintiff in error.*R. T. Daniel*, for defendant in error.

LUMPKIN, P. J. It appears from the record that H. A. Cannon purchased at Camilla, Ga., a reduced rate ticket from that point to Atlanta and return. When he applied to the agent at Camilla for such a ticket, he was handed one upon which was printed a contract the portion of which now material was of the nature indicated in the first headnote. The agent asked Cannon to sign his name to that contract. Thereupon the latter took a pen, and, instead of affixing his signature in the usual way, made the letters composing his name in the form of printed characters, or, as stated by a witness, he "printed" his name upon the ticket, instead of writing it. The agent informed Cannon that this method of making his signature was not satisfactory, refused to stamp the ticket, and wrote upon it the word "void." Cannon insisted it was his right to sign his name in any manner he pleased, and the agent, upon reflection, reaching the conclusion that he had no right to refuse to sell a ticket to an applicant for the same, furnished Cannon with another ticket in the same form, at the same time cautioning him that if he "printed" his name to the contract thereon he would have difficulty in identifying himself in Atlanta as the original purchaser. Nevertheless Cannon "printed" his name upon this second ticket. It was duly stamped by the agent, and subsequently was accepted for passage from Camilla to Atlanta. Desiring to return to Camilla, Cannon went to the validating agent in Atlanta, who requested him to write his name on a blank line upon the ticket reserved for this purpose, and thereupon Cannon "printed" his signature upon this line. The validating agent refused to accept this as sufficient proof of Cannon's identity as the original purchaser of the ticket. The latter then produced two witnesses who stated to the

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validating agent that they knew Cannon, and that he was the man he represented himself to be. They were, however, unable to say that he was the man who purchased the ticket in Camilla. No other proof being offered, the validating agent declined to stamp and sign the ticket, and informed Cannon that it would not be accepted for passage. Nevertheless he boarded a train of the defendant company, and was ejected therefrom by the conductor, who refused to recognize the ticket as valid. Cannon brought this action against the company, recovered a verdict of \$950, and the defendant filed a motion for a new trial, which was overruled, and it excepted. This motion contained many grounds. It is unnecessary to set them forth in full, for the material questions of law thereby presented are stated in the headnotes. In the main, these questions were raised by exceptions to instructions given by the judge at the trial, and to refusals to give in charge to the jury requests submitted by counsel for the defendant.

1. The most important issue at the trial was whether or not the plaintiff was rightfully upon the car of the defendant company as a passenger. The court charged, without qualification or explanation, that the burden of proof was upon the defendant to show that, if the plaintiff was ejected from the car, he was lawfully expelled. Upon the assumption that the plaintiff was entitled to ride upon the defendant's train, this instruction would have been correct; but, it being a seriously contested issue whether or not he was so entitled, the instruction should have been qualified by a statement to the effect that the burden referred to would rest upon the company only in the event the evidence satisfied the jury that the plaintiff had a legal right to enter and take passage upon this train. Certainly, until this appeared, the company was not bound to show that he was properly ejected.

2. The language of the contract signed by Cannon plainly expresses his undertaking with the railway company. In

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sengers—Right to
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construing a similar contract, this court, in *Morse v. Railway Co.*, 102 Ga. 302, 29 S. E. 865, held it was incumbent upon the ticket holder to furnish such proof of his identity as would satisfy a reasonable man. It requires no argument to show that, under such a contract, the validating agent, if not satisfied by having the ticket holder write his name, had the right to call for other proof of his identity as the original purchaser of the ticket, and that so doing cannot properly be regarded as either arbitrary or captious. *Railway Co. v. Barlow* (Ga.) 30 S. E. 732.

Excursion
Tickets—Con-
ditions—Identi-
fication of Pur-
chaser.

3. The person who, under the terms of such a contract, is to be satisfied of the identity of the holder as the original purchaser of the ticket, is the validating agent; and while, under the ruling in the case first above cited, a wrong would be done to the ticket holder if such agent arbitrarily refused to accept and act upon evidence that ought to satisfy a reasonable man, we know of no rule of law or justice which would authorize a jury to find that the agent acted captiously and without justification merely because the evidence presented to him would have been satisfactory to them. The question upon which the jury should have been instructed to pass was, not what they would have done, but how a reasonable man ought, under the circumstances, to have acted in discharging the duties imposed upon him.

Same—Same—
Same.

4. One of the expressions used by the judge in his charge to the jury was capable of the construction that, if the plaintiff produced to the validating agent evidence sufficient to show that the former "was the man he represented himself to be," it should be regarded as satisfactory proof that he was in fact the original purchaser of the ticket. Obviously, such an inference would be unauthorized. The plaintiff might have produced any number of reputable witnesses to show that his name was H. A. Cannon, but this would not have proved he was the H. A. Cannon who purchased the ticket in Camilla, or

Same—Same—
Same.

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negative the inference that a person of an entirely different name had really purchased the ticket at that station, had there "printed" the name of H. A. Cannon upon it, and subsequently delivered the ticket to the plaintiff, in accordance with a preconcerted arrangement between them. It is a lamentable fact, too well known to be overlooked, that, as regards the unauthorized and fraudulent transfer of nonnegotiable railway tickets, the standard of morality to which those who deal in and use such tickets have attained is not, as yet, sufficiently elevated to justify any inference, much less a presumption of law, that the holder of such a ticket is the person who purchased it from the carrier.

5. The preliminary statement preceding this discussion discloses the manner in which the plaintiff placed his name beneath the contract on the ticket at the time he purchased it in Camilla, and the manner in which he wrote his name at the time of offering the ticket for validation in Atlanta. In view of these facts, it was clearly erroneous to instruct the jury as indicated in the fifth headnote. It is apparent, without argument, that the nature and character of this "signature" were of the utmost materiality and importance.

6. The charge referred to in the sixth headnote was also erroneous. The jury were, in effect, instructed by the court that, no matter what passed between Cannon and the validating agent, or how reasonably the latter may have acted in declining to stamp and sign the ticket, the holder of it was nevertheless entitled to a return passage thereon if he satisfactorily identified himself to the conductor as the original purchaser, and merely informed the latter that the ticket had been offered for validation.

7. As will have been seen, Cannon intentionally and deliberately adopted a peculiar and unusual method of affixing his name to the contract upon the ticket. Any man of ordinary common sense ought to have known that when he merely "printed" his

Same-Same-Same.

Same-Refusal
to Validate-
Liability for
Ejection.

Same-Identifica-
tion of Pur-
chaser.

name in the manner stated, he could not identify himself as the man to whom the ticket was issued by again "printing" his name in a similar way. Moreover, Cannon was distinctly cautioned that signing his name to the contract in such a manner would inevitably give him trouble when he sought to have the ticket validated for his return passage. There is in the record some evidence strongly indicating that he had a definite object in acting as he did. One of the witnesses introduced at the trial testified that Cannon, immediately after signing the second ticket handed to him by the agent at Camilla, said, in speaking of the exposition in Atlanta, which he was expecting to attend, that going there would be "flying high, and having a big time, and cost a heap; and some of these infernal railroads will have to pay for it, and pay my expenses." In view of all the facts and circumstances of this case, there is certainly no hardship done to the plaintiff in holding that, as he had voluntarily placed it out of his power to identify himself "by writing his name" in the presence of the validating agent, it was incumbent upon the former to find other satisfactory means of identifying himself as the original purchaser of the ticket. We do not think that the refusal to accept as sufficient for this purpose the statements of the witnesses produced by the plaintiff, showing merely that he was H. A. Cannon, was at all unreasonable. On the whole, we are of the opinion that a new trial should be ordered. Judgment reversed. All the justices concurring.

NOTES.

When Presumption that One Was a Passenger Does and Does Not Arise.—See *notes*, 11 Am. & Eng. R. Cas., N. S., 227 *et seq.*

Whether Tickets Are Contracts.—See *notes*, 11 Am. & Eng. R. Cas., N. S., 250 *et seq.*

Defective Ticket—Expulsion from Train.—See *McGhee et al. v. Reynolds*, 10 Am. & Eng. R. Cas., N. S., 49, and *foot-note*.

Ejection of Passenger—Mistake of Ticket Agents and Conductors.—See *notes*, 10 Am. & Eng. R. Cas., N. S., 272 *et seq.*

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YAZOO & M. V. R. Co.

v.

ANDERSON.

(Supreme Court of Mississippi, May 8, 1899.)

Free Ride—Collusion—Expulsion—Liability.*—By the fraudulent collusion of plaintiff and defendant's baggage master, plaintiff was admitted to the baggage car in order to obtain free transportation; and was compelled by the baggage master to jump from the car while it was in motion, whereby plaintiff was injured. *Held*, that there could be no recovery against the company.

APPEAL by defendant from Claiborne county circuit court.
Reversed.

Mayes & Harris, for appellant.

Martin & Anderson and *McLaurin & McKnight*, for appellee.

WOODS, C. J. Accepting as true the evidence of the appellee himself, the peremptory instruction asked for the appellant should have been given. By the fraudulent collusion of the appellee, the bridge foreman, and the baggage master, the appellee was admitted to the baggage car to be carried some distance in violation of the rules of the company, against its interests, and in fraud of its rights. He knew he must pay fare or have a pass, and, though he endeavored to secure the pass, he failed to get it; and he did not pay his fare, and never intended so doing. The baggage master and the appellee were aware of the propriety of keeping the appellee out of sight while in the baggage car, and when the train reached Knoxville, the point to which the baggage master collusively agreed to carry appellee, the train not stopping, the baggage master compelled the appellee to jump from the

*See note at end of case.

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rapidly-moving car, whereby he lost a leg. The baggage master may be liable to appellee for his injury, but not the railroad company. The case is controlled by the opinions of this court in *Railroad Co. v. Latham*, 72 Miss. 32, 16 South. 757, and *Williams v. Railroad Co.* (Miss.) 19 South. 90.

Reversed and remanded.

NOTE.

Contributory Negligence of Passengers Riding in Baggage, Mail and Freight Cars.—Mr. Patterson in his valuable book on *Railway Accident Law*, states the law upon this subject as follows: "It is contributory negligence in a passenger to ride in a baggage or other car, not intended for the carriage of passengers, save with the consent of the railway, provided, of course, that the position of the passenger was a contributing cause of his injury, and was, in itself, so dangerous a place that a man of ordinary prudence would not have voluntarily occupied it under ordinary circumstances. Baggage cars and luggage vans are not primarily intended for the carriage of passengers. It is, in case of accident to the train, dangerous to be in them, not only because they are in general coupled to the engine drawing the train, and preceding the passenger cars, but also because in case of derailment or collision, the boxes and trunks in the baggage car are violently thrown about. It is therefore not reasonable to hold the railway liable to one whose injuries have been caused by his imprudence in voluntarily riding in such car." *Patt. Ry. Accident Law*, p. 286.

Mr. Beach in his book, "The law of contributory negligence," takes a similar position. He says: "It is contributory negligence on the part of a passenger to ride in a baggage car, contrary to the rules of the company. The contract of carriage must be understood to be a contract to carry the passengers in a passenger car and the baggage in baggage cars. The passenger car is the place the company provides for the passenger. It is his duty to occupy that car, and to keep out of the other cars of the train. A failure to do this is negligence." *Beach, Contrib. Neg.* § 55.

And the position of these text writers is abundantly supported by the decided cases. Thus in *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160, 1 Am. & Eng. R. Cas. 79, it is held that a passenger riding in a baggage car, when there is room in the passenger coaches, is negligent, and if an accident happens in which, as the event shows, he would not have been injured had he remained in the pas-

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senger car, he cannot recover, although his negligence may not have contributed to cause the injury. And in *Houston & T. C. R. Co. v. Clemmons*, 55 Tex. 88, 8 Am. & Eng. R. Cas. 396, the rule is laid down that a passenger on a railway train, who, instead of occupying a coach provided for passengers, remains, without necessity therefor, in the baggage car, knowing the fact that he is in more danger there than in a passenger coach, and thus remaining, receives injury in the wreck of the train, which he would have avoided had he remained in the passenger coach, is guilty of contributory negligence, and cannot recover on account of injuries received under such circumstances.

In *Cody v. New York & N. E. R. Co.*, 151 Mass. 452, it appeared that a passenger entered at a station, the smoking car of a train on a single track railroad and began to read and smoke. The train started before the arrival of a train due to pass it at that station, and he, noticing that fact after his train was fairly under way, and being apprehensive, from his knowledge of the running of the trains, that a collision might take place at any moment, went into a baggage compartment at the forward end of the car, and there stood with his hand upon the knob of the door prepared to jump, and did jump just before the trains collided, and was injured. *Held*, in an action against the railroad company, that the question whether he was in the exercise of due care or guilty of contributory negligence was properly submitted to the jury.

In *Webster v. Rome, W. & O. R. Co.*, 115 N. Y. 112, it appeared that the plaintiff while being transported as a passenger by the defendant railroad company was injured by a collision. Prior to the occurrence of the collision, he left his seat in the passenger coach and went forward into the baggage car to smoke, and was there at the time of the collision. The evidence tended to show, that the baggage car was the safer place, and plaintiff's escape from sudden death was due to his presence there. The court instructed the jury that they should determine whether plaintiff being where he had no business contributed to the injury, and that if he did he could not recover. Also that the "question is simply whether his being in the baggage car at that time and under the circumstances in which he was, contributed to his receiving the injury which he did receive." *Held*, that the charge was as favorable as defendant could ask.

In *Jones v. Chicago, St. P. M. & O. R. Co.*, 43 Minn. 279, 44 Am. & Eng. R. Cas. 357, it was held that the fact that a passenger on a railroad is, when injured, in a baggage car, in which, by the rules of the company, passengers are not permitted to be, is not negligence on his part that will defeat his recovery, unless it contributed to or aggravated the injury.

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The fact that the conductor of the train gives the passenger permission to ride in the baggage or mail car has an important bearing. Mr. Beach holds that such permission does not impose any liability whatever upon the company. Beach, Contrib. Neg. § 55. JUDGE THOMPSON, on the other hand, lays down the rule that the permission of the conductor is the permission of the company, and a passenger acting thereon is not negligent. Thomp. Carriers of Passengers, p. 262. The cases are conflicting. Carroll v. New York, etc., R. Co., 1 Duer (N. Y.) 571, is cited by JUDGE THOMPSON to support his position. But the weight of authority is to the contrary. Thus in Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21, 1 Am. & Eng. R. Cas. 87, it is held that a conductor cannot in violation of a known rule of the company, intended for the safety of passengers, license a passenger to ride in the baggage car so as to make the company responsible in case of injury. And see Hickey v. Boston, etc., R. Co., 14 Allen (Mass.), 429. And in Louisiana it is held that it is not within the scope of the employment of a baggage master connected with a train, but not shown to have been put in charge of the same, to invite or permit any person or persons to enter or ride on a coach of such train; and permission given under such circumstances cannot create the relation of carrier and passenger. The company is not liable to such person for injuries which they may receive, unless for negligence or tortious acts on the part of the company. Reary v. Louisville, N. O. & T. R. Co., 40 La. Ann. 32, 34 Am. & Eng. R. Cas. 277. After the conductor has told a passenger that he must not ride in a car used for transporting theatrical properties, etc., it being a dangerous place, it is not necessary for him to repeat the warning, and the passenger remains there at his own risk. Blake v. Burlington, C. R. & N. R. Co., 78 Iowa 57, 39 Am. & Eng. R. Cas. 405.

In a Maryland case it was held that where the evidence shows that postal clerks holding photographic commissions are entitled to ride as passengers on trains while on duty and in returning home, and that by the permission of the conductor, a postal clerk holding such a commission travelled while off duty in the mail car and was injured in a collision, he is not guilty of contributory negligence *per se* so as to defeat a right of action for his death, although there was greater risk of injury in the mail car, and he would have escaped injury if he had continued his journey in the smoking car where he commenced it. Baltimore & O. R. Co. v. State, 72 Md. 36, 41 Am. & Eng. R. Cas. 126.

In Higgins v. Cherokee R. Co., 73 Ga. 149, 27 Am. & Eng. R. Cas. 218, it appeared that the plaintiff was voluntarily on the train where he was injured, by the invitation of the conductor, made at

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his own request; he paid no fare, and none was expected from him; he selected an open flat car, on which he rode rather than in the passenger coach, and was in position where he was more exposed to accident from sparks and cinders than he would have been had he taken a seat in the closed coach. *Held*, that he was entitled to look only for such security as that mode of conveyance was reasonably expected to afford; and having voluntarily incurred the injury of which he complains, resulting from getting a cinder in his eye, he was not entitled to recover from the railroad, even if it were somewhat at fault.

RANCHAU

v.

RUTLAND R. CO.

(Supreme Court of Vermont, Jan. 12, 1899.)

Loss of Passenger's Baggage—Variance.—In an action against a railroad company for the loss of a box and contents, which it was alleged defendant, as a common carrier, had undertaken to carry for, and deliver to plaintiff, evidence was admissible to show that he purchased a passenger ticket of defendant, and defendant received the box as part of his baggage, and gave him a check therefor, although the box was not described in the declaration as the baggage of plaintiff.

Same—Pleading.—Nor was it necessary in such action to allege that the hire for carrying the box and contents was a part of the purchase money of plaintiff's ticket.

Evidence.—In such action, it was proper, on cross-examination, to ask the baggage master of the station of plaintiff's destination if he had ever found a box or baggage called for by plaintiff's check, as such question on its face only called for the personal knowledge of the witness, although he had testified in chief that he had, after searching for such baggage, turned the matter over to another employee.

Common Carriers — Limiting Liability — Burden of Proof.*—Where a railroad company by its charter and occupation, is subject to the common-law liability of a common carrier, it will be held to

*See able article by MR. U. M. ROSE, 2 Am. & Eng. R. Cas., N. S., 1; notes, 5 Am. & Eng. R. Cas., N. S., 66 *et seq.*

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such liability, until it establishes that it has limited or varied it by a contract, express or implied.

Same—Same—Tickets—Assent to Printed Conditions—Burden of Proof.*—The ordinary passenger ticket is only a receipt or token; and in order that the purported conditions printed on such ticket may have the effect of limiting the carrier's common-law liability, the carrier must show that the passenger, when he paid his money, and received the ticket, did it under such circumstances that he assented to such conditions.

Common-Law Liability.*—Where the carrier is subject to the common-law liability, the passenger is entitled to recover the entire value of the baggage lost.

Remarks of Counsel—Reversible Error.—In such action, plaintiff's counsel, in the closing argument, said: "The policy of defendant was evidently to fight every claim; that if the defense was honest, it would arbitrate; * * * but no, their policy was to fight." There was no evidence authorizing such assertion; and, on defendant's objection, the court merely told the counsel to confine himself to the discussion of the testimony. *Held*, that the court's failure to state to the jury that there was no evidence supporting such assertion was reversible error.

EXCEPTIONS by defendant from Windham county court.
Reversed.

C. F. Robb, for plaintiff.

W. W. Stickney and *J. G. Sargent*, for defendant.

ROSS, C. J. The declaration, in substance, alleges that the defendant, in the capacity of a common carrier, undertook, for hire, to carry safely for the plaintiff from Burlington, Vt., to Fitchburg, Mass., a box containing certain specified articles, and there to deliver it to the plaintiff; that the box was delivered to the defendant, and that it so carelessly and negligently conducted in the premises that the box and its contents were wholly lost to the plaintiff. Against the objection and exception of the defendant the plaintiff was allowed to show that, on the occasion specified in the declaration, he purchased a ticket, for himself and family, of the defendant, from Burlington to

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*See able article by MR. U. M. ROSS, 2 Am. & Eng. R. Cas., N. S., 1; notes, 5 Am. & Eng. R. Cas., N. S., 66 *et seq.*

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Fitchburg, and that defendant received, as a part of his baggage, and gave him a check therefor, the box named in the declaration; that he, with his family, rode on the ticket to Fitchburg, but that defendant did not safely carry nor deliver to him at Fitchburg the box, nor any of its contents. The defendant insists that this box and contents should have been described in the declaration as the baggage of the plaintiff, and without such description the testimony excepted to was not admissible. This exception is not well taken. The capacity in which the defendant was acting and its undertaking are properly set forth, and the property sufficiently described to enable it to be identified. There was no variance between the allegations of the declaration and the proof. If the box and contents had been described as baggage, it would only have added another element for its identification. It was not necessary for that purpose. Nor was it necessary to allege that the hire for carrying the box and contents was a part of the purchase money of the plaintiff's ticket for himself and family. The defendant was also a common carrier of the box and contents, even if it had by special contract to some extent limited its common-law liability as such carrier.

Loss of Passenger's Baggage—
Variance.

Same—Pleading.

2. The baggage check for the box claimed to have been lost was 17,652. The defendant introduced as a witness the baggage master at the Fitchburg station, who testified that he received no baggage answering to this check; that he made search for it for some time, and then passed the matter over to another servant of the Fitchburg Railroad. Against the exception of the defendant, on cross-examination the witness was asked if they ever found a box or any baggage called for by this check anywhere on the Fitchburg road. The inquiry was proper. On its face it did not call for anything but the personal knowledge of the witness. His answer, "No," must be presumed to be upon his personal knowledge, until something further was shown. The question did not call for what he had heard

Evidence.

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from others, as contended by the defendant, nor does his answer profess to be given upon information. But, if the question and answer are capable of the construction claimed by defendant, the defendant could not have been injured by its admission. It is stated in the exceptions that it appeared by the defendant's testimony that the baggage was examined soon after the train left Burlington, and there was no baggage upon the train corresponding with the check for the claimed lost baggage, and none received by the Fitchburg station. Hence the testimony of this witness, if improperly received, was no more than what the defendant conceded to be true by its own witnesses. When exceptions state that certain facts appeared, they mean there was no controversy over the existence of such facts.

3. The ticket sold by the defendant to the plaintiff, contained a clause stating that the defendant, "in selling the ticket and checking baggage hereon, * * * acts as agent, and is not responsible beyond its own line." The verdict of the jury, finding that the loss occurred on the defendant's own line, renders a consideration of this clause immaterial. It also contains a clause stating: "Baggage liability of any company is limited to wearing apparel, not exceeding \$100 in value." The special verdict finds that the plaintiff's damages were \$158, of which \$143 were for wearing apparel. The defendant contends that the court erroneously, against its exceptions, rendered judgment for the largest sum named. This attempt of the defendant to limit its common-law liability as a common carrier must be considered with reference to the other undisputed facts stated in the exceptions. It is there stated that the evidence tended to show that the plaintiff could neither read nor write; that the tickets were not read to him by any person; and that he did not know the provisions of the tickets. With this testimony in the case, the defendant was not entitled to have the court comply with its four requests: "That the plaintiff is bound by the terms of the contract set forth on his ticket; that by said contract

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the defendant is only liable for loss of baggage occurring on its own lines; that the defendant's liability is limited to wearing apparel as specified in the contract; that the defendant's liability is limited to wearing apparel not exceeding \$100 in value." These requests all assume that such a contract existed between the plaintiff and the defendant. This assumption was not warranted by the testimony in the case. The defendant by its charter became a common carrier of passengers and their baggage, subject to the common-law

Common Carriers—Limiting Liability—Burden of Proof.

rules in regard to liability therefor. By nearly universal concurrence of decisions of courts of final resort, including the decisions of this court,

such carrier may, by contract, reasonably limit and vary its common-law liability, except as to its own negligence. But, by its charter and occupation, being subject to the common-law liability, it will be held to that liability until it establishes that it has limited or varied it by a contract, express or implied existing between it and its passengers.

Same—Same—Tickets—Assent to Printed Conditions—Burden of Proof.

The ordinary passenger ticket does not profess to contain the contract by which the passenger obtains his right to carriage over the road of the

carrier. It is only a receipt or token, given by the carrier, for the passenger to show to its servants and managers of its trains, that he has purchased the right to be safely carried on its trains between the stations specified. In this respect it is different from a bill of lading for the carriage of freight. Whatever is printed on passenger tickets has usually been regarded as a notice by the carrier of its desire to limit or vary its common-law liability. To effect such limitation, the carrier must show that the passenger, when he paid his money and received the ticket, did it under such circumstances that he assented to the conditions named upon the ticket. Whether such assent is established depends upon the circumstances of each case. Assent will not be presumed unless the proposed conditions and limitations are known by the passengers, and then much will depend upon whether

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they are reasonable or unreasonable. If not entirely reasonable, assent will not be presumed from knowledge merely, because the carrier without such assent is under the common-law liability, and has the passenger at a disadvantage. The passenger's circumstances and necessities may be such as would compel him to assent to almost any conditions or limitations. Hence, when the conditions or limitations are not entirely reasonable, it is generally held that the assent to them will not be implied from a knowledge of them, but express assent must be established. As the defendant took no exceptions to the charge on the subjects of the special findings of the jury, it is to be presumed that the court stated the law correctly in regard thereto, and that the jury found, as the plaintiff's testimony tended to show, that he had no knowledge of the conditions placed by the defendant upon his ticket at the time he purchased it. He must have had knowledge of them at the time he paid his money. When purchasing the ticket, the passenger frequently has no opportunity nor time to examine it. He has a right to understand, unless directly informed to the contrary, that the carrier's undertaking has the common-law liability. It is unreasonable to hold, if the conditions printed on the ticket come to his knowledge first after he has entered upon his journey, that he should be held to have assented thereto. His assent may well be assumed when he knows that the carrier is selling special tickets, at reduced rates, with the conditions and limitations plainly stated in the notices of the sale of such special tickets. 3 Am. & Eng. Enc. Law, *tit.* "Baggage, Duty to Carry," 543, and note; *Id.* *tit.* "Limitations of Liability," 554, and notes; 5 Am. & Eng. Enc. Law, *tit.* "Carriers of Passengers, Limitations of Liability," 608, 612, and notes; Bissell v. Railroad Co., 25 N. Y. 442, 82 Am. Dec. 369, and note; Hollister v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455, and note; Cole v. Goodwin, 19 Wend. 254, 32 Am. Dec. 470, and note; Newell v. Smith, 49 Vt. 255; Mann v. Birchard, 40 Vt. 326; Kimball v. Railroad Co., 26 Vt. 247;

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Farmers' & Mechanics' Bank v. Champlain Transp. Co., 23 Vt. 186; Blumenthal v. Brainerd, 38 Vt. 402; Ouimit v. Henshaw, 35 Vt. 605; Thorp v. Railroad Co., 61 Vt. 378, 17 Atl. 791; Gillis v. Telegraph Co., 61 Vt. 461, 17 Atl. 736; Hadd v. Express Co., 52 Vt. 335; Davis v. Railroad Co., 66 Vt. 290, 29 Atl. 313. In Davis v. Railroad Co., where a bill of lading is considered, it is said, in regard to notices: "Notice, unless brought distinctly to the knowledge of the consignor in such a manner that the law will imply his assent to the limitation contained in the notice, will not be considered as entering into, and forming a part of, the contract." The special verdict does not establish that the plaintiff had knowledge of the conditions printed upon his ticket, and his assent thereto will not be implied. The defendant rests under the common-law liability in regard to the loss of the baggage. That liability, as held in Ouimit v. Henshaw, *supra*, entitles plaintiff to recover for the bedding lost, as for his entire loss.

4. In the closing argument the plaintiff's counsel said: "The policy of the defendant was evidently to fight every claim; that if the defense was honest, it would arbitrate; * * * but, no, their policy was to fight." There was no evidence in the case that authorized the assertion of these facts. On the defendant's objection to this line of argument, the court told the counsel to confine himself to a discussion of the testimony, and made no other ruling in regard to the defendant's objection, and allows exception to its action, if the matter was the subject of exception. The counsel did not proceed further in that line of argument, nor did he retract the statements quoted. The statement, if allowed to stand, was calculated to prejudice the defendant with the jury, and must have been intentionally made for that purpose. It charged the defendant with making a dishonest defense to the plaintiff's claim, as a conclusion from alleged facts, of the existence of which there was no evidence in the case. If it had been an unintentional mistake, the counsel should,

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and would, have corrected it as soon as objection was made. The court also should have corrected this statement of facts which did not exist. Failing to do so, the defendant was entitled to an exception. As said by this court in *Cutler v. Skeels*, 69 Vt. 161, 37 Atl. 230: "It was a statement of facts that he had no right to make, and, as it was permitted by the court, it was an implied ruling that such argument was legitimate." Its allowance, under the circumstances, was reversible error. *Magoon v. Railroad Co.*, 67 Vt. 196, 31 Atl. 156; *State v. Hannett*, 54 Vt. 83; *Rea v. Harrington*, 58 Vt. 181, 2 Atl. 475. Judgment reversed, and cause remanded.

Remarks of
Counsel—Rever-
sible Error.

COFFEE

v.

LOUISVILLE & N. R. Co.

(Supreme Court of Mississippi, March 6, 1899.)

Checking Baggage—Rules.—A rule that baggage shall not be checked until a ticket has been procured is a reasonable one.

Same—Same.*—But a rule that a baggage master shall not receive, into the baggage room, baggage until a ticket is procured is unreasonable and void.

Authority of Baggage Master.—The presumption is that a railroad baggage master has authority in regard to matters pertaining to checking baggage.

APPEAL by plaintiff from Jackson county circuit court.
Reversed.

Denny & Woods, for appellant.

Gregory L. Smith and Mayes & Harris, for appellee.

WHITFIELD, J. The case should have gone to the jury. A rule that baggage shall not be checked until a ticket has

*See note at end of case.

Note

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been procured is a reasonable regulation to prevent imposition upon the company. But a rule that a baggage master shall not receive, into the baggage room, baggage until a ticket shall have been procured, if there be such a rule, is an imposition on the public, unreasonable, and void. It would require intending passengers to care for their own baggage, in many situations that may readily be imagined, where to do so would be entirely impracticable. Every reasonable facility for travel should be afforded those who are intending passengers, and rules should be so framed as to be just in their provisions, alike to the company and the traveling public. As to the authority of the baggage master, see *Isaacson v. Railroad Co.*, 94 N. Y. 285, 286, 16 Am. & Eng. R. Cas. 188, 46 Am. Rep. 142.

Reversed and remanded.

NOTE.

Baggage—Delivery to Baggage-Master—Liability of Carrier.—The proprietors of a railroad, who receive passengers and commence their carriage at the station of another road, are bound to have a servant there to take charge of the baggage until it is placed in their cars; and if it is the custom of the baggage master of the station, in the absence of such servant, to receive and take charge of baggage in his stead, the proprietors will be responsible for baggage so delivered to him. *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69.

And his acceptance of such trunk for transportation, imposes upon the railroad company the obligation of common carriers. *Wilson v. Grand Trunk R. Co.*, 57 Me. 138.

If a baggage master receives and checks a trunk, and it is lost before the passenger purchases a ticket, the company is liable, though the baggage master may have violated a rule of the company in so checking it, unless the existence of such rules is brought to the knowledge of such owner. *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 319, 4 N. E. Rep. 20.

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ROONEY

v.

NEW YORK, N. H. & H. R. CO.

(*Supreme Judicial Court of Massachusetts, April 17, 1899.*)

Injury to Passenger—Insanity—Concurring Causes—Liability.—There was evidence tending to show that plaintiff, while a passenger on defendant's train, received a nervous shock at the time of the accident in question, which resulted in insanity; but there was also evidence tending to show that two occurrences subsequent to the accident had some effect on her mental condition. *Held*, that it was not error to instruct the jury that they must not compare the various causes of plaintiff's mental condition, and try to ascertain which had the most important effect; but that if they found that they, combined together, brought about her mental disease they must find that it was not caused by the accident in question.

Personal Injuries—Damages—Annuities.*—In estimating damages for personal injuries, if all the elements entering into the problem can be accurately determined, the rule applicable to the purchase of an annuity would enter into the determination of the amount of damages to be allowed plaintiff for the loss of ability to earn wages; and the charge of the trial judge on this subject was not misleading, as he did not state the law on the subject, but merely suggested for the jury's consideration whether or not such rule was more reasonable than one suggested by plaintiff's counsel, and left them to follow his previous instructions on the subject of damages.

Same—Same—Same—Question for Jury.—In such an action, it is not within the province of the court to tell the jury that they cannot find the facts to be such as to furnish a proper basis for the application of the principle on which annuities are purchased in computing damages to be allowed plaintiff for the loss of ability to earn wages.

EXCEPTIONS by defendant from Suffolk county superior court. *Exceptions overruled.*

J. E. Cotter, for plaintiff.

Benton & Choate, for defendant.

*See note at end of case.

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KNOWLTON, J. The defendant made no request for instructions to the jury, but excepted to two portions of the charge. The evidence tended to show that the plaintiff received a nervous shock at the time of the accident, which resulted in insanity. The accident occurred in October, 1894, and there was evidence that in August, 1895, an acquaintance of the plaintiff, about her age, named James Dunn, was run over by a train and killed, and that the plaintiff, not long afterwards, saw his dead body. On October 24, 1895, another railroad accident occurred at Hyde Park, and the plaintiff saw the bodies of the injured persons lying in the railroad station a short time after the accident. There was evidence tending to show that these two occurrences subsequent to the accident to her had some effect on her mental condition. The defendant excepted to the charge of the judge in regard to its liability, in view of these subsequent events, which occurred before it became necessary to commit the plaintiff to a hospital for the insane. We see no error in this part of the charge. The jury were instructed that the defendant would not be liable; if the plaintiff's condition was not caused by the accident to her, but by these two subsequent occurrences, or either of them. The judge further said: "If, from all the evidence in the case, you are unable to distinguish the cause of this mental disease,—that is, if you are unable to distinguish whether it was the accident of October, 1894, or the accident to James Dunn, or the accident at Hyde Park, that was the cause of this mental disease,—it would be your duty to find for the defendant on that issue. That is, you are not to compare these various accidents one with the other, and try to find out which had the most important effect; but if you find that they, combined together, brought about this mental disease, it would be your duty, on that issue, to find for the defendant." This exception must be overruled.

The only remaining exception is to the part of the charge on the subject of damages. The judge first gave instructions

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on that subject referring to the different elements of damage, and then proceeded as follows: "Evidence has been introduced as to her earning capacity before the injury and after the injury. You are to compensate her for that. If she has suffered from loss of capacity, you are to compensate her for that. I can make you no suggestions, gentlemen, as to what you ought to do with reference to the computation of damages upon that point. If you find this is only temporary in its nature, and you are satisfied she will recover within a short time or a longer time, it is for you to say what she ought to receive by reason of the injury to her capacity to earn wages by labor. If you find, on all the evidence, that this is a permanent injury, and that for the rest of her life she will be deprived of the ability to labor that she had before the injury, it is for you to say what she ought to receive as compensation. Counsel for the plaintiff made some suggestions to you as to the rule for you to consider. He afterwards stated he would not state it as a rule, and I shall not state it as a rule; and, I wish you to understand it, I only make the suggestion. The suggestion was made that you were to consider the difference between the earning capacity she had before the injury and after, and then set apart a capital sum, the interest of which would be equal to the difference between what her capacity was before the injury and afterwards. I call your attention to that suggestion, and suggest to you, as reasonable men whether that is the proper rule. Supposing that you should adopt that rule of estimating these damages, you can see very well for yourselves, as business men, that you would be providing a certain sum to be paid to her yearly for interest as long as she lives, and at her death there will be a certain sum in capital which would go to her next of kin. Now, gentlemen, you are not here to assess damages for the benefit of the next of kin, and I do not think that the counsel for the plaintiff would claim that. I only suggest this to you, gentlemen,—whether that would be reasonable for you to adopt that as a rule for compensation;

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to set apart a certain sum which should go to her next of kin. I can make a suggestion for you to consider, but I do not suggest that as a rule of damages. As some of you know, as business men, there is such a thing as an annuity; that is, a person may purchase an annuity. That annuity, of course, expires with the life of the individual, and you have to consider the reasonable probabilities of the life of that individual, in providing that annuity or in purchasing that annuity; and it is such a sum as will probably expire with the life of the individual,—that is, a certain sum, which, perhaps, taking the interest and a portion of the principal each year, will provide a certain sum annually. I do not suggest that as a rule for you to apply, but the only question is whether that is not a more reasonable plan than the plan suggested by the counsel for the plaintiff.” The suggestion made by the plaintiff’s counsel in the argument referred to in the charge was not objected to by the defendant, and no request was made for instructions in regard to it. The effect of the judge’s reference to it in his charge was to point out one particular in which it would certainly lead to a wrong result. He then stated the principle on which annuities were computed; showing that the sum required to purchase an annuity was “a certain sum, which, perhaps, taking the interest and a portion of the principal each year, will provide a certain sum annually.” Herein he pointed out the difference between the method suggested by the plaintiff’s counsel and the true method of reckoning an annuity. He was careful at the same time, to tell the jury that he did not suggest it as a rule for them to apply, and virtually to say that, if the principle applicable to the purchase of annuities was to be applied at all, it should be applied with a correction of the method proposed by the plaintiff’s counsel. In the absence of any request by the defendant for an instruction on this point, either before or after the charge, we are of opinion that there is no ground of legal objection to the charge. It seems clear that, if all the elements entering into the problem could be accurately determined, the

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principle applicable to the purchase of an annuity would enter into the determination of the amount of damages to be allowed to the plaintiff for the loss of ability to earn wages. It was so held by this court in *Copson v. Railroad Co.*, 171 Mass. 233, 50 N. E. 613; and there are many cases in other jurisdictions to the same effect. *Railroad Co. v. Putnam*, 118 U. S. 545-556; 7 Sup. Ct. 1; *Sauter v. Railroad Co.*, 65 N. Y. 50; *McDonald v. Railroad Co.*, 26 Iowa, 124-140; *Railroad Co. v. Richards*, 62 Ga. 306; *Railroad Co. v. Allison*, 86 Ga. 145, 12 S. E. 352; *Railroad Co. v. Mahony's Adm'r*, 7 Bush, 235; *Walters v. Railroad Co.*, 36 Iowa, 458, 41 Iowa, 71; *Railroad Co. v. Noell's Adm'r*, 32 Grat. 394; *Railway Co. v. Lundin*, 3 Colo. 94; *Railway Co. v. Woodward*, 4 Colo. 1; *The D. S. Gregory*, 2 Ben. 226, 239, Fed. Cas. No. 4,100; *Railway Co. v. Needham*, 3 C. C. A. 129, 52 Fed. 371.

The practical difficulty in using annuity tables in cases of this kind, and in making computations upon the principle on which annuity tables are founded, is that there are too many elements which are uncertain, and which cannot be reduced to any close approximation to certainty. These tables are usually computed on the probabilities for sound lives, while in the cases on trial there are often many circumstances which make the probabilities as to length of life different from those estimated in the tables. In estimating damages for personal injury, the amount to be allowed for loss of ability to earn money depends upon conditions which are not constant, but which vary from many causes. The physical condition of the plaintiff would very likely have changed from time to time from other causes, if there had been no accident. Her physical condition is usually likely to change as the years go on after the accident. The income to be obtained from labor or effort in any given calling is not a constant quantity from year to year as time goes on, but the ability to procure employment, and the prices paid for services, are likely to change. For these and other reasons, annuity tables will seldom be found helpful in a trial of such cases; and, if they

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are used, the jury should be carefully instructed to apply them only so far as the facts found correspond to those on which the tables are computed. So, too, a jury can apply the principle on which annuities are purchased only after they have found facts which form a proper basis for such a computation; but, if all such facts are found and made definite, the principle on which such tables are computed can properly be used in estimating the amount to be allowed as a present sum to compensate for a probable annual loss for a probable term of years. We do not think the judge said anything which misled the jury in this case. He was careful to leave them to follow his original instructions, and to tell them that he did not suggest an estimate of the value of an annuity. He could not tell them that they could not find the facts to be such as to furnish a proper basis for such a mathematical computation, if they, as men of intelligence, knew how to make it. It was for them to find the facts, and then to use methods of computation applicable to them. Exceptions overruled.

Same-Same-
Same-Question
for Jury.

LATHROP, J. (dissenting). I am unable to agree with the opinion of the majority of the court, that the suggestion of the judge in regard to an annuity did not prejudice the defendant. To my mind, it was clearly the duty of the judge, as the matter had been called to the attention of the jury by the counsel for the plaintiff, to state to them what the rule of law was; and this duty was not performed by suggesting for their consideration whether a certain other rule was not a more reasonable one. As the matter was left to the jury, they might adopt either the suggestion made by the counsel for the plaintiff, or that made by the judge, or any other they saw fit. Cases ought not to be tried in this way. No evidence was introduced at the trial upon which the cost of an annuity could be based. The plaintiff was earning nine dollars a week while she worked. There was no evidence of her probable length of life, or the cost of an annuity which would give her nine dollars a week. In the absence of evidence, the jury were left to grope in darkness. There

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are, without doubt, authorities which allow the admission in evidence of standard life tables, which show at any age the probable duration of life, for the purpose of aiding the jury in estimating the probable duration of the life of the person injured or killed by the negligence of another. *Railroad Co. v. Putnam*, 118 U. S. 545, 556, 7 Sup. Ct. 1; *Sauter v. Railroad Co.*, 66 N. Y. 50; *McDonald v. Railroad Co.*, 26 Iowa, 124, 140; *Railroad Co. v. Richards*, 62 Ga. 306; *Railroad Co. v. Mahony's Adm'x*, 7 Bush, 235; *Walters v. Railway Co.*, 36 Iowa, 458, 41 Iowa, 71; *Railroad Co. v. Noell*, 32 Grat. 394; *Railway Co. v. Lundin*, 3 Colo. 94; *Railway Co. v. Woodward*, 4 Colo. 1. But these cases do not go further, and, with the exception of the case first cited, there is no suggestion that annuity tables are admissible for any other purpose than to show the probable duration of life. It is obvious, however, that, if such evidence is admissible, it is only to establish one element in the problem to be solved. Tables of this kind are based merely upon average lives, and the condition of the life of the person injured must be ascertained. So, also, allowance must be made for loss of time by sickness or otherwise, and the diminution of earning power which attends old age. The admission of such tables, by themselves, would be of very little, if of any, value. In *Railroad Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. 1, it is said: "In an action for a personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including, not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant." It is then added: "In order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the probable duration of life and the present value of a life annuity, are competent evidence." It was, however, held that an in-

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struction to give an annuity for future earning power was erroneous, and general instructions to the jury were considered more appropriate. This rule has been followed in later cases. *Railroad Co. v. Allison*, 86 Ga. 145, 12 S. E. 352; *Railway Co. v. Needham*, 3 C. C. A. 129, 52 Fed. 371. But there is very little authority for the admission in evidence of annuity tables, or for the proposition that damages may be assessed on the basis of a sum which, according to such tables, will give an annuity for life. In *The D. S. Gregory*, 2 Ben. 226, 239, Fed. Cas. No. 4,100, where a passenger on a ferryboat was injured by a collision, JUDGE BLATCHFORD, then a district judge, after stating various matters for which the libelant was entitled to recover, said: "The libelant was, at the time of the accident, about 40 years of age. The sum required, according to the Northampton tables, to produce, at that age, an annuity for life of \$456, is \$4,881.48. This sum, added to the \$1,000 before mentioned, makes \$5,881.48." He then stated that he thought that adding a sum for physical pain and mental suffering would make the amount claimed in the libel, \$10,000, a proper sum to be awarded. The decree for the libelant was affirmed by the circuit court, with a slight variation, but the case does not appear to have been reported. An appeal was then taken to the supreme court of the United States, which then had jurisdiction in admiralty of questions of both law and fact, and the decree of the circuit court was affirmed. 9 Wall. 513. The opinion says nothing about an annuity, and the question of damages is disposed of in these words: "The extent and character of the injuries sustained by the libelant are not disputed, and we do not think the amount at which her damages were assessed by the district court, and which was approved by the circuit court, at all excessive."

In England it was many years ago said by BARON PARKE, in charging the jury in the case of *Armsworth v. Railway Co.*, 11 Jur. 758: "You are not to consider the value of his existence as if you were bargaining with an annuity office; for in that case you would have to calculate all the accidents

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which might have occurred to him in the course of it, which would be a very difficult matter. I therefore advise you to take a reasonable view of the case, and give what you consider a fair compensation." The case of *Rowley v. Railway Co.*, L. R. 8 Exch. 221, which has been sometimes cited in support of the proposition that annuity tables are admissible, stands on its own peculiar facts. The person for whose death the action was brought under St. 9 & 10 Vict. c. 93, §§ 1, 2, had covenanted to pay an annuity of £200 to his mother during their joint lives. The action was brought for the benefit of the mother, and it was held that, as she had lost an annuity by the negligence of the defendant, the payment of it being unsecured except by the personal covenant of the person killed, there was no objection to the jury estimating as damages what would buy an equally good annuity. There is no occasion to consider whether this court should follow this case, where the circumstances were similar. It is manifest that the case is not an authority for the general proposition that damages in an accident case may be awarded on the basis of an annuity. In the important case of *Phillips v. Railway Co.*, 5 Q. B. Div. 78, the jury were instructed that they were not to give the value of an annuity of the same amount as the plaintiff's average income for the rest of his life, for that would be to disregard the contingencies; and it was held by the court of appeal that there was no misdirection. A new trial was, however, granted, on the ground that the damages awarded were inadequate. The case was afterwards tried before CHIEF JUSTICE COLERIDGE, who gave the jury general instructions, without any reference to an annuity, and his instructions were held to be correct by the queen's bench division and by the court of appeal. 5 C. P. Div. 280, 49 Law J. Q. B. 239. It was said by LORD JUSTICE COTTON: "In my view, a fair compensation for the pecuniary loss is not to be arrived at by any arithmetical process. It cannot be said that, the amount of the income being known, the loss is reduced to a mere matter of calculation. LORD COLERIDGE

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has not taken this course, but he has directed the jury to look to the nature of the income, the probability of its continuance, and the circumstances upon which it depended. The plaintiff is not to receive an annuity for the rest of his life, calculated upon the amount of his income. It is possible that he might have been disabled by illness or other causes from continuing to earn it. After taking into account the chances affecting the income, the jury were to say what, in their opinion, was a fair compensation for the disability; whether permanent or temporary, under which the plaintiff came, of practicing his profession, and earning the income which he previously enjoyed."

The case of *Copson v. Railroad Co.*, 171 Mass. 233, 50 N. E. 613, was heard by a judge, without a jury. He found for the plaintiff, and assessed damages in the sum of \$15,000. The opinion states that the judge "put upon a paper a memorandum which indicated his view of the facts on which his assessment of damages was founded," and that he allowed for the loss of ability to earn money "a sum equivalent to the present worth of an annuity of \$1,500 for ten years at 4 per cent." This court, on exceptions, refused to set aside the finding, apparently on the ground that no question of law was involved, for it is said in the opinion: "The defendant excepted to the finding of the judge in regard to the damages. If we assume that this exception is open to the defendant, we are of opinion that no question of law is involved in it." The judgment appears to have been based upon the ground that the judge had a right to ascertain the damages in any way he saw fit, and that what was written by him did "not indicate that the judge thought it gave an ascertained mathematical measurement of the damages for the loss of earning capacity." It is added: "Neither the degree of future disability, nor the time it would continue, could be told, except as a probability; nor could the income or rate of interest that a fixed sum, awarded as damages, could be made to produce for a long period of years, be known." I see nothing in the decision in this case which

Note

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warrants a judge in instructing a jury that they may estimate the damages on the basis of an annuity. Such a rule would be contrary to the rule established in England and by the supreme court of the United States. It also has no support in this country. See cases before cited. In this commonwealth the rule of damages which governs in cases of injury by the negligence of another has been carefully stated. *Ballou v. Farnum*, 11 Allen, 73. I see no occasion to adopt either the rule contended for by the plaintiff's counsel, or that suggested by the court, and am of opinion that what was said tended to mislead the jury. I think there should be a new trial.

NOTE.

Personal Injuries—Damages—Tables.—In an action for personal injuries, where such injuries are permanent, though not resulting in death, life tables are admissible to show plaintiff's expectancy of life in estimating damages. *Arkansas Mid. R. Co. v. Griffith*, 63 Ark. 491, 9 Am. & Eng. R. Cas., N. S., 846; *Chase v. Burlington*, etc., R. Co., 76 Iowa 675, 38 Am. & Eng. R. Cas. 148; *Louisville*, etc., R. Co. v. *Miller*, 141 Ind. 533; *McDonald v. Chicago*, etc., R. Co., 26 Iowa 124, 96 Am. Dec. 114; *Louisville*, etc., R. Co. v. *Hurt*, 101 Ala. 34; *Morrison v. McAtee*, 23 Ore. 230; *Columbus v. Sims*, 94 Ga. 483; *Greer v. Louisville*, etc., R. Co., 94 Ky. 169, 42 Am. St. Rep. 345; *Louisville*, etc., R. Co. v. *Mothershed*, 97 Ala. 261; *Denman v. Johnston*, 85 Mich. 387; *Friend v. Ingersoll*, 39 Neb. 717; *Richmond*, etc., R. Co. v. *Garner*, 91 Ga. 27.

In the last case it was held that tables were admissible, even though the evidence was conflicting as to whether the injuries were permanent, for the jury's use in case the injuries were found to be permanent. See also *Blair v. Madison Co.*, 81 Iowa 313.

And in *Arkansas Mid. R. Co. v. Griffith*, 63 Ark. 491, 9 Am. & Eng. R. Cas., N. S., 846, it was held that it was not error to permit the tables of mortality to be read in evidence though plaintiff's health previous to the accident rendered him a non-insurable risk, if the jury had been properly instructed as to the value of such evidence.

In *Florida Cent. & P. R. Co. v. Burney* (Ga.), 6 Am. & Eng. R. Cas., N. S., 543, is set forth a form of instructions to be given to the jury in regard to the use of such tables. The sufficiency of this form was affirmed in *Savannah, F. & W. Ry. Co. v. Austin* (Ga.), 11 Am. & Eng. R. Cas., N. S., 539.

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LANE

v.

SPOKANE FALLS & N. RY. CO.

(*Supreme Court of Washington, April 28, 1899.*)

Personal Injuries—Physical Examinations.*—The courts of Washington have authority to order one who sues to recover damages for injuries to his person to submit to a physical examination by disinterested witnesses in order that the extent of his injuries may be ascertained; and for non-compliance with such an order the trial may be stayed, or the case dismissed.

Same—Negligence—Question for Jury.—In an action for injuries to a passenger, where there is any evidence tending to show that they were caused by the negligence of the railroad company, it is proper to refuse to direct for defendant.

Exclusion of Testimony—Inferences.—In an action for personal injuries sustained by plaintiff, she can exercise the right of having the testimony of her physicians, in regard to the result of their physical examination of plaintiff, excluded, without making the exercising of such right a subject of comment for the jury.

Contributory Negligence—Question for Jury.*—Whether a passenger was guilty of contributory negligence in standing in the aisle of the car, when it was stationary, and an engine was being backed down to connect it with the train, was a question for the jury.

APPEAL by defendant from Spokane county superior court.
Reversed.

Will H. Thompson and Albert Allen, for appellant.

Fenton & O'Brien, James E. Fenton, and F. C. Robertson, for respondent.

GORDON, C. J. Respondent was a passenger on appellant's train between Spokane, in the state of Washington, and Rossland, British Columbia, and sued to recover damages for injuries alleged to have been sustained while such passenger, as a result of appellant's negligence. In the lower court, prior to the commencement of

Case Stated.

*See notes at end of case.

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the trial, defendant made an application for an order directing that the plaintiff be examined by medical experts appointed by the court, for the purpose of ascertaining the nature, character, and extent of plaintiff's injuries. The court denied the application, and the main question for determination upon this appeal is whether the courts of this state have the power to compel one who sues to recover damages for injuries to his person to submit to such an examination. The question is a very important one, and is presented for the first time in this court. Upon the question the courts of the country are not agreed. In Iowa, Nebraska, Kansas, Wisconsin, Alabama, Arkansas, Ohio, Michigan, Georgia, Minnesota, and Missouri it has been held that the court possesses the inherent power to make such an order (*Schroeder v. Railroad Co.*, 47 Iowa, 375; *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419; *Railroad Co. v. Finlayson*, 16 Neb. 579, 20 N. W. 860; *Railroad Co. v. Thul*, 29 Kan. 466; *White v. Railway Co.*, 61 Wis. 536, 21 N. W. 524; *Railroad Co. v. Hill*, 90 Ala. 71, 8 South. 90; *Sibley v. Smith*, 46 Ark. 275; *Turnpike Co. v. Baily*, 37 Ohio St. 104; *Graves v. City of Battle Creek*, 95 Mich. 266, 54 N. W. 757; *Railroad Co. v. Childress*, 82 Ga. 719, 9 S. E. 602; *Hatfield v. Railroad Co.*, 33 Minn. 130, 22 N. W. 176; *Owens v. Railroad Co.*, 95 Mo. 169, 8 S. W. 350); while in Illinois, New York, Indiana, and the United States supreme court the power is denied (*Railway Co. v. Rice* [Ill. Sup.] 33 N. E. 951; *Roberts v. Railroad Co.*, 29 Hun, 154; *Pennsylvania Co. v. Newmeyer* [Ind. Sup.] 28 N. E. 860; *Railway Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000). It is said that it is abhorrent to the principles of liberty to compel a party to submit to such an examination; that it invades the inviolability of the person, is an indignity involving an assault and a trespass, and an impertinence to which a modest woman would not consent. Courts should not sacrifice justice to notions of delicacy, and knowledge of the truth is essential to justice. The attainment of justice in the courts is of far greater importance than any merely personal con-

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sideration. A witness is frequently required to answer questions which shock modesty and offend the sense of delicacy. The demands of justice not infrequently occasion private inconvenience and annoyance. "Her delicacy and refinement of feeling, though of course entitling her to the most considerate and tender treatment consistent with the rights of others, cannot be permitted to stand between the defendant and a legitimate defense against her claim of a large sum of money. When it becomes a question of possible violence to the refined and delicate feelings of the plaintiff on the one hand, and possible injustice to the defendant on the other, the law cannot hesitate. Justice must be done." Railroad Co. v. Hill, *supra*. In the case at bar the respondent is a voluntary actor. She brings the suit, and, as said by the supreme court of Georgia in Railroad Co. v. Childress, *supra*: "When a person appeals to the sovereign for justice, he impliedly consents to the doing of justice to the other party, and impliedly agrees, in advance, to make any disclosure which is necessary to be made in order that justice may be done." It is to be presumed that, in exercising this power, the trial court will always see that only proper physicians or surgeons, and, where possible, wholly disinterested ones, are appointed to conduct the examination, and the expense of such examination should be borne by the party requesting it. Care should be exercised to avoid all unnecessary inconvenience and annoyance to the plaintiff, and, when desired, it should be made in the presence of the counsel and friends of the party to be examined, and the trial court must be free to exercise that sound discretion which the nature of the case and the ends of justice may require. In the present case, we think the application was seasonable and a proper one, and we perceive no reason why it should have been denied, unless, as asserted by appellant's counsel, the trial court was of the opinion that it had no power to make the order. If such was the reason for refusing the order, then it is apparent that the court exercised no discretion, and the case affords no ground for our refusal to

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review its action. Such an order, when granted, will operate to stay the suit until its provisions are complied with. As is said by JUSTICES BREWER and BROWN, dissenting in *Railway Co. v. Botsford*, *supra*: "It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court never fines or imprisons for disobedience thereof. It simply dismisses the case, or stays the trial until the security is given." Authority of courts of divorce to compel a party to submit to a physical examination by physicians or surgeons appointed by the court has never been doubted. *Le Barron v. Le Barron*, 35 Vt. 365; *Devanbagh v. Devanbagh*, 5 Paige, 554. But it is said by the majority in *Railway Co. v. Botsford*, *supra*, that the reason for the exercise of such an authority in divorce actions is "the interest which the public as well as the parties have in upholding or dissolving the marriage state." But will it be said that the public has no interest in the attainment of justice between individuals? The admission that the court has power to make the order whenever it is deemed requisite to ascertain the fact of incapacity in a divorce action seems to us an argument in favor of the existence of the power to make such an order in the present case. It exists by implication, and may be exercised in either case, whenever the demands of justice require it. Actions of this character have, in recent years, become so numerous that the question is of far greater importance than it could possibly have been 25 years ago, and it is not surprising that most of the cases in which the question has arisen or is discussed at all are of recent origin. In our state, counties, cities, and other municipal corporations are liable for negligence resulting in injury to the person, to the same extent as private corporations and individuals (*Kirtley v. Spokane Co.* [Wash.] 54 Pac. 936; *Sutton v. City of Snohomish*, 11 Wash. 24, 39 Pac. 273); and it becomes of the utmost importance that the question be determined with due regard for the public welfare. "The

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common law grew with society, not ahead of it. As society became more complex, and new demands were made upon the law by reason of new circumstances, the courts originally, in England, out of the storehouse of reason and good sense, declared the 'common law.' But, since courts have had an existence in America, they have never hesitated to take upon themselves the responsibility of saying what is the common law, notwithstanding current English decisions, especially upon questions involving new conditions. * * * And we understand * * * that, where there are no governing provisions of the written laws, the courts * * * of this state are, in all matters coming before them, to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the the common law." Sayward v. Carlson, 1 Wash. St. 29, 23 Pac. 830 (see pages 40, 41, 1 Wash. St., and page 833, 23 Pac.). In concluding upon this question, we adopt and indorse the view expressed in the dissenting opinion in Railway Co. v. Botsford, *supra*, "that a party who voluntarily comes into court alleging personal injuries, and demanding damages therefor, should permit disinterested witnesses to see the nature and extent of those injuries, in order that the jury may be informed thereof by other than the plaintiff and his friends, and that compliance with such an order may be enforced by staying the trial or dismissing the case."

Personal Injuries
—Physical Ex-
aminations.

The conclusion we have reached upon this question disposes of the appeal, but, in view of the new trial which must occur, we deem it necessary to notice other questions which may arise thereon.

From the evidence in the case, it appears that when the train upon which plaintiff was a passenger arrived at the town of Northport, a distance of 140 miles from Spokane, the engine was uncoupled, and taken by the fireman up the track a short distance, for the purpose of getting water, the engineer leaving the engine to get his dinner. It appears that at that point time and opportunity are afforded

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passengers to procure dinner before proceeding on the journey. In backing the engine down to connect it with the train, it was permitted to collide with the cars with such force as to throw the plaintiff, who was standing in the aisle of one of the coaches, to the floor, causing the injuries of which she complains. At the trial the defendant introduced witnesses, who testified that the engine was a standard locomotive passenger engine, and in first-class condition; that it had been inspected at Spokane prior to going out with the train in question; that it was equipped with all modern appliances for starting and stopping; that the fireman who was on the engine at the time of the accident was a competent engineer as well as fireman, and had had some experience in running a switch engine; that from the water tank to where the coaches were standing the engine was permitted to drift, on a down grade, at a rate of from five to ten miles an hour; that when within the usual, proper, and a sufficient distance from the cars to enable the engine to be slowed down for the coupling, the fireman applied the air brakes; that, they proving insufficient under the ordinary application of air, the full volume of air, or what is termed the "emergency pressure," was turned on, and that, too, proving ineffectual to stop or impede the engine, he thereupon reversed, but was unable to stop the engine in time to prevent the collision which occurred. An examination disclosed that a nut or pin in the connecting rod had broken or dropped out, rendering it impossible to apply the air brakes, and appellant contends that the collision was the result of unavoidable accident. Upon this theory, the appellant asked for an instruction directing a verdict in its favor, and assigns as error the court's refusal to give it. In support of this assignment, it is contended that a railroad is not an insurer of the safety of its passengers, which may be conceded; that it owes simply the duty of exercising the utmost care, skill, prudence, and foresight in the conduct of its business, which may also be accepted as the measure of its duty in this regard. It also insists that the evidence which was introduced upon its own

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part, and uncontradicted, shows that prior to, and at the time of, the accident, it had used, and was using, such care, skill, prudence, and foresight. But concerning this question we think the court could not, as a matter of law, assume that the conditions claimed by the appellant were established by the evidence introduced. It was for the jury to say whether or not the inspection was sufficient and adequate; whether or not the fireman was a suitable and competent person to have the conduct and management of the engine under such circumstances; whether or not it was negligence for the engineer to leave the engine intrusted to the care of the fireman under such circumstances; whether or not, if the fireman had been a competent engineer, he would have been equal to the emergency which presented itself when it became apparent that brakes were not in working order, and could have stopped the engine and prevented the collision. Then, too, witness Luce, who was conductor of the train and a witness for appellant, says that he saw the engine approaching to make the coupling; that at that time he was standing between the engine and waiting room on the platform, 10 or 15 feet from the engine. The train consisted of a baggage car and three coaches. The brakes were set on the train up to the time the engine was coupled on. "I saw this engine as it approached for the purpose of making the coupling. This was a few minutes before the departure of the Nelson train. I saw the coupling when it was made, and saw the engine as it approached the train for the purpose of making the coupling. Mr. Choat (the fireman) was operating the engine at the time. As he backed down to couple on he was coming a little faster than he should have been, of course, to make the coupling, and I heard him try to set the brake—that is, I heard the air escape as it does always in applying the brake—about probably two hundred feet, and possible two hundred and fifty, before they came to the car; and he got along about fifty or one hundred feet further, and I heard him apply the air again; and very soon after that—almost immediately—I heard him apply

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the air full force, which is called the emergency, and yet she didn't slack up as he intended, I suppose, she should, and he struck the head end of the baggage car. I didn't see him reverse the engine, but I know she was reversed when she struck, as she immediately started forward." Upon the testimony of this witness, the jury might have considered that the engine was permitted to approach the train at a greater rate of speed than prudence justified. We think the evidence made a case for the jury, and the instruction was properly denied.

Same—Negligence—Question for Jury.

There was no error committed in the giving of instruction No. 6, which withdrew from the jury certain items of damage which were abandoned at the trial, and the computation made by the court was correct, under the pleadings.

Nor did the court err in refusing defendant's requests for instructions numbered 1 and 2. It appears that Drs. Russell and Catterson had been consulted by plaintiff in their professional capacity as physicians, and had made physical examinations of the plaintiff, for the purpose of determining her injuries. At the trial the defendant called them as witnesses, and, upon plaintiff's objection, the court refused to permit them to testify to any information acquired on such examinations. By instructions 1 and 2, which were refused, the court was asked to tell the jury, in effect, that they might infer from plaintiff's refusal to consent to the doctors testifying that their testimony, if given, would have been unfavorable to plaintiff's cause. We think the defendant was not entitled to have these instructions given. The court correctly ruled that these gentlemen could not, without plaintiff's permission, give testimony as to any information obtained in their professional capacity, and, if the plaintiff had the legal right to have this testimony excluded, she could exercise that right without making it the subject of comment for the jury.

Exclusion of Testimony—Inferences.

We think that the question raised by the assignment of error based upon the refusal of the court to give instruction No. 3, as requested, becomes unimportant by reason of our

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conclusion in regard to the power of the court to order an examination in a proper case.

Assignments numbered 9 and 10 are based upon a refusal of the court to tell the jury, as a matter of law, that the respondent was guilty of contributory negligence because she was standing in the aisle of the car at the time the collision occurred. We think that to have given these instructions would have been gross error. *Railroad Co. v. Pollard*, 22 Wall. 341; *Carroll v. Burleigh*, 15 Wash. 208, 46 Pac. 232; *Redford v. Railway Co.*, 15 Wash. 419, 46 Pac. 650; *McQuillan v. City of Seattle*, 10 Wash. 464, 38 Pac. 1119. Because of the error above pointed out the judgment is reversed, and the cause remanded for further proceedings in conformity herewith.

Contributory
Negligence—
Question for
Jury.

DUNBAR and ANDERS, JJ., concur.

REAVIS, J. (dissenting). This cause is reversed upon a single assignment of error; that is, the refusal of the superior court to make an order directing that the plaintiff be examined by medical experts appointed by the court, for the purpose of ascertaining the nature, character, and extent of her injuries. As observed in the opinion, the question is one of great importance. It can be confidently asserted that until this time no court in this state has ever assumed the power to direct the surgical examination of a party to a civil action. The proposition affirmed is that the court has the power to compel the plaintiff, in an action for personal injuries, to submit to an assault and indignity to her person, under penalty of the dismissal of her action in case of her refusal. The fixed rules of the common law are as controlling on the courts as is the statute law of the state. It is true, these principles frequently require an extension of their application to new facts and conditions, and the court is then authorized to make such extension or prolongation of these rules to such new condition or fact. But established and ancient rights at the common law, which have been adopted by our legislation, cannot be altered or invaded without legislative sanction.

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The inquiry here would fairly seem to be, what was the controlling rule at common law in the production of testimony in actions for personal injuries?

All the authorities produced by counsel for the defendant, and mentioned in the opinion of the court, may be examined, and it will be found that no case asserts that such rule existed at common law; and, further, no case has been found, in the judgment of a common-law court, until 1868, first reported in 1877, sustaining in the court such power to order an examination of the person. The case of *Schroeder v. Railroad Co.*, 47 Iowa, 375, is the strongest case, and the only one unlimited in its expressions, supporting the doctrine. It was decided in December, 1877. In that case, before the jury were impaneled, application was made by the defendant that the plaintiff be required to submit to an examination by physicians and surgeons, that they might determine the true condition of his health and the character and extent of his injuries. The application requested that such examination be made by physicians to be selected in equal numbers by plaintiff and defendant; and the affidavit of a physician was made that such examination was necessary, and would determine that the injuries were not of the extent and character claimed by the plaintiff. The trial court ruled that it had no authority to order the examination. The supreme court affirmed the power to order such examination, on the ground that the refusal of the plaintiff to be examined was an impediment to the administration of justice and a contempt of the courts authority; that he could be subjected to punishment as a recusant witness, who refuses to answer proper questions propounded to him; that the court could have stricken from the pleadings all allegations as to permanent injury in case of continued refusal; that such refusal would amount to a contempt; and, in admitting that there were no precedents, the court observed: "Great progress, however, in a comparatively recent period, has been made, by legislative and judicial decisions, in the work of conforming the system of evidence to this germinal principle," that "whoever is a

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party to an action in a court, whether a natural person or a corporation, has a right to demand therein the administration of exact justice." It is also mentioned with approbation that legislative changes in the system of common-law evidence have been made, as the abrogation of the rule which prohibited parties to a case from giving testimony therein, and some others. But it would seem that it was forgotten that the power to make such changes is vested in the sovereign through the legislative department. Thus, the right given the party to testify in a civil action, or to be examined by his adversary, is given by legislation, and it is assumed that no precedent can be found where a common-law court permitted a witness, a party to an action, to testify, until the legislature had changed the rule. The court also urges, in support of the principle affirmed by it, that those who effect insurance upon their lives and pensioners for disability incurred in the military service of the country are all subject to examination of their bodies, and it is never deemed a dishonor or indignity. But these are voluntary, and by legislative authority only; and it is then admitted that no case has hitherto been found in which the question has been considered, except that 2 Bish. Mar. & Div. § 590, mentions that in divorce cases, under the ecclesiastical law of England, when the impotency of the party is in question, an examination may be ordered of the person alleged to be impotent, and the court observes that the authorities mentioned by Bishop may be regarded as giving some support to its conclusion.

In *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419, three physicians had testified in behalf of plaintiff, who had made an examination of the person of the plaintiff, a man, and defendant requested that four physicians examine plaintiff. The trial court refused to make the order, and this refusal was affirmed by the supreme court, though the power to make such order for an examination was stated to be in the discretion of the court.

This case followed that of *Railroad Co. v. Finlayson*, 16

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Neb. 579, 20 N. W. 860. There a man sued the railroad company, and, after all plaintiff's evidence was in, defendant requested an order for the examination of plaintiff's person by defendant's physicians. The trial court refused such order, because it deemed it had no power to make it. The supreme court affirmed the judgment of the lower court, because such order was deemed to be within the discretion of the trial court; observing that the court was inclined to believe the trial court had the power to order the examination.

In *Railroad Co. v. Thul*, 29 Kan. 466, the plaintiff, a man, had introduced physicians, who testified to an examination of plaintiff's person, and the result that was deduced therefrom, when defendant applied for an order of examination by physicians to be appointed by the court. The lower court refused to make such order, and its judgment was affirmed by the supreme court, for the reason that sufficient expert testimony was introduced by the plaintiff, and that, such testimony having been supplied, it was within the discretion of the trial court to refuse to hear more; and the court observes that the only cases of which it has any knowledge considering the question are those of *Schroeder v. Railroad Co.*, *supra*, and *Loyd v. Railroad Co.*, 53 Mo. 509. In the Iowa case the power to appoint medical experts to examine the person was affirmed, and in the Missouri case denied.

In *White v. Railway Co.*, 61 Wis. 536, 21 N. W. 524, the opinion contains but few reasons, but observes that such examinations are frequently ordered in impotency and pregnancy, and its conclusion is based upon the authority of the Iowa case, *supra*, and *Walsh v. Sayre*, 52 How. Prac. 334. *Sibley v. Smith*, 46 Ark. 275, sustains the doctrine on the authority of *Walsh v. Sayre*, *supra*.

In the case of *Graves v. City of Battle Creek*, 95 Mich. 266, 54 N. W. 757, cited by appellant, and mentioned in the opinion of the majority, in favor of the doctrine, the plaintiff was a woman who had an injured arm and wrist, and appeared before the jury, and testified to its condition, as

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also did a physician who had examined the arm. Upon the refusal of the plaintiff to remove her glove from the injured hand, and exhibit the same to the jury, defendant asked for an order of the court directing that a medical expert examine the plaintiff's arm, which was refused by the court. The trial court refused the order on the ground that it had no power to direct such examination. This was reversed by the supreme court, which observes: " * * * The rule recognizing, however, that a wide discretion is vested in the trial court, which justifies a refusal to require the examination where the necessities of the case are not such as to call for it, or where the sense of delicacy of the plaintiff may be offended by the exhibition, or where the testimony would be merely cumulative, or where, in the judgment of the trial court, it would not materially aid the jury."

In the case of Railroad Co. v. Childress, 82 Ga. 719, 9 S. E. 602, the trial court ruled that it had no power to order an examination of plaintiff's person by medical experts without plaintiff's consent. The supreme court cites a Georgia statute (Code, § 206), which declares that "every court has power * * * to control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto"; and construes such statute to vest power in the court to order such an examination, concluding that it is vested in the sound discretion of the trial court alone.

Hatfield v. Railroad Co., 33 Minn. 130, 22 N. W. 176, does not seem to sustain the view maintained by the appellant. The opinion is a short one. Plaintiff alleged injuries to one of her limbs, which impeded her locomotion, and testified before the jury. The defendant moved the court for an order directing the plaintiff to walk across the court room before the jury, which the trial court refused, for the reason that it had no power to make such order. The supreme court affirmed the judgment of the lower court, but remarked that the power to make such order was vested in the discretion of the trial court.

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In *Owens v. Railroad Co.*, 95 Mo. 169, 8 S. W. 350, the court concludes that the defendant has not an absolute right to have a personal examination, but that it is in the discretion of the trial court. It will be observed that in the cases above mentioned, with the exception of 47 Iowa, the case of *Walsh v. Sayre*, *supra*, decided in 1877, is relied upon as a precedent to sustain the power of the court to order a physical examination. That case, however, was overruled by the appellate court of New York in January, 1883, in the case of *Roberts v. Railroad Co.*, 29 Hun, 154, and it is observed in the opinion: "The order is so unusual that we may well inquire upon what authority of precedent or principle it rests. For precedent the defendant cites what is called the leading case of *Walsh v. Sayre*, 52 How. Prac. 334. That case was decided by the special term of the superior court of New York in 1868, and was reported in 1877. The action was for malpractice, and the motion by the defendant was that the plaintiff submit to a personal examination by surgeons. The opinion states that there is no recorded case of an application for any such discovery having been granted, and the decision is based upon the analogy to discovery in chancery. We see no analogy whatever between the production of books and papers, or the examination of a party by a bill of discovery, and the compelling of a party to expose his person to the inspection of physicians." The court also observes that in *Schroeder v. Railroad Co.*, *supra*, "the doctrine contended for by the defendants here was sustained." But that opinion cites no precedent or authority, and the court also observes, with reference to the cases cited in 2 Bish. Mar. & Div. § 950: "Whatever may be the rule in such actions for divorce, nothing which is there said applies to this case. No such necessity exists. The injuries, if any, suffered by the plaintiff, can be proved by ordinary common-law evidence, as similar injuries are proved every day. The other instances thought by defendant to be analogous are the trial by inspection and the writ *de ventre inspiciendo*. An examination of 3 Bl.

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Comm. 331, will show that the trial by inspection was a trial by the judges, not by a jury, of some single matter, obvious to sight, except in appeals of mayhem, which are matters long obsolete. No analogy exists between those proceedings and the present. The writ *de ventre inspiciendo* (1 Bl. Comm. 456), taken by the English law from Roman Dig. 25, 4, 1, 10, and made indecent in the taking, has long become obsolete. If it shows anything in the present case, its disuse shows that such an invasion of the sacredness of the person as is here proposed cannot be permitted at this day. Thus, the whole authority for this order rests, in the way of precedent, on the special-term case above cited" (Walsh v. Sayre, *supra*).

In *Railway Co. v. Rice* (Ill. Sup.) 33 N. E. 951, at the close of the plaintiff's evidence in chief, counsel for defendant moved for an order that the plaintiff submit to an examination by four physicians named. The motion was overruled. The court cites a long line of authorities in sustaining the judgment of the trial court, and observes: "We do not think injustice is likely to result to a defendant by a refusal to make such an order. * * * Rules of practice must be laid down, not with reference to a single case, but to be applied generally, and we entertain no doubt that our conclusion heretofore announced on this subject is the better and safer practice,"—citing a number of former decisions in that court denying the power to order such an examination.

In *Pennsylvania Co. v. Newmeyer* (Ind. Sup.) 28 N. E. 860, the trial court refused to require the plaintiff to submit to an examination of his injuries by surgeons appointed by the court for that purpose. The supreme court affirmed the judgment, and observed: "There is no statute in this state conferring upon the circuit court the power to make such an order as was asked in this case. If such power exists, it is power that inheres in the court, independent of any statutory provision. It is applicable alike to all, male and female, and is confined to an examination of no particular part of the person. To say that the power resides in the sound discretion of the court

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does not meet the case, for the real question is as to whether the power exists at all. * * * We think the better reason is against the existence of such a right, and, in the absence of some statute upon the subject, we do not think the court should attempt to compel litigants against their will, to submit their persons to the examination of strangers for the purpose of furnishing evidence to be used on the trial of the cause."

In the case of *McQuigan v. Railroad Co.*, 129 N. Y. 50, 29 N. E. 235, the sole question presented to the court was whether the supreme court has power, in advance of the trial of an action for personal and physical injury, to compel the plaintiff, on an application made in behalf of the defendant, to submit to a surgical examination of his person by surgeons appointed by the court with a view of enabling them to testify on the trial. This case contains an exhaustive review of the whole question. The court by ANDREWS, J., observed: "Upon the organization of the state government, our courts succeeded to the powers theretofore exercised by the courts of law and chancery in England, so far as they were applicable to our situation. It is a significant fact that not a trace can be found in the decisions of the common-law courts of England, either before or since the Revolution, of the exercise of a power to compel a party to a personal action to submit his person to examination at the instances of the other party. If the power existed, it is difficult to suppose that it would not have been frequently invoked. Actions for assault and battery, for injuries arising from negligence, and, generally, for personal torts, were among the most common known to the law, and yet, so far as we can discover, in no case was it supposed or claimed that the court was armed with this jurisdiction. The nonexercise of a power is not conclusive against its existence, but it is strange, if the power in question existed, it should have been unused for centuries and never have been called into activity. * * * The only authority in the English common-law courts in any degree analogous is found in the power which

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the courts of England have occasionally, though rarely, exercised, to issue, on the application of apparent heirs, the writ *de ventre inspiciendo*. * * * This practice in England is *sui generis*, and has never been adopted here. * * * The doctrine of the cases in chancery (*Devanbagh v. Devanbagh*, 5 Paige, 554; *Newell v. Newell*, 9 Paige, 25), that in an action to procure a degree of nullity of marriage on the ground of impotence or sexual incapacity, the chancellor may compel the defendant to submit to a surgical examination, is a graft from the civil and common (canon) law, and, as has been said, 'rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction.' * * * The power to compel a party to submit to an examination of his person has never been conferred by any statute. * * * But we have to deal only with the question of the power of the courts, in the absence of any legislation. It is very clear that the power is not a part of the recognized and customary jurisdiction of courts of law or equity. The doctrine that courts have an inherent jurisdiction to mold the proceedings to meet new conditions and exigencies is true, but in a limited sense. They cannot, under cover of procedure or to accomplish justice in a particular case, invade recognized rights of person or property. * * * We think the assumption by the court of this jurisdiction, in the absence of statute authority, would be an arbitrary extension of its powers."

The case of *Railway Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, was where the single question before the court was whether, in a civil action for an injury to the person, the court, on application of the defendant and in advance of the trial, could order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for. This case is an exhaustive and thorough statement, upon authority and principle, of the controversy, and the principle enunciated that no power

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exists in the court to order such an examination of the person of the plaintiff. The court observed of the cases cited by appellant: "Within the last fifteen years * * * a practice to grant such order has prevailed in the courts of several of the Western and Southern states, following the lead of the supreme court of Iowa in a case decided in 1877. The consideration due to the decision of those cases has induced us fully to examine, as we have done above, the precedents and analogies on which they rely. Upon mature advisement, we retain our original opinion that such an order has no warrant of law."

It would seem that no authority should be inferred from the very rare instances in the ecclesiastical courts of ancient England for granting an order for the examination of the person for a single purpose, when the nullity of marriage was the issue. With the exception of the cases of *Le Barron v. Le Barron*, 35 Vt. 365, and *Devanbagh v. Devanbagh*, *supra*, and the allusion by Bish. Mar. & Div., *supra*, there does not seem to be any American authority that has ever supposed these instances of the ecclesiastical law were a part of the common law of this country or England. The action of divorce in this state, and perhaps universally now, is purely statutory. The grounds for divorce are statutory. The procedure and method of taking evidence in the ecclesiastical court has never been used in this country or in a court of common law, and the ecclesiastical law was never a part of the common law. The action of divorce is purely a civil action, and the procedure provided by legislation is that of other civil actions.

In *Page v. Page*, 51 Mich. 88, 16 N. W. 245, which was a divorce case, upon the production of testimony before the commissioner, physicians were produced by counsel for plaintiff, who examined the person of the defendant, and the eminent jurist, JUDGE COOLEY, delivering the opinion of the court, observed of this examination: "There was also a most extraordinary compulsory examination of the defendant by physicians, who stripped him, and subjected him to

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oral inquisition, to compel him to give evidence which they could repeat before the commissioner for use against him. What means they could be supposed to have for compelling him to answer their questions, in case he declined, as he ought to have done, we do not know, but we are certain they could not be means known to the law. We strike from the record all the evidence obtained by this inquisition also. It should be understood that there are some rights which belong to man as man and to woman as woman which, in civilized communities, they can never forfeit by becoming parties to divorce or any other suits, and that there are limits to the indignities to which parties to legal proceedings may be lawfully subjected." The same high authority, in Cooley, Torts, 29, declares: "The rights to one's person may be said to be a right to complete immunity,—to be let alone." And this definition is approved in *Railway Co. v. Botsford*, *supra*.

Neither can there be a sound argument founded upon the fact that actions for personal injuries may have become more frequent in recent years, and that counties, cities, and other municipal corporations are liable for negligence resulting from injuries to persons. Certainly, the public policy which authorized these actions is entirely a subject of legislation. The legislature of this state has authorized actions for personal injuries against counties and municipal corporations. If it be questionable policy, the argument against their maintenance is a legislative, rather than a judicial, one. It does not seem that the necessity exists, in obtaining justice in the trial of these cases, to overturn ancient principles of personal liberty, and, if it did, it should be remitted to the lawmaking department of the state.

FULLERTON, J. I concur in the dissenting opinion of JUDGE REAVIS.

NOTES.

Surgical Examination of Plaintiff's Person in Actions for Personal Injuries.—In *Union Pacific R. Co. v. Botsford* (U. S.), 47 Am. & Eng. R. Cas. 406, it was held that in an action for an injury to the

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person, the courts of the United States have no power to order, on the application of the defendant, and in advance of the trial, that the plaintiff, without his or her consent, submit to a surgical examination as to the extent of the injury sued for.

The decision of the supreme court of the United States in that case, as is admitted by MR. JUSTICE GRAY in the opinion of the majority of the court, is in conflict with a long line of well considered cases. There are but two states in which the courts adopt the rule approved by the federal supreme court, namely, New York and Illinois. In all the other states where the question has arisen, it is held that in actions to recover damages for injuries to the person, the trial court has authority and may in its discretion order the plaintiff to submit to a physical examination of his or her person by physicians, in order that the extent of the injury may be ascertained. The reasons for this rule cannot be expressed in better language or more concisely than in the words of MR. JUSTICE BREWER in his dissenting opinion. "The end of litigation is justice. Knowledge of the truth is essential thereto."

The pioneer case upon this question is from New York, *Walsh v. Sayre*, 52 How. Pr. (N. Y.), 334. This case admitted of the power of the trial court to order the plaintiff to submit to such an examination. When the question came before the New York supreme court, however, this case was in effect overruled, and it is now the rule in New York that the courts have no such authority. *Roberts v. Ogdensburg & L. C. R. Co.*, 29 Hun (N. Y.), 154.

The consideration which the supreme court of Illinois has given of this important question is exceedingly unsatisfactory. The subject is dismissed in an opinion with the assertion that "the court had no power to make or enforce such an order." *Parker v. Enslow*, 102 Ill. 272. This case established the law in Illinois, but in view of the meagre consideration which the court has given the question, it can hardly be considered as authority outside of that state. Later, the question arose in the case of *Chicago & E. I. R. Co. v. Holland*, 122 Ill. 461, 30 Am. & Eng. R. Cas. 590. The trial court had overruled an application for an examination, and this decision was assigned as error. But the court in this case did not seem to think the question was a settled one, CRAIG, J., saying that whether the decision was erroneous or not, was a question which it was not necessary there to determine.

The other states in which the question has arisen are principally Western and Southern states, namely, Iowa, Nebraska, Kansas, Missouri, Ohio, Texas, Minnesota, Georgia, Arkansas, Wisconsin and Alabama, and Indiana, with some qualifications. *Schroeder v. Chicago, R. I. & E. R. Co.*, 47 Iowa 375; *Sioux City, etc., R. Co. v.*

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Finlayson (Neb.), 18 Am. & Eng. R. Cas. 68; *Stuart v. Havens*, 17 Neb. 211; *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kans. 466, 10 Am. & Eng. R. Cas. 783; *Sidekum v. Wabash, etc.*, R. Co. (Mo.), 30 Am. & Eng. R. Cas. 640; *Owens v. Kansas City, etc.*, R. Co. (Mo.), 33 Am. & Eng. R. Cas. 524; *Miami & M. Turnpike Co. v. Bailey*, 37 Ohio St. 104; *Gulf, C. & S. F. R. Co. v. Norfleet* (Tex.), 45 Am. & Eng. R. Cas. 207; *Missouri Pacific R. Co. v. Johnson* (Tex.), 37 Am. & Eng. R. Cas. 128; *International & G. N. R. Co. v. Underwood*, 64 Tex. 463, 27 Am. & Eng. R. Cas. 240; *Richmond & V. R. Co. v. Childress*, 82 Ga. 719, 41 Am. & Eng. R. Cas. 216; *Sibley v. Smith*, 46 Ark. 275; *White v. Milwaukee City R. Co.* (Wis.), 18 Am. & Eng. R. Cas. 213; *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 44 Am. & Eng. R. Cas. 441; *McGuff v. State*, 88 Ala. 147. In Missouri it was originally held that the court had no authority to order the examination. *Lloyd v. Hannibal & St. J. R. Co.*, 53 Mo. 509. But this doctrine was afterward seceded from, and the supreme court of that state is now in line with the weight of authority. See cases cited *supra*.

Same—Refusal of Court to Order.—But the right of the defendant in these jurisdictions to a surgical examination is not absolute. *Norton v. St. Louis & H. R. Co.*, 40 Mo. App. 642; *Shepard v. Missouri Pac. R. Co.*, 85 Mo. 625, 55 Am. Rep. 390. It is well established that where the order for an examination is not necessary for purposes of justice it will not be made. *Lloyd v. Hannibal & St. J. R. Co.*, 53 Mo. 509. The court in all cases exercises a sound, judicial discretion. *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 10 Am. & Eng. R. Cas. 783; *Sidekum v. Wabash, etc.*, R. Co., 93 Mo. 400, 30 Am. & Eng. R. Cas. 640; *McGuff v. State*, 88 Ala. 147. Refusal of the court to order an examination will be presumed to have been made on the ground that under the circumstances, the order ought not to have been granted. *Miami & M. Turnpike Co. v. Bailey*, 37 Ohio St. 104. The court has a discretion in this matter which will not be interfered with unless manifestly abused and where the evidence given is such that a medical examination could not add any information as to plaintiff's previous health, and but little as to her subsequent condition, the ruling of the trial court in refusing the order will not be disturbed. *Owens v. Kansas City, St. J. & C. P. R. Co.*, 95 Mo. 169, 33 Am. & Eng. R. Cas. 524. So, the refusal of the court to order a physical examination is not a ground for reversal, where it appears that during the trial opportunity for such examination was given, and it not appearing that the court room did not furnish all facilities necessary, and that the nature of the examination was not such that propriety would forbid it being made in public. *Gulf, C. & S. F. R. Co. v. Norfleet*, 78 Tex. 321, 45 Am. & Eng. R. Cas. 207. Nor is it error for the court

to refuse to order an examination by physicians who are witnesses for the defendant in the absence of any showing whatever that justice will be promoted thereby, and especially so when the plaintiff submits to an examination by such witnesses in the presence of the jury. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 18 Am. & Eng. R. Cas. 68.

A cause will not be reversed for refusal to order an examination in the absence of a showing that it was necessary to a full presentation of all the facts, and where it was not shown that the plaintiff was unwilling to submit to an examination by a competent person. *International & V. R. Co. v. Underwood*, 64 Tex. 463, 27 Am. & Eng. R. Cas. 240. And it has been held that the trial court should not order the examination by a physician appointed by it when the party is willing to be examined by a competent and disinterested man without such order. *Gulf, C. & S. F. R. Co. v. Norfleet*, 78 Tex. 321, 45 Am. & Eng. R. Cas. 207. Where the court orders an examination of the plaintiff's person, it ought to appoint either experts of its own selection or such as may be agreed upon by the parties; and it is not error to refuse to compel plaintiff to submit to examination by a physician named by the defendant, to whom he objects. *Missouri Pacific R. Co. v. Johnson*, 72 Tex. 95, 37 Am. & Eng. R. Cas. 128. The selection of the experts is entirely within the discretion of the court. *Alabama G. S. R. Co. v. Hill* (Ala.), 9 So. Rep. 722.

If the discretion of the court to order the examination is abused by refusing to make such order, where a proper case is clearly made, it is ground for reversal. *Alabama G. S. R. Co. v. Hill* (Ala.), 44 Am. & Eng. R. Cas. 441. Thus, it is error to refuse to order an examination on the ground that an examination had already been made by plaintiff's physician, who had deposed to the injuries complained of, where the opinions and conclusions of such physician are not concurred in by several other reputable surgeons. *Alabama G. S. R. Co. v. Hill* (Ala.), 44 Am. & Eng. R. Cas. 441. So, the fact that the plaintiff is a young woman of nervous temperament, and delicate and refined feelings, is not sufficient cause for overruling the motion for a physical examination of her person by physicians, where it appears that her attending physician had already made several examinations, and that no ill consequences would result. *Alabama G. S. R. Co. v. Hill* (Ala.), 44 Am. & Eng. R. Cas. 441.

In Indiana it is held that if a motion to require the plaintiff to submit to an examination is not supported by any affidavit showing a necessity therefor, nor any belief as to what it would develop, the court may deny the motion. *Terre Haute & I. R. Co. v. Bruner* (Ind.), 22 N. E. Rep. 178.

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Same—Enforcing Order.—On refusal of the plaintiff to comply with the order for an examination when properly made, the court may dismiss the action, or refuse to allow the plaintiff to give evidence to establish the injury. *Miami & M. Turnpike Co. v. Bailey*, 37 Ohio St. 104. Or may refuse to try the cause until the order is obeyed. *Hess v. Lake Shore & M. S. R. Co.*, 7 Pa. Co. Ct. Rep. 565.

The application for the order ought to be made so as not unnecessarily to prolong the trial or to prejudice the plaintiff in proving his case. Hence, where the application is not made until after the close of the plaintiff's evidence in chief, and the commencement of the introduction of the defendant's evidence, and no reason is shown for the delay in making the application, it may be refused on that ground. *Miami & M. Turnpike Co. v. Bailey*, 37 Ohio St. 104.

Carriers of Passengers—Standing in Aisle of Car.—A passenger may leave his seat in the course of the journey, and stand in the aisle of the car. *Barden v. Boston, etc., R. Co.*, 121 Mass. 426. But a passenger on a freight train who knew or could have known that switching was being done cannot recover for injuries from being thrown down while standing in the caboose. *Harris v. Hannibal, etc., R. Co.*, 89 Mo. 233, 27 Am. & Eng. R. Cas. 216, 58 Am. Rep. 111. But in *Wallace v. Western North Carolina R. Co.*, 101 N. Car. 454, 37 Am. & Eng. R. Cas. 159, it was held that where a passenger on a freight train rose when the train came to a sudden stop to pick up a coat which had been thrown down, and was knocked down and injured by a sudden jolt of the train, it was error to instruct that he was guilty of contributory negligence.

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BOSTON & M. R. R. *et al.**(Supreme Court of New Hampshire, July 28, 1893.)*

Jurisdiction to Direct Location of Union Depot.—Although the legislature has not conferred upon any tribunal the power to locate union passenger depots, a court of general jurisdiction has common law power to locate them, when properly invoked.

Frank S. Strecker, for plaintiff.

Oliver E. Branch, for defendants.

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PER CURIAM. The legislature has not authorized the railroad commissioners to locate railroad stations (Pub. St. c. 155, §§ 11-23; *Id.* c. 159, §§ 21, 22), and no other tribunal is directly invested with that power. It is conceded that the public good requires that there should be a union passenger station in the city of Manchester, to be used by the railroads connecting at that point, for the accommodation of the public, as well as for their own convenience and advantage. From this concession it necessarily follows that it is the legal duty of the parties to locate, erect, and maintain such a depot as public necessity requires. The fact that they are unable to agree upon a suitable location does not relieve them from that duty; and the question is whether this obligation is an unenforceable one, in the absence of express legislation upon the subject, or whether the right, which each has in the performance of its public function, to locate a union station at a reasonably convenient point, cannot be vindicated and enforced by the orders and decrees of this court.

In *Burke v. Railroad*, 61 N. H. 160, 241, it is said: "And if the Concord were not expressly authorized by its charter to enter on and use the Nashua & Lowell road, and if sections 1 and 2, c. 163, Gen. Laws, did not recognize the validity of business connections of railroads, and if chapter 164 had not provided a method of compulsorily adjusting the business connection of the Concord and the Nashua & Lowell, we should not be prepared, upon such consideration as we have been able to give the subject, to say that there was such a defect of corporate powers, or such a defect of public rights and remedies, that these companies could not be compelled to make with each other a convenient and economical business connection. It may be found, should this point ever be presented for consideration, that, as these roads * * * are highways authorized to be located and constructed for public use, there is, by necessary implication, a judicial power of compelling the corporations to work them as parts of a continuous line, in such a business connection as is

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required by the reasonable necessities of public convenience and public economy. * * * Where there is a legal right, public or private, and no statutory remedy, the common law generally furnishes an adequate remedy by appropriate process of law or equity. And in case the Concord and Nashua & Lowell Companies should neglect their duty of making a business connection as economical, convenient, and efficient as the public have a right to demand, it would be strange if the judicial introduction of numerous forms and process during the last one or two thousand years had so exhausted the resources of the common law that it could no longer produce the simple remedies needed for the maintenance of such an ordinary prerogative as the public right of reasonable use of connected highways." In *Moses v. Julian*, 45 N. H. 52, 59, it was held that when a will could not be proved in the probate court, because it was written by the judge of probate, it could be proved in this court, where such decrees could be made as justice might require. The estate could be settled here, because it must be settled somewhere, and no other forum is provided. The effect of that decision is that when there is judicial work to be done, and no court of limited and special jurisdiction is authorized to do it, the duty of affording relief is imposed upon the court of general jurisdiction. This rule was applied in *Boody v. Watson*, 64 N. H. 162, 187, 188, 9 Atl. 794, and is well settled in the jurisprudence of this state. In the absence of a court of special and limited jurisdiction authorized to administer a particular law, requiring judicial action, legal rights are maintained by the court of general jurisdiction performing its ordinary duty of rendering judgment and issuing process in cases in which there is no other judicial mode of administering the law. The right of these parties and the public to have the union station at Manchester located in the proper place is a legal right, which is not deprived of the means of enforcement by the circumstance that the remedial power is not conferred upon a tribunal of special and limited jurisdic-

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tion. It is a right which can be judicially determined at the trial term upon a petition or bill in equity seeking such relief. The procedure will be such as is considered most appropriate for the work to be done. Walker *v.* Walker, 63 N. H. 321. Case discharged.

CHASE and WALLACE, JJ., did not sit. The others concurred.

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v.

KANSAS CITY, S. & G. RY. CO.

(*Supreme Court of Louisiana, Feb. 6, 1899.*)

Establishment of Depot—Mandamus to Carrier.*—A railroad company cannot be forced by *mandamus* to establish a depot at a particular place, in the absence of a duty having been imposed upon it so to do, either by general laws, or by special requirement in its charter.

(Syllabus by the Court.)

APPEAL from parish of Vernon judicial district court.
Affirmed.

The plaintiffs in this case represented in their petition to the court that they were residents of the town of Leesville, parish of Vernon, where many of them owned residences and stores, and where many of them had been conducting various occupations, as merchants, hotel keepers, and mechanics; that they owned their several business and residence houses long before the construction by the defendant of its railway line through the parish of Vernon and through the town of Leesville, the parish seat of Vernon parish; that, in consideration of the public benefit to be derived by the town of Leesville, E. E. Smart, one of the plaintiffs, donated to said railroad the right of way through said town, and petitioners

*See note at end of case.

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were led to believe by the proper officials of said railway that the said town should have a depot, with proper conveniences, and so located as to furnish proper facilities for the people of Leesville; that it was the duty of said corporation to furnish their town with a convenient and suitable depot, sufficient in capacity for the transaction of railroad business, and so located as to be accessible and convenient to the business and residents of said town; that this obligation was incumbent on said railroad company by the constitution and the laws of the state of Louisiana; that for a period of six months the said corporation stopped its trains, received freight and discharged same, as well as carried passengers, from a switch located within 230 yards of the court house of Vernon parish, about the center of said town; that access to said stopping point was easy, safe, and convenient to the public and the people generally having business in said town of Leesville and at the court house of Vernon parish; that on the 29th of January, 1897, the said corporation, through its right of way agent, purchased 40 acres of land adjacent to the town, had the same surveyed and platted into town lots, and built a depot thereon, one-half mile from the court house; that the said depot is located in a swamp, inaccessible to the public, and imposes extra expense on passengers going to and from said town of Leesville to said depot; that it is with extreme difficulty goods are hauled to and from said depot, owing to the almost impassable condition of the road leading from the town to the same, the ground being of marshy character, and quicksands underlying part of the road; that access to said depot to secure freight was difficult and expensive, and the public were greatly inconvenienced thereby; that an additional expense was imposed on the people of Leesville in order to transact business with said railroad company, which was an unnecessary and grievous burden, because said company could furnish safe, convenient, and easy access to the public and people of Leesville by locating a depot in said town, and continuing to serve the public as they began; that

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the said corporation, in total disregard of the constitution of the state and its charter of incorporation, had engaged in the business of buying and selling real estate in said parish of Vernon, and that the purchase of said 40 acres of land was not incidental or necessary to its business as a common carrier; that said depot was located, not in the interest of the public, or for the convenience of its business as a railroad, but for the sole purpose of making large profits on the land purchased; that said company, through its land commissioner, was seeking to secure the removal of the court house, which stands where it has been convenient to the people of Vernon, on high ground, and surrounded by the buildings of the merchants, mechanics, and residents of said town, and said commissioner had offered \$1,000 and 1 acre of ground for its removal to the center of the company's tract of land, but a half a mile distant from the present court house, all for the sole purpose of aiding said corporation to carry on its land speculations, and make profitable its real-estate investment in land, not necessary nor incidental to its business as a common carrier, which it was illegally conducting; that its agents and employees were actively engaged in circulating petitions to the police jury of Vernon parish to order an election for the removal of the court house one-half mile distant, to a low, marshy thicket, where the corporation was then selling lots by reason of its locating its depot on said tracts; that prior to said location it was an uninhabited tract of forest swamp; that the said acts of the corporation would render valueless a large amount of property in residences and business houses belonging to the relators, and practically compel them to remove to close proximity to said depot as then located, and solely to advance the illegal and selfish real-estate speculation of the officer of said corporation, and that said corporation was so conducting its business near the town of Leesville, by locating its depot at a remote distance from said town, and refusing to furnish adequate and sufficient depot facilities for the general public in said town and vicinity, as to infringe on the equal rights of individuals, and the general

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well-being of the state; that said acts of said corporation in locating its depot one-half mile from said town, and refusing to furnish a depot for the general public's convenience in said town, although passing immediately through it, was illegal, and to the great injury of petitioners, and that for said injury the law had assigned no relief by the ordinary means, and that, in order to maintain their rights and those of the public, it was necessary that a writ of *mandamus* issue on relators' behalf, ordering and commanding said corporation to furnish them and the public generally of the town of Leesville suitable, adequate, and accessible depot facilities, at which the public business of said town can be conducted with comfort, and with regard to the rights and general convenience of the public, without the oppressive, expensive, and extremely difficult method occasioned by the remote and inconvenient location which was solely in the interest of the sale of town lots, and not in the interest of the public. Their prayer was that the corporation establish a depot in the town of Leesville which would give the people of said town accessible, adequate, and suitable facilities for the transaction of freight and passenger business with the said corporation. The defendant filed an exception of no cause of action, which the district court sustained, and dismissed plaintiffs' suit. They appealed. In its reasons for judgment the district court said: "The petition sets forth no contract or agreement binding the defendant to maintain a station in Leesville, but alleges that such is the obligation of the company under the constitution and laws of the state. The court has been referred to no law or decision of this state which makes it the duty of a railroad company to establish stations at or near the county seat of the parish, or in every town or village which its line may traverse. It is not alleged that Leesville is an incorporated town, and it may be assumed that it is a village without fixed limits, in which the court house of the parish is located. It is admitted that the station of the defendant corporation is not more than one-half mile from the court house, and the object of this suit is to compel

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the erection of a depot, side tracks, etc., at a point nearer to the court house, say 230 yards distant therefrom. In *State v. New Orleans & C. R. Co.*, 37 La. Ann. 589, our supreme court held that the writ of *mandamus* does not lie to compel corporations to perform obligations arising from a contract, and that it can be invoked only to compel the performance of some clear, unequivocal duty imposed by law. By Act No. 133 of 1888 it was provided that when a corporation is bound by contract or otherwise to any parish or corporation, with reference to the paving, grading, repairing, reconstructing, or care of any street, highway, bridge, culvert, levee, canal, ditch, or crossing, and shall fail or neglect to perform said contract or obligation, the parish or municipal corporation shall have the right to proceed by *mandamus*. In *State v. New Orleans & N. E. R. Co.*, 42 La. Ann. 138, 7 South. 226, our supreme court held that Act No. 133 of 1888 extended the remedy of *mandamus* to matters and things not hitherto included in its scope, and must be strictly construed. If there is no law of this state imposing a clear and unequivocal duty on defendant to establish a station in Leesville, the *mandamus* will not lie, however reprehensible may have been the motive and actions of the corporate authorities."

J. Henry Shepherd, for appellants.

Taliaferro Alexander, for appellee.

NICHOLLS, C. J. (after stating the facts). Though the fact is not directly stated in plaintiffs' petition, we understand them to charge that the defendant company, after having during a period of six months stopped its trains, and received and discharged freight, and received and delivered passengers from a switch located within 230 yards of the court house of Vernon parish, about the center of said town, had illegally and improperly discontinued said service; that it had done so from the selfish and improper motive of furthering its own interests in the sale of lots upon a tract of land which it had bought for speculation, in violation of the

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constitution of the state. Plaintiffs do not allege that defendant had ever established a depot at Leesville; nor do they allege if the service at that place, such as it was, was discontinued, that a demand for its resumption was made and refused. The relief which they seek at our hands is not the resumption of the discontinued service at the place referred to, and the replacing of the switch, if it has been removed, but the "establishment by the defendant company of a depot in the town of Leesville which would give the people of said town accessible and suitable facilities for the transaction of freight and passenger business with said corporation." Plaintiffs do not question the right of the company to establish depots at points other than Leesville, whether far or near; nor do they ask that the depot which the company has established on its ground be removed to Leesville. Plaintiffs ask at our hands no action looking to the prohibiting of the further sale by the defendant of lots of ground on real estate which it had purchased and was dealing with in violation of the constitution. The allegations on that subject, we presume, were inserted simply in aid of the limited relief sought, by showing bad faith in the company in discontinuing business in the town. If true it be that the defendant is violating the provision of article 236 of the constitution by "engaging in business other than that expressly authorized in the charter or incidental thereto," and relators are injured and prejudiced thereby, they are not without remedy, as the attorney general, on his attention being called to that fact, with official action requested at his hands, would, beyond doubt, bring the authority of the state to bear in the premises.

On the argument of the case our attention was directed to the allegation that "E. E. Smart [one of the plaintiffs] donated to the defendant company the right of way through the town in consideration of the public benefit to be derived by the town of Leesville, and petitioners were led to believe by the proper officials of said railway company that the said town should have a depot, with proper precautions, and so

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located as to furnish proper facilities for the people of Leesville." This averment falls short of showing any promise or engagement to that effect by the corporation, or of showing any misrepresentation on its part by which petitioners were led to take action of any kind. The allegation is of too vague and uncertain a character to base upon it any claim of estoppel, contract, or engagement.

As matters stand the only question before us is whether, as a matter of law, the plaintiffs have the right, through *mandamus*, to force the defendant to establish a depot at Leesville. The supreme court of the United States was called upon to consider this question in *Railroad Co. v. Washington Ter.*, 142 U. S. 492, 48 Am. & Eng. R. Cas. 475, 12 Sup. Ct. 283, under a state of facts very similar to those alleged by the plaintiffs in their petition. The facts of that case, as shown by the report of the court's opinion, were that "the Northern Pacific Railroad at one time stopped its trains at Yakima City, but never built a station there, and after completing its road four miles further, to North Yakima, established there a freight and passenger station; that North Yakima was a town laid out by the defendant on its own unimproved land; that, after having established this depot, defendant ceased to stop its trains at Yakima City. In consequence, apparently, of this, Yakima City, which at the time of the filing of the petition for *mandamus* was the most important town, in population and business, in the county, rapidly dwindled, and most of its inhabitants removed to North Yakima, which at the time of the verdict had become the largest and most important town in the county. The defendant could build a station at Yakima City, but the cost of building one would be eight thousand dollars, and the expense of maintaining it one hundred and fifty dollars a month, and the earnings of the whole of this division of the defendant's road are insufficient to pay the running expenses. There were other stations for receiving freight and passengers between Yakima and Pasco Junction, which furnished sufficient facilities for the country south of North Yakima,

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which included Yakima City; and the passenger and freight traffic of the people living in the surrounding country, considering them as a community, would be better accommodated by a station at North Yakima than by one at Yakima City. After the verdict, and before the district court awarded the *mandamus*, the county seat was removed by the territorial legislature from Yakima City to North Yakima." In discussing the question the supreme court of the United States declared that "a writ of *mandamus* to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of that duty. If, as in *Railroad Co. v. Hall*, 91 U. S. 343, the charter of a railroad company expressly requires it to maintain its railroad on a continuous line, it may be compelled to do so by *mandamus*. So, if the charter requires the corporation to construct its road and run its cars to a certain point on tide water, as was held to be the case in *State v. Railroad Co.*, 29 Conn. 538, and it has so constructed its road and used it for years, it may be compelled to continue to do so. And *mandamus* will lie to compel a corporation to build a bridge in accordance with an express requirement of statute. *New Orleans, M. & T. Ry. Co. v. Mississippi*, 112 U. S. 12, 5 Sup. Ct. 19; *People v. Boston & A. R. Co.*, 70 N. Y. 569. But if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by *mandamus* to complete or maintain its road to that point, when it would not be remunerative. *York & N. M. Ry. Co. v. Reg.*, 1 El. & El. 858; *Great Western Ry. Co. v. Reg.*, *Id.* 874; *Com. v. Fitchburg R. Co.*, 12 Gray, 180; *State v. Southern Minnesota R. Co.*, 18 Minn. 40 (Gil. 21). The difficulties in the way of issuing a *mandamus* to compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter itself are much increased when it is sought to compel the corporation to establish or to main-

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tain a station and to stop its trains at a particular place on the line of its road. The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public, as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at or near, or within convenient access to, one point or another, which are more appropriate to be determined by the directors, or, in case of their abuse, by the legislature, or by administrative boards intrusted by the legislature with that duty, than by the ordinary judicial tribunals." Referring to the case directly before it, the court said: "To hold that the directors of this company, in determining the number, place, and size of its stations and other structures, having regard to the public convenience as well as its own pecuniary interests, can be controlled by the courts by writ of *mandamus*, would be inconsistent with many decisions of high authority in analogous cases." The court cited a number of decisions bearing upon the question at issue,—among others, that of Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co., 110 U. S. 667, 681, 682, 4 Sup. Ct. 185, 192, in which CHIEF JUSTICE WAITE, in delivering the opinion, said: "No statute requires that connecting roads shall adopt joint stations, or that one railroad shall stop or make use of the station of another. Each company in the state has the legal right to locate its own stations, and, so far as statutory regulations are concerned, is not required to use any other. A railroad company is prohibited, both by common law and by the constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one, and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place. A station may be established for the special accommodation of a particular customer, but we have never

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heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than a court of law, clothed with legislative power." The court quoted approvingly from *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58, 66, 67, 9 N. E. 856, in which the court of appeals refused to grant a *mandamus* to compel a railroad corporation to construct and maintain a station and warehouse of sufficient capacity to accommodate passengers and freight at a village containing 1,200 inhabitants, and furnishing to the defendant at its station therein a large freight and passenger business, although it was admitted that its present building at that place was entirely inadequate; that the absence of a suitable one was a matter of serious damage to large numbers of persons doing business at that station; that the railroad commissioners of the state, after notice to the defendant, had adjudged and recommended that it should construct a suitable building there within a certain time; and that the defendant had failed to take any steps in that direction, not for want of means or ability, but because its directors had decided that its interests required it to postpone doing so. The court, speaking by JUDGE DANFORTH, while recognizing that "a plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public," yet held that it was powerless to interpose, because the defendant, as a carrier, was under no obligation at common law to provide warehouses for freight offered, or station houses for passengers waiting transportation, and no such duty was imposed by the statutes authorizing companies to construct and maintain railroads "for public use in the conveyance of persons and property," and "to erect and main-

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tain all necessary and convenient buildings and stations" for the accommodation and use of their passengers, freight, and business, and because, under the statutes of New York, the proceedings and determinations of the railroad commissioners amounted to nothing more than a request for information, and had no effect beyond advice to the railroad company and suggestion to the legislature, and could not be judicially enforced. The court said: "As the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by *mandamus*. It cannot compel the erection of a station house, nor the enlargement of one. As to that the statute imports an authority only, not a command, to be availed of at the option of the company, in the discretion of its directors who are empowered by statute to manage 'its affairs,' among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard to its own interest. With the exercise of that discretion the legislature only can interfere. No doubt, as the respondent urges, the court may by *mandamus* also act in certain cases affecting corporate matters, but only where the duty concerned is specific, and plainly imposed upon the corporation. Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation, upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character. Nor can it by fair or reasonable construction be implied."

The *mandamus* in Railroad Co. *v.* Washington Ter. was refused, though presented in the name of the territory on the relation of its prosecuting attorney. The *mandamus* in the case at bar was presented in the name of private individuals.

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whose special interest in the subject-matter, as differing from that of the public at large, and giving them a right to stand in judgment, might be questioned. No issue was made, however, upon that point in the briefs or argument.

In *Southeastern Ry. v. Railway Com'rs*, 6 Q. B. Div. 586, 592, a railway company was held, by LORD CHANCELLOR SELBORNE, LORD CHIEF JUSTICE COLERIDGE, and LORD JUSTICE BRETT, in the English court of appeal, to be under no obligation to establish stations at any particular place or places, unless it thought fit to do so, and was held bound to afford improved facilities for receiving, forwarding, and delivering passengers and freight at a station once established, and used for the purpose of traffic, only so far as it had been ordered to afford them by the railway commissioners, within powers expressly conferred by act of parliament.

The decisions in *Railroad Co. v. Washington Ter.*, and in *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58, 66, 67, 9 N. E. 856, were, in our opinion, based upon correct principles, which should and must control the present case. For the reasons herein assigned, it is ordered, adjudged, and decreed that the judgment of the district court be affirmed, without prejudice.

NOTE.

Railroad Depots—Power to Compel Erection.—In the absence of charter or statutory provisions regulating, railroads cannot be required to construct and maintain depot buildings at those points on the line where it is in the habit of receiving and discharging passengers and freight. *People ex rel. Hunt v. Chicago and Alton R. Co.* (Ill.), 35 Am. & Eng. R. Cas. 462.

In the case of *People v. N. Y., L. E. & W. R. Co.*, 104 N. Y. 58, 29 Am. & Eng. R. Cas. 480, and note 485, 58 Am. Rep. 484, it was held, by the New York court of appeals, that at common law a carrier of passengers and freight is under no obligation to provide depots for passengers awaiting transportation or warehouses. The court say that the court cannot compel the erection of a station-house, nor the enlargement of one. "The power of the company to provide such buildings is, under the statute, a permissive one only. If the corporation choose to exercise it, it may. The statute does not exact

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it.... The statute is peremptory as to many matters ; but it nowhere says that, for its intending passengers or awaiting freights, cover by building of any kind shall be provided. As to that the statute imports an authority only, not a command, to be availed of at the option of the company in the discretion of its directors, who are empowered by statute to manage 'its affairs,' among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard also to its own interest. With the exercise of that discretion, the legislature only can interfere.... The grievance complained of is an obvious one ; but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character. Nor can it by any fair or reasonable construction be implied." *Mandamus* to compel a railroad company to do a particular act in constructing its road or buildings, or in running its trains, will lie only when there is a specific duty on its part to do that act, and clear proof of a breach of that duty. *Northern Pac. R. Co. v. Territory of Washington ex rel. Dustin* (U. S.), 48 Am. & Eng. R. Cas. 475, 142 U. S. 492.

A contrary doctrine is held in some cases. In *People ex rel. Hunt, Attorney General v. Chicago & Alton R. Co.* (Ill.), 40 Am. & Eng. R. Cas. 352, it was held that where it appears that a town has a population of 1800 ; that it is situated on the line of the defendant's railroad about midway between two stations seven miles apart, and that various manufacturing and other business enterprises are carried on within its limits for which transportation facilities are necessary, the right of the public at common law to the establishment and maintenance of a freight and passenger station on defendant's line at that place is established, and *mandamus* will lie to compel it to establish a station and stop its trains. Reversing 35 Am. & Eng. R. Cas. 462. Thus, it is held, by the supreme court of Nebraska, in the case of *State ex rel. Mattoon v. Republican Valley R. Co.*, 17 Neb. 647, 22 Am. & Eng. R. Cas. 500, that "The common law, under the principle that it is the duty of the railroad company to furnish reasonably sufficient and equal facilities to the public, whose servant it is, authorizes courts, by *mandamus*, to compel the erection and maintenance of new stations, in proper cases." The court say : "At common law it was the duty of a common carrier by land to deliver freight personally to the consignee ; but when railways took the place of conveyances drawn by animals, necessity

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required the relaxation of this rule so as to allow of the substitution, in place of personal delivery, of a delivery at the warehouse or depot provided by the companies for the storage of goods. Vincent *v.* Chicago & A. R. Co., 49 Ill. 33. Is it too much to say that this relaxation of the above rule in favor of railway companies as common carriers, imposed upon them the duty of providing suitable depots for the purpose of such delivery? This duty is so intimately connected with the business for which railways are built and managed, that motives of self-interest almost always secure its observance. But when, for any reason, it is neglected or refused, may it not be enforced, the same as any other public duty?" And it was held, in the case of Northern Pac. R. Co. *v.* Territory (Wash. Tr.), 29 Am. & Eng. R. Cas. 82, that "The court of equity will compel a railway company to construct a depot and give other railroad facilities at a proper and necessary place. As the time to establish a station upon a public highway is a public duty, no demand for the placing of a station need be made by the state before bringing suit to enforce the duty." In the course of the opinion, the court say: "In the absence of legislation providing other means for regulating and controlling the matter. Field on Corp. 585; Moses on Mand. 155-169. See also note to People *v.* New York, L. E. & W. R. Co., 29 Am. & Eng. R. Cas. 485.

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v.

WARDEN OF CITY PRISON OF CITY OF NEW YORK.

(Court of Appeals of New York, Nov. 22, 1898.)

Constitutionality of Statute Declaring the Sale of Tickets, Except by Agents of Carriers, Unlawful.*—That portion of the act of 1897 of New York (chapter 506) providing, in substance, that the sale of passage tickets shall be restricted to agents specially authorized in writing to sell tickets by transportation companies, and attempting to make the mere sale of a passage ticket, by a person not authorized by some one of the transportation companies, an unlawful act, is in contravention of the provisions of the state constitution declaring, in substance, that no member of the state shall be deprived of liberty, or of any of the rights secured to any citizen thereof, without due process of law.

*See note at end of case.

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BARTLETT, MARTIN, and GRAY, JJ., dissenting.

APPEAL by relator from first department appellate division supreme court. *Reversed.*

The relator is a citizen of the state of New York and of the United States, and immediately prior to his arrest, and for several years before that time, had been engaged in the city of New York in the business of selling, and offering for sale, and procuring, tickets, giving, and purporting to give, the right to a passage and conveyance on vessels and railway trains. He is charged with having received the sum of \$6.30 as a consideration for a passage or conveyance upon a ferryboat, train, and vessel from the city of New York to the city of Norfolk, Va., and for the procurement of a ticket giving the absolute right of passage and conveyance upon such ferryboat, train, and vessel, he not being at the time an authorized agent of the owners or consignees of such vessel, or of the company running such train. It is not pretended that the relator did not come into the possession of the tickets lawfully, and by purchase from the transportation companies issuing them. The relator sued out a writ of *habeas corpus*, and demanded his discharge from the custody of the defendant, on the ground that the act of 1897 (chapter 506) violated certain provisions of the constitution of the state of New York and the constitution of the United States, and was therefore void. The special term made its order dismissing the writ, and remanded the relator. The appellate division affirmed that order.

Samuel Untermeyer, for appellant.

Asa Bird Gardiner and *James D. McClelland*, for respondent.

PARKER, C. J. (after stating the facts). The statute that appellant insists is in derogation of the limitation placed upon the legislative power by the people, through the constitution of the state, reads as follows:

"Section 1. The Penal Code is hereby amended by insert-

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ing therein a new section, to be known as section six hundred and fifteen, to read as follows: § 615. Sale of Passage Tickets on Vessels and Railroads Forbidden, Except by Agents Specially Authorized. No person shall issue or sell, or offer to sell, any passage ticket, or an instrument giving or purporting to give any right, either absolutely or upon any condition or contingency to a passage or conveyance upon any vessel or railway train, or a berth or stateroom in any vessel, unless he is an authorized agent of the owners or consignees of such vessel, or of the company running such train, except as allowed by sections six hundred and sixteen and six hundred and twenty-two; and no person is deemed an authorized agent of such owners, consignees or company, within the meaning of the chapter, unless he has received authority in writing therefor, specifying the name of the company, line, vessel or railway for which he is authorized to act as agent, and the city, town or village together with the street and street number, in which his office is kept, for the sale of tickets.

"Sec. 2. Section six hundred and sixteen of the Penal Code is hereby amended so as to read as follows: § 616. Sale by Authorized Agents Restricted. No person, except as allowed in section six hundred and twenty-two, shall ask, take or receive any money or valuable thing as a consideration for any passage or conveyance upon any vessel or railway train, or for the procurement of any ticket or instrument giving or purporting to give a right, either absolutely or upon a condition or contingency, to a passage or conveyance upon a vessel or railway train, or a berth or stateroom on a vessel, unless he is an authorized agent within the provisions of the last section; nor shall any person, as such agent, sell, or offer to sell, any such ticket, instrument, berth or stateroom, or ask, take or receive any consideration for any such passage, conveyance, berth or stateroom, except at the office designated in his appointment, nor until he has been authorized to act as such agent according to the provisions of the last section, nor for a sum exceeding the price charged

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at the time of such sale by the company, owners or consignees of the vessel or railway mentioned in the ticket. Nothing in this section or chapter contained shall prevent the properly authorized agent of any transportation company from purchasing from the properly authorized agent of any other transportation company a ticket for a passenger to whom he may sell a ticket to travel over any part of the line for which he is the properly authorized agent, so as to enable such passenger to travel to the place or junction from which his ticket shall read." Laws 1897, c. 506.

The remaining portion of the section relates to the redemption of tickets purchased from an authorized agent of a railway company, under certain contingencies, and within certain periods of time, and is not in any wise involved in this appeal.

Having observed how the statute reads, it will be well next to analyze it, and see if we can find out what was intended to be accomplished, and is in fact accomplished, by the phraseology of the statute, in order that we may ascertain whether the statute is in contravention of any of the rights secured by the constitution to the citizen. It will be observed, in the first place, that it does not prohibit the sale of tickets absolutely, nor does it limit to the particular transportation company over whose route he desires to be conveyed the right to sell tickets to the traveler. It may be said, in passing, that the last assertion is in conflict with the position taken by the learned judge who wrote the opinion of the appellate division; for he assumes that, as only persons appointed agents can sell, the effect of the provision is that a corporation "shall only sell through its agents, and is merely a declaration that the corporation itself was to sell its tickets."

The first section and the first part of the second section do restrict the sale of passage tickets to agents specially authorized by transportation companies; and, if there was nothing else in the statute upon the subject, it would bear the construction put upon it, that its only effect is to confine

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the right to sell passage tickets of a corporation to that corporation itself, which can act only through agents; but between the opening and the closing sentences of the second section may be found the following: "Nothing in this section or chapter contained shall prevent the properly authorized agent of any transportation company from purchasing from the properly authorized agent of any other transportation company a ticket for a passenger to whom he may sell a ticket to travel over any part of the line for which he is the properly authorized agent, so as to enable such passenger to travel to the place or junction from which his ticket shall read." Thus we see that the moment a man becomes the agent of a transportation company he is by that designation authorized to buy tickets of any other transportation company in the United States or the world, and may sell such tickets to any person who applies for them. In the sale of tickets of the various transportation companies, other than those of the company of which he is an agent, he necessarily acts as a broker. He can buy the tickets and sell them again, making a profit that may perhaps depend more or less on the degree of competition between railroads in various parts of the country. Clearly, the agent of a transportation company, in the purchase and sale of tickets of foreign corporations, is not engaged in selling the passage tickets of the transportation company appointing him. It is not the sale of the tickets of his principal alone that the agent is thus engaged in; but when a transportation company appoints an agent to sell its tickets, then the state, by this statute, steps in and attempts to clothe him with the power which it takes from all other citizens to deal in the tickets of as many other transportation companies as he may be able to make satisfactory arrangements with.

This leads us to note another interesting feature of this remarkable statute. The buying and selling of passage tickets is not abolished; it is only condemned where the seller has not authority from some one of the transportation companies to act as its agent. It has happened before that

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for the protection of the people the lawmaking power has provided for an examination for the purpose of ascertaining whether applicants possessed suitable qualifications as to character, intelligence, and financial responsibility to fill certain positions of trust, or to engage in a business which might prove dangerous to the people in the hands of a person either incompetent or of bad character; but in no instance has it conferred a general and unlimited power of appointment upon a class of persons or corporations wholly unconnected with the state government. It may possibly be that there was such a situation as would have justified an enactment placing some restrictions upon those engaged in the selling of passage tickets, and prescribing penalties by way of fine or imprisonment for those who should break over such restraints. Our excise legislation affords an illustration. By its provisions all are permitted to sell liquor, within certain limitations that apply to all citizens alike, and for the violation of the regulations of the traffic are provided certain penalties that are expected to assure to the public some measure of protection from non law-abiding citizens engaged in the business. But this act simply turns over to the transportation companies the selection of those who are hereafter to be permitted to sell tickets. It imposes no restraints whatever upon the appointing power, nor upon the agent selected, other than that, in the purchase of tickets, he must confine himself to the properly authorized agents of the transportation companies. The business of buying and selling tickets, as to such agents, continues to be a legitimate business, but to all citizens other than those who may be selected by the transportation companies the right to buy and sell tickets is denied, and an actual sale by them constitutes a felony. The act itself is silent as to the motive of its enactment by the legislature, and it contains no suggestion as to the public interests which its purpose is to subserve.

Ticket brokerage as a business has been in existence for many years. It is a matter of common knowledge that at great agencies, such as Cook's and Gaze's, tickets can be

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purchased over a great portion of the transportation routes of the world. Intending travelers in great numbers have gone to those agencies for advice as to choice of routes to be taken in contemplated journeys and to purchase the tickets for the trip, whether it should require days or weeks or months to make it. The traveling public in large numbers have come to make use of the facilities afforded by such agencies, of which there are now very many. And Cook's and Gaze's are among the agencies that must go out of business in this state if this statute can live, unless some transportation company shall deem it wise to clothe them with the authority to act as its agents.

It is asserted by counsel that the traveling public and the transportation companies have been so defrauded by the acts of the brokers in the selling of unused, or alleged to be unused, passage tickets, as to call for legislation of a protective character, of which this statute is the outcome. The tendency of the times undoubtedly is to rush to the legislature for a cure for all the grievances of citizens, whether real or imaginary, and many novel experiments in legislation are the result. But usually, in case of wrongs, penalties have been provided. It is novel legislation, indeed, that attempts to take away from all the people the right to conduct a given business because there are wrongdoers in it, from whose conduct the people suffer. But where in the statute is to be found the evidence that its purpose is to prevent fraud? "In the title of the act," answers counsel, and with that answer he has to be content; for while the act is entitled "Frauds in the sale of passage tickets," the body of the statute does not contain any reference to forged, altered, used, or stolen tickets. The sale of such tickets is made a punishable offense under other sections of the Penal Code. The provisions of the act, therefore, have reference to the selling of valid tickets, regularly issued by a transportation company. Can the legislature declare such sales to be fraudulent, or prohibit them on the ground that it tends to prevent fraud? If the act prohibited is fraudulent, there can be no doubt that the

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legislature, under its police power, may provide for its punishment; but whether it may, under such power, interdict the sale of a valid ticket by one person to another, upon the pretext that fraud will thus be prevented, presents a very different question. I confess I am unable to see how such a sale defrauds a transportation company. If a transportation company sells a ticket from New York to San Francisco, it undertakes to carry the holder from one place to the other. It costs the company no more to carry one person than it does the other. How then can it be defrauded or in any way prejudiced by the transfer of such a ticket by the purchaser to another person? It is said that the prohibition of such a sale tends to protect the traveler from being defrauded. If it is a sale of a valid ticket, no fraud can possibly result; and if it is not a sale of a valid ticket, then the sale is fraudulent and is prohibited by other provisions of the Penal Code.

Only one prop remains which it is pretended can support the weight of this statute, and that is that the penal laws not having proved sufficiently efficacious to wholly prevent fraud, an emergency is presented which justifies the taking away from the general public the right to engage in the business of ticket selling. It is not contended that the business of ticket brokerage is in itself of a fraudulent character. The business can be honestly conducted; it has been so conducted in the past by honest men engaged in it; and the most that is asserted is that there are some men engaged in the business who have imposed on the public. The same assertion can be made with equal truth of every business, trade, and profession. Because some coal dealers and vendors in sugar cheat in weight, and dealers in paints and oil in measurements, and in tobacco in quality, it has not hitherto, we venture to say, been thought the proper remedy to make it a felony for persons to hereafter engage in such business, unless they shall have been duly appointed as agents by the corporations manufacturing or producing the product.

Still another motive for this enactment is suggested, and

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that is that its real purpose is to enable transportation companies to compel others with which they may enter into pooling arrangements to preserve their agreement from secret violation, which is frequently the outcome under the present ticket brokerage system, which offers an avenue by which the weaker corporation to such an agreement can dispose of its tickets at a price lower than that agreed upon.

This subject received judicial attention in *Railway Co. v. McConnell*, 82 Fed. 65, and *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, where statutes having apparently the same object in view as this one were under consideration, as will appear from the following extract from the opinion: "It was also commonly believed that, in order to evade statutes designed to secure uniformity of rates and to prevent discriminations, some carriers of passengers were in the habit of placing large blocks of their tickets with 'scalpers,' ostensibly not their agents, for sale at cut rates. To remedy these and similar abuses, real or supposed, this statute was passed. That all its provisions have some relation to, and tendency to accomplish, this end, is quite clear."

Counsel argue that the helpfulness of the ticket broker in securing to the traveling public the benefits of such competition was of such a fraudulent character as to wholly justify the legislation, and appeal to the decisions quoted from in support of such contention. But we pass for the present the subject of motive, to be again referred to when we come to consider whether, under the police power, the legislation can be justified. Whatever the legislature's motive, the fact is, that it has passed an act which does not declare ticket brokerage unlawful, for it allows any person who may be fortunate enough to secure an appointment as agent for a transportation company to engage in ticket brokerage, but the act does declare that if any person, other than an agent of a transportation company, undertakes to engage in the passenger ticket brokerage business he shall be guilty of a felony; in other words, that it is unlawful for all citizens of New York to engage in the buying and selling of passage

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tickets unless empowered to do so by the written appointment of a transportation company.

Much has been said in argument with reference to this statute in a more agreeable vein placing the statute in a somewhat more attractive form, but it is as well to go beneath the surface, and get at the truth, which is that the statute was intended to and does in fact vest the control of the sale of passage tickets within this state, not only of transportation companies doing business in this state, but throughout the world, exclusively in the hands of such companies. The business of selling passage tickets continues, therefore, to be regarded as a lawful and legitimate business. Public policy is still declared to favor a business which recognizes the propriety of the middleman between the passenger and the transportation company, but the right to engage in it is denied to the general public. The question, then, is whether the organic law prohibits legislation of this character.

Before referring to the provisions of the constitution that it is confidently asserted condemn such legislation, it may not be out of place to note that the granting of monopolies or exclusive privileges to corporations or persons has been regarded as an invasion of the rights of others to follow a lawful calling and an infringement of personal liberty, from the times of the reigns of Elizabeth and James. The statute of 21 Jac., abolishing monopolies, has been from the time of its enactment regarded as a statutory landmark of English liberty, and that nation has jealously preserved it. It was a part of that inheritance which our fathers brought with them and incorporated into the organic law, to the end that the lawmaking power should be restrained from interference with it.

In this connection, the language employed by MR. JUSTICE FIELD in *Butchers' Union Slaughter-House Co. v. Crescent City Live-Stock Landing Co.*, 111 U. S. 746, 756, 757, 4 Sup. Ct. 652, 660, is most instructive. "As, in our intercourse with our fellow men, certain principles of morality are assumed to exist, without which society would be im-

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possible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident [that is, so plain that their truth is recognized upon their mere statement], that all men are endowed [not by edicts of emperors, or decrees of parliament, or acts of congress, but] by their Creator with certain inalienable rights [that is, rights which cannot be bartered away, or given away, or taken away, except in punishment of crime], and that among these are life, liberty, and the pursuit of happiness, and to secure these [not grant them, but secure them] governments are instituted among men, deriving their just powers from the consent of the governed.' Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright. * * * In this country it has seldom been held, and never in so odious a form as is here claimed, that an entire trade and business could be taken from citizens and vested in a single corporation. Such legislation has been regarded everywhere else as inconsistent with civil liberty. That exists only where every individual has the power to pursue his own happiness according

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to his own views, unrestrained, except by equal, just, and impartial laws."

From the opinion of MR. JUSTICE MATTHEWS in *Yick Wo v. Hopkins*, 118 U. S. 356, 370, 6 Sup. Ct. 1064, 1071, the following is taken: "But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men'; for the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

These principles have also been incorporated into the organic law of this state. Article 1, § 1, of the state constitution reads as follows: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." Article 1, § 6, of the state constitution provides that "no person shall * * * be deprived of life, liberty, or property without due process of law."

The word "liberty," as employed in the provision of the constitution quoted, was considered by this court in *Re Jacobs*, 98 N. Y. 98, in a masterful opinion by JUDGE EARL. He said (pages 106, 107): "So, too, one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. 'Liberty,' in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue

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any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty, which are under constitutional protection."

In *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, this court declared unconstitutional a statute that prohibited the manufacture and sale of any substitute for butter or cheese produced from pure unadulterated milk or cream. JUDGE RAPALLO, speaking for the court, said: "Among these no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit. The term 'liberty,' as protected by the constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare."

In *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, a statute was declared to be unconstitutional which prohibited the sale of any article of food, or offering or attempting to do so, upon any representation or inducement that anything else would be delivered as a prize, premium, or reward to the purchaser. JUDGE PECKHAM, in delivering the opinion of the court, after considering the statute, said (page 399, 109 N. Y., and page 346, 17 N. E.): "A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed, by such legislation."

Argument certainly is not needed, in the light of these

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decisions, to support the assertion that the "liberty" of this relator and other citizens of this state to engage in the business of brokerage in passage tickets is sought to be interfered with by the statute under consideration, for brokerage in such tickets has been a lawful business in this state for many years, and many persons have pursued it. It is still a lawful business, although the right to engage in it is limited to such persons as may be appointed by the transportation companies. The statute is therefore in contravention of the state constitution, and is void unless its enactment by the legislature constituted a valid exercise of the police power. That power is very broad and comprehensive, and has not as yet been fully described, or its extent plainly limited, but it is exercised to promote the health, comfort, safety, and welfare of society. In each of the last three cases cited it was invoked by counsel to sustain a statute, and it received very careful consideration at the hands of this court. It was held that the power, however broad and extensive, is not above the constitution, in obedience to the commands of which the courts will protect the rights of individuals from invasion under the guise of police regulations, when it is manifest that such is not the object and purpose of the regulation; and, while it is the general province of the legislature to determine what laws and regulations are needed to protect the public health, comfort, and safety, courts must be able to say, upon a perusal of the enactment, that there is some fair and reasonable connection between it and the ends above mentioned. Unless such relation exists, an enactment cannot be upheld as an exercise of the police power.

The doctrine of these cases was very recently considered and reasserted by this court in *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302, and its further discussion at this time would be a work of supererogation. Under the law of this state, therefore, it is the duty of the courts to examine legislation complained of as in violation of the rights secured to the citizens by the constitution, for the purpose of ascertaining whether the health, morals, safety, or welfare of the public

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justifies its enactment. In passing, it may be observed that while it is undoubtedly the rule that railroads, steamboats, warehouses, and other associations of that nature, impressed with a public duty and intended to perform certain *quasi* public functions, may be the subject of legislative control and regulation so long as the legislature does not transcend the limit of state or federal constitution, still that rule is without application to the features of the statute before the court on this review. This inquiry involves such portion of the statute only as undertakes to prohibit citizens of the state from engaging in the brokerage business in passage tickets. That portion of the statute certainly places no burden upon transportation companies, nor does it in any way regulate the manner in which transportation companies shall conduct their business or any part of it. The legislature has no jurisdiction to regulate the methods of business of foreign transportation companies, nor can it prevent them from selling their passage tickets in this state, but by this act it does undertake to prevent any citizen of this state from purchasing the passage tickets of foreign companies for sale to others, unless such citizen shall have been regularly appointed an agent by some transportation company. The right hitherto exercised by citizens to deal in passage tickets over transportation routes without, as well as within, this state, is sought to be cut off.

Again, it may be conceded that it is within the power of the legislature to regulate the manner in which certain kinds of business may be conducted; that it may require one seeking to engage in a given pursuit to secure from the state, or one of its agents, a license; that it may require one pursuing any particular occupation to pay a tax for the privilege of conducting his business; and that, as a condition to the right of carrying on a business that, in the hands of incompetent persons, may be productive of injury to others, the legislature may require that before engaging therein one must satisfy the public authorities that he is competent and morally qualified to conduct it. But none of these methods

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was adopted. No attempt is made to exclude persons of bad character from engaging in the business, nor are the public authorities given the right to determine, by examination or otherwise, the character of the person to be engaged in it; but the transportation companies alone are invested with the power to allow whomsoever they will to engage in the business.

Nor can the contention be tolerated that because there have been, in times past, dishonest persons engaged in the ticket brokerage business, with the result that frauds have been perpetrated on both travelers and transportation companies, therefore the legislature can deprive every citizen engaged therein of the "liberty" to further conduct such business. Stringent rules undoubtedly may be enacted to punish those who are guilty of dishonest practices in the conduct of such a business, and the machinery of the law put in motion for its rigorous enforcement; but to cut up, root and branch, a business that may be honestly conducted, to the convenience of the public and the profit of the persons engaged in it, is beyond legislative power.

If the law were otherwise, no trade, business, or profession could escape destruction at the hands of the legislature if a situation should arise that would stimulate it to exercise its power, for in every field of endeavor can be found men that seek profit by fraudulent processes. Transportation tickets have been forged, it is said; so have notes, checks, and bank bills. Railroad companies are no more bound to honor forged tickets than the alleged maker of a forged note is bound to pay it. An innocent person who suffers by parting with his money on a forged ticket has his remedy against the vendor just the same as has the bank that discounts a forged note. Such instances might be multiplied, but it would serve no good purpose, for it is well known that no business can be suggested through which innocent parties may not be occasionally victimized. But, because of that fact, honest men cannot be prevented from engaging in their chosen occupations.

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Again, it is said that ticket brokers enable the railroads to engage in unfair competition. This is accomplished by the sale to the broker by a competing railroad, at much less than the regular rates, of a block of tickets that the broker is enabled to sell to his customers, and this to a certain extent takes travel from its competitors. An opinion is cited in which the court in another jurisdiction denounces the ticket scalper for engaging in a business of this character, and pronounces such business fraudulent alike in its conception and operation; but we pass this opinion without other comment than to say that, whatever may be regarded as the law in other jurisdictions, in this one it is well established that the public welfare is best subserved by the encouragement of competition (*People v. Sheldon*, 139 N. Y. 263, 34 N. E. 785; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790); and hence this so-called reason furnishes no support to the claim that this legislation was for the public good.

I have now called attention to all the arguments that have been advanced in support of the claim that the provisions of the statute under consideration are so evidently intended for the public good as to constitute a valid exercise of the police power by the legislature, and those arguments seem so wholly without merit as to suggest that they constitute a mere pretext put forward to uphold legislation hostile to the liberty of the citizen, as that word is used in the constitution. If the views expressed be well founded, it follows that it is the duty of the court to declare that portion of the statute we have considered to be in contravention of the constitution and void. The order should be reversed, and the prisoner discharged.

BARTLETT, J. (dissenting). This appeal is based upon the alleged unconstitutionality of chapter 506 of the Laws of 1897, entitled "An act to amend the Penal Code, relative to the sale of passenger tickets." Chapter 12 of title 15 of the Penal Code, amended by this statute, is entitled "Fraud in the sale of passage tickets." The relator insists that the act of 1897 violates article 1, § 1, of the state constitution.

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which provides that no member of the state shall be disfranchised or deprived of his rights or privileges unless by the law of the land and the judgment of his peers; also article 1, § 6, of the state constitution, providing that no person shall be deprived of life, liberty, or property without due process of law; also the fourteenth amendment of the constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; also article 3, § 1, of the state constitution, vesting the legislative power of the state in a senate and assembly; also article 1, § 8, subd. 3, of the constitution of the United States, providing that congress shall have power to regulate commerce among the several states. The learned counsel for the relator and appellant asks us to consider, in the light of these constitutional prohibitions, the act of 1897, which makes, as he insists, the pursuit of a business which for 40 years prior to September 1, 1897, was legitimate and lawful, a felony.

The business referred to is described in the relator's petition for the writ of *habeas corpus* as "selling and offering for sale, and procuring, tickets, giving, and purporting to give, the right to a passage and conveyance on vessels and railway trains." It should be observed that the act of 1897 is merely an amendment of a chapter of the Penal Code containing some 12 sections, and inserts therein one new section and amends another. It is not, in a general sense, new legislation, but ingrafts some additional provisions upon statutory enactments that have existed, in one form or another, for 40 years or more. A short review of this legislation, which is not referred to in the briefs of counsel or the opinion below, may be profitable at this time.

Chapter 470, Laws 1857, is entitled "An act to prevent frauds in the sale of tickets to passengers upon railroads, steamboats and steamships," and provides that no person,

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other than the agents or employees of the carriers named, duly appointed by them for that purpose, by a proper authority in writing, shall offer for sale, or sell, within this state, any tickets, etc. A violation of this act is made a misdemeanor, punishable by a fine of not less than \$100, or by imprisonment not less than three months, or by both such fine and imprisonment.

Chapter 103, Laws 1860, is entitled "An act to prevent frauds in the sale of tickets upon steamboats, steamships and other vessels," and is confined to the sale of tickets upon various vessels, and, while longer and more comprehensive than the act of 1857, is similar in its restrictive provisions, and makes the penalty for violation imprisonment in a state prison for a term of not more than two years, or by imprisonment in a county jail not less than six months.

Chapter 820, Laws 1868, amends the act of 1857.

Chapter 201, Laws 1876, is entitled "An act to prevent frauds in the sale of staterooms, berths and tickets upon steamboats, and steamships, and other vessels," and is in harmony with the previous legislation upon the general subject.

While these laws remained upon the statute book, and in 1881, the Penal Code was adopted (chapter 676, Laws 1881), which in title 15, c. 12, contained practically the same provisions as the laws of 1857 and 1860.

Chapter 384, Laws 1882, amended the Penal Code by repealing section 615, being the opening section of said chapter 12, but the remaining sections were retained, which forbade the sale of tickets by persons other than authorized agents of companies.

Chapter 593, Laws 1886, repealed chapter 470, Laws 1857: sections 1-7, 9, 11, c. 103, Laws 1860; and chapter 201, Laws 1876.

Chapter 662, Laws 1892, amended sections 618 and 621 of the Penal Code, relating to this subject, by increasing the penalty for the violation of the statute to a maximum imprisonment of two years, and declaring that offices kept for the

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purpose of selling tickets in violation of any provisions of the chapter are to be deemed disorderly houses. This seems to have been the last legislation upon this general subject until chapter 506 of the Laws of 1897, the act now under consideration, which enacted a new section, 615 of the Penal Code, in place of the old section repealed by chapter 384 of the Laws of 1882; and also amended section 616.

While the argument based upon practical construction is not conclusive, it is entitled to great weight. When we are confronted, as in this case, by a declared public policy of the state which has existed for more than a generation, its illegality must be made very clearly to appear before the court will hold it to be in violation of constitutional provisions, and consequently void. It may be stated, in this connection, that similar legislation exists in several other states, and has been uniformly sustained by the courts. *Burdick v. People*, 149 Ill. 600, 36 N. E. 948; *State v. Corbett*, 57 Minn. 345, 59 N. W. 317; *Com. v. Wilson*, 14 Phila. 384.

The only question presented for our decision at this time may be thus stated: Is it competent for the legislature, in the exercise of the police power and in regulating the sale of passage tickets by common carriers, to prohibit sales by ticket brokers, unless they are duly authorized to make such sales by the owners or charterers of the vessel, or by the company running the railway train upon which passage tickets are offered for sale? We are not now called upon to determine the privileges enjoyed by, or obligations imposed upon, common carriers by this legislation; nor are we to decide whether the individual who has purchased a ticket in good faith, with the intention of using the same, has been deprived of his property without due process of law, when prohibited from selling his unused ticket, and compelled to resort to a more or less imperfect scheme of redemption by the individuals or corporations issuing it. The relator is in no way concerned with these questions, and his appeal must stand or fall upon the proper construction of the law relating to the sale of passage tickets by ticket brokers. The statute

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might be void as to the passenger holding an unused ticket, and valid as to the ticket broker. The court should express no opinion on this point. We are not only confined to the single question pointed out, but we have nothing to do with those questions of fact that were presented with great ability by the learned counsel for the appellant, as they have no place in the record. We have to deal with the legal question of legislative power only, and are not judicially informed as to the facts that induced the legislature to act, save as they may be inferred from that which appears upon the face of the legislation the validity of which is now challenged.

The acts prior to the Penal Code aver in their titles that they were enacted to prevent frauds in the sale of tickets to passengers upon railways and vessels, and the chapter of the Penal Code that has taken the place of these earlier statutes is entitled, "Fraud in the Sale of Tickets." It may, therefore, be fairly and reasonably inferred from these declarations on the face of the statutes that the legislature was moved to act in order to prevent frauds upon passengers and common carriers. As this record presents only the constitutionality of the act in question upon its face, we are not advised judicially of the evils which many years of legislation have sought to remedy. So we come to the question whether it is competent for the legislature, in the exercise of the police power, in order to prevent frauds in the sales of passage tickets by land and water, to confine their sale to the individuals and corporations issuing them, or their duly-authorized agents. In other words, has the relator such an inalienable right to deal in these tickets by purchase and sale that to deprive him of it is to strip him of his liberty, rights, privileges, and property without the judgment of his peers and due process of law?

The appellant insists that to confine the sale of tickets to the common carriers, or their agents, not only works these results as to him, but is to discriminate against every citizen and build up a monopoly. We are cited in a learned brief to many cases in the supreme court of the United States,

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our own court, and other courts, to sustain this position. The reasonable limits of this discussion will not permit a review of these authorities, but I am of opinion they have no application to the case at bar. It has been often remarked by judicial writers that it is difficult and undesirable to define the limits of the police power. It has been said to be "the general power of a government to preserve and promote the public welfare, even at the expense of private rights." 18 Am. & Eng. Enc. Law, p. 740. JUDGE COOLEY, in his Constitutional Limitations (4th Ed., 719), says: "The limit of the police power in these cases must be this: The regulations must have reference to the comfort, safety, and welfare of society." The supreme court of Illinois, in *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 194, referring to the police power, said: "It may be assumed it is a power co-extensive with self-protection, and is not inaptly termed 'the law of paramount necessity.' * * *

It may be said to be that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society." The supreme court of the United States (*In re Rahrer*, 140 U. S. 554, 11 Sup. Ct. 865) pointed out that it is within the power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity. It was, as it seems to me, a reasonable and proper exercise of the police power by the legislature, when seeking to put an end to frauds in the sale of passage tickets, to require carriers, who are usually created by legislation, to sell their own tickets either directly or through duly-authorized agents. It is always the fact that the exercise of the police power by the legislature leads to loss and inconvenience in the cases of many individuals. It is the inevitable result, and must be endured, unless personal and property rights are invaded to such an extent that constitutional provisions are violated. The relator insists that he is deprived of his property without due process of law. We do not have here presented, as before

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intimated, the question which might arise in the case of the purchaser of a ticket in good faith, intending to use the same, who, being unexpectedly prevented from so doing, desires to sell it. This relator has no such special property in the ticket as the supposed case discloses, but is a mere dealer or speculator in these symbols or tokens. The relator claims the same right to traffic in passage tickets as he would have to buy and sell cotton, grain, or any other article of personal property that can be seen and handled.

The nature of a passage ticket has been repeatedly considered by this court. In *Hibbard v. Railroad Co.*, 15 N. Y. 455, 466, the plaintiff was ejected from the train because he refused to show his ticket. The plaintiff recovered damages below, but this court reversed, and in its opinion said: "The ticket is the property of the railroad company, and is a part of the means by which it conducts its business. It is delivered to the passenger to be held by him, temporarily, for a special purpose, and who, to that extent, acquires a special property in it. When the journey is ended, or about to end, it is to be redelivered to the conductor. It serves a threefold purpose: It is evidence in the passenger's hands that he has paid his fare, and has a right within the cars; it insures the payment of the passage money by all who take seats; and when it is redelivered to the company it becomes a voucher, in its hands, against the office or agent who issued it, in the adjustment of its accounts." It thus appears that the original and legitimate function of the ticket is to carry out a transaction between the carrier and the passenger, the ticket being the property of the carrier, while the passenger is entitled to retain it in his possession until the completion of his journey. In *Quimby v. Vanderbilt*, 17 N. Y. 306, this court held that passage tickets are generally to be regarded as tokens, rather than contracts, and are not within the rule excluding parol evidence to vary a written agreement. In *Rawson v. Railroad Co.*, 48 N. Y. 212, the court held that a ticket does not generally contain any contract, and is not intended to. It is a mere token or voucher, adopted

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for convenience, to show that the passenger has paid his fare from one place to another.

I am of opinion that neither the act of 1897, nor the statute it amends, deprives the relator of his property without due process of law. The relator has no such vested right as a ticket broker to traffic in the purchase and sale of these symbols or tokens, which are the property of the carrier, as has the merchant dealing in goods, wares, and merchandise. If the legislature deemed this interference in the business of the common carrier relating to the sale of passage tickets as leading to great frauds and abuses, it was competent for that body to put an end to it, even if, as may be possible in the relator's case, ticket brokers were unfavorably affected who were in no way responsible for the evils sought to be remedied. This is not the case of the legislature saying to the merchant: "You shall no longer buy and sell and get gain; you must henceforth abstain from dealing in those articles of merchandise the handling of which, by land and sea, constitutes the commerce of the world." This is the case of the legislature saying to the citizen: "You must not interfere with the due and orderly conduct of business between the common carrier and the passenger in the sale and purchase of the symbol or token used for the purpose, as it leads to frauds upon, not only the common carrier and the first-class passenger but the emigrant as well (see Pen. Code, § 626); and, in the exercise of the police power to protect the traveling public, we enact that the passage ticket of the common carrier shall be sold only by it or its agents." In sustaining this exercise of the police power, it is not necessary to refer in detail to the legislation regulating the conduct of business in various ways, in order to prevent fraud and promote the welfare of society, which has been uniformly sustained in this and other states.

It is further insisted on behalf of the relator that the act of 1897 is unconstitutional, because it amounts to a regulation of commerce among the several states by the legislature

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of this state. It is difficult to understand how any such result is accomplished by this legislation. It has often been said that legislation by a state may, in a great variety of ways, affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the constitution of the United States. *Kidd v. Pearson*, 128 U. S. 1, 23, 9 Sup. Ct. 6; *Hall v. De Cuir*, 95 U. S. 485, 487, 488; *Sherlock v. Alling*, 93 U. S. 99, 103; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, *Id.* 155; *Pound v. Turck*, 95 U. S. 459. The act of 1897 does, indeed, affect ticket brokers who were, in a sense, engaged in interstate commerce, but it cannot properly be said that it was an effort on the part of the legislature of this state to regulate commerce, within the meaning of the federal constitution. The traveling public is at liberty to freely come and go as heretofore, and the fact that they are prohibited from dealing with the unauthorized ticket broker offers no obstacle to interstate commerce. The act of 1897 deals with the ticket broker as a resident of this state, carrying on his business here, and there is no attempt to usurp the powers of congress to regulate interstate commerce.

It is finally argued on behalf of relator that the legislation offends the constitution of this state, because it is practically an abdication of governmental functions in favor of private individuals and corporations. The statement of the argument is that the legislature has left it to private agencies to determine who shall and who shall not be permitted to carry on the business of selling tickets. This argument refutes itself. The legislature, in the constitutional exercise of the police power, has said to the common carrier, "You must select and duly commission the agents who are to sell your passage tickets, and no one else can engage in that business." This is certainly not an abdication of governmental functions, but a wise and proper exercise of them, as I view the situation. I have carefully considered the elaborate argument presented in the appellant's brief, but see no reason to disa-

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gree with the conclusions reached by the learned appellate division. The order appealed from should be affirmed.

MARTIN, J. (dissenting). Recognizing the justice of recent criticisms upon the increase of long and argumentative dissenting opinions in this court, still the importance of the principle announced in the decision of this case demands a statement of the reasons which prevent my concurring with the majority. The case involves the validity of a statute which continues a protection to the public and to transportation companies against fraud in the sale of passage tickets which has existed in this state, in substantially the same form, for more than 40 years. Therefore the present statute cannot be held unconstitutional without practically determining that for all that time the affairs of this state in that respect have been controlled by statutes which were invalid, as being in excess of the powers of the legislature to enact. The passage and continuance upon the statute books of this and similar statutes for so many years show that during that time a legislative policy has prevailed in this state which has been sanctioned by numerous legislative acts. It has never been questioned by the courts, and has been acquiesced in by the departments of the state government. This constitutes such a practical construction of the constitutional provisions invoked by the appellant as to justify this court in holding the statute to be within the police power of the state, especially as similar statutes had been in force for many years when the present constitution was adopted. *People v. Dayton*, 55 N. Y. 367, 378; *People v. Home Ins. Co.*, 92 N. Y. 328, 337; *In re Washington St. A. & P. R. Co.*, 115 N. Y. 442, 447, 22 N. E. 356; *People v. Murray*, 149 N. Y. 367, 376, 44 N. E. 146.

The real inquiry here presented is whether the legislature may provide that steamboat and railroad tickets shall not be sold by irresponsible or unknown persons, thus exposing travelers to fraud, and require them to be so sold that the companies issuing them shall be responsible to the traveler who purchases them. While the statute forbids persons other

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than the companies, or their duly-constituted agents, making such sales, still its purpose was to compel the companies to sell their own tickets, and thus become responsible. Manifestly, the method prescribed by this act was the only efficient one that could be adopted to secure the end sought. If the companies had merely been forbidden to permit such sales, their permission could never be established, and thus the purpose of the statute would be thwarted.

The single question presented is whether the legislature was authorized to enact a statute requiring railroad and steamboat companies, or, where the passage extends over more than one line, one of such companies, to sell the tickets for such passage by their duly-constituted agents, and forbidding such sales by persons not sustaining that relation, under penalty of imprisonment. If this act is in conflict with the fundamental law, it is for the reason that it affects the liberty of the citizen to engage in a legitimate employment or business in a lawful way, or because it is destructive of some property right which he lawfully possesses.

It has been asserted by counsel that the business of ticket brokerage has been a legitimate one in this state for more than 40 years. With that statement I am unable to agree. During that entire time a law has existed making the sale of railroad and steamboat tickets, by others than the companies or their properly authorized agents, a crime.

Nor do I understand how it can be properly said that railroad or steamboat tickets are "property," within the common acceptation of that term, when in the hands of others than passengers, as during all those years the statute has continuously declared that passage tickets should not become property in the hands of others, at least so as to include the ordinary right of sale. Their right of sale was limited to the company over whose route the traveler desired to pass, or, where the route was over several lines, to one of the companies over whose line the passenger intended to travel. The manifest purpose of this statute was to prevent fraud in the sale of passage tickets, and thus protect the purchaser

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and companies as well. I do not see how it can be correctly said that the legislature was silent as to the motive of passing these various acts. In each the title of the act disclosed that its purpose was to prevent fraud in the sale of passage tickets. The title of an act affords means of determining the legislative intent, and its help cannot be rejected as being extrinsic and extralegislative, as it bears upon its meaning and purpose. Suth. St. Const. § 211; People *v.* Wood, 71 N. Y. 374.

That the sale of tickets by brokers has long been a source of fraud, both upon the traveling public and the companies issuing them, is a matter of common knowledge, and of its existence there can be no doubt. Indeed, it is doubtful if the business would exist but for the profit derived from improper or fraudulent sales. The fraud of ticket brokers assumes various forms, such as changing tickets which are not transferable by the erasure of the name, the place of destination, or the date, and substituting others, and by otherwise changing the tickets, or by obliterating the dates so as to render their improper use possible. Moreover, the existence of such brokers incites the stealing of tickets, and encourages the employees of the companies in defrauding their employers by furnishing a market for stolen tickets and those not canceled by dishonest officers. That the sale of such tickets is a fraud upon both the carrier and the honest traveler cannot be successfully denied. Again, when a passenger loses his ticket, instead of its being restored to him, resort may at once be had to those agencies to realize upon it. Hardly a week passes when the public prints do not contain one or more accounts of the grossest fraud upon honest, but unwary, travelers, which would not occur but for their existence. Therefore the existence of ticket brokers is a continual menace to both passengers and carriers. It tends to encourage forgery, larceny, the receipt and sale of stolen and fraudulent tickets, the perpetration of frauds upon travelers, and is clearly a disadvantage to the honest traveler as well as to the carrier. Hence the necessity for this statute is

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obvious, and I think the legislature was wise in adopting it.

While every person has a right to pursue, in a legitimate manner, any lawful calling he may select, and the state can neither compel him to adopt any particular calling nor prohibit his engaging in any legitimate business, still it, in the exercise of its police power, is authorized to subject all occupations to such restraint as may be necessary to prevent their becoming harmful to the public, and where an occupation threatens public injury, and its suppression is essential to the public welfare, the state may prevent its pursuit. *Wynehamer v. People*, 13 N. Y. 378, 487; *Metropolitan Board v. Barrie*, 34 N. Y. 657. The state has a right to reasonably control the manner in which public corporations shall transact their business, and to protect the public against fraud. This statute does nothing more. Its effect is to require railroad and steamboat companies to sell their own tickets in a manner that will render them responsible to the purchaser for any fraud or mistake that may be perpetrated or may occur. The property and business of these companies is clothed with a public interest which makes them of public consequence, affecting the community at large, and hence they may be controlled by any police regulation which is necessary to secure the public good. *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682; *People v. Boston & A. R. Co.*, 70 N. Y. 569; *Munn v. Illinois*, 94 U. S. 113. It is therefore reasonable that the state may provide any preventive remedy necessary when the frequency of fraud or the difficulty in circumventing it is so great that no other means will prove efficacious. A regulation which is instituted for the purpose of preventing fraud or injury to the public, and which tends to furnish such protection, is clearly constitutional. This proposition is sustained by numerous authorities in this state and elsewhere, and is an important element of the police power, which is vested in the legislature.

It seems clear that the judgment in this case should be upheld upon the grounds :

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(1) Railroad and steamboat tickets can in no proper sense be regarded as property in which third persons have any vested interest. They are mere tokens or evidences of a right to transportation, in which even the traveler who has purchased one has but a special interest, and to which the companies have title and the ultimate right of possession. *Hibbard v. Railroad Co.*, 15 N. Y. 455, 466; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Rawson v. Railroad Co.*, 48 N. Y. 212.

(2) The sale of railroad and steamboat tickets by persons other than the companies or their agents, as a business, is not an employment in which they have any unqualified right to engage. A ticket is a mere incident to the business of the companies in transporting passengers. Like a baggage check, it is merely a method adopted by them for the transaction of their own business. The ticket itself possesses none of the ordinary elements of property, and cannot, without the consent of the companies, form the basis of a legitimate independent business. At most, it is but an evidence of the arrangement between the companies and their passengers, in which others have no lawful interest. No right to transfer is given, and, generally, none is intended. To hold that every person has a constitutional right to interfere with the relations between passengers and carriers, which is superior to the control of the legislature, would result in extending the restraints imposed upon the lawmaking power much further than they have hitherto been supposed to exist, and would be an interference with the power vested in the legislative branch of the state government that is wholly unwarranted. Third persons have no constitutional right to interfere with the relations between the carrier and passenger by the purchase and sale, without its consent, of tickets issued by the former, and to establish such a right would be unauthorized by any existing principle of constitutional law. It is true the act recognizes the right of third persons to make sales of passage tickets, but that right is a limited one, and can be properly exercised only by

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an agent of one of the companies furnishing the traveler with the transportation for which the ticket is purchased. But it is to be observed that, as such sales are to be made by one of the companies furnishing the transportation, the company making it becomes responsible to the passengers and other carriers for any fraud perpetrated by its agent, and is in harmony with the general purpose of the act.

(3) In the exercise of its police power the state was authorized to prevent the pursuit of the occupation of ticket brokers upon the ground that it was harmful to the public, and the difficulty in circumventing the fraud which attended it was so great that no other efficient means could be found.

(4) As railroad and steamboat companies are public corporations, or at least their business is of such public interest as makes it of public consequence, the legislature had power to control their business by any regulation which was necessary to secure the public good. People *v.* King, 110 N. Y. 418, 18 N. E. 245; People *v.* Budd, 117 N. Y. 1, 22 N. E. 670, 682; People *v.* Ewer, 141 N. Y. 129, 36 N. E. 4; People *v.* Warden of City Prison, 144 N. Y. 529, 39 N. E. 686; People *v.* Havnor, 149 N. Y. 195, 43 N. E. 541; Grannan *v.* Racing Ass'n, 153 N. Y. 461, 47 N. E. 896. The regulation instituted by this statute was for the purpose of preventing fraud, and consequent injury, to the public. It tends to furnish such protection, and is clearly within the police power of the state. For these reasons I am of the opinion that the act under consideration is constitutional, and should be upheld.

Moreover, if this act is unconstitutional, many other statutes which have hitherto been regarded as valid and a part of the existing law of the state are also unconstitutional. This may be illustrated by reference to a few of the many statutes which fall within the principle of this decision. The taking of any conveyance of lands from any person not being in the possession thereof, while they are the subject of controversy or suit, is a crime. Pen. Code, § 129. It is a crime to buy or sell any title to lands, real or pretended,

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unless the grantor or his predecessors in title have been in possession for the space of a year before such sale. *Id.* § 130. It is a crime to solicit life insurance without a certificate of authority, to issue a policy after a certificate to do business within the state has been revoked, to act for a foreign insurance company which has not designated the superintendent of insurance as an attorney upon whom process may be served, or to act for any foreign corporation not authorized to do business in this state. *Id.* §§ 577c, 577i, 577j, 593. It is also made a crime to manufacture or sell oleomargarine made in imitation of dairy butter (Laws 1885, c. 183); to exhibit a female child as a dancer or in a theatrical exhibition, or to consent thereto (Pen. Code, § 292); to exclude citizens, by reason of race, color, etc., from the equal enjoyment of any privilege furnished by owners of places of amusement (*Id.* § 383); to charge for elevating grain a price greater than that fixed by law (Laws 1888, c. 581); to engage in the trade or business of plumbing without registration (Laws 1892, c. 602); not to furnish water at one or more places on each floor in tenement houses in the city of New York occupied by families (Laws 1882, c. 410, as amended by chapter 84, Laws 1887); to sell milk which does not reach a prescribed standard, whether adulterated or pure (Laws 1884, c. 202); to sell vinegar which contains any artificial coloring, whether wholesome or otherwise (Laws 1889, c. 515); and for barbers to work on Sunday, except in the city of New York and the village of Saratoga Springs (Laws 1895, c. 823). If the statute under consideration invades the liberty or property of the individual, it is obvious that the statutes to which we have adverted are subject to the same criticism, and yet most, if not all, of them have been held to be constitutional, and their enactment to be within the police power of the state, as will be seen by examining the following, which are a few of the many cases bearing upon the subject: *Danziger v. Boyd*, 120 N. Y. 628, 24 N. E. 482; *Dawley v. Brown*, 79 N. Y. 390; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107; *People v. Arensberg*,

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105 N. Y. 123, 11 N. E. 277; People *v.* King, 110 N. Y. 418, 18 N. E. 245; People *v.* Budd, 117 N. Y. 1, 22 N. E. 670. 682; People *v.* Ewer, 141 N. Y. 129, 36 N. E. 4; People *v.* Warden of City Prison, 144 N. Y. 529, 39 N. E. 686; Health Department of City of New York *v.* Rector, etc., of Trinity Church, 145 N. Y. 32, 39 N. E. 833; People *v.* Girard, 145 N. Y. 105, 39 N. E. 823; People *v.* Havnor, 149 N. Y. 195. 43 N. E. 541. Indeed, if the principle of this decision is to be regarded as the established law of this state, it renders invalid many, if not all, of the statutes creating offenses where the act made a crime was not such at common law. No such principle has any proper place in the jurisprudence of this state. In the language of ANDREWS, J.: "It is not a good objection to a statute prohibiting a particular act, and making its commission a public offense, that the prohibited act was before the statute lawful, or even innocent, and without any element of moral turpitude. It is the province of the legislature to determine, in the interest of the public, what shall be permitted or forbidden, and the statutes contain very many instances of acts prohibited, the criminality of which consists solely in the fact that they are prohibited, and not at all in their intrinsic quality." People *v.* West, 106 N. Y. 293, 296, 12 N. E. 610.

In considering this case, it should be remembered that a statute cannot be declared unconstitutional, unless it can be shown, beyond reasonable doubt, that it is in conflict with some particular provision of the organic law, nor until every reasonable mode of reconciliation with the constitution has been resorted to, and reconciliation has been found impossible. The presumption of constitutionality attaches to every statute passed by the legislature, and the burden of establishing its unconstitutionality rests upon, and must be borne by, the party asserting it. People *v.* Board of Sup'rs, 147 N. Y. 1, 41 N. E. 563. It is for the legislature to determine what laws and regulations are needed for the protection of the public, and, if its measures are calculated and appropri-

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ate to accomplish that end, the exercise of its discretion is not the subject of judicial review.

Applying to this case the principles already stated, it is obvious that the statute in question was within the police power of the state. Its necessity to the public welfare was for the legislature to determine, and, as it has a clear relation to that end, its propriety is not subject to review by this court. To hold that this act is unconstitutional would establish a principle which would impair or destroy nearly every statute that has for its purpose the prevention of fraud. It would practically annihilate the police power of the legislature, and make the courts administrators of that power instead of the body in which it is vested by the constitution. Besides, if the cases passing upon the validity of the statutes, to which we have called attention, were correctly decided, they establish a principle which, if applied in this case, requires us to hold that this act was a proper exercise of the police power by the legislature, and that it is consequently valid.

The result of this action is of slight importance in comparison with the principles promulgated as the law of this state. An arbitrary and unauthorized interference by the judiciary with the administrative affairs of the state is fraught with quite as much danger as would follow legislative interference with judicial affairs. Neither can occur without affecting the stability and efficiency of our state government. The legislative power of the state is vested in the senate and assembly. When courts seek to control the action of the legislature, or, in effect, to repeal its statutes, by holding them in conflict with some nonexistent or doubtful constitutional limitation, their action ceases to be judicial, and becomes mere usurpation. I think the order should be affirmed.

PARKER, C. J., reads for reversal of order and discharge of prisoner; O'BRIEN, HAIGHT, and VANN, JJ., concur. BARTLETT and MARTIN, JJ., read for affirmance; and GRAY, J., concurs.

Order reversed, and prisoner ordered discharged.

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NOTE.

Ticket Scalpers.—The Indiana Law (1 Rev. St. Indiana, 1876, ch. 249), prohibiting general brokerage business in the buying and selling of unused portions of railroad tickets, except under certain well-defined restrictions, is a police regulation, and, whatever may be said either for or against the justice thereof, the legislature in its enactment did not exceed its legitimate power under the state constitution. *Fry v. State*, 63 Ind. 553. Similar rulings have been made in other states. *Com. v. Wilson*, 37 Leg. Int. (Pa.) 484, 56 Am. & Eng. R. Cas. 230; *Burdick v. People*, 149 Ill. 600, 36 N. E. Rep. 948, 24 L. R. A. 152.

Minn. Act of 1893, ch. 66, entitled "An act to regulate the sale and redemption of transportation tickets of common carriers, and to provide punishment for the violation of the same," is not unconstitutional either as class legislation or as granting special privileges to carriers. Neither is the act unconstitutional as a delegation of police power of the state to grant licenses to engage in the business, or as an interference with interstate commerce; nor does the act deprive the citizen of his property without due process of law, at least as to tickets purchased after the passage of the act. *State v. Corbett*, 57 Minn. 345, 59 N. W. Rep. 317, 24 L. R. A. 498.

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COMMONWEALTH.

(*Court of Appeals of Kentucky, May 19, 1899.*)

Negroes—Separate Coaches—Penal Statute—Indictment.—The statute of Kentucky, providing that a failure to furnish separate coaches for white and colored passengers, and to have each car bear, in some conspicuous place, words indicating the race for which the car was intended, shall render the railroad company liable to a fine of not less than \$500, designates but one offense; and an indictment under such statute can charge but one offense.

Constitutionality of Statute.*—Such statute is not in violation of the federal constitution, either as to the commerce clause or the fourteenth amendment.

*See *Smith v. State*, 11 Am. & Eng. R. Cas., N. S., 144, and *note*, 156.

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APPEAL by defendant from Shelby county circuit court.
Affirmed.

P. J. Foree and *John T. Shelby*, for appellant.

R. F. Peak, for the Commonwealth.

WHITE, J. The appellant, the Chesapeake & Ohio Railroad, was indicted and convicted in the Shelby circuit court for a failure to furnish separate coaches for both white and colored passengers, and failing to have each car bear, in some conspicuous place, appropriate words, in plain letters, indicating the race for which such car was intended. The fine assessed was the minimum fixed by the statute, \$500. From that judgment of conviction this appeal is prosecuted.

Case Stated.

It is insisted that the indictment is defective, in that it charges two offenses,—one for failing to furnish cars, and one for failing to designate by lettering the cars for white and colored persons. It is also insisted that the separate coach law is unconstitutional, as being a regulation of interstate commerce, which is exclusively within the powers of congress, as given by the eighth section of the federal constitution. It is also insisted that there is no evidence to support the charge in the indictment, and that the verdict should therefore be set aside.

We are of the opinion that the indictment charges but one offense, and that but one offense is designated in the statute. It may be committed by a failure to have separate coaches, or by a failure, if more than one coach for passengers be in a train, to designate, by lettering, which coach is designated for white, and which for colored, passengers. It cannot be said that, if appellant had in each passenger train more than one coach for passengers, it would then be relieved from the duty of designating which of those cars were intended for the white, and which for the colored, race. The statute makes it the duty to not only furnish separate cars for the races,

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but also to designate for which race each car is intended. A failure to observe these provisions is a violation of the law, and subjects the offending party or company to the penalty prescribed. The validity of this statute has

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been before this court in the case of *Ohio Val. Ry.'s Receiver v. Lander*, 47 S. W. 344, 882, and it was there held that the act was not in violation of the federal constitution, either as to the commerce clause or the fourteenth amendment. The opinion of the court, by MR. JUSTICE GUFFY, is a clear statement of the law of this case, and is decisive of all questions here raised as to the validity of the act. In the recent case of *Lake Shore & M. S. Ry. Co. v. Ohio* (decided by the supreme court of the United States, Feb. 20, 1899) 19 Sup. Ct. 465, in a decision by MR. JUSTICE HARLAN, the doctrine of this court, as announced in the *Lander Case*, was reaffirmed.

As to the contention that there should be a reversal of the judgment on account of the evidence, this cannot be done. The rule in criminal and penal cases is that, if there be any testimony tending to prove the facts charged, it will be upheld. While the evidence in this case may not be as clear and convincing as might be desired, yet it cannot be said that there is an entire failure of any proof tending to show guilt.

We perceive no prejudicial error in the admission of testimony. The argument of the prosecuting attorney is complained of, but there appear no exceptions that will bring the matter before us for review. There appears no error in the judgment, and the same is affirmed, with damages.

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LAKE SHORE & M. S. RY. CO.

v.

SMITH.

(*Supreme Court of the United States, April 17, 1899.*)

Constitutionality of Statute—State Decision—Review.—It is not within the province of the supreme court of the United States to review a state decision upon the question whether a statute of the state violates its constitution.

Power of State to Fix Rates—Constitutional Law.*—Where a state is unhampered by contract, there is no doubt of its power to provide by legislation for maximum rates of charges for railroad companies, subject to the condition that they must be such as will admit of the carrier earning a compensation that, under all the circumstances, shall be just to it and to the public, and whether they are or not just is a judicial question. And if the rates are so fixed at an insufficient amount within the meaning of that term as given by the courts, the law would be invalid, as amounting to the taking of the property of the railroad without due process of law.

Police Power.—If, in the assumed exercise of its police power, a state by legislation directly and plainly violates a provision of the constitution of the United States, such legislation is void.

Same—Discrimination.—The legislature of a state, after having fixed a maximum rate for the transportation of passengers by railroad companies, has not the power to discriminate and make an exception in favor of certain persons, and give to them a right of transportation by such companies for a less sum than the general rate provided by law.

Reasonableness of Rates—Presumptions.—The maximum rates of charges for railroad companies as fixed by a state are *prima facie* reasonable.

Same—Same.—There is no presumption that certain named rates of charges for railroad companies which it is claimed that a state

*See *Smith v. Lake Shore & M. S. Ry. Co.* (Mich.), 8 Am. & Eng. R. Cas., N. S., 496, and *note*, p. 511; *Smyth v. Ames* (U. S.), 10 Am. & Eng. R. Cas., N. S., 1.

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might fix, but which it has not fixed, would, in case it did so fix them, be reasonable and valid.

Public Convenience.—A legislative enactment purporting to give certain classes of persons the privilege of purchasing of railroad companies 1,000-mile tickets for less than the standard rate cannot be sustained upon the ground that it provides for the public convenience.

Railroad Charters—Scope of Power to Amend or Repeal.—The power to amend or repeal the charter of a railroad corporation does not extend to the taking of its property directly or indirectly.

Constitutionality of Statute.—A statute of Michigan provides, in substance, that one thousand-mile non-transferable tickets shall be kept for sale at the principal ticket offices of all railroad companies in the state or carrying on business partly within and partly without the limits of the state, at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula, which, when required by the purchaser, shall be issued, in the name of the purchaser, his wife and children; and that such a ticket shall be valid for two years only after date of purchase, and, in case it is not wholly used within such period, the issuing company, upon its presentation, shall redeem the unused portion, and be entitled to charge three cents per mile for the portion used. *Held*, that the statute was a violation of the provision of the federal constitution forbidding the taking of property without due process of law and requiring the equal protection of the laws.

ERROR by defendant to the Supreme Court of the State of Michigan. *Reversed and remanded.*

In 1891 the general railroad law of the state of Michigan was amended by the legislature by Act No. 90, a portion of the ninth section of which reads as follows:

“ * * * Provided, further, that one thousand-mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this state or carrying on business partly within and partly without the limits of the state, at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula. Such one thousand-mile tickets may be made non-transferable, but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife and children, designat-

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ing the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand-mile ticket shall be forfeited to the railroad company. Each one thousand-mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used."

On April 19, 1893, and again on October 17, 1893, the defendant in error demanded of the ticket agent of the plaintiff in error, in the city of Adrian, Mich., a 1,000-mile ticket, pursuant to the provisions of the above section, in the names of himself and his wife, Emma Watts Smith, which demand was refused. The defendant in error then applied for a *mandamus* to the circuit court to compel the railway company to issue such ticket upon the payment of the amount of \$20; and, after a hearing, the motion was granted. Upon *certiorari*, the supreme court of Michigan affirmed that order, and held that the statute applied only to the railway lines of the plaintiff in error operated within the state of Michigan.

The defense set up by the railway company was that, under the charter from the state to one of the predecessors of the company to whose rights it had succeeded, it had the right to charge three cents a mile for the transportation of all passengers, and that such charter constituted a contract between the state and the company, which the former had no right to impair by any legislative action, and that the statute compelling the company to sell 1,000-mile tickets at the rate of two cents a mile was an impairment of the contract, and was therefore void, as in violation of the constitution of the United States. It also alleged that the act was in violation of the fourteenth amendment of the constitution of the United

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States, in that it deprived the company of its property and liberty of contract, without due process of law, and also deprived it of the equal protection of the laws. The act was also alleged to be in violation of the constitution of the state of Michigan, on several grounds.

The supreme court of the state decided that there was no contract in relation to the rates which the company might charge for the transportation of passengers, and that the statute violated no provision either of the federal or the state constitution, but was a valid enactment of the legislature; and therefore the court affirmed the order for *mandamus*, the ticket to be good upon and limited to the railway lines of the defendant railroad company within the state of Michigan. 72 N. W. 328. The company sued out a writ of error from this court.

George C. Greene, for plaintiff in error.

Fred. A. Maynard and *H. C. Smith*, for defendant in error.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

The only subject of inquiry for us in this case is whether the act of the legislature of the state of Michigan violates any provision of the federal constitution. It is not within our province to review the decision of the supreme court upon the question whether the act violates the constitution of the state.

The two questions of a federal nature that are raised in the record are (1) whether the act violates the constitution of the United States by impairing the obligation of any contract between the state and the railroad company; and (2) if not, does it nevertheless violate the fourteenth amendment of the constitution by depriving the company of its property or liberty without due process of law, or by depriving it of the equal protection of the laws? If we should decide that this act violates any provision of the fourteenth amendment, it would be unnecessary to examine the question whether there was any contract between the state and the company, as

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claimed by it. We will therefore first come to an investigation of the legislative authority with reference to that amendment.

If unhampered by contract, there is no doubt of the power of the state to provide by legislation or maximum rates of charges for railroad companies, subject to the condition that they must be such as will admit of the carrier earning a compensation that, under all the circumstances, shall be just to it and to the public, and whether they are or not is a judicial question. If the rates are fixed at an insufficient amount within the meaning of that term as given by the courts, the law would be invalid, as amounting to the taking of the property of the company without due process of law. *Railway Co. v. Wellman*, 143 U. S. 339, 344, 12 Sup. Ct. 400; *Reagan v. Trust Co.*, 154 U. S. 362, 399, 14 Sup. Ct. 1047; *Railway Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484; *Smyth v. Ames*, 169 U. S. 466, 523, 18 Sup. Ct. 418, 10 Am. & Eng. R. Cas., N. S., 1.

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Constitutional
Law.

The extent of the power of the state to legislate regarding the affairs of railroad companies has, within the past few years, been several times before this court. *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4; *Illinois Cent. R. Co. v. Illinois*, 163 U. S. 142, 4 Am. & Eng. R. Cas., N. S., 354, 16 Sup. Ct. 1096; *Lake Shore & M. S. Ry. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, and cases cited. These cases arose under the commerce clause of the federal constitution, the inquiry being whether the legislation in question violated that provision. In the cases in which the legislation was upheld, it was on the ground that the state was but exercising its proper authority under its general power to legislate regarding persons and things within its jurisdiction, sometimes described as its police power, and that in exercising that power in the particular cases it did not violate the commerce clause of the federal constitution by improperly regulating or interfering with interstate commerce. The extent of the right of the state to legislate was examined

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in these various cases, so far, at least, as it was affected by the commerce clause of the constitution of the United States.

In *Illinois Cent. R. Co. v. Illinois*, *supra*, the state statute imposed the duty upon the company of stopping its fast mail train at the station of Cairo, to do which the train had to leave the through route at a point three miles from that station, and then return to the same point in order to resume its journey. This statute was held to be an unconstitutional interference with interstate commerce, and therefore void.

In *Lake Shore & M. S. Ry. Co. v. Ohio*, *supra*, a statute of the state of Ohio required the company to stop certain of its trains at stations containing 3,000 inhabitants for a time sufficient to receive and let off passengers, and the statute was held to be a valid exercise of legislative power, and not an improper interference with interstate commerce. In the course of the opinion of the court, which was delivered by MR. JUSTICE HARLAN, it was said that: "The power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own constitution or by the constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the states is entirely distinct from any power granted to the general government, although, when exercised, it may sometimes reach subjects over which national legislation can be constitutionally extended." And again, speaking of cases involving state regulations more or less affecting interstate or foreign commerce, it was said that these cases "were sustained upon the ground that they were not directed against, nor were direct burdens upon, interstate or foreign commerce; and having been enacted only to protect the public safety, the public health, or the public morals, and having a real, substantial relation to the public ends intended to be accomplished thereby, were not to be deemed absolutely forbidden because of the mere grant of power to congress to

regulate interstate and foreign commerce, but to be regarded as only incidentally affecting such commerce, and valid until superseded by legislation of congress on the same subject."

The police power is a general term used to express the particular right of a government which is inherent in every sovereignty. As stated by MR. CHIEF JUSTICE TANEY, in the course of his opinion in the License Cases, 5 How. 504, 583, in describing the powers of a state: "They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion."

This power must, however, be exercised in subordination to the provisions of the federal constitution. If, in the assumed exercise of its police power, the legislature of a state directly and plainly violates a provision of the constitution of the United States, such legislation would be void.

Police Power.

The validity of this act is rested by the counsel for the defendant in error upon the proposition that the state legislature has the power of regulation over the corporations created by it, and, in cases of railroad corporations, the same power of regulation, and also full control over the subject of rates to be charged by them as carriers for the transportation of persons and property. Assuming that the state is not controlled by contract between itself and the railroad company, the question is, how far does the authority of the legislature extend in a case where it has the power of regulation, and also the right to amend, alter, or repeal the charter of a company, together with a general power to legislate upon the subject of rates and charges of all carriers? It has no right, even, under such circumstances, to take away or destroy the

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property or annul the contracts of a railroad company with third persons. *Greenwood v. Freight Co.*, 105 U. S. 13, 17; *Com. v. Essex Co.*, 13 Gray, 239; *People v. O'Brien*, 111 N. Y. 1, 52, 18 N. E. 692; *City of Detroit v. Detroit & H. P. R. Co.*, 43 Mich. 140, 5 N. W. 275.

A railroad company, although a *quasi* public corporation, and although it operates a public highway (*Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 10 Sup. Ct. 965; *Lake Shore & M. S. Ry. Co. v. Ohio*, 173 U. S. 285, 301, 19 Sup. Ct. 465), has, nevertheless, rights which the legislature cannot take away without a violation of the federal constitution, as stated in *Smyth v. Ames*, 169 U. S. 466, 544, 18 Sup. Ct. 418. A corporation is a person within the protection of the fourteenth amendment. *Railway Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207; *Smyth v. Ames*, 169 U. S. 522, 526, 18 Sup. Ct. 418. Although it is under governmental control, that control must be exercised with due regard to constitutional guaranties for the protection of its property.

The question is presented in this case whether the legislature of a state, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, with the limitations above stated, and having power to alter, amend, or repeal their charters, within certain limitations, has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs, and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law.

It is said that the power to create this exception is included in the greater power to fix rates generally; that, having the right to establish maximum rates, it therefore has power to lower those rates in certain cases and in favor of certain individuals, while maintaining them or permitting them to be maintained at a higher rate in all other cases. It is asserted also that this is only a proper and reasonable regulation.

It does not seem to us that this claim is well founded. We

Same—Discrimination.

cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases, and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates, which the company can in no case violate. The legislature, having established such maximum as a general law, now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination,—an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates; a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the tickets purchased shall be valid, and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute; and to that extent it would seem that the statute takes the property of the company without due process of law. We speak of the general right of the company to conduct and manage its own affairs; but, at the same time, it is to be understood that the company is subject to the unquestioned jurisdiction of the legislature in the exercise of its power to provide for the safety, the health, and the convenience of the public, and to prevent improper exactions or extortionate charges from being made by the company.

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It is stated upon the part of the defendant in error that the act is a mere regulation of the public business, which the legislature has a right to regulate, and its apparent object is to promote the convenience of persons having occasion to travel on railroads, and to reduce for them the cost of transportation; that its benefit to the public who are compelled to patronize railroads is unquestioned; that it brings the reduction of rates to two cents per mile within the reach of all persons who may have occasion to make only infrequent trips; and that there is no reason why the legislature may not fix the period of time within which the holder of the ticket shall be compelled to use it. The reduction of rates in favor of those purchasing this kind of ticket is thus justified by the reasons stated.

The right to claim from the company transportation at reduced rates by purchasing a certain amount of tickets is classed as a convenience. As so defined, it would be more convenient if the right could be claimed without any compensation whatever. But such a right is not a convenience at all, within the meaning of the term as used in relation to the subject of furnishing conveniences to the public. And, also, the convenience which the legislature is to protect is not the convenience of a small portion only of the persons who may travel on the road, while refusing such alleged convenience to all others; nor is the right to obtain tickets for less than the general and otherwise lawful rate to be properly described as a convenience. If that were true, the granting of the right to some portion of the public to ride free on all trains and at all times might be so described. What is covered by the word "convenience," it might be difficult to define for all cases; but we think it does not cover this case. An opportunity to purchase a 1,000-mile ticket for less than the standard rate, we think, is improperly described as a convenience.

The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular

class in the community, and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. We do not deny the right of the legislature to make all proper rules and regulations for the general conduct of the affairs of the company, relating to the running of trains, the keeping of ticket offices open, and providing for the proper accommodation of the public.

This act is not like one establishing certain hours in the day during which trains shall be run for a less charge than during the other hours. In such case, it is the establishing of maximum rates of fare for the whole public during those hours, and it is not a discrimination in favor of certain persons by which they can obtain lower rates by purchasing a certain number of tickets, by reason of which the company is compelled to carry them at the reduced rate, and thus, in substance, to part with its property at a less sum than it would be otherwise entitled to charge. The power to compel the company to carry persons under the circumstances as provided for in this act, for less than the usual rates, does not seem to be based upon any reason which has hitherto been regarded as sufficient to authorize an interference with the corporation, although a common carrier and a railroad.

The act also compels the company to carry not only those who choose to purchase these tickets, but their wives and children, and it makes the tickets good for two years from the time of the purchase. If the legislature can, under the guise of regulation, provide that these tickets shall be good for two years, why can it not provide that they shall be good for five or ten or even a longer term of years? It may be said that the regulation must provide for a reasonable term. But what is reasonable under these circumstances? Upon what basis is the reasonable character of the period to be judged? If two years would, and five years would not, be reasonable, why not? And if five years would be reasonable, why would not ten? If the power exist at all, what are the factors which make it unreasonable to say that the tickets shall be valid

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for five or for ten years? It may be said that circumstances can change within that time. That is true, but circumstances may change within two just as well as within five or ten years. There is no particular time in regard to which it may be said in advance, and as a legal conclusion, that circumstances will not change. And can the validity of the regulation be made to depend upon what may happen in the future, during the running of the time in which the legislature has decreed the company shall carry the purchaser of the ticket? Regulations for maximum rates for present transportation of persons or property bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a lower than the general rate, and to provide that they shall be good for years to come. This is not fixing maximum rates, nor is it proper regulation. It is an illegal and unjustifiable interference with the rights of the company.

If this power exist, it must include the right of the legislature, after establishing maximum freight rates, to also direct the company to charge less for carrying freight where the party offering it sends a certain amount, and to carry it at that rate for the next two or five or ten years. Is that an exercise of the power to establish maximum freight rates? Is it a valid exercise of the power to regulate the affairs of a corporation? The legislature would thus permit not only discrimination in favor of the larger freighter as against the smaller one, but it ~~would~~ ^{could} compel it. If the general power exist, then the legislature can direct the company to charge smaller rates for clergymen or doctors, for lawyers or farmers or school teachers, for excursions, for church conventions, political conventions, or for all or any of the various bodies that might desire to ride at any particular time or to any particular place.

If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them

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unreasonably low, as that term is understood in the law; but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations.

But it may be said that, as the legislature would have the power to reduce the maximum charges for all to the same rate at which it provides for the purchase of the 1,000-mile ticket, the company cannot be harmed or its property taken without due process of law, when the legislature only reduces the rates in favor of a few, instead of in favor of all. It does not appear that the legislature would have any right to make such an alteration. To do so might involve a reduction of rates to a point insufficient for the earning of the amount of remuneration to which a company is legally entitled under the decisions of this court. In that case, reduction would be illegal. For the purpose of upholding this discriminatory legislation, we are not to assume that the exercise of the power of the legislature to make in this instance a reduction of rates as to all would be legal, and therefore a partial reduction must be also legal. *Prima facie*, the maximum rates as fixed by the legislature are reasonable. This, of course, applies to rates actually fixed by that body.

Reasonableness
of Rates—Presumptions.

There is no presumption, however, that certain named rates which it is said the legislature might fix, but which it has not, would, in case it did so fix them, be reasonable and valid. That it has not so fixed them affords a presumption that they would be invalid, and that

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presumption would remain until the legislature actually enacted the reduction. At any rate, there is no foundation for a presumption of validity in case it did so enact, in order to base the argument that a partial reduction, by means of this discrimination, is therefore also valid. And this argument also loses sight of the distinction we made above between the two cases of a general establishment of maximum rates and the enactment of discriminatory, exceptional, and partial legislation upon the subject of the sale of tickets to individuals willing and able to purchase a quantity at any one time. The latter is not an exercise of the power to establish maximum rates.

True it is that the railroad company exercises a public franchise and that its occupation is of a public nature, and the public therefore has a certain interest in, and rights connected with, the property, as was held in *Munn v. Illinois*, 94 U. S. 125, and the other kindred cases. The legislature has the power to secure to the public the services of the corporation for reasonable compensation, so that the public shall be exempted from unreasonable exactions, and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort, and health of its patrons and of the public with regard to the railroad. But in all this we find it neither necessary nor appropriate, in order that the legislature may exercise its full right over these corporations, to make such a regulation as this, which discriminates against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power.

The legislature having fixed a maximum rate at what must be presumed, *prima facie*, to be also a reasonable rate, we think the company, then, has the right to insist that all persons shall be compelled to pay alike; that no discrimination against it in favor of certain classes of married men or families, excursionists, or others shall be made by the legislature. If otherwise, then the company is compelled at the caprice or whim of the legislature to make such exceptions

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as it may think proper, and to carry the excepted persons at less than the usual and legal rates; and thus to part in their favor with its property without that compensation to which it is entitled from all others, and therefore to part with its property without due process of law. The affairs of the company are in this way taken out of its own management, not by any general law applicable to all, but by a discrimination made by law to which the company is made subject. Whether an act of this nature shall be passed or not is not a matter of policy to be decided by the legislature. It is a matter of right of the company to carry on and manage its concerns, subject to the general law applicable to all, which the legislature may enact in the legal exercise of its power to legislate in regard to persons and things within its jurisdiction.

This case differs from that which has just been decided. *Lake Shore & M. S. Ry. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465. In that case, the convenience of the public in the state was the basis of the decision, regard being also had to the convenience of the public outside of and beyond the state. It included all the public who desired to ride from the stations provided for in the act, and the convenience to the people in taking a train at these stations was held by this court to be so substantial as to justify the enactment in question.

Public Con-
venience.

But in this case it is not a question of convenience at all, within the proper meaning of that term. Aside from the rate at which the ticket may be purchased, the convenience of purchasing this kind of a ticket is so small that the right to enact the law cannot be founded upon it. It is no answer to the objection to this legislation to say that the company has voluntarily sold 1,000-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The

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action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company.

To say that the legislature has power to absolutely repeal the charter of the company, and thus to terminate its legal existence, does not answer the objection that this particular exercise of legislative power is neither necessary nor appropriate to carry into execution any valid power of the state over the conduct of the business of its creature. To terminate the charter, and thus end the legal life of the company, does not take away its property, but, on the contrary, leaves it all to the shareholders of the company after the payment of its debts.

In *Attorney General v. Old Colony R. Co.*, 160 Mass. 62, 35 N. E. 252, the statute required every railroad corporation in the commonwealth to have on sale certain tickets which should be received for fare on all railroad lines in the commonwealth, etc., and the statute was held invalid. The precise question involved in this case was not there presented, and the court said it was not necessary or practicable to attempt to determine in that case just how far the legislature could go by way of regulating the business of railroad companies, or just where were the limits of its power.

The power to enact legislation of this character cannot be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend, or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means.

The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling

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and using their property in a manner in which the public have an interest.

In this case there is not an exercise of the power to fix maximum rates. There is not the exercise of the acknowledged power to legislate so as to prevent extortion or unreasonable or illegal exactions. The fixing of the maximum rate does that. It is a pure, bald, and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road, and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not legislation for the safety, health, or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who, in the legislative judgment, should be carried at a less expense than the other members of the community. There is no reasonable ground upon which the legislation can be rested, unless the simple decision of the legislature should be held to constitute such reason. Whether the legislature might not in the fair exercise of its power of regulation provide that ordinary tickets purchased from the company should be good for a certain reasonable time is not a question which is now before us, and we need not express any opinion in regard to it.

In holding this legislation a violation of that part of the constitution of the United States which forbids the taking of property without due process of law, and requires the equal protection of the laws, we are not, as we have stated, thereby interfering with the power of the legislature over railroads as corporations or common carriers to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience, or proper protection of the public. We say this particular piece of legislation does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects, and that it does violate the federal constitution, as above stated.

Constitutionality
of Statute.

The judgment of the supreme court of the state of Michigan

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should be reversed, and the case remanded for further proceedings not inconsistent with the opinion of this court; and it is so ordered.

The CHIEF JUSTICE and MR. JUSTICE GRAY and MR. JUSTICE MCKENNA dissented.

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v.

SOUTHERN RAILWAY NEWS CO.

(*Supreme Court of Missouri, June 14, 1899.*)

Carriers of Passengers—Contract of Indemnity—Public Policy.*—A contract of indemnity, by which a news company agrees, for a valuable consideration, to indemnify a railroad company against loss which the latter may sustain by reason of the duty it incurs to a news agent, as a common carrier of passengers, in carrying out such contract, is not voidable as against public policy.

Findings of Fact by Court—Review.—Where the issues of fact were submitted to the trial court, its findings of fact, if supported by the evidence, are conclusive on appeal.

Contract of Indemnity—Right to Compromise Claim.—Where one is bound to protect another from liability, he is bound by the result of a litigation to which such other is a party, if he had opportunity to manage it; and the fact that the result was brought about by agreement is immaterial in this connection.

APPEAL by defendant from Jackson county circuit court.
Affirmed.

Wallace & Wallace, for appellant.

Pratt, Dana & Black, for respondent.

BRACE, P. J. On the 28th of December, 1889, the plaintiff and defendant entered into a written contract by

*See note at end of case.

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which the plaintiff, for and in consideration of the sum of \$1,500, and of the covenants of the defendant therein contained, granted to said news company

Case Stated.

the privilege of selling upon its regular passenger trains during the year beginning January, 1890, "periodicals, newspapers, books, confections, fruits, cigars, cakes, pies, and sandwiches," under certain conditions and regulations therein set out; said contract containing, among others, the following covenants upon the part of the defendant, to wit: "And, in consideration of the foregoing grant and the privileges therein specified, said news company releases said railroad company from any right of action, claim, or demand which may accrue to it by reason of the loss of any of its property while being transmitted on any of the trains of the railroad company under the terms of this contract, and further agrees, for such consideration, to indemnify said railroad company and save it harmless from all claims, demands, damages, actions, costs, and charges to which the railroad company may be subject, or which it may have to pay, by reason of any injury to any person or property, or loss of life or property, suffered or sustained by any agent or employee of the news company while in, upon, or about any of the stations, platforms, cars, or other premises of the railroad company, whether such injuries or loss arise from the negligence of the employees of said railroad company or otherwise." This is an action for damages for a breach of the second covenant aforesaid, in which the plaintiff recovered judgment in the circuit court of Jackson county for the sum of \$5,000, and the defendant appeals.

The case was tried by the court without a jury, the court finding the facts to be as follows:

"(1) Plaintiff is a railroad corporation owning and operating at the times mentioned in the amended petition a line of railway in the states of Tennessee, Mississippi, and Alabama; and defendant is and was at the same times a

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corporation organized and existing under the laws of Kentucky, and having an office for the transaction of its usual and customary business in Jackson county, Missouri, and at such times was engaged in selling newspapers, books, periodicals, and merchandise on railroad trains throughout the country, through agents and servants commonly and generally known as 'newsboys,' and in conducting such business it was usual and necessary for such agents and servants to pass back and forth from car to car on the trains while the latter were in motion.

"(2) On December 28, 1889, plaintiff and defendant entered into a written contract, a copy of which is set forth in the amended petition filed herein, on the 22d day of February, 1896.

"(3) That pursuant to the terms of said contract said plaintiff throughout the year 1890 received and carried upon its trains the agents, employees, and merchandise of said defendant placed thereon by the latter, and afforded such agents and employees facilities for selling and offering for sale such merchandise; that among such agents and employees of said defendant was one George W. Davis, who, in the course of his employment, and acting as agent for defendant, did on the 21st day of October, 1890, at plaintiff's station of Birmingham, Alabama, under the provisions of said contract, enter and go upon one of plaintiff's passenger trains with the merchandise furnished him by said defendant, and for the purpose of selling the same thereon; that on the same day, while said train was moving over plaintiff's said road between said Birmingham and the station of Ensley, and while in said state of Alabama, it came in collision with another train on plaintiff's road, and in consequence thereof said George W. Davis while so on said passenger train as an agent and employee of said defendant as aforesaid received injuries from which he subsequently died. Such collision occurred and such death was caused by the negligence of plaintiff's employees in the

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operation of such train, and the personal representatives of Davis were thereby damaged in the sum of \$5,000.

"(4) By the laws of Alabama in force at the time, the plaintiff became and was liable to the personal representative of such Davis for such damages as were occasioned by the negligence aforesaid. Section 2589 of volume 1 of the Civil Code of Alabama of 1886, then in force, provided as follows: '2589—(2641, 2642, 2643). Action for Wrongful Act, Omission or Negligence Causing Death. A personal representative may maintain an action and recover such damages, as the jury may assess for the wrongful act, omission or negligence of any person or persons or corporations, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission or negligence, if it had not caused death; such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained though there has not been prosecution or conviction or acquittal of the defendant for such wrongful act or omission or negligence, and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate.'

"(5) That the true construction of said statute, as decided by the supreme court of Alabama, which is the court of last resort in that state, is and was that a person entitled to recovery at all thereunder may recover any amount which a jury may see fit to allow; there being no limit fixed by law to the amount of the verdict which a jury may render in an action under said statute.

"(6) George W. Davis received his injuries on the 21st day of October, 1890, and died therefrom on the 29th day of November, 1890; and his administrator instituted a suit in the city court of Birmingham, Alabama, on February 2, 1891, against plaintiff for \$50,000 damages for such injuries re-

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ceived, as claimed, through the negligence of the plaintiff. Plaintiff herein was duly served with process in such suit, which was on the 18th day of June, 1891, dismissed.

"(7) After the death of George W. Davis, and on the 2d day of February, 1891, the probate court of Jefferson county, Alabama (a court, having, under the laws of Alabama, full jurisdiction), appointed Eugene S. Smith as the administrator of said Davis; and under the laws of Alabama said administrator became and was the personal representative of said Davis, and entitled to have and recover the damages authorized by the laws of Alabama for the death of said Davis through the negligence of the employees of plaintiff.

"(8) On the 19th day of June, 1891, Eugene S. Smith, administrator of George W. Davis, deceased, instituted in the circuit court of Walker county, Alabama (a court of competent jurisdiction under the laws of Alabama), a suit against plaintiff for \$50,000 damages for the death of said Davis through the negligence of the plaintiff's employees. The plaintiff herein, as defendant therein, was duly summoned with process in accordance with the laws of Alabama. On the 16th day of February, 1892, said suit was dismissed.

"(9) On the 18th day of September, 1891, Eugene S. Smith, as administrator of George W. Davis, deceased, filed in the city court of Birmingham, Alabama (a court of competent jurisdiction under the laws of Alabama), a suit against this plaintiff for \$20,000 damages for the death of George W. Davis through the negligence of this plaintiff's employees. Process was served on this plaintiff as required by the laws of Alabama, and this plaintiff, as defendant therein, entered its appearance to said suit. A jury was duly empaneled in said cause, and on the 18th day of September, 1891, rendered a verdict for the administrator, assessing the damages at \$5,000, for which amount said court on the 18th day of September, 1891, rendered judgment in favor of the said administrator and against this plaintiff for \$5,000, which judgment this plaintiff on the 18th day of September, 1891, paid to said Eugene S. Smith, administrator of said Davis.

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“(10) As a matter of fact the verdict and judgment for \$5,000 were entered by and with the consent of the parties, though the proof of this fact was received over the objection of the plaintiff that such proof was incompetent and immaterial. As a matter of fact, there had been negotiations to compromise the case pending in Walker county, Alabama, and \$5,000 was the best settlement that could be made, and was a reasonable sum to be allowed for the damages; and so it was decided between plaintiff and said administrator, after long negotiations, that there should be a settlement for that amount, and pursuant thereto it was agreed to dismiss the case in Walker county, and institute a new suit in the city court of Birmingham, Alabama, in which the jury should assess the damages at \$5,000, and the court rendered judgment therefor. This was all done in good faith, and was a reasonable settlement.

“(11) This plaintiff did hire doctors and incur expenses for medical treatment and hospital care of George W. Davis while he was suffering from his injuries, and paid therefor \$430.85, which was a reasonable sum to pay therefor. It also hired an undertaker to prepare his body for burial and furnish a coffin therefor, and paid such undertaker \$80, which was a reasonable sum to pay therefor. But the court refused to allow plaintiff for that money so expended as aforesaid, to which refusal of the court the plaintiff excepted.

“(12) This plaintiff on October 8, 1891, demanded of this defendant the \$5,000 on account of the payment of the judgment aforesaid, and also said sum of \$510.85, and this defendant refused to pay either of said sums.

“(13) Upon the 21st day of February, 1891, this plaintiff notified this defendant of the pendency of said suit of said administrator in the city court, and was called upon by this plaintiff to defend the same or settle the claim, but refused to have anything to do with the defense of the case or settlement of the claim, and thereafter, and prior to the rendition of the judgment of the city court of Birmingham in the last case, this defendant was fully notified of the pendency of the case

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in Walker county, the negotiations for a settlement, and that the case would be settled for \$5,000; and defendant made no objection to the amount, but said that it was a reasonable sum, and the only objection made by this defendant to the settlement was that it could not take any part in the defense or settlement, because it was insured by some insurance company which had the control of the matter.

“(14) The collision in which the newsboy, George W. Davis, was injured, occurred by reason of the engineer of the passenger train mistaking a signal, and starting from Birmingham with only the baggage car and two passenger coaches attached to his engine; having left the sleeping car, which was to be a part of the train, in Birmingham, and having started without the conductor or brakeman of the train. The engineer learned these facts upon stopping at Ensley, the first station west of Birmingham, and about five miles therefrom. The fireman was on the engine with the engineer and baggageman, in the baggage car attached to the engine. There were a good many passengers in the two coaches. Upon finding that he had left part of the train and the conductor and brakeman in Birmingham, the engineer asked the newsboy, Davis, if the red lights were on the rear end of the coach, and told him to get on the platform of the rear coach, and that the train would be backed up to Birmingham for the conductor, and also told him to signal if he saw anything in the way. Thereupon Davis said he would, and started towards the back end of the train, and was afterwards seen looking through the rear door of the coach, but inside thereof (said rear door was locked), but at the time of the collision was running through the rear coach, in the direction of the engine, and just after the collision was seen crawling on his hands in the aisle of the rear coach, dragging his legs, going towards the engine, and right ahead of a witness seated four or five seats from the rear of the coach. As the collision came, just before they struck, the newsboy came running past two witnesses who sat about the fourth seat from the rear of the coach; the same being the front of the coach while backing

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towards Birmingham. The newsboy came from towards the rear door of the coach, running towards the engine of the passenger train. The evidence fails to show that Davis obeyed the directions of the engineer, except as above stated. Under the laws of Alabama, railroad companies are liable for negligence of co-employees in some cases; and, under the laws of that state, Davis did not, by reason of the directions of the engineer, even had he acted under such directions and obeyed them, become an employee of the railroad company, or cease to be a servant of the news company."

The finding of facts by the trial court is exhaustive, supported by the evidence, and furnishes a sufficient statement for the discussion of the legal questions raised.

1. It is contended that the contract sued on is against public policy, and is for that reason void. The argument in support of this contention is made from the standpoint of the deceased news agent, and his relation to the railroad company, and is predicated on the well-settled principle that a common carrier cannot by contract limit its liability to a passenger for the negligence of its servants. It may be conceded that the news agent in this case was a passenger on the train in which he lost his life, and that the company could not, by a contract such as this, relieve itself of its duty to him as a common carrier of passengers, or of its liability to him for the negligence of its servants. *Jones v. Railway Co.*, 125 Mo. 666, 28 S. W. 883; *Magoffin v. Railway Co.*, 102 Mo. 540, 15 S. W. 76; *Mellor v. Railway Co.*, 105 Mo. 455, 16 S. W. 849; *Voight v. Railway Co.*, 79 Fed. 561, and cases cited; *Railroad Co. v. Lockwood*, 17 Wall. 359; *Starr v. Railway Co.*, 67 Minn. 18, 69 N. W. 632. But the contract in question is not with a passenger; it is not with a person to whom the company owed a duty as a common carrier of passengers; nor does it in terms, as it could not in effect, attempt to relieve the railroad company from any of its duties or liabilities as such. The contract is simply one of indemnity, by which the news company agreed, for a valuable consider-

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sengers—Con-
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ation, to indemnify the railroad company against loss which the latter might sustain by reason of the duty it would incur to the news agent, as a common carrier of passengers, in carrying out the contract. In *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 1176, it was held by the supreme court of the United States that: "No rule of law or public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants. By obtaining insurance he does not diminish his own responsibility to the owners of the goods, but, rather, increases his means of meeting that responsibility." In the subsequent case of *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365, that court was asked to review its announcement of this principle, to which it was replied: "Nor are we disposed to review our decision that common carriers can insure themselves against loss proceeding from the negligence of their own servants. The doctrine in the case cited has been referred to with approval in the subsequent cases of *Insurance Co. v. Adams*, 123 U. S. 67, 72, 8 Sup. Ct. 68, and *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 468, 9 Sup. Ct. 469." That this doctrine is supported by the great weight of authority is manifested by the cases cited in the above cases, by others in the brief of counsel for the plaintiff, and by some of those cited by counsel for the defendant. While in the great majority of the cases the principle has been applied to contracts of indemnity against damages for the loss of property, that it is equally applicable to like contracts against losses for injuries to passengers has in two very recent cases been directly decided. *Casualty Ins. Co.'s Case* (1896) 82 Md. 535, 34 Atl. 778; *Boston & A. R. Co. v. Mercantile Trust & Deposit Co. (Md.)* 34 Atl. 778; *Trenton Pass. Ry. Co. v. Guarantors' Liability Indemnity Co.* (1897) 60 N. J. Law, 246, 37 Atl. 609. In these cases the question

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was maturely considered, and thoroughly discussed; and in each, after a review of the authorities, the conclusion reached was that "a contract to indemnify a common carrier of passengers against losses occurring from injuries to passengers carried by it is not invalid, as against public policy, because it covers losses resulting from its negligence or the negligence of its servants." To the trenchant argument in support of this conclusion of McSHERRY, C. J., who delivered the opinion of the Maryland court of appeals in the first case, and which was highly commended, and followed by the supreme court of New Jersey in the second, no additional force could be added by any words of ours. We shall therefore content ourselves for argument on this branch of the case with the following extract from that opinion: "Whilst the carrier will not be permitted by contract or otherwise to exempt himself from liability for losses caused by his own negligence or the negligence of his servants, there is no reason of public policy which prohibits him from contracting with a third person for insurance against these very same losses. Consequently he may by insurance indemnify himself against loss of or injury to property intrusted to his care, even where the loss or injury is caused by his own or his servant's negligence. This was decided in *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U.S. 324, 6 Sup. Ct. 750, 1176; and the ground upon which the decision was based was that such insurance did not diminish the carrier's own responsibility to the owner of the goods, but increased the means of meeting that responsibility. Notwithstanding such insurance, the carrier remains liable to the owner or shipper of the goods, and by insuring them he merely contracts, as in every other instance of a reinsurance, with some one else for reimbursement for such loss. The doctrine announced in the *Phoenix Ins. Co.'s Case*, *supra*, was affirmed in *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365, and is the settled law of the land. A reasonable restriction by contract of his common-law liability and an

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insurance by the carrier of goods against loss are recognized by the law, and are not in contravention of its policy to-day, whatever that policy might have been heretofore. It is obvious that a carrier of passengers cannot by contract restrict, diminish, or limit that obligation to the public, or that duty to the passengers, which requires the exercise of the highest degree of care and diligence on his part. A contract which stipulates for or agrees to such relaxation, and therefore contemplates immunity from the carrier's own negligence, would be utterly void, precisely as would a contract purporting to relieve a carrier of goods from liability for losses occasioned by his own or his servant's negligence. But the policies before us are not contracts of that character. Neither in express terms nor by implication do they profess or purport to abridge in any way the carrier's common-law liability for injuries to passengers, employees, or strangers. These policies leave that liability precisely where and as complete as it was before they were written. They contain no provisions impugning or questioning in the slightest degree the full measure of that responsibility. It is perfectly manifest, therefore, that they are not in terms contracts restricting or attempting to restrict the carrier's conceded liability; and, if they contravene public policy at all, it must and can only be incidentally and indirectly. This is all that can be imputed to them. But they are all, it is alleged, repugnant to public policy, because, by furnishing the carrier with a fund with which to reimburse himself for losses caused by his own negligence, their inevitable tendency or effect is to induce less vigilance or to promote greater carelessness on the part of the carrier. Precisely the same reasoning would invalidate, as repugnant to public policy, every species of fire and marine insurance. To the extent that a fire insurance policy affords an individual protection against loss, to exactly the same extent it may be said the assured will become indifferent in guarding against casualties from fire. And in so far as a carrier may have a policy covering goods, and insuring them for his own benefit

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against losses arising from his or his servant's negligence, just so far will he be either tempted to be negligent or become indifferent as to vigilance. But in neither instance can it be said that, because a temptation to be negligent may possibly result from the possession of an insurance policy, the contract of insurance necessarily begets negligence or conflicts with public policy. Nor can we assume, as an unvarying rule, of which judicial notice will be taken, that a carrier of passengers, who has secured an indemnity to reimburse himself for losses which his own negligence may produce, will, merely because and solely in consequence of having such indemnity,—which, at best, is but limited and partial,—necessarily disregard the duty to exercise the highest degree of care. And, unless it be assumed as a postulate that the mere possession of an indemnity will of itself necessarily and invariably produce negligence, it does not logically follow that such a policy or indemnity is even incidentally or indirectly repugnant to public policy. The indemnity in no way affects the liability of the carrier to the person injured." The only distinction between those cases and the one in hand is that in those the contracts were formal contracts of insurance with insurance companies, while the contract in question is a contract of indemnity by a news company. But a mere contract of insurance is nothing more nor less than a contract of indemnity against loss, as is this with the defendant, and the principles governing must be the same in each; and, as nothing can be predicated of the contract in this case which could interfere with or affect the liability of the carrier to the person injured, there is nothing in it to take it out of the principle of those cases or render it obnoxious to public policy. Hence we conclude that this contract cannot be avoided as against public policy.

2. It is next contended that "the defendant is not liable on the contract sued on, for the reason that the newsboy was killed while acting as a lookout on plaintiff's train, and while outside of his employment as news agent." This theory of fact was presented upon the trial, and upon it the

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court declared the law to be: "(2) That the plaintiff could not take the newsboy, Davis, from the duties for which he was employed by the defendant, and send him to a place of danger, to assist in the plaintiff's own business, and, while said Davis was at said place of danger by its (the plaintiff's) own negligence, injure said Davis so that thereafter he died, and then in this action recover the amount paid by it on account of the injuries so inflicted by it on said Davis." If

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by Court—
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the court had found the fact to be as predicated in this contention, under this declaration of law its finding and judgment would have been for the defendant; but the court, in substance, found the fact to be that the newsboy was not in fact killed in a place of danger to which he had been exposed while in the employ of the plaintiff (that is to say, as "a lookout on plaintiff's train"), and the argument in support of it is aimed at the finding of fact, and not at an error of law, and, as the finding of the court is supported by the evidence, that finding is conclusive on appeal, as has been uniformly held in cases at law, where the issues of fact are submitted to the court. *Sutter v. Raeder* (Mo. Sup.) 50 S. W. 813; *Rogers v. Warren*, 75 Mo. App. 271; *Williams v. Monroe*, 125 Mo. 574, 28 S. W. 853; *Pitts v. Sheriff*, 108 Mo. 110, 18 S. W. 1091; *Hamilton v. Boggess*, 63 Mo. 233. This point must be ruled against the defendant.

3. The defendant's next contention is that the judgment of the circuit court is erroneous "for the reason that plaintiff's evidence showed that it compromised the claim

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demnity—Right
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made by the administrator, without securing the assent of the defendant." As was said by

WAGNER, J., in *Strong v. Insurance Co.*, 62 Mo. 289, the rule to be deduced from the whole current of authorities on this subject is that, "where one is bound to protect another from a liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation, and opportunity to control and manage it,"—a rule that has been frequently announced and approved in the decisions of this court. *Garrison v. Trans-*

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portation Co., 94 Mo. 130, 6 S. W. 701; *City of St. Joseph v. Union Ry. Co.*, 116 Mo. 636, 22 S. W. 794. That the defendant was notified of the pendency of the litigation which resulted in the judgment against the plaintiff for \$5,000 on a liability against which the defendant by its contract had agreed to indemnify it, and was afforded ample opportunity to control and manage that litigation if it had seen proper to do so, was abundantly shown by the evidence, and was so found by the court (thirteenth finding). The fact that the amount of the judgment was determined by agreement would not take the judgment without the protection of the defendant's covenant "to indemnify the plaintiff for all damage to which it may be subject or which it may have to pay." The only effect the consent could have would be to reduce the judgment from conclusive to presumptive evidence only of the defendant's liability on its contract, and of the amount thereof, and to afford it the right and privilege of showing either that the judgment was procured by a fraudulent collusion, was not founded upon a legal liability, or that it exceeded such liability. *Conner v. Reeves*, 103 N. Y. 527, 9 N. E. 439. This the defendant did not attempt to show, but, on the contrary, it affirmatively appeared from the evidence; and the court found, that the settlement was made in good faith, that there was a legal liability, for which the judgment was rendered, and that the amount thereof was reasonable (tenth and fourteenth findings). We find no error in this record for which the judgment of the circuit court should be reversed, and the same is affirmed. All concur.

NOTE.

Carriers of Passengers—Newsboys—Exemption from Liability.—A company is not liable for the death of a newsboy killed on one of its station platforms, when it has a contract with the news company that employed deceased, expressly exempting it from all liability to its news agents, newsboys, and their property, whether occasioned

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by the railroad's negligence or not. *Alexander v. Toronto & N. R. Co.*, 33 U. C. Q. B. 474; *Alexander v. Toronto & N. R. Co.*, 35 U. C. Q. B. 453.

In *Louisville, N. A. & C. Ry. Co. v. Keefer (Ind.)*, 5 Am. & Eng. R. Cas., N. S., 26, wherein an express messenger sought to recover for personal injuries *MONKS, C. J.*, said: "Appellee insists that a common carrier cannot protect itself by contract from liability for negligence to a person riding, as appellee was, on appellant's train, for the reason that such a contract is void, as against public policy. This is a correct statement of the law in this state, where the carrier is at the time performing a duty it owes to the public as a common carrier. A common carrier may, however, become a private carrier or bailee for hire, where, as a matter of accommodation, or special engagement, he undertakes to carry something which it is not his business to carry. *Railroad Co. v. Lockwood*, 17 Wall., on page 377; *Coup v. Railway Co.*, 56 Mich. 111, 22 N. W. 215; *Robertson v. Railway Co.*, 156 Mass. 525, 31 N. E. 650; *Railway Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257. Was appellant, in the carriage for the express company of goods and appellee, its agent in charge thereof, performing a duty as a common carrier, or was it performing a service foreign to its duties as a common carrier. and which it could not have been compelled to perform? Railroad companies are not required, by usage or common law, to transport the traffic of independent express companies over its lines, in the manner in which the traffic is usually carried and handled; and they need not, in the absence of a statute requiring it, furnish to such express companies equal facilities for doing an express business upon their passenger trains. *Sargent v. Railroad Corp.*, 115 Mass. 416; *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628."

In *Voight v. Baltimore & O. S. W. Ry. Co. (C. C.)*, 9 Am. & Eng. R. Cas., N. S., 835, *TAFT, C. J.*, criticising the decision in the *Keefer Case*, *supra*, said: "With deference to that court, I find it impossible to follow the reasoning upon which this conclusion is based. It is based upon distinctions supposed to be established by the supreme court of the United States in the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628. The cases cited in the beginning of this opinion clearly establish the fact that the relation between the railroad company and the express messenger, where there is no contract exempting the railroad company from liability, is that of a public carrier to a passenger for hire. The supreme court of the United States in the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 628, did not decide that the express business was not the business of a common carrier. The plain intimation of the opinion of the court was that the express business had become such a necessity that it was the duty

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of a railroad company to furnish express facilities to the public; but the point in judgment was that a railroad company was not obliged to furnish to an independent express company means for carrying on the express business upon its road. The court held that the railroad company was not a common carrier of common carriers, and that it sufficiently complied with any obligation which it was under to the public to furnish to them express facilities, if it made a contract with one company to do all the express business upon its road. It follows from that case that, if a railroad company chooses to do its own express business, it may exclude all express companies from its line. The case does not decide that the railroad company, when it contracts to transport the express matter of an express company, is not discharging its duty as a common carrier in offering the public express facilities. It is true that it is under no obligation to carry an express messenger as such. It may stipulate with the express company that it will provide one of its own servants to take charge of the express matter while upon its trains. But when it does carry an express messenger, it is discharging its function as a common carrier of persons."

The lines of reasoning adopted in the decisions may, it seems, be applied to the case of a news agent.

INDIANAPOLIS UNION RY. CO.

v.

DOHN.

(Supreme Court of Indiana, May 23, 1899.)

Station Grounds—Exclusive Privileges to Hackmen.*—A railroad company cannot, under the guise of rules, exclude from its station grounds all hackmen but those of a certain company, and thereby protect a contract from which it derives a revenue.

APPEAL by plaintiff from Marion county circuit court.
Affirmed.

Baker & Daniels, for appellant.

Schuyler Haas, for appellee.

**State v. Reed*, 12 Am. & Eng. R. Cas., N. S., 22, and *foot-note*.

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BAKER, J. Suit to enjoin appellee from entering upon the station grounds of appellant to solicit customers for his hack. The question arises upon appellant's exception to the conclusions of law upon the facts specially found. The facts are briefly these: Appellant is a corporation composed of various railway companies, and organized under the act of March 2, 1885 (Acts 1885, p. 30; Burns' Rev. St. 1894, §§ 5232-5250; Horner's Rev. St. 1897, §§ 3964a-3964s). Appellee is the driver of a public conveyance, commonly called a "hack," engaged in the business of transporting persons, without discrimination, from place to place, in and about Indianapolis. Appellant owns the Union passenger station at Indianapolis. It acquired the ground partly by condemnation and partly by purchase. The station building faces north. The tracks are south of the building, under a train shed. At the north of the building is an open area, bounded on the north by Jackson Place street, on the east by McCrea street, on the south by the station building, and on the west by Illinois street. The distance from Jackson Place street to the station building is 67 feet. Along the north line of the building is a sidewalk 16 feet wide. The residue of the area is paved, and used as a driveway to and from the entrance, which is at the center of the north front. This condition has continued 10 years. Appellant, by contract, undertook to give the Frank Bird Transfer Company the exclusive right to stand hacks on the area, and solicit business of persons leaving the station. Employees of the transfer company were accustomed to stand their hacks upon the area at all hours of day and night, and for such length of time as they pleased. Intending passengers were allowed to alight at the entrance of the station building from their private conveyances, or from public ones that had been employed to bring them there. Arriving passengers were permitted to be met at the entrance by their private conveyances, or by public ones previously engaged to meet them. All other vehicles except the transfer company's were excluded from the area. Appellant has had rules in force to this effect for many years. The city, by ordi-

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nance, permitted hacks to stand along the west side of McCrea street. An ordinance forbade hackmen to approach the station building nearer than fifteen feet to solicit business. Appellee, within three weeks before the commencement of this suit, at least a dozen times, drove his hack upon the area outside of the sidewalk, when he had no passenger to be discharged or to be received, and stayed from half an hour to an hour at a time, soliciting business from arriving passengers. Appellant several times told him that he should leave; that he was violating appellant's rules and regulations; and that he was trespassing on private property. Appellee each time refused to leave, stating that he had the right to stand his hack on the area so long as the transfer company was permitted to stand its hacks there, and that he intended to continue to come upon the area so long as the transfer company was given that privilege. From this finding it does not appear that appellee's conduct was boisterous, or that he was interfering with appellant in the discharge of its duties to the passengers of the proprietary and associate railway companies, or that he was annoying or interfering with the passengers, or that he was refusing to comply with any rule or regulation of appellant that applied to all hackmen.

Appellant has the undoubted right to make rules and regulations concerning the use of its station and grounds. *Lucas v. Herbert*, 148 Ind. 64, 47 N. E. 146. The term "rules and regulations," however, implies uniformity in operation, not discrimination, for the pecuniary advantage of the promulgator. The question is not what rules, uniform in application and promulgated by appellant impartially in the interest of the traveling public, and without a money consideration to itself, might be held reasonable, and what unreasonable, but whether appellant may, under the guise of rules, exclude from its station grounds all hackmen but one, and thus protect a contract from which it derives a revenue. A collection of authorities is made in *Lucas v. Herbert*, *supra*. To them may be added *In re Palmer*, L. R.

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6 C. P. 194; *Parkinson v. Railway Co.*, *Id.* 554; *Railway Co. v. Scovill*, 71 Conn. 136, 41 Atl. 246; *State v. Reed* (Miss.) 24 South. 308. The majority of the English cases appear to sustain, and the majority of the American to deny, the right of a railway company to grant such an exclusive privilege. See the note of Mr. Freeman in *Bus Co. v. Sootsma* (Mich.) 22 Am. St. Rep., on pages 699-702 (s. c. 47 N. W. 667), and the note of Mr. Lewis in *McConnell v. Pedigo* (Ky.) 5 Am. Ry. & Corp. Rep. on pages 715-724 (s. c. 18 S. W. 15). In some of the cases, constitutional and statutory provisions enter into the determination, but, in the main, the question is decided from the points of view of the powers of the corporation and of public policy. By the governing act, appellant is authorized "to regulate the use of its depots, stations, structures, appliances, and facilities." Appellant has only the powers that are expressly granted, and those that are necessary to the exercise of express grants. The act is searched in vain for appellant's authority to discriminate. If, under regulations that are uniform and impartial, equality fails by reason of limited facilities, appellant would not be at fault. Appellant acquired its grounds through the sovereign right of eminent domain, whether by purchase or by condemnation; for it could not obtain a broader right by grant than by force. Taking the land by the right of the state, for the purposes of public business, appellant should not be permitted to grant special privileges and immunities that the state could not. The city of Indianapolis is given the right to regulate the use of its streets by hacks. The city would hardly undertake to exclude all but one hack from the stand on McCrea street, in order to make good a rental for the exclusive privilege. The state intrusted appellant with the right to regulate the use of its facilities, not to increase its revenues by creating a monopoly. Appellant is chartered to furnish depot and switching facilities to its proprietary and associate companies, in connection with the transportation of persons and property on their railroads, not to engage in the hack business upon the

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streets of Indianapolis. True, appellant only rented its grounds to the transfer company. But the only use of the grounds, of advantage to the transfer company, is to base thereon the use of the streets for revenue. If appellant has authority to grant that advantage to another, it may take it to itself. The passengers' payment for transportation includes payment for their common use of the station facilities. If they are not entitled to have appellant use those facilities disinterestedly for their advantage, they are at least entitled to have appellant refrain from coercing them into yielding further tribute; for, under threat of having otherwise to leave the grounds, they pay a fare that necessarily includes appellant's rental. Appellant's action tends to restrict competition and to enhance prices, and is therefore against public policy. *Oil Co. v. Nunnemaker*, 142 Ind. 560, 41 N. E. 1048. Appellant sought from a court of equity the extraordinary remedy of injunction. It has failed to show any ground for equitable interposition. Judgment affirmed.

FULTON

v.

BULLARD.

(Circuit Court of Appeals, Sixth Circuit, May 15, 1899.)

Injury to Employee—Presumption of Negligence—Rebuttal.—The presumption of knowledge on the part of a railway corporation of a defect in a car used by it, which the statute of Ohio declares shall exist where one of the company's employees sustains an injury because of such defect, is not rebutted by anything less than evidence that there was an actual and proper inspection, and is not rebutted by proof of the employment of a competent inspector.

Inspection of Foreign Cars.*—Under the common law a railway company is responsible to its employee for all defects in foreign

*See note, 9 Am. & Eng. R. Cas., N. S., 788 *et seq.*

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cars which would be disclosed by a reasonably careful inspection before admitting them into its trains.

Fellow Servants.*—A car inspector is not the fellow servant of a brakeman who sustains an injury through a defect in a foreign car, provided the defect might have been discovered by the exercise of reasonable care in the inspection of the car by the inspector.

Latent Defects.—Where the evidence made it a question for the jury whether a mere visual inspection was sufficient, it was proper to modify a requested instruction to the effect that if the defect was latent,—that is not visible,—the company would not be liable for an injury to an employee caused by such defect.

Question for Jury.—The inspector testified that he properly inspected the car in question, but it was manifest that his testimony was based not upon any recollection of such car, but upon his habit and the record made of cars inspected, and his testimony was contradicted by circumstantial evidence. *Held*, that whether he had made a proper inspection was a question for the jury.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Lawrence Maxwell, for plaintiff in error.

Harvey Scribner, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge. Edward McCarn, a brakeman in the service of the plaintiff in error, was killed, while descending from the top of a moving car, by reason of the defective character of a grab iron, which broke off and threw him beneath the wheels. This grab iron was attached to the end of a foreign car, which belonged to the Grand Trunk Railway Company, which had been received the day before from a connecting railway company. The grab iron was of the usual construction, and had been attached to the end of the car, in the usual way, by two screws, each of from three to four inches in length; one being at each end of the iron. An examination after the accident disclosed the fact that one of these screws was badly rusted, and had long been broken, so that it supported one

*See note at end of case.

end of the iron by a stub only one-half inch in length, which rested in wood much decayed. The screw at the other end appeared to have been freshly broken or wrenched in two; a part being pulled out with the grab iron when it came off the car. That this defective grab iron was the direct cause of the death of the intestate was not disputed. It constituted an attachment upon a car at the time being operated by the receiver upon a line of railway within the state of Ohio.

The Ohio act of April 2, 1890, so far as it bears upon the facts of this case, furnishes a rule of law which must govern its disposition. The second section of that act makes it unlawful for any railway corporation to knowingly or negligently use or operate any car that is defective or upon which any attachment thereto belonging is defective. It also provides that, if an employee of any such corporation shall receive any injury by reason of any defective attachment thereto belonging, the corporation "shall be deemed to have had knowledge of such defect before and at the time such injury was so sustained," and that, when the fact of such defect shall be made to appear by such employee or his legal representatives in an action against any such railroad corporation for damages on account of such injuries so received, the same shall be "*prima facie* evidence of negligence on the part of such corporation." 87 Ohio Laws, 149. This section of this statute recognizes no distinction between the liability of a railway company for injuries sustained by its employees through the operation of defective cars owned by such corporation and injuries sustained from defects in foreign cars. The statute applies to cars "owned and operated, or being run and operated, by such corporations." The liability is the same in either case. How, then, may this *prima facie* evidence of corporate negligence be rebutted? Prior to the passage of this act the decisions of the supreme court of Ohio were to the effect that a railroad company was not liable to a brakeman for the negligence of a car inspector, it being held that the brakeman and the inspector were fellow servants. Railroad Co. v. Fitzpatrick, 42 Ohio St. 318;

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Railroad Co. v. Webb, 12 Ohio St. 475. The third section of this act changes the law of fellow servant in the cases to which it applies. That section provides that:

"In addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employee of such company, is not the fellow servant, but superior of such other employee, also that every person in the employ of such company having charge or control of employees in any separate branch or department, shall be held to be the superior and not fellow servant of employees in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

This section would seem to have no bearing upon the case now to be decided, inasmuch as the inspector employed by the receiver had no subordinates, and had no power "to direct or control any other employee" of the receiver. He was sole inspector, with no power of direction or control and no assistants. The situation is, therefore, unique. The inspector, under the decisions of the Ohio courts, which doubtless constituted a part of "the now-existing law" referred to in this section, was the fellow servant of the brakeman. This "now-existing law" is not changed by this section, except in so far as specifically provided by this enactment. Conceding, therefore, that the third section has no application to the peculiar facts of this case, we reach the inquiry as to the effect of the second section, which creates a statutory presumption of corporate knowledge of the defect from evidence of its existence and an injury sustained by an employee engaged in operation of such defective car. Is that *prima facie* case rebutted by evidence that the railroad corporation had furnished a sufficient and competent inspector? This question finds its answer in the case of *Railway Co. v. Erick*, 51 Ohio St. 146-162, 37 N. E. 128. One of the questions in that case arose upon the refusal of the trial court to instruct the jury that if the company had employed a competent in-

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spector, whose duty it was to carefully inspect all cars and their appliances before they were permitted to go out, the company would not be liable if he neglected to make such inspection. This, in various forms, was refused. The supreme court held that the presumption of knowledge of the defective condition of the car in question, raised by the proof of the defect and injury, under the second section of the act of April 2, 1890, was not rebutted by proof of the employment of a competent and sufficient inspector. Upon this question the court said:

"The presumption of knowledge of the defect, before and at the time of the injury, is, by the statute, chargeable to the company; and this statutory presumption cannot be overcome by proof of facts which only raise a presumption that the company did not have such knowledge. Competent and careful inspectors are presumed to properly inspect the cars and their attachments, but such presumption would not overcome the statutory presumption of knowledge of defects before and at the time of the injury. It would take an actual and proper inspection, or its equivalent, to overcome the statutory presumption of knowledge of such defects. It will be noticed that this section of the statute also provides that, in the trial of a personal injury case against a railroad company, the fact of such defect in its cars or their attachments shall be *prima facie* evidence of negligence on the part of such corporation."

That this section of the statute constitutes a mere rule of evidence, as decided by the same court in *Pennsylvania Co. v. McCann*, 54 Ohio St. 10, 42 N. E. 768, and *Hesse v. Railroad Co.*, 58 Ohio St. 167, 50 N. E. 354, is no answer. These cases in no way diminish the weight of the case of *Railway Co. v. Erick*, *supra*, as an authoritative construction of the statute, in which it is held that the statutory presumption of knowledge is not rebutted by anything less than evidence that there was "an actual and proper inspection."

Aside from the effect to be given to the second section of

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the act of 1890, we hold that the duty of inspecting foreign cars is a duty due from the master to his servant, and that the master is responsible to the servant for all defects which would be disclosed by a reasonably careful

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Foreign Cars.**

inspection. The well-known course of business pursued by carriers in this country involves so large a use of foreign cars as to make it inadmissible that any distinction should be recognized between the duty of caring for the safety and protection of employees engaged in operating such cars and that exacted in respect to cars owned or controlled by the carrier. Employees can no more be said to assume the responsibility for injuries due to the defective condition of foreign cars than they can be said to assume the risk arising from defects in domestic cars which might have been discovered by proper inspection. In the one case, as much as in the other, the inspector is discharging the duty of the master to his servants, and for his negligence in this particular the master is responsible. The question is one of general, and not local, law, unless controlled by statute. It is, therefore, a question for the courts of the United States to decide upon their own judgment as to the common law controlling the question. *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983.

To support the contention that, in the matter of the inspection of foreign cars, the inspector is the fellow servant of the men operating such cars, the cases of *Mackin v. Railroad Co.*, 135 Mass. 201, and *Coffee v. Railroad Co.*, 155 Mass. 21, 28 N. E. 1128, have been cited. In *Mackin v. Railroad Co.*, the court, in discussing the duty of carriers to receive from other companies cars to be forwarded, said:

"The obligation of drawing cars over its road would not extend to such as were in an unsafe condition; but, as to cars so received, the duty of the defendant is, not that of furnishing proper instrumentalities for service, but of inspection, and this duty is performed by the employment of sufficient, competent, and suitable inspectors, who are to

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act under proper superintendence, rules, and instructions; and, however it may be as to other cars, the inspectors must be deemed to be engaged in a common employment with the brakeman, as to such cars, while in transit, and until ready to be inspected for a new service."

In the later case of *Chandler v. Railroad Co.*, 159 Mass. 588, 589, 35 N. E. 89, the court declined to extend the exception made in the earlier cases to foreign cars employed in any way by the receiving company for its own uses during the process of forwarding them.

The rule which we deduce as having the support of the weight of authority and reason is that a railroad company owes to its servants engaged in handling or operating foreign cars the legal duty of not exposing them to dangers arising from defects which might be discovered by reasonable inspection before they are admitted into its trains. *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344; *Goodrich v. Railroad Co.*, 116 N. Y. 398-401, 22 N. E. 397. In the case last cited the New York court of appeals said:

"It was decided in *Gottlieb v. Railroad Co.*, 100 N. Y. 462, 3 N. E. 344, that a railroad company is bound to inspect the cars of another company, used upon its road, just as it would inspect its own cars; that it owes this duty as master, and is responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection; that, when cars come in from another road which have defects visible or discernible by ordinary examination, it must either remedy such defects or refuse to take them. This duty of examining foreign cars must obviously be performed before such cars are placed in trains upon the defendant's road, or furnished to its employees for transportation. When so furnished, the employees whose duty it is to manage the trains have a right to assume that, so far as ordinary care can accomplish it, the cars are equipped with safe and suitable appliances for the discharge of their duty, and that they are not to be exposed to risk or danger through the negligence of their employer."

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This rule, as thus stated, was approved and applied in *Railroad Co. v. Mackey*, 157 U. S. 72-91, 15 Sup. Ct. 491. In concluding a discussion of the question, the court, speaking by JUSTICE HARLAN, after quoting from *Goodrich v. Railroad Co.* the paragraph we have set out above, said:

"We are of opinion that sound reason and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employees to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its trains."

In the later case of *Railway Co. v. Archibald*, 170 U. S. 665-669, 18 Sup. Ct. 777, the supreme court again had under consideration the duty of a railroad company to its servants in respect to foreign cars, and followed the doctrine announced in the case of *Railroad Co. v. Mackey*, cited above, saying:

"That it was the duty of the railway company to use reasonable care to see that the cars employed on its road were in good order and fit for the purposes for which they were intended, and that its employees had a right to rely upon this being the case, is too well settled to require anything but mere statement. That this duty of a railroad as regards the cars owned by it exists also as to cars of other railroads received by it, sometimes designated as 'foreign cars,' is also settled."

That this duty is not discharged by merely furnishing an inspector competent to discharge the duty is very clear, and that this was the holding in both the cases decided by the supreme court of the United States, and cited above, is most apparent from an examination of the facts of the cases, as well as from the language employed by the court in considering the duty as one identical in character with that resting upon the master in respect to the inspection of his own cars, before admitting them into its trains. That the master is responsible for the negligence of such an inspector, and that the inspector is not the fellow servant of those

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operating such foreign cars, is the necessary conclusion from the character of the duty.

In *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, the court held that the inspector was not the fellow servant of a brakeman who was injured through the negligence of the inspector, who failed in his duty as inspector. Upon the same grounds he is not the fellow servant of a brakeman who sustains an injury through a defect in a foreign car, provided the defect was one which might have been discovered by the exercise of reasonable care in the proper inspection of the car by the inspector.

At the close of the charge, which included much upon the general subject of the exercise of care in making such an inspection as was possible and usual when foreign cars were received, and to which no exception was taken, the court was asked to charge as follows:

"If the defect was latent,—that is, one not visible,—the defendant is not liable, if the injury occurred by reason of such latent or invisible defects."

In response to this request the court instructed the jury as follows:

"I would not put it upon the ground of visibility alone. I will give it as I have already done,—if it was not discoverable by fair and reasonable and an ordinarily prudent inspection. It does not depend upon the mere question of visibility alone, but it depends upon that. Of course, it is an important circumstance. If it was visible, so that everybody could see it, why, it would be negligence not to see it. But if it was latent and concealed, in the sense that a reasonable and ordinarily prudent inspection would not discover it, then the railroad company is not liable."

The refusal to instruct in the words of the request is now assigned as error. There was evidence tending to show that neither the broken and rusted condition of one of the screws by which the grab iron was held to the wood of the car nor the decayed condition of the wood surrounding this broken

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screw was visible from the surface. Indeed, the evidence strongly indicated that no mere visual inspection would have disclosed the dangerous condition of this grab iron. But would a mere visual inspection of such an attachment be due and reasonable inspection of such an instrumentality? Was no other inspection reasonable and possible, under the circumstances under which such cars are received and forwarded? Would a mere visual inspection of a car wheel be regarded as ordinary and reasonable? If the tapping of the wheel with a hammer would disclose by sound the presence or absence of a fracture which might not be disclosed to the eye, could it be said that so ready and accessible a test should not be applied? As much may be said touching the firmness and security with which this grab iron was fastened to the end of this car. This grab iron was one of the rounds in a ladder provided for the use of brakemen, whose duty called them more or less often to the top of such cars. The life of the brakeman may often depend upon the firmness with which such an iron is attached to the end or side of the car. Was there no other ready means of ascertaining whether it was properly and safely attached than a visual inspection? If the application of some force would disclose a dangerous weakness, ought not such a test to be applied? The plaintiff in error did not regard a visual test as alone sufficient, for the inspector says that his habit was to go up such ladders at one end of a car and down the ladder at the other end. Did he do that in this instance? If he did, did he do so in such a way as to throw his weight upon this particular iron, or upon that end of the grab iron supported by the broken screw? If not, would such a test be feasible and calculated to disclose a broken screw or rotten wood? These were proper questions for the jury to consider, and it was not error to modify this request as was done.

Neither was it error to refuse the request for an instruction to find for the defendant. This request was based upon the

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insistence that there was no evidence upon which the jury could reasonably find that the railroad company had been guilty of negligence. The inspector testified that he did inspect this car upon the day it was received, being the day before the happening of the accident. He says he did so by going up one ladder and down the other. He also testified that neither the condition of the broken screw nor of the wood into which it had been driven could be discovered by the eye. The inspector also testified that he inspected all cars for his company, and that he frequently inspected as many as 50 in one day. It is true that he said he inspected this particular car and this particular grab iron in the manner stated; that is, by going up and down the ladder in which it was one of a series of four or five iron handholds, one above another. But it is manifest that his testimony was not based upon any memory of this particular car, but depended upon his habit and the record made of cars inspected. Did he in truth and fact test this particular grab iron by any means likely to disclose its weakness? It was held at one end only by a rusted stub of the screw one-half inch in length, and that embedded in decayed wood, though this fact did not show externally. Is it likely that this iron would not show its weakness if any weight had been thrown upon the broken screw? The grab iron was about two feet in length. If the weight of a man was thrown upon the end supported by the sound screw, it might hold. But, if that weight was thrown upon the other screw, was it likely to indicate any firmness? The facts were not voiceless. They speak for themselves. The condition of the screw supporting one end, and of the wood into which it was screwed, was such, as disclosed by examination after the accident, as to make it obvious that any strain thrown upon that end would disclose the weakness with which it was attached. Did the inspection made involve any strain upon the weak end of this grab iron? Did the inspector use this ladder at all? If so, did he use it in such way as to really afford a test of the firmness of its

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attachment? If the inspection made did not involve such a physical test as was feasible, and calculated to disclose just such an infirmity as existed, would not a jury be warranted in finding either that no physical test at all was made, or that, if made, it was so carelessly made as to be useless? The circumstances were such as that it was not error to take the opinion of the jury.

Let the judgment be affirmed.

NOTE.

Fellow Servants—Car Inspectors as.—See generally 12 Am. & Eng. Enc. Law (2nd Ed.) *sub tit.* Fellow Servants, at p. 958.

(1) *View That Car Inspectors and Repairers Are Vice-Principals.*—In the following jurisdictions it has been held that car inspectors and repairers are vice-principals.

United States.—Northern Pac. R. Co. *v.* Herbert, 116 U. S. 642.

Colorado.—Denver Tramway Co. *v.* Crumbaugh, 23 Colo. 363.

Illinois.—Chicago, etc., R. Co. *v.* Hoyt, 122 Ill. 369, 31 Am. & Eng. R. Cas. 309.

Indiana.—Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, 10 Am. St. Rep. 67.

Iowa.—Braun *v.* Chicago, etc., R. Co., 53 Iowa 595, 36 Am. Rep. 243.

Kansas.—Atchison, etc., R. Co. *v.* Seeley, 54 Kan. 21.

Kentucky.—See Illinois C. R. Co. *v.* Hilliard, 99 Ky. 684, 18 Ky. L. Rep. 505.

Michigan.—Morton *v.* Detroit, etc., R. Co., 81 Mich. 423.

Minnesota.—Tierney *v.* Minneapolis, etc., R. Co., 33 Minn. 311, 53 Am. Rep. 35, 21 Am. & Eng. R. Cas. 545; Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, 11 Am. & Eng. R. Cas. 193.

Missouri.—Condon *v.* Missouri Pac. R. Co., 78 Mo. 567, 17 Am. & Eng. R. Cas. 583.

New York.—Bailey *v.* Rome, etc., R. Co., 139 N. Y. 302. But see Gibson *v.* Northern Cent. R. Co., 22 Hun (N. Y.) 289.

Texas.—Houston, etc., R. Co. *v.* Marcelles, 59 Tex. 334, 12 Am. & Eng. R. Cas. 231.

West Virginia.—Cooper *v.* Pittsburgh, etc., R. Co., 24 W. Va. 38.

(2) *View That Car Inspectors and Repairers Are Not Vice-Principals.*—Alabama.—Nashville, etc., R. Co. *v.* Foster, 10 Lea (Tenn.)

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351, 11 Am. & Eng. R. Cas. 180 (decided under Alabama statute).

Arkansas.—St. Louis, etc., R. Co. v. Rice, 51 Ark. 467.

Maryland.—See *Wouder v. Baltimore, etc., R. Co.*, 32 Md. 411, 3 Am. Rep. 143.

Massachusetts.—*Mackin v. Boston, etc., R. Co.*, 135 Mass. 201, 15 Am. & Eng. R. Cas. 196, 46 Am. Rep. 456.

Ohio.—*Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318, 17 Am. & Eng. R. Cas. 578.

Pennsylvania.—See *Philadelphia, etc., R. Co. v. Hughes*, 119 Pa. St. 301.

KINCADE

v.

CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Iowa, April 6, 1899.*)

Liability of Master for Fellow Servant's Torts—Statute.*—Under the statute of Iowa making a railroad company liable for injuries to its employee caused by any wrongful act of a co-employee which is connected in any manner with the use and operation of the railroad, the company is not liable unless the tortious act is one within the scope of the fellow servant's employment.

Same—Same—Scope of Employment.*—Where a railroad employee on a hand car strikes at another employee because of a personal matter between the two, and thereby causes another co-employee to fall from the car and sustain injuries, there can be no recovery against the common employer, as the tortious act was not one within the scope of employment.

APPEAL by plaintiff from Appanoose county district court.
Affirmed.

Porter & Porter, for appellant.

Mabry & Payne and *J. C. Cook*, for appellee.

WATERMAN, J. Plaintiff was in the employ of defendant company as a section hand. At the time of his injury he

*See notes at end of case.

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was returning from work in company with nine other employees on a hand car. Plaintiff stood on the front of the car, facing to the rear. He had hold of the lever, and was aiding in propelling the car. Two of his companions engaged in a political discussion. One of them (McCoy) was standing on the right of the plaintiff. The other (Howard) was on his left. This discussion culminated in McCoy striking Howard. The latter, in attempting to avoid the blow, pushed against plaintiff, throwing him to the ground in such a manner that the car passed over him, and inflicted the injuries for which he sues.

Section 1307 of the Code of 1873 is as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person including employees of such corporation in consequence of the neglect of agents or by any mismanagement of the engineers or other employees of the corporation and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed. * * *"

Appellee treats the case as though plaintiff's injury was willfully caused by a co-employee. We cannot take this view of the facts. While the blow struck by McCoy was willful, in the sense that it was intentional, he had no purpose to harm plaintiff thereby. The effect upon plaintiff was purely accidental. But this distinction is not material, as will be seen from what is further said.

The question presented is, was the negligent act of McCoy of such a character as that the company is liable therefor, under the section quoted? It is a familiar rule that a master

Liability of Master for Fellow Servant's Torts—Statute.

is not liable to a third person for the torts of a servant, unless the latter at the time is acting within the scope of his employment. Wood, Mast. & Serv. 277; Cooley, Torts, 532; 2 Thomp. Neg. 884. We take this to be, also, the test of responsibility under section 1307. The master is not liable

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to an employee for an injury done by a co-employee, when he would not have been liable to a third person injured by a like act. It is not always easy to determine when an act done is within the scope of the servant's employment. The distinction, however, is always preserved. In *Cobb v. Railway Co.* (S. C.) 15 S. E. 878, it was held that a railway company was liable for the misconduct of an engineer in unnecessarily blowing off steam so as to frighten a horse and cause him to run away, but not for the misconduct of the trainmen in shouting at the animal, although the noise made by them may have aided in causing the accident. So, in *Railway Co. v. Mogk*, 44 Ill. App. 17, the plaintiff in error was held not liable for the act of a driver of one of its cars who willfully struck a child in the street, with the end of the lines, as the car was passing. The rule seems to be that the master is liable, whether the act of the servant be willful or negligent, if it is done or attempted in the master's interest; but where the line of duty is wholly departed from, and the act is done for the servant's own purpose, though it may be done while the servant is pursuing the master's business, the latter will not be liable. 2 Thomp. Neg. p. 886, § 4. There is, however, no claim in the case at bar that the blow struck by McCoy was an act done within the scope of his duty. It was clearly not. The contention of the plaintiff is that, because he was in the performance of his duty at the time of his injury, the defendant is liable. But it is by the act of McCoy, and not by the conduct of plaintiff, that defendant's responsibility is to be fixed. If McCoy was not defendant's agent in doing this act, there can be no liability here. That he was not acting for his employer, but sought to serve some independent purpose of his own, seems too clear for discussion. As we have said, it is practically conceded by appellant. In *Wiltse v. Bridge Co.* (Mich.) 30 N. W. 370, defendant was held not liable for any injury caused to a traveler through his horse being frightened by objects negligently displayed by the toll

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keeper of defendant's bridge. It is said in this case, "The rule, briefly stated, is, the responsibility of the master grows out of, is measured by, and begins and ends with, his control of the servant." See, also, *Golden v. Newbrand*, 52 Iowa, 59, 2 N. W. 537; *Porter v. Railway Co.*, 41 Iowa, 360; *Marrier v. Railway Co. (Minn.)* 17 N. W. 952; *Curtis v. Dinneen (Dak.)* 30 N. W. 148; *Mouse v. Newspaper Co. (Minn.)* 59 N. W. 941; *Keating v. Railway Co. (Mich.)* 56 N. W. 346; *Winkler v. Fisher (Wis.)* 70 N. W. 477. The district court did not err in taking the case from the jury, and rendering judgment in defendant's favor. Affirmed.

NOTES.

Liability of Master for Torts of Servant Committed outside Scope of Employment.—The earlier cases, both in this country and in England, support the doctrine that the principal cannot be held liable for the wanton or malicious acts of the agent. The later decisions, however, incline to the rule making the principal liable for acts of the agent done within the scope of his employment, though they be wanton or malicious, and relieving him from responsibility when the agent steps aside from the business of his principal and wantonly or maliciously commits an act to accomplish an independent purpose of his own. *M'Manus v. Crickett*, 1 East 106; *Croft v. Alison*, 4 B. & Ald. 590, 6 E. C. L. 614; *Gilliam v. South, etc.*, Alabama R. Co., 70 Ala. 268; *Johnson v. Barber*, 10 Ill. 426, 50 Am. Dec. 416; *Tuller v. Voight*, 13 Ill. 278; *Illinois Cent. R. Co. v. Downey*, 18 Ill. 259; *Oxford v. Peter*, 28 Ill. 434; *Cleveland Co-operative Stove Co. v. Koch*, 37 Ill. App. 595; *Evansville, etc., R. Co. v. Baum*, 26 Ind. 70; *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 126, 7 Am. Rep. 418; *Rounds v. Delaware, etc., R. Co.*, 64 N. Y. 134, 21 Am. Rep. 597; *Hoffman v. New York Cent., etc., R. Co.*, 87 N. Y. 32, 41 Am. Rep. 337; *Cantrell v. Colwell*, 3 Head (Tenn.) 471. See also *Middleton v. Fowler*, 1 Salk. 282; *Poulton v. London, etc., R. Co.*, L. R. 2 Q. B. 538; *Lyons v. Martin*, 8 Ad. & El. 512, 35 E. C. L. 448; *Richoux v. Mayer*, 29 La. Ann. 828; *Gulf, etc., R. Co. v. Moore*, 69 Tex. 157. Lawless acts of employees, adverse to interests and contrary to orders of employer cannot be imputed to it as having been done by its agents and servants. *Greisner v. Lake Shore, etc., R. Co.*, 102 N. Y. 563, 26 Am. & Eng. R. Cas. 287; *Marion v. Chicago, etc., R. Co.*, 59 Iowa 428, 8 Am. & Eng. R. Cas. 177; *Louisville, etc.,*

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R. Co. v. Kelley, 92 Ind. 371, 13 Am. & Eng. R. Cas. 1. A master is not liable for the wilful and malicious acts of his servant when they happen outside of the scope of his employment and are in no way connected with the execution of his master's business or orders. Lyons v. Martin, 8 A. & E. 512; Coleman v. Riches, 16 C. B. 104; Frazer v. Freeman, 43 N. Y. 566; Greisner v. Lake Shore, etc., R. Co., 102 N. Y. 563, 26 Am. & Eng. R. Cas. 287.

Same—Assaults.—A corporation is not liable, unless the servant making the assault appears to have been acting within the scope of his authority, or there was a subsequent ratification of his conduct by the corporation. Ward v. General Omnibus Co., 42 L. J. C. P. 265; Turner v. North Beach, etc., R. Co., 34 Cal. 594; Johnson v. Chicago, etc., R. Co., 58 Iowa 348, 8 Am. & Eng. R. Cas. 206; Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 8 Am. St. Rep. 512; Ware v. Barataria, etc., Canal Co., 15 La. 169, 35 Am. Dec. 189; McKeon v. Citizens' R. Co., 42 Mo. 79; Higgins v. Watervliet Turnpike Co., 46 N. Y. 23, 7 Am. Rep. 293; Isaacs v. Third Ave. R. Co., 47 N. Y. 122, 7 Am. Rep. 418; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373. See also Rounds v. Delaware, etc., R. Co., 64 N. Y. 129, 21 Am. Rep. 597; M'Manus v. Crickett, 1 East 106; Wood v. Detroit City St. R. Co., 52 Mich. 402, 50 Am. Rep. 259.

REDDINGTON

v.

CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Iowa, April 7, 1899.)

Injury to Employee—Liability for Negligence of Fellow Servant—"Operation of Railroad"—Statute.*—The negligence of a railroad employee in handling a derrick in coaling a railroad engine which injures a fellow servant engaged in the same work, is not a wrongful act in any manner connected with the use and operation of a railroad within the meaning of the statute making a railroad liable for injuries to its employee caused by any negligence of a fellow servant which is connected in any manner with the use and operation of the railroad.

APPEAL by plaintiff from Cerro Gordo county district court.
Affirmed on rehearing.

*See note, 9 Am. & Eng. R. Cas., N. S., 9.

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This case is before us for further consideration, a rehearing having been granted. For former opinion, see 11 Am. & Eng. R. Cas., N. S., 440, 75 N. W. 679. It is an action to recover for personal injuries sustained by plaintiff when in the employment of defendant as head brakeman on a freight train. Plaintiff alleges that said injuries were caused by the neglect of one Anderson, a co-employee, while he and the plaintiff were engaged in coaling the engine that drew the train upon which plaintiff was employed as brakeman. Defendant answered, denying generally, and alleging contributory negligence on the part of the plaintiff. At the close of the evidence for plaintiff, the defendant moved for a verdict upon several grounds, which, in effect, are as follows: That it does not appear that plaintiff and any co-employee of his were handling railroad machinery moved on railroad tracks at the time of his injury; that it does not appear that plaintiff was at the time of his injury exposed to the hazards or dangers incident to the use and operation of the railroad, nor that he was injured by any wrongful act in any manner connected with the use and operation of a railroad; that it does not appear that plaintiff was free from negligence contributing to his injury, but it does appear that he was guilty of such negligence. This motion was sustained, and a verdict and judgment rendered for the defendant. Plaintiff appealed.

GIVEN, J. 1. The facts shown by the evidence necessary to be noticed are these: On and for some time prior to November 1, 1894, the plaintiff was in the employment of the defendant as head brakeman on a freight train, and on that day was so employed on a train running west from North McGregor to Mason City. Defendant had at different stations, including the station of Monona, coal sheds from which to supply its engines, at each of which one or two men, known as "coal heavers," were employed to have the coal ready, and to put the same on the engines, or to assist in doing so. Where there was but one coal heaver employed at a shed, as is the case at Monona, it was the duty of the head brakeman to

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assist him. In coaling the engine drawing the train on which the brakeman worked at Monona, the coal was put into large iron buckets, and placed in position on an elevated platform by means of a derrick, with a windlass, preparatory to the coming of engines for coal. In coaling an engine at Monona, the coal heaver stood on the ground at the foot of the derrick, and worked the windlass so as to raise and lower the buckets, and assist in swinging them to and from the engine, by turning the derrick. It was the duty of the head brakeman, in assisting in coaling the engine of his train at Monona, to go upon the elevated platform, to give signals to the man at the windlass when to hoist and lower the buckets; to hook the derrick chain to a full bucket, give a signal to hoist it, and, when sufficiently lifted, to aid in swinging it around over the tender; to open the spring that holds the bottom of the bucket; to replace the bottom when the bucket was emptied; and to aid in swinging it around to the place on the platform. It was while thus employed that plaintiff was injured. He had hold with both hands of an empty bucket that had been lifted above his head, and was walking backward, with his head under the bucket, pulling it towards him, for the purpose of swinging it into place. Without signal from him, the bucket was lowered so as to strike him and knock him off the platform to the ground, about eight feet below, by reason of which he was injured. At the time this occurred, the engine and train were standing still; the engineer being on the ground, oiling the engine, and the fireman engaged in drawing clinkers from the firebox. The negligence charged is that, while plaintiff was so employed, "the said Anderson negligently and recklessly let loose of said crank, which he was then managing for the purpose of raising and lowering said bucket, while said bucket was being moved back to said coal shed after the same had been unloaded, without any notice or warning whatsoever that he intended so to do."

2. Section 1307 of the Code of 1873, under which this action is brought, is as follows: "Every corporation operat-

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ing a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or of omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." This section, as originally enacted, and as amended, has been frequently construed by this court. These various decisions were carefully reviewed in the recent case of *Akeson v. Railroad Co.*, 75 N. W. 676; and, adhering to the law as therein announced, we proceed to a further consideration of this case. We said in *Akeson's Case* as follows: "The only dangers peculiar to railroading are those occasioned by the movement of the engines, cars, and machinery on the track, or directly connected therewith. It is evident that the statute contemplates such injuries only as are caused by the negligent acts of employees so engaged. In no other proper sense is a railroad used and operated. The peculiarity of the railroad business, which distinguishes it from any other, is the movement of vehicles or machinery of great weight on the tracks by steam or other power; and the dangers incident to such movement are those the statute was intended to guard against. If, then, the injury is received by an employee whose work exposes him to the hazards of moving trains, cars, engines, or machinery on the track, and is caused by the negligence of a co-employee in the actual movement thereof, or in any manner directly connected therewith, the statute applies, and recovery may be had. Beyond this, the statute affords no protection. The purpose of the lawmakers was evidently not to make men, because employed by railroad companies, favorites of the law, but to afford protection owing to the peculiar hazards of their situation." A rehearing was granted, that we might again, aided by further arguments,

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consider whether the facts bring this case within said section 1307, as construed in the Akeson Case.

3. The plaintiff does not allege or claim that he was injured by the actual movement of machinery on the railroad track, but insists that the handling of the derrick in coaling the engine was "directly connected therewith,"—that is, with the movement of the engine,—and that, therefore, his case comes within the provisions of said section 1307, as construed in *Akeson v. Railroad Co.*, *supra*. In that case Akeson and Forshay were employed to coal engines from coal cars alongside of the engine, by carrying coal from the car to the tender, in handbarrows, over planks laid from the car to the tender as a footway. They had in this way coaled an engine that had been detached from a passing train and moved into position for that purpose. The coaling having been completed, Forshay remained upon the engine, to go on it to the water tank, where it was to be immediately moved. Plaintiff passed over the plank, onto the coal car, whereupon Forshay, for the purpose of allowing the engine to be immediately moved, shoved the plank onto the car, and in so doing struck and injured the plaintiff. We said: "The very purpose of removing the plank was to enable the engine to move, and if, in doing this, Forshay was negligent, such negligence was so clearly connected with the movement as to come within the terms of the statute. Indeed, it is difficult to conceive of a case where negligence not in the actual movement of an engine is more directly connected therewith." Upon closer investigation, we reach the conclusion that that case is distinguishable in its facts from this. That engine could not be properly moved until the plank was detached from it. Therefore the removal of the plank was not remotely, but immediately, connected with the moving of the engine. All that remained to be done to move the engine was to give it steam. Let us suppose that the reverse lever of that engine had been set to run backward, and it was desired to go forward. The lever would have to be changed before giving the engine steam,

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yet it would hardly be claimed that changing the lever to the forward movement would not be immediately connected with the movement of the engine. Now, the removal of the plank was just as directly connected with the movement of that engine as would have been the reversing of the lever in the case we have supposed. It is true that this engine could not be moved without coaling, and that the use of the crane was necessary in providing it with coal, but not more necessary than any act that preceded, in the mining of the coal, or in putting it in the shed to be handled by the derrick. The handling of the derrick and of the windlass thereon in this case had no more connection with the movement of the engine than in *Luce v. Railway Co.*, 67 Iowa, 75, 24 N. W. 600. In that case the plaintiff was employed in a coal house of the defendant, and while hoisting coal for the purpose of filling the car, or, as the record shows, coaling an engine, a co-employee so negligently managed the crane that it struck the plaintiff's arm and broke it. The court said: "The danger arising from the use of the crane does not appear to have been greater or less by the fact that it was used in loading a railroad car; nor does it appear that the plaintiff while engaged in his duty, was exposed to any danger from the operation of the road,"—citing cases. In *Stroble v. Railway Co.*, 70 Iowa, 555, 31 N. W. 63, the plaintiff, with another, was employed to elevate coal to a platform for delivery into the tenders of engines; and, in the performance of their duty, it was necessary to pass up and down stairs or steps which were out of repair, and in consequence of which the plaintiff fell and was injured. It was said: "The coal house and stairs were a part of the contrivances for placing fuel within easy reach of the defendant's locomotives, and employees charged with any duty pertaining thereto had no connection with the use and operation of the railroad which is contemplated by the statute. It is true, there is a remote connection, as there is in the case of the coal miner, or teamster who hauls the coal, all being employed in work which in the end will supply the coal to the locomotive;

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but this is not the connection contemplated by the statute." In *Johnson v. Railway Co.* (Minn.) 45 N. W. 156, the plaintiff was a member of a crew of workmen engaged in repairing one of defendant's bridges, and, in performing the work, it was necessary to leave the draw open; and, through the negligence of another employee, the draw was left unfastened, and was blown shut by the wind, and the plaintiff injured while at work. It was held, under a statute quite similar to ours, that the case was not within the provisions of the act. Appellee's counsel speak of the *Akeson Case* as a "border-line case," and appellant's counsel insist that this is another border-line case, on the same side of the line. The distinction between these cases is not as broad as between either case and many others that might be cited, yet sufficiently so to show that the wrong complained of in the one was directly connected with the use and operation of a railroad, while in the other it was not. The writer wishes to add that his view of this case has always been that it is not within the statute. The former opinion was written under the supposition that it followed the *Case of Akeson*, but, upon further investigation, we reached the conclusion that this case is not controlled by that, and that the judgment herein should be affirmed.

WELSH

v.

PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, May 24, 1899.)

Death of Engineer—Negligence of Fellow Servant.*—In an action for the death of an engineer caused by the negligence of a watchman in failing to discover, as it was his duty to do, that a switch

*See notes at end of case.

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was unlocked there can be no recovery, as such employees were fellow servants.

Same—Intemperate Habits.—In such action, a habit of drunkenness on the part of the watchman did not warrant a recovery, as it appeared that such habit was not connected in any way with the cause of the accident.

APPEAL by plaintiff from Lancaster county court of common pleas. *Affirmed.*

The opinion of the court below reads as follows :

“Before there can be a recovery had by the plaintiff in this case, it is incumbent upon her to show by competent proof the position which she assumes here, which is that this accident, or the proximate cause of this accident, was an omission of duty on the part of Linville, an incompetent employee, and, secondly, that the company was negligent by not having placed a pot lamp at the switch in question. In passing upon these questions, we will follow the order of the learned counsel who have discussed this matter, and pass upon the second count in the statement first. It has always been the law in this state, at least for a number of years, that the risk of injury from the act of a co-employee is one of the risks which the employee assumes when he engages in the service to which the employment pertains. And there is another rule of law, and that is, in accepting an employment, the employee is assumed to have notice of any patent risks incident thereto, of which he is informed, or of which it is his duty to inform himself. The engine driver in this case, Mr. Welsh, has been in the employ of the defendant for a period of about eight years. He knew the condition of these tracks during all this period, and during the period of their construction. He had an opportunity to ascertain the character of these switches, and therefore, by continuing in its service after he was cognizant of the character of these switches, he is assumed to have a requisite knowledge of them; and therefore the plaintiff could not recover upon that count in the statement. It is

not necessary to go further, so far as that question is concerned.

"The other position is one which, if fairly made out by proof, would hold the defendant company responsible. It is true that the company is responsible for employing an incompetent or unfit person in its service; or, if the company retains such an unfit person, after having knowledge of his condition, it would be responsible for the acts of the servant. The rule as to the burden of proof, however, in this action is different from the proof that would be required in the case of an action brought by a passenger. It is on the plaintiff. The presumption of negligence on the part of a railroad company in case of an injury to an employee is against the employee; and it is the duty of the plaintiff, before the jury can be asked to render a verdict against the company, to prove the act affirmatively. The mere fact of an accident having happened, or an injury having occurred, is not sufficient. Now, the plaintiff in this case admits that an injury caused by the negligence of an employee is not sufficient to sustain a recovery. They admit that requisite; but they go a step further, and attempt to show that it was caused by the omission of an employee, who was an incompetent and unfit person for the position, by reason of habits of intoxication. They endeavored to show here that this accident could not have occurred if it had not been for the omission of an act that ought to have been performed by Linville, the assistant track man.

"Now, what is the effect of the testimony that has been presented? It has been shown that there was a watchman at this place; and, undoubtedly, under the rules as they have been presented to you, it was the duty of the watchman to see that the switches were in proper condition, that they were set, and that they were locked for the main track. It was the duty of the watchman carefully to examine the track, and see that it was in a safe condition. It has not been shown by the testimony, so far as we can see, that Linville's duty was to see that these switches were locked or

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unlocked, or even that he was to watch the track, or to examine it after the passing of each train. It is true, it is the duty of foremen of the different divisions, during heavy storms, to detail all hands to watch the road and take precaution to prevent accident; and this has been the case in this instance, though the watchman, Linville, at 11 o'clock the night before the accident, was called in from duty, and he must have been called in by his supervisor, Mr. Welsh, the foreman of the tracks. The watchman was on duty there all that time till he was called out again, which was at half past 2 o'clock the next morning. The watchman called him up, and said he had orders for them to go out and clean the switches, that they were drifting shut, and that he should take another hand with him. Mr. Linville got up, and went and called Duncan, and wakened him up, and they both started for the place of those switches. They had half a mile to walk to this place. As soon as they got there, they commenced to perform their duty by sweeping the first switch they came to. It was not their duty to go to the other end—to the furthest switch—first. It was doubtless their duty to sweep and clean off the first switch. While they were cleaning off this switch, a freight train approached and stopped, the fireman jumped off the engine, and while he was working at the switch to allow the freight engineer to pass over to the west-bound passenger track with his train, this man, Linville, and his companion walked up, and said to the fireman: 'Stranger, if you will allow me to brush away the snow, you can turn that lever over easy.' The fireman said: 'I can turn it over without that.' And, as the fireman turned the switch, Linville and his companion went back to their work of cleaning off the snow at the other switch.

"We do not agree with the learned counsel for the plaintiff that it was their duty then to go to work and clean the switch first at the place where the accident happened. It was not his duty to see that the switch was in condition till after they had come to it to open and clean up. If, after he had reached the place of the accident and had cleaned the

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switch, he had seen the track open, and he then had not closed it, and locked the switch, and the train had run across, then, no doubt, the accident would have been caused by some act of his,—some specific act of negligence. The evidence, so far as we can see, shows no omission of duty on his part that night. There is no specific act of negligence shown here, because he was performing his duty as he was ordered to perform it, and as he said he did perform it, and as all the circumstances surrounding the case show he was in the act of performing his duty at the time this accident happened. It would be a mere conjecture on the part of the jury, if we left the case to them, to find that this man was guilty of an omission of duty that night, and they found for the plaintiff. We are sorry, in one respect, that we are obliged to so decide. It is an unfortunate accident. Our sympathy is with the plaintiff. But it is the duty of the plaintiff to make out a case of negligence clearly against the defendant, for the reasons given, before she can recover from the company defendant. It is unfortunate that the widow and the children have no remedy. In such a case it is natural that our sympathy should be for them; but we have here a simple duty to perform, and that is to pass upon the law as it is laid down to us in our books. We have done so.”

C. E. Montgomery and Brown & Hensel, for appellant.

H. M. North, for appellee.

PER CURIAM. In any view of the testimony in this case, the negligence alleged against the defendant was the negligence of a co-employee, and therefore there could be no recovery. We do not understand that the habit of drunkenness on the part of Linville had anything to do with the cause of the accident. Without engaging in a detailed discussion of the testimony on the subject of his acts or omissions, it is, in our judgment, entirely insufficient to authorize a verdict against the defendant. The assignments of error are dismissed. Judgment affirmed.

Death of Engi-
neer—Negligence
of Fellow Servant.

Same—Intemper-
ate Habits.

Notes

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Criterion of Fellow Service.—See *Bateman v. Peninsular Ry. Co.*, 12 Am. & Eng. R. Cas., N. S., 678, and *note* 684.

Servants in Different Departments.—See *note*, 12 Am. & Eng. R. Cas., N. S., 678.

Watchman and Gripman.—A person employed by a cable railway company to guard a crossing, to prevent injuries to persons crossing the tracks, and to signal approaching cars to stop and start so that they should not pass each other upon a curve, is a fellow-servant of the Gripman of a car. *Murray v. St. Louis C. & W. R. Co.*, 41 Am. & Eng. R. Cas. 446, 98 Mo. 573, 12 S. W. Rep. 252, 5 L. R. A. 735.

Engineers and Switchmen.—The greater number of the courts have held that the engineer of a locomotive and a switchman are fellow-servants, and that the company is not responsible for injuries to the latter caused by the negligence of the former. *Naylor v. New York C. & H. R. R. Co.*, 33 Fed. Rep. 801; *Smith v. Memphis & L. R. Co.*, 18 Fed. Rep. 304; *Randall v. Baltimore & O. R. Co.* (U. S.), 15 Am. & Eng. R. Cas. 243; *Brown v. Central Pac. R. Co.*, 68 Cal. 171; *Columbus C. & I. R. Co. v. Troesch*, 68 Ill. 545; *Chicago, R. I. & P. R. Co. v. Tonhy*, 26 Ill. App. 99; *Chicago, R. I. & P. R. Co. v. Henry*, 7 Ill. App. 222; *Satterly v. Morgan*, 35 La. Ann. 1166; *Farwell v. Boston & W. R. Co.*, 4 Met. (Mass.), 49, 38 Am. Dec. 339; *East Tennessee, V. & G. R. Co. v. Gurley*, 12 Lea (Tenn.), 46, 17 Am. & Eng. R. Cas. 563; *Fowler v. Chicago & N. W. R. Co.*, 61 Wis. 159, 17 Am. & Eng. R. Cas. 536; *Toms v. Buffalo Creek R. Co.*, 70 Hun 84, 53 N. Y. S. R. 640, 23 N. Y. Supp. 1112.

Same—Contra.—The courts of Tennessee and Kentucky, however, regard the engineer as the superior servant of brakemen, switchmen, etc., and hold the company responsible for injuries caused to them through his negligence. *Louisville & N. R. Co. v. Brooks*, 83 Ky. 129; *East Tennessee & W. N. C. R. Co. v. Collins*, 85 Tenn. 227; *Nashville, C. & St. L. R. Co. v. Wheless*, 10 Lea (Tenn.), 741, 15 Am. & Eng. R. Cas. 315. See, also, *Cowles v. Richmond & D. R. Co.* (N. Car.), 2 Am. & Eng. R. Cas. 90.

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STEPHANI

v.

SOUTHERN PAC. R. CO.

(*Supreme Court of Utah, April 3, 1899.*)

Injury to Track Walker—Negligence of Engineer of Wrecking Engine—Fellow Servants*—Common Law Rule.—Under the common-law rule in reference to fellow servants, a track walker for defendant company, engaged in traveling over the road of the company from a point where a wreck had occurred to a point 13 miles distant, for the purpose of summoning a section gang to assist in clearing away the wreck, is a fellow servant with an engineer in charge of a lone engine traveling over the same road, in the same direction, for the purpose of reaching the nearest turntable, so as to turn his engine, and return to assist at the wreck; and, if the track walker be injured by the negligence of the engineer, he cannot recover damages from their common employer.

Contributory Negligence.—The plaintiff having failed to use reasonable care, as shown by the evidence, it cannot be said that he did not contribute to the injury.

Fellow Service—Rules of Master.—The rule of law that a train conductor represents the company, and is not a fellow servant with his subordinates, cannot be changed by a regulation of the company so as to make the conductor a fellow servant, nor can a regulation of the company calling some one else a conductor bring a case within the scope of the rule of law.

(Syllabus by the Court.)

APPEAL by plaintiff from Weber county district court.
Affirmed.

This action was brought to recover damages caused by the alleged negligence of the defendant in running its engine over and upon the plaintiff, to his injury. The record shows that on the 30th day of July, 1897, a wreck had occurred on defendant's road a short distance east of Palisade, in the state of Nevada. The engine and tender

Case Stated.

*See notes at end of case.

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by which plaintiff was afterwards injured had that morning arrived at Palisade with a train from the west, and, its passage east being obstructed by the wreck, it was at Palisade detached from the train, and sent back west, to enable it to reach a turntable at Winnemucca, 110 miles west, which was the nearest turntable to Palisade which could be reached, because of the obstruction east of Palisade. The engine and tender was compelled to go west backward; or, in other words, the tender in front, and the boiler and cowcatcher behind. The engine so backing west had its usual attendants, to wit, an engineer and fireman, there being no train attached thereto. The road master, whose duty it was to remove this wreck, had a number of his section hands at work at a point 13 miles west of Palisade, and desired to have them notified to come to Palisade, and from there to go to the wreck, and assist in the removal thereof, so as to open the road for travel to the east. For the purpose of notifying them, he sent the plaintiff, who was one of the section hands and track walker, on a railroad velocipede, from Palisade, to notify those men, and bring them to Palisade for the proposed work. The plaintiff on that day started west from Palisade a short time before the engine and tender started, and at a distance of about $1\frac{1}{2}$ miles west of Palisade was run into by the engine and tender, and suffered the injury complained of. The engine ran through the canyon without ringing the bell or blowing the whistle. The plaintiff looked behind him every minute or two. The engineer could not see the plaintiff before the accident, but the fireman did see him 10 or 15 feet ahead, and called to the engineer to stop. The engineer reversed the engine, and did all he could do to stop it, and succeeded in doing so after running about 20 feet beyond the point of the accident. The road at the point of the injury, and for some distance both east and west thereof, passed over many curves and high cuts, thus obstructing the view of the engineer and fireman, and preventing their seeing the plaintiff until within a few feet of him. At the time of the accident the engine was moving at the rate

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of about 10 miles an hour. On this state of facts the appellant contends that the nonsuit granted by the court below was improperly granted, and that there was a liability on the part of the respondent.

J. H. & H. R. Macmillan, for appellant.

Marshall, Royle & Hempstead, for respondent.

After stating the facts, MINER, J., delivered the opinion of the court.

It was admitted at the trial that no statute existed in Nevada, at the time of the injury complained of, changing the rule of the common law with reference to fellow servants, or defining what a fellow servant is, as in Utah, and that the common law prevailed in that state, and still prevails there. At the time of the injury the plaintiff was a common laborer and track walker on defendant's road, working, with others, under orders of Mr. Cannon, a section boss, who ordered the plaintiff to go to Twelve Mile Canyon, where he was going when injured. Mr. Cole was road master, having authority over the section boss.

The first question to be determined is whether or not at the time of the injury in Nevada the plaintiff was a fellow servant of the engineer, and whether the court erred in granting a nonsuit. By the stipulation referred to this

question is to be determined under the rules of the common law, and not under the statute of this state defining what fellow servants are.

The authorities bearing upon this question are hopelessly divided upon the general subject of

fellow servants, as well as upon the other questions here involved. It is useless to undertake to analyze the cases which have arisen in the courts of the several states because they are wholly irreconcilable in principle, and too numerous to classify. As between the laborer or other employees upon a railroad track and the conductor, engineer, or other employees of a moving railroad train, the courts of Massa-

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chusetts, Rhode Island, New York, Indiana, Iowa, Michigan, North Carolina, Minnesota, Maine, Texas, California, Maryland, Pennsylvania, Arkansas, and Wisconsin hold that the relation of fellow servants exists. *Railroad Co. v. Hambly*, 154 U. S. 355, 14 Sup. Ct. 983. In *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, the court held, in substance, that a railroad corporation is responsible to its train servants and employees for injuries received by them in consequence of neglect of duty by a train conductor in charge of its train with the right to command its movements and control the persons employed upon it; that a conductor of a railroad train, who has a right to command the movements of the train, and to control the persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow servant to the engineer and other employees of the corporation on the train. The late territorial supreme court of Utah, in *Webb v. Railroad Co.*, 7 Utah, 363, 26 Pac. 981, held that a car repairer assisting in making a coupling was not, as a matter of law, a fellow servant of an engineer in charge of a switch engine; and a similar holding was made in *Armstrong v. Railroad Co.*, 8 Utah, 420, 32 Pac. 693, and *Openshaw v. Railroad Co.*, 6 Utah, 137. Since these decisions were rendered, the rule has been considerably enlarged, and the supreme court of the United States, with many of the states, has held to a rule modifying the decision in the *Ross Case* to a considerable extent. In *Randall v. Railroad Co.*, 109 U. S. 478, 15 Am. & Eng. R. Cas. 243, 3 Sup. Ct. 322, the court held, in substance, that a brakeman working a switch for his train on one track in a railroad yard is a fellow servant with the engineman of another train of the same corporation upon an adjacent track; and he cannot maintain an action against the corporation for an injury caused by the negligence of the engineman in driving his engine too fast, and not giving due notice of its approach, without proving negligence of the corporation in employing an unfit engineman. This holding was upon the theory that the two were employed and paid by

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the same master, and their duties were such as to bring them to work at the same time and place, and their respective services had the common object and purpose of moving the trains within the sphere of their employment. The service rendered by a switchman in keeping the track clear for the passage of trains does not necessarily differ, so far as actions for negligence are concerned, from those of a track walker or other laborer engaged in keeping the railroad track in repair, and cleaning it of obstructions. While neither of these is under the personal control of the engineer, yet both are engaged in an employment that brings them in contact with moving trains and passing engines, and constitute the lookout for securing the safety of passing trains. The departments of the two servants are so far separate from each other that if the possibility of coming in contact, and hence incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow servants should not apply. In *Martin v. Railroad Co.*, 166 U. S. 399, 6 Am. & Eng. R. Cas., N. S., 600, 17 Sup. Ct. 603, it was held, as copied from the headnote, as follows: "The plaintiff in error was in the employment of the defendant in error as a common laborer. While on a hand car on a road, proceeding to his place of work, he was run into by a train, and seriously injured. It was claimed that the collision was caused by carelessness and negligence on the part of other employees of the company,—road master, foreman of the gang of laborers, conductor, etc. Held, that the co-employees whose negligence was alleged to have caused the injury were fellow servants of the plaintiff, and hence that the defendant was not liable for the injuries caused by that negligence." In *Railroad Co. v. Peterson*, 16 Sup. Ct. 843, 4 Am. & Eng. R. Cas., N. S., 117, where the foreman of a gang of laborers, including the plaintiff, who were engaged in placing ties and repairing the railroad, with power to hire and discharge men, and direct the management of all matters connected with their employment, and while so engaged the

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plaintiff was injured by the negligence of the foreman, it was held that the foreman was not engaged as superintendent in a separate department of the road, nor in control of such a distinct branch of the work of the company as to render it liable to a co-employee for neglect, but he was a fellow servant, whose negligence entailed no liability on the company. In the case of *Railroad Co. v. Charless*, 162 U. S. 359, 4 Am. & Eng. R. Cas., N. S., 128, 16 Sup. Ct. 848, it appears from the headnote of the case that the plaintiff was a day laborer in the employ of the Northern Pacific Railroad. With the rest of his gang, he started on a hand car, under a foreman, to go over a part of the section to inspect the road. While running rapidly round a curve, they came in contact with a freight train, and they were seriously injured. The brake of the hand car was defective. The freight train gave no signals of its approach. He sued the company to recover damages for his injuries, and it was held: "(1) That the railroad company was not liable for negligence of its servants on the freight train to give signals of its approach, as such negligence, if it existed, was the negligence of a co-servant of the plaintiff; (2) that any supposed negligence of the foreman in running the hand car at too high a rate of speed was negligence of a co-employee of the company, and not of their common employer." In *Railroad Co. v. Baugh*, 149 U. S. 368, 54 Am. & Eng. R. Cas. 328, 13 Sup. Ct. 914, it was held, quoting from the headnote, as follows: "Whether the engineer and fireman of a locomotive engine, running alone on a railroad, and without any train attached, are fellow servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former, is not a question of local law, to be settled by the decisions of the highest court of the state in which a cause of action arises, but is one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant. Such engineer and such fireman, when engaged in such duty, are, when so considered, fellow ser-

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vants of the railroad company, and the fireman is precluded by principles of general law from recovering damages from the company for injuries caused, during the running, by the negligence of the engineer." In *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, it was held that: "A common day laborer in the employ of a railroad company, who, while working for the company under the order and direction of a section boss or foreman, on a culvert on the line of the company's road, receives an injury by and through the negligence of the conductor and of the engineer in moving and operating a passenger train upon the company's road, is a fellow servant with such engineer and such conductor in such a sense as exempts the railroad company from liability for the injury so inflicted."

In the argument of this case counsel for appellant rely upon the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, in connection with the rule of the company, No. 89, to bring their case within the rule laid down in the above decision. The rule provides that, "in case an engine is run over any portion of the road unaccompanied by a conductor, the engineer must perform the duties and make the reports of a conductor, in addition to his own." And they insist that this rule clothes the engineer with the duties and powers of the conductor when running the engine in the absence of a conductor. If this contention should be maintained, it would clothe the railroad company with power to make rules to such an extent as would change the law, and relieve such company from liability. This was the holding in the case of *Railroad Co. v. Baugh*, 149 U. S. 379, 54 Am. & Eng. R. Cas. 328, 13 Sup. Ct. 918, where a similar rule to the one referred to was before the court for consideration. In connection with the question of fellow servants, the court said: "The *Ross Case*, as it is commonly known, decided that 'a conductor of a railroad train, who has a right to command the movements of a train, and control the persons employed upon it, represents the company while per-

Fellow Service-
Rules of Master.

forming those duties, and does not bear the relation of fellow servant to the engineer and other employees on the train.' The argument is a short one. The conductor of a train represents the company and is not a fellow servant with his subordinates on the train. The rule of the company provides that when there is no conductor the engineer shall be regarded as a conductor. Therefore, in such case, he represents the company, and is likewise not a fellow servant with his subordinates. But this gives a potency to the rule of the company which it does not possess. The inquiry must always be directed to the real powers and duties of the official, and not simply to the name given to the office. The regulations of the company cannot make the conductor a fellow servant with his subordinates, and thus overrule the law announced in the Ross Case. Neither can it, by calling some one else a conductor, bring a case within the scope of the rule there laid down. In other words, the law is not shifted backwards and forwards by the mere regulations of the company, but applies generally, irrespective of all such regulations. There is a principle underlying the decision in that case, and the question always is as to the applicability of that principle to the given state of facts." Further commenting upon the rule laid down in the Ross Case, the court said: "The court therefore did not hold that it was universally true that, when one servant has control over another, they cease to be fellow servants within the rule of the master's exemption from liability, but did hold that an instruction couched in such general language was not erroneous when applied to the case of a conductor having exclusive control of a train in relation to other employees of the company acting under him on the same train. The conductor was, in the language of the opinion, 'clothed with the control and management of a distinct department.' He was 'a superintending officer,' as described by Mr. Wharton. He had 'the superintendency of a department,' as suggested by the New York court of appeals. * * *

Thus, between the law department of a railroad corporation

and the operating department there is a natural and distinct separation, one which makes the two departments like two independent kinds of business in which the one employer and master is engaged. So, oftentimes, there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating department. These two departments are, in their relation to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is, as to it, in the place of the master. But this is a very different proposition from that which affirms that each separate piece of work in one of those branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice principal or representative of the master." In discussing the Ross Case, the court, in *Railroad Co. v. Hambly*, 154 U. S. 358, 14 Sup. Ct: 985, distinguishes the Ross Case, and says: "The case was decided not to be one of fellow service upon the ground that the conductor was 'in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants.' The court drew a distinction 'between servants of a corporation exercising no supervision over others engaged with them in the same employment and agents of a corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence.' In that particular case the court found that the conductor had entire control and management of the train to which he was assigned, directed at what time it should start, at what speed it should run, at what stations it should stop, and for what length of time, and everything essential to its successful movements, and that all persons employed upon it were subject to his orders. Under such circumstances he was held not to be a fellow servant with the fireman, brakeman,

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and engineer." The facts in this case differ somewhat from the facts in the Ross Case and from cases referred to from Utah. The plaintiff was a common track walker, engaged in keeping the track in repair so that trains could pass up and down the road in safety. A wreck having occurred, he was sent ahead by the section boss, on a railroad velocipede, to notify certain members of the section gang to come to Palisade, and assist in removing the wreck. The engineer and fireman were sent back west with the engine and tender to reach a turntable, so as to turn around, and return to assist in removing the same wreck on the same road on which the plaintiff was working. The plaintiff and the engineer were in the same department of labor, working for the same object, under a common master. The line, object, and purpose of employment was the same at the time of the injury. Their duties were such as would bring them to work at the same time and place. Their respective services at the time had the common object and purpose of removing the wreck. They were employed and paid by the same general master, in the same general line of work. So far as negligence is concerned, the service of the train walker does not differ materially from the engineer running the train over the track. The mission of the one was to keep the track clear from obstructions, and to bring aid to assist in removing obstructions upon it, and put it in a condition so that the engineer, or the company by its engineer, could run trains over in safety, and at the same time remove himself from the danger of contact with the cars. In this case the plaintiff and the engineer were sent on the same errand. They were working to clear the track from a wreck. They both started on the same errand, and were working with the same object in view. The plaintiff knew the engine was following him. He was aware of the danger he was in. His employment brought him in constant connection and contact with passing or moving trains. While he was on the lookout for the safety of passing trains when inspecting and repairing the track and while going

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upon this present mission, he was also bound to look out for his own safety, and keep clear from passing engines. The laborer upon a railroad track, whether he be a track walker or one operating a railroad velocipede, is frequently exposed to dangers of passing trains, and is bound to look out for them. The negligent management of the trains is a risk which is taken into consideration by him when entering into the service of the company. The general rule is that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of their employment. The separate service had the common object of removing the wreck and running the cars. The departments of service of the plaintiff and the engineer were not so far removed from each other but that the possibility of coming in contact and incurring danger to each other from their negligent acts must have been in contemplation of the plaintiff when he entered the defendant's service. Each, on entering the service, and undertaking to remove the wreck, took the risk of the negligence of the other in performing their respective services. Under the great weight of authority neither can maintain an action for an injury caused by such negligent acts of their common employment. Had the plaintiff exercised that reasonable care and caution which he was called upon to exercise in the position in which he was placed, it is quite possible that he might have avoided the injury he complains of. By failing to use reasonable care, it cannot be said that he did not contribute to bring upon himself the injury for which he seeks redress.

Contributory
Negligence.

Upon a careful examination of all the decisions of the higher courts of the country, we are impelled to conclude that under the facts, as shown, the plaintiff was a fellow servant of the engineer, and that the court committed no error in directing a verdict for the defendant. The judgment of the district court is affirmed, with costs.

BARTCH, C. J., concurs.

Fellow Servants—Trackmen and Train Hands.—In each of the following cases the employee injured was a servant employed about the company's track as section hand, repairer, walker, etc., while the offending employee whose negligence caused the injury was employed on or about the company's trains. And in every instance the court held that the two employees stood in the relation of fellow-servants. *Collins v. St. Paul & S. C. R. Co.*, 30 Minn. 31, 8 Am. & Eng. R. Cas. 150; *Pennsylvania R. Co. v. Wachter*, 60 Md. 395, 15 Am. & Eng. R. Cas. 187; *Blake v. Maine Cent. R. Co.*, 70 Me. 60, 35 Am. Rep. 297; *Gormley v. Ohio & M. R. Co.*, 72 Ind. 31, 5 Am. & Eng. R. Cas. 581; *Corbett v. St. Louis, I. M. & S. R. Co.*, 26 Mo. App. 621; *Schultz v. Chicago & N. W. R. Co.*, 67 Wis. 616, 58 Am. Rep. 881, 28 Am. & Eng. R. Cas. 404; *Clifford v. Old Colony R. Co.*, 141 Mass. 564; *Houston & T. C. R. Co. v. Rider*, 62 Tex. 267; *O'Connell v. Baltimore & O. R. Co.*, 20 Md. 212, 83 Am. Dec. 549; *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384; *Baltimore & O. R. Co. v. State*, 41 Md. 227; *Van Wickle v. Manhattan R. Co.* 32 Fed. Rep. 278; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Whaalan v. Mad River L. E. R. Co.*, 8 Ohio St. 249; *Coon v. Syracuse & U. R. Co.*, 5 N. Y. 492; *St. Louis, I. M. & S. R. Co. v. Shackelford*, 42 Ark. 417; *Sullivan v. Mississippi & M. R. Co.*, 11 Iowa 421; *Connolly v. Minneapolis E. R. Co.*, 38 Minn. 80; *East Tennessee, V. & G. R. Co. v. Rush*, 15 Lea (Tenn.), 145, 25 Am. & Eng. R. Cas. 502. *Compare* *Toledo, W. & W. R. Co. v. O'Connor*, 77 Ill. 391; *Chicago & A. R. Co. v. Kelley* (Ill. 1889), 21 N. E. Rep. 203. And the authorities seem to be almost unanimous in support of this doctrine.

Contra.—But in *Howard v. Delaware & Hudson Canal Co.* (C. C. D. Vt., 1889), 41 Am. & Eng. R. Cas. 473, *WHKELER, J.*, in deciding that persons in charge of and operating trains are not fellow servants of trackmen, and the latter are entitled to recover for injuries sustained through the negligence of the former, said: "If the company is responsible to trainmen for the negligence of those in charge of the track, that it should be held responsible to trackmen for the negligence of those in charge of its trains would seem to directly follow."

Criterion of Fellow Service.—See *Norfolk & W. R. Co. v. Houchen's Adm'r* (Va.), 8 Am. & Eng. R. Cas., N. S., 616, and note by Mr. McKinney, p. 630.

MISSOURI, K. & T. Ry. Co.

v.

ELLIOTT *et al.*

(*Court of Appeals of Indian Territory, June 8, 1899.*)

Right to Continuance.—Defendant had no right to a continuance.

Challenges to Jurors.—The lower court did not err in overruling defendant's challenges to jurors, as it cannot be held that all persons who have had claims against a railroad are forever thereafter disqualified from acting as jurors in any cause where such company may be a party.

Depositions.—The lower court did not err in overruling defendant's objection to the reading of the depositions of certain witnesses.

Evidence.—In an action for the killing of defendant's fireman in a collision between its trains, it was proper to allow the conductor of one of the trains to testify as to the contents of a written order for the running of his train, which had been issued from the train dispatcher's office, the witness having testified to the destruction of the order.

Same.—The chief dispatcher of the railroad company and its engineers who had received orders from the company's train dispatcher at a certain point were competent to testify as to whether or not the company maintained a train dispatcher at such point at the time of the collision, and to testify who that train dispatcher was.

Same.—In such an action, where the defendant railroad has, at time of the trial, received notice to produce books and papers, plaintiff, in the absence of the written orders for the running of the trains, may prove the contents of such orders by secondary evidence.

Same.—In such action, the testimony of certain employees of defendant as to the salary of fireman in general, and as to that of deceased, was competent.

Same.—In such an action, where defendant has failed to comply with an order to produce at the trial the records of its train master's office, the contents of such records may be proved by secondary evidence.

Corporate Existence—Pleading.—In such action, a mere denial that defendant was, as alleged in the complaint, a private corporation.

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"duly incorporated under the laws of Missouri," raises no issue, it being necessary, in order to raise such an issue, to state the facts.

Fellow Servants.*—Where a train dispatcher has authority to direct the movements of trains, his relation to fireman on such trains, is not that of a fellow servant, but of a vice principal.

Wrongful Death—Right of Action.—A right of action for the wrongful killing of the husband and father survives in his widow and heirs.

APPEAL by defendant from the United States court for the Northern district of the Indian Territory. *Affirmed.*

This is an action brought by Lydia J. Elliott, the widow, and Georgia C. Elliott and Nannie F. Elliott, the minor children of William H. Elliott, deceased, to recover damages

Case Stated.

of the appellant for the alleged wrongful killing of the said William H. Elliott, who, at the time of his death, was employed as a fireman upon one of the engines operated upon the line of the appellant's railway between the town of Muskogee, in the Indian Territory, and Denison, in the state of Texas. The complaint was filed on the 9th day of April, 1893. Verdict was rendered in favor of the appellees on the 29th day of November, 1897, for the sum of \$7,500. Motion for new trial was overruled, and appeal prayed, and allowed by this court.

The attorney for the appellant, in his "Specifications of Error," alleges that 101 errors were committed in the trial of this cause by the lower court. The first error alleged by appellant in his brief in this cause is as follows: "No. 1. The district court erred in refusing to grant a continuance of this case in accordance with the stipulation between appellee Lydia J. Elliott and appellant, and, after declining to grant continuance on stipulation, in further declining to either grant continuance or postponement of this case, to enable appellant to prepare for trial."

Clifford L. Jackson, for appellant.

William T. Hutchings and *Preston C. West*, for appellees.

*See note at end of case.

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THOMAS, J. (after stating the facts). We have carefully examined this alleged stipulation, and also the motion for a continuance filed by the appellant, and the exhibits attached thereto, and it is our opinion that the appellant had no right to a continuance of this cause on either. This cause had been upon the docket for more than four years. The venue had been changed by the appellant from South McAlester, on the 1st day of February, 1894, and the record does not disclose that between that date and the month of November, 1897, this case had ever been reached for trial. There were other parties plaintiff in this case, the minor heirs, who were present in person and by their attorneys, pressing for trial, and we do not think that a stipulation signed by the attorney for the appellant and by only one of the appellees, the widow, should have worked a continuance, to the inconvenience and annoyance of the other appellees. The court also had a right to insist that this case, which had been on the docket for such a length of time, should be taken up and disposed of, and a stipulation of this kind certainly would not compel the court to continue the case to the detriment, perhaps, of other suitors. The motion for continuance did not state legal grounds for a continuance, and discloses that the appellant railway company for over five years had had an opportunity to investigate the case and circumstances surrounding the killing of Elliott. It further shows that the attorneys for the minor appellees had written a letter to the attorney for the appellant a month before the day of the trial, offering to compromise the case, and also stating that, if the proposition was not accepted, they would be ready for trial, and would press for a trial, when the case was called. There seems to have been no diligence used by the railway company to secure testimony which they infer in their motion for a continuance that they could procure, nor do they even intimate what witnesses they would have secured, or what their testimony would have been. And, even if there had been diligence on the part of the defendant

Right to Continuance.

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railway company in this respect, the appellees would have had the right, under the statute (had the railway company given the names of its witnesses and what they expected to prove by each), to have admitted that such absent witnesses would, if present, have testified as claimed by the appellant in its motion for continuance, and the appellees would have then been entitled to an immediate trial. Section 5107, Mansf. Dig., provides that "the trial in each action shall be in the order in which it stands upon the docket." And section 5108 provides that "a motion to postpone a trial on account of the absence of evidence shall, if required by the opposite party, be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it; and, if it is for an absent witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant himself believes them to be true. If, thereupon, the adverse party will admit that on the trial, the absent witness, if present, would testify to the statement contained in the application for a continuance, then the trial shall not be postponed for that cause: provided, that the opposite party may controvert the statement so set forth in the said motion for continuance by evidence."

"(2) The court erred in refusing to allow appellant's challenges to jurors Murphy, Bramstetter, and Whiteside." The record shows that the juror Murphy had had several claims against the Missouri, Kansas & Texas Railway Company; that some of them had never been settled; but, when asked by the court the question, "Are they still pending?" he answered, "They have been dropped." He stated that he had not had any claim against the railway company since the year 1889, except such as had been settled by the railway company, with one exception, and that was a small fire, which burned a few hundred rails for him, and that that had occurred in 1884 or 1885, and that he had never brought suit. He was further

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asked by the court the question: "Is there any reason why you cannot try this case now according to the law and the evidence, without any bias or prejudice whatever on account of your previous relations with the company?" Answer: "That would cut no figure in the case pending, nor in any other case." Question: "Your mind, then, is perfectly free from any bias or prejudice against the company?" Answer: "Yes, sir." The juror Bramstetter testified that he did not have a claim of any kind against the Missouri, Kansas & Texas Railway Company; that he lost a son at Pryor Creek recently; that his son was killed by a car on the railway; that he never had any intention of instituting suit against the company for the killing of his son; and that he could try the case fairly and impartially, without prejudice or bias in any way. The juror Whiteside testified that he lived in the district; was a cattleman; that he did not have any claims at that time against the Missouri, Kansas & Texas Railway Company; that he had had; that all claims which the company did not pay he had dropped; that the last claim which he had had against the company was about a year and a half ago; and that he could try the case according to the law and the evidence, without any bias or prejudice as to the rights of the defendant. The appellant's attorney challenged the jurors Murphy and Whiteside because they had once had claims against the company, and the juror Bramstetter because his son had been killed by a railway car at Pryor Creek. As none of these jurors at the time had any claims against the defendant railway company pending or in course of suit, and as Murphy and Whiteside both testified that they had dropped any and all claims which they ever had, and the juror Bramstetter testified that he had never had any intention of bringing suit for his son, and all swore that their minds were free from bias or prejudice, and that they could try the case according to the law and the evidence, we think that the lower court did not err in overruling the appellant's challenges for cause. We are not willing to declare the law to be that all persons who have ever had claims against the

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railroad company are forever thereafter disqualified from acting as jurors in any cause where that railroad company may be a party.

"(3) The district court erred in overruling appellant's objection to the introduction of any evidence under the complaint in this cause." This alleged error will be fully considered upon the appellant's specification of alleged error of the court in holding that the plaintiffs' complaint stated a cause of action, and in refusing to instruct the jury to return a verdict for the appellant.

"(4) The district court erred in overruling appellant's objection to the reading of the depositions of witnesses Andrews, Thoman, and Smythe." The record discloses that

Depositions. all three of these witnesses resided at the city of Denison, in the state of Texas; that they were or had been in the employ of the defendant railway company; that the witness Andrews was, at the time his deposition was taken, a conductor for the Missouri, Kansas & Texas Railway Company; that the witness O. E. Thoman, at the time his deposition was taken, was a locomotive engineer for the defendant railway company; and that the witness John Smythe, at the time his deposition was taken, was a fireman for the defendant railway company. And the record further discloses that the appellant was present, and cross-examined these witnesses, at the time their depositions were taken. The objection to the reading of these depositions was that all three of these witnesses, although they resided in the state of Texas, were frequently within the jurisdiction of this court, as they were employed by the defendant railway company upon its division running from Muskogee, Ind. T., to Denison, Tex. At the time these depositions were taken, although the appellant was present and cross-examined the witnesses, no objection was made to the taking of the depositions for the reasons now urged; nor was there any objection made by the appellant until this case was called for trial, and the jury sworn. Sections 2954-2956, Mansf. Dig., read as follows:

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"Sec. 2954. Exceptions to depositions shall be in writing, specifying the grounds of objection, filed with the papers of the case, and noted on the record.

"Sec. 2955. No exception, other than to the competency of the witness, or to the relevancy or competency of the testimony, shall be regarded, unless filed and noted on the record before the commencement of the trial.

"Sec. 2956. The court, on the motion of either party, shall decide upon the exceptions before the commencement of the trial."

The first and fourth paragraphs of section 2921 read as follows:

"Sec. 2921. They [meaning depositions] may be used on the trial of all issues in any action in the following cases: First. Where the witness does not reside in the county where the action is pending, or in an adjoining county, or is absent from the state, or in the military service of the United States, or of this state. Fourth. Where the witness resides thirty or more miles from the place where the court sits in which the action is pending, unless the witness is in attendance upon the court."

We are therefore of the opinion that the objection of the appellant to the reading of the depositions of these witnesses was properly overruled by the court, because the witnesses did not reside in the district or in an adjoining district, and resided more than 30 miles from Muskogee, where this action was pending; and we are also of the opinion that, even if this objection had been well taken, it was made too late by the appellant, the trial of the cause having commenced, and this objection not having been made as required by the statute.

"(5) The district court erred in admitting the evidence complained of in the specifications of error 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 21, 31, 32, 33, 35, 37, and 38." The appellant objected to the witnesses named in the specifications of error as above, each testifying to the contents of

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certain writings. We think the court properly overruled these objections.

The witness J. F. Andrews testified that he was the conductor of the south-bound train which collided with the north-bound train; that he had received orders for the running of his train, which were issued from the train dispatcher's office, which was located at McAlester, Ind. T., at that time; that he received various orders at different stations between Muskogee and McAlester; that he received his last order at Eufaula station; that this order was in writing, and that he had torn it up or destroyed it. As this order had been destroyed, it certainly was not error for him to testify what the order was.

The witness O. E. Thoman produced the order about which he was testifying, identified it, it was made a part of his deposition, and it was clearly admissible; and as the record shows that all the testimony as to the contents of these writings was admitted either because the writings themselves had been destroyed or lost, or, being in the possession of the defendant railway company, it refused to produce them at the trial, as it had been notified to do by the attorneys for the appellees on the 24th day of September, 1897, we are of the opinion that the appellant's objections were properly overruled.

As to the alleged errors urged by the appellant in its paragraph 6, on page 61 of its brief, that the court erred in admitting the testimony of the witnesses Thoman, Smythe, and Sullivan, stating that the man Barton was a train dispatcher, and in further stating what the duties of a train dispatcher were, we are of the opinion that the court properly admitted this testimony. All those witnesses were in the employ of the defendant railway company. Two of them were employed as engineers, running on this Choctaw division and, the witness Sullivan was the chief train dispatcher of the defendant railway company. We certainly think that the chief train dispatcher of the defendant railway company would be presumed to

know that the defendant railway company had a train dispatcher's office at McAlester at the date of this collision, and that Barton was the train dispatcher at that point; and that the other two witnesses, who were engineers, and received orders from this train dispatcher at McAlester, would certainly be presumed to know that Barton was the train dispatcher of the defendant railway company at McAlester, and that the defendant railway company maintained a dispatcher's office at that point. The court properly refused to charge the jury, as requested by the appellant, that they could not find that this man Barton was a train dispatcher from the mere fact that these witnesses called him so. All of the testimony on this point was that Barton was a train dispatcher as distinguished from an ordinary telegraph operator, and there was no testimony in this case which would have justified the jury in finding that Barton was only an ordinary telegraph operator, and therefore a fellow servant of the deceased, and for that reason that the jury should return a verdict for the defendant. We think that, if there was any one witness who could have been produced by the appellees in this case to have testified as to whether or not the defendant railway company maintained a train dispatcher's office at McAlester at the time of this collision and to testify as to who that train dispatcher was, the chief train dispatcher of the appellant railway company, at that time was the one witness who was, of all others, competent to testify as to these facts.

As to the errors alleged and urged by the appellant in paragraph 7, on page 62 of its brief, the court properly admitted the order attached to the deposition of Thoman, because he swore that it was the order issued to him by the train dispatcher, was identified by him, and made a part of his deposition. The court properly admitted the testimony of the witness Smythe as to the contents of the train order which was delivered to him, because the proof showed that this order had been destroyed or misplaced, and could not be produced. The testimony of the witness Andrews, as to

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the contents of the order which was delivered to him by the train dispatcher, was properly admitted, because the witness Andrews testified that the original order had been torn up or destroyed by him. It appears from the testimony in this case that the train dispatcher at McAlester delivered to the engineer of the north-bound train a copy of this order, and also delivered to the conductor of that train a copy of the order, and retained a copy himself. We do not think that it was incumbent upon the appellees to have produced the copy retained by the train dispatcher and which most probably was in the possession of the defendant railway company. The contention of the appellant that the notice given by the appellees to wit, to produce books and papers at the time of the trial, was not such a notice as would

Same.

permit the appellees to offer secondary evidence as to the contents of the writings referred to in the testimony, in our opinion is not tenable. If the contention of the appellant was correct, it would be in its power to withhold or destroy writings of this character; and as, under the section referred to by the appellant, the only remedy which the appellees would have would be to strike out the defendant's answer, this would clearly work a great injustice, and would prevent the proof of negligence of this character, if the appellees were compelled to prove the contents by the writings themselves. We think that this notice to produce these writings and records, which were in the possession of the defendant railway company, was sufficient to permit the appellees to prove the contents of these writings by secondary evidence.

As to the eighth assignment of error, urged on page 65 of appellant's brief, "that the court erred in admitting the testimony of the witnesses Powers, Morton, and Broyles as to the compensation and salary of firemen in general, and as to the deceased," we are of the opinion that this

Same.

testimony was properly admitted. Morton was the station agent of the defendant railway company at Muskogee, and Powers was a fireman in the employ of the de-

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fendant. Morton testified that he had in his possession a schedule showing the amount paid firemen, and we think that both of these witnesses were competent to testify as to the amount received by firemen on defendant's line of railway, and the testimony of the witness Broyles, who stated that the deceased told him the amount received by him, we believe was competent testimony.

As to the error alleged in specification No. 9, on page 71 of appellant's brief, that "the court erred in permitting the witness Sullivan to testify as to the contents of certain records in the train master's office," we think the testimony was competent. Same. The testimony shows that all of these records were kept in the state of Texas, outside of the jurisdiction of this court. It would be an impossibility to have them produced by a *subpœna duces tecum*, and the contents of those records could be proved—First, by the production of the records themselves; second, when the writing is in the hands or power of the adverse party, as in this case, the notice served upon the adverse party to produce the writing at the trial is sufficient to lay the foundation for the introduction of secondary evidence as to the contents of the document or record. See 2 Greenl. Ev. (13th Ed.) § 560. It appears from the record in this case that this notice was served upon the defendant railway company, that they failed to produce the records called for, and therefore the appellees had the right to prove their contents by secondary evidence. The statute of the United States referred to by appellant (section 724, Rev. St. U. S.), and the statute of Arkansas, also referred to by counsel for appellant, do not apply. These statutes simply provide the manner in which the courts may compel the production of books and papers by a party to a suit, and the penalty to be imposed for a failure to comply with the court's order. The appellees might have proceeded under the statute of Arkansas, and, in that event, a failure on the part of the railway company to produce the books and papers called for would have been punished by

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striking its answer and defense from the files; but the notice served upon the defendant railway company was sufficient to lay the foundation for the introduction of secondary evidence.

The alleged error complained of in paragraph 10, on page 73 of appellant's brief, in our opinion, is without merit. The witness Broyles was the father-in-law of the deceased; was acquainted with him, and had been for a number of years, and certainly was qualified to testify as to his habits and his custom with reference to providing for his family; and we think that his testimony with reference to the wages received by the deceased as railway fireman was admissible. It is probable that no witness, except an official of the railway company, who kept the account of the deceased as fireman, or the paymaster, who paid him monthly, could have testified exactly as to the amount of wages received by the deceased. While the appellant infers that it could have proved that Elliott was in his private life a profligate man, it did not attempt to give the name of any witness by which this proof could be made, and we are of the opinion that, if the deceased had been the character of man claimed by counsel for the appellant, he would not have been in the employ of the defendant railway company as a fireman.

There are three other questions raised by the appellant's brief which we deem necessary to consider. The first is that the plaintiffs allege in their complaint that the defendant

was a private corporation, "duly incorporated under the laws of the state of Missouri."

Corporate
Existence—
Pleading.

The defendant's answer upon that proposition is as follows: "Defendant denies that it is a private corporation, duly incorporated under the laws of the state of Missouri." Appellant claims that the court should have directed the jury to return a verdict for it, because the plaintiff failed to prove the allegation as charged. This contention is not well taken. It was the duty of the appellant, if it had intended to deny that it was a corporation, or that it was a Missouri corporation, or that, if it had been a corporation, the corporation had been dissolved.

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or if it intended to plead misnomer, to have also stated the facts. In the case of *Express Co. v. Haggard*, 37 Ill. 465, the defendant was sued as a corporation, which was in fact a limited partnership, and the denial in its answer was as follows: "It denies that the defendant is, or ever was, a corporation organized and existing under the laws of England." The court held that this was a negative pregnant,—pregnant with the admission that the defendant was a corporation,—and that it consequently raised no issue. The plea of the defendant admitted that it was a corporation, and, by answering the pleading as such, it waived this objection. See 6 Thomp. Corp. §§ 7677, 7678.

The second question to be considered is a proposition contended for by counsel for appellant that the train dispatcher Barton was a fellow servant of the deceased, and therefore that the appellees could not recover for that reason, and that the court below should Fellow Servants. have directed a verdict for the appellant. The case of *Railroad Co. v. Barry*, 58 Ark. 198, 23 S. W. 1097, was a case very similar to the one at bar. In that case a fireman was injured in a railway collision, and sued the railroad company, claiming that his injury was caused by the negligence of the train dispatcher in ordering the movement of trains. The question as to whether or not the train dispatcher was a fellow servant of the fireman was directly passed upon. The court in that case refused to instruct the jury that the train dispatcher was a fellow servant of the fireman; and the court in that case also held that the negligence of the train dispatcher was the negligence of the company, and that the plaintiff was entitled to recover for the damage, citing *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184; referring to which case we find that JUSTICE FIELD, speaking for the court, quotes many English and other authorities to the effect that employees engaged by the same corporation or employer in carrying on the usual business of the corporation or employer were fellow servants, notwithstanding the fact of their being engaged in the performance

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of different duties and work in different departments of the same business, and that one employee could not recover damages from the corporation or employer growing out of the negligence of his fellow servant. He then proceeds to show that this cannot be regarded as a general rule applicable alike to each case arising from the negligence of a co-laborer or employee, and cites the case of *Coal Co. v. Reid*, 3 Macq. 266, and *Same v. McGuire*, *Id.* 300, decided in 1858, in which some of the exceptions to the rule are stated. LORD CHANCELLOR CHELMSFORD, who gave the principal opinion in the latter case, referring to previous cases in which the master's exemption from liability had been sustained, said: "In the consideration of these cases, it did not become necessary to define with any great precision what was meant by the words 'common service' or 'common employment,' and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case, to ascertain whether the servants are fellow laborers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon another by carelessness of his peculiar work is not within the exemption, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him." The lord chancellor also commented upon some decisions of the Scotch courts, among others that of *McNaughton v. Railway Co.*, 19 Sess. Cas. Scot. (2d Series) 271, and said that it might be "sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work; the deceased being a joiner or carpenter, who, at the time of the accident, was engaged in repairing a railway carriage, and the persons by whose negligence his death was

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occasioned were the engine driver and the persons who arranged the switches." And in the same case LORD BROUGHAM, after mentioning the observations of the judge of the Scottish courts that an absolute and inflexible rule releasing the master from responsibility in every case where one servant is injured by the fault of another was utterly unknown to the law of Scotland, said that it was also utterly unknown to the law of England, and added: "To bring the case within the exemption, there must be this most material qualification: that the two servants must be men in the same common employment, and engaged in the same common work, under that common employment." Later decisions in the English courts extend the master's exemption from liability to cases where the servant injured is working under the direction of a foreman or superintendent, the grade of service of the latter not being deemed to change the relation of the two fellow servants. Thus in *Wilson v. Merry*, decided in the house of lords in 1868, on appeal from the court of sessions of Scotland, the submanager of a coal pit, whose negligence in erecting a scaffold which obstructed the circulation of air underneath, and led to an accumulation of fire damp, which exploded and injured a workman in the mine, was held to be a fellow servant with the injured party. And the court laid down the rule that the master was not liable to his servant unless there was negligence on the master's part in that which he had contracted with the servant to do, and that the master, if not personally superintending the work, was only bound to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work; that when he had done this he had done all that he was required to do; and, if the persons thus selected were guilty of negligence, it was not his negligence, and he was not responsible for the consequences. L. R. 1 H. L. Sc. 326. In this case, as in many others in the English courts, the foreman, manager, or superintendent of the work by whose negligence the injury was committed was himself also a workman with the other laborers, although exercising a

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direction over the work. The reasoning of that case has been applied so as to include, as contended here, employees of a corporation in departments separated from each other; and it must be admitted that the terms "common employment," under late decisions in England, and the decisions in this country following the Massachusetts case, are of very comprehensive import. It is difficult to limit them so as to say that any persons employed by a railway company, whose labors may facilitate the running of its trains, are not fellow servants, however widely separated may be their labors. See *Holden v. Railroad Co.*, 129 Mass. 268. But, notwithstanding the number and weight of such decisions, there are, in this country, many adjudications of courts of great learning restricting the exemption to cases where the fellow servants are engaged in the same department, and act under the same immediate direction, and holding that, within the reason and principle of the doctrine, only such servants can be considered as engaged in the same common employment. It is not, however, essential to the decision of the present controversy to lay down a rule which will determine, in all cases, what is to be deemed such an employment, even if it were possible to do so. There is, in our judgment, a clear distinction to be made, in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and a just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under

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him, in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles, at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know, from the manner in which railways are operated, that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow servant with the fireman, the brakemen, the porters, and the engineer. The latter are fellow servants in the running of the train under his direction, who, as to them and the train, stands in the place of and represents the corporation. As observed by Mr. Wharton in his valuable treatise on the Law of Negligence: "It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases where it is impossible for it to be negligent personally. But, if this be true, it would relieve corporations from all liability to servants. The true view is that, as corporations can act only through superintending officers, the negligence of those officers, with respect to other servants, are the negligences of the corporation." Section 232a. The author, in a note, refers to *Brickner v. Railroad Co.*, decided in the supreme court of New York, and afterwards affirmed in the circuit court of appeals, and to *Malone v. Hathaway*, decided in the latter court, in which opinions are expressed in conformity with his views. These opinions are not, it is true, authoritative, for they do not cover the precise points in judgment. but were rather expressed to distinguish the questions thus

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arising from those then before the court. They indicate, however, the disposition to ingraft a limitation upon the general doctrine as to the master's exemption from liability to a servant for the negligence of their fellows, when a corporation is the principal and acts through superintending agents. Thus, in the first case, the court said: "A corporation cannot act personally. It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men, and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are the representatives of the corporation. They are then the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointee, equally with themselves, represents the corporation as master in all those respects. And though, in the performance of these executive duties, he may be and is a servant of the corporation, he is not in those respects a 'co-servant,' a 'co-laborer,' a 'co-employee,' in the common acceptance of those terms, any more than is a director who exercises the same authority." 2 Lans. 516, affirmed in 49 N. Y. 672. And in *Malone v. Hathaway*, in the court of appeals, JUDGE ALLEN says: "Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employees, provide materials and machinery for the service of the corporation, and generally direct and control under powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duties, exercising the discretion ordinarily exercised by principals, and, within the limits of delegated authority, the acting principal. These acts are in such case the acts of the corporation, for which and for whose neglect the corporation, within adjudged cases, must respond,

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as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care." 64 N. Y. 5-12. See, also, *Corcoran v. Holbrook*, 59 N. Y. 517. In *Railroad Co. v. Stevens*, the supreme court of Ohio held that where a railroad company placed the engineer in its employ under the control of a conductor of its train, who directed when the cars were to start and when to stop, it was liable for an injury received by him caused by the negligence of the conductor. 20 Ohio, 415. There a collision between two trains occurred in consequence of the omission of the conductor to inform the engineer of a change of places in the passing of trains ordered by the company. Exemption from liability was claimed, on the ground that the engineer and conductor were fellow servants, and that the engineer had in consequence taken, by his contract of service, the risk of the negligence of the conductor, and also that public policy forbade a recovery in such cases. But the court rejected both positions. To the latter it very pertinently observed that it was only when the servant had himself been careful that any right of action could accrue to him, and that it was not likely that any would be careless of their lives and persons or property merely because they might have a right of action to recover for injuries received. "If men are influenced," said the court, "by such remote considerations, to be careless of what they are likely to be most careful about, it has never come under our observation. We think the policy is clearly on the other side. It is a matter of universal observation that, in any extensive business where many persons are employed, the care and prudence of the employer is the surest guaranty against mismanagement of any kind." In *Railroad Co. v. Keary*, 3 Ohio St. 201, the same court affirmed the doctrine just announced, and decided that when a brakeman in the employ of a railroad company, on a train under the control of a conductor having exclusive command, was injured by the carelessness of the conductor, the company was responsible; holding that the conductor in such case was

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the sole and immediate representative of the company, upon which rested the obligation to manage the train with skill and care. In the course of an elaborate opinion, the court said, that, from the very nature of the contract or service between the company and the employees, the company was under obligation to them to superintend and control with skill and care the dangerous force employed, upon which their safety so essentially depended. "For this purpose," said the court, "the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner, and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as a man and a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both are necessary to produce the result. It is his to command, and theirs to obey and execute. No service is common that does not admit a common participation, and no servants are fellow servants when one is placed in control over the other." In *Railroad Co. v. Collins*, 2 Duv. 114, the subject was elaborately considered by the court of appeals of Kentucky. And it is held that in all those operations which require care, vigilance, and skill, and which are performed through the instrumentality of superintending agents, the invisible corporation, though never actually, is yet always constructively, present through its agents who represent it, and whose acts, within their representative spheres, are its acts; that the rule of the English courts, that the company is not responsible to one of its servants for an injury inflicted from the neglect of a fellow servant, was not

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adopted to its full extent in that state, and was regarded there as anomalous, inconsistent with principle and public policy, and unsupported by any good and consistent reason. In commenting upon this decision, in his treatise on the Law of Railways, Redfield speaks with emphatic approval of the declaration that the corporation is to be regarded as constructively present in all acts preformed by its general agents within the scope of their authority. "The consequences of mistake or misapprehension upon this point," says the author, "have led many courts into conclusions greatly at variance with the common instincts of reason and humanity, and have tended to interpose an unwarrantable shield between the conduct of railway employees and the just responsibility of the company. We trust that the reasonableness and justice of this construction will at no distant day induce its universal adoption." 1 Redf. R. R. 554. There are decisions in the courts of other states, more or less in conformity with those cited from Ohio and Kentucky, rejecting or limiting, to a greater or less extent, the master's exemption from liability to a servant for the negligent conduct of his fellows. We agree with them in holding, and the present case requires no further decision, that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that for injuries resulting from his negligent acts the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner.

If, now, we apply these rules of the relation of a train dispatcher of railway trains to the company and to the subordinates on trains under his direction, the objections urged to the rulings of the court below will be readily disposed of. The purport of the court's rulings touching the liability of the company is that the train dispatcher and fireman, though both employees, were not "fellow servants," in the sense in

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which that term is used in the decisions; that the former was the representative of the company, standing in its place and stead in the running of its trains, and that the latter was, in that particular, his subordinate; and that for the former's negligence, by which the latter was injured, the company was responsible.

It was not disputed on the trial below that the collision which caused the death of the fireman was the result of the negligence of the train dispatcher, and hence was attributable to the negligence of the appellant company. See *Sheehan v. Railroad Co.*, 91 N. Y. 332; *Smith v. Railway Co.*, 92 Mo. 359, 4 S. W. 129; *Darrigan v. Railroad Co.*, 52 Conn. 285; *Railroad Co. v. McLannan*, 84 Ill. 109; *Railroad Co. v. McKenzie*, 81 Va. 71; *Cooley, Torts*, 564. In the case of *Railroad Co. v. Camp*, 13 C. C. A. 233, 65 Fed. 952, this question was involved and directly passed upon. The court, in substance, held as follows: A train dispatcher, who has complete control of all trains on a division of a railroad, is not a fellow servant of an engineer of a train running on such division, either at common law or under the statute of Ohio. JUDGE TAFT delivered the opinion of the court in that case, and the conclusion was that a person who was merely a telegraph operator, and who has no authority to direct the movement of trains, is a fellow servant of a fireman or engineer; but that a train dispatcher, who has the power and authority, acting in the name of the superintendent, to direct the movement of trains, would not be a fellow servant, and the railroad company would be liable for his negligence.

The third and last question raised by the appellant in its brief is that the right of survivorship of actions by the widow and heirs against one who wrongfully killed the husband and father does not exist in the Indian Territory, and that for that reason the court should have directed a verdict for the railway company. As this question has been directly passed upon by the United States circuit court of appeals for the Eighth circuit in the case

Wrongful Death
—Right of Action.

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of Coal Co. v. Bevil, 10 C. C. A. 41, 61 Fed. 757, which court holds that the right of action does survive in the widow and heirs, this court is bound by the decision of the circuit court of appeals. No errors appearing in the record in this case, the judgment of the lower court is affirmed.

CLAYTON and TOWNSEND, JJ., concur.

NOTE.

Train Dispatcher as Vice-Principal.—See Louisville, N. A. & C. Ry. Co. v. Heck (Ind.), 11 Am. & Eng. R. Cas., N. S., 382, and *note*, p. 402, where the cases are collected.

Additional authorities holding that the train dispatcher is a vice-principal are: McLeod v. Ginther, 80 Ky. 399; Haynes v. East Tenn., etc., R. Co., 3 Coldw. (Tenn.) 222; Baltimore, etc., Ry. Co. v. Camp, 65 Fed. Rep. 952, 31 U. S. App. 213; Clyde v. Richmond, etc., R. Co., 69 Fed. Rep. 673; Flannegan v. Chesapeake, etc., R. Co., 40 W. Va. 436; Hogan v. Missouri, etc., R. Co., 88 Tex. 679; Little Rock, etc., R. Co. v. Barry, 58 Ark. 198.

SMITH

v.

ST. LOUIS & S. F. RY. CO., *et al.*

(*Supreme Court of Missouri, July 12, 1899.*)

Actions against Receivers—Jurisdiction.—Persons having claims to property in the hands of receivers must submit such claims to the court that has obtained jurisdiction over the *res*, and the consent of such court must be obtained before its receivers can be sued in any other tribunal.

Instructions.—It is error to give instructions not warranted by the evidence.

Negligence of Fellow Servant—Liability of Master.*—The master is not liable for the negligence of a fellow servant, if ordinary care

*For authorities supporting this rule, see numerous cases in American & English Railroad Series, and 12 Am. & Eng. Enc. Law (2nd Ed.) at p. 896.

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was exercised in employing him, and the master was not negligent in retaining him in his employment after chargeable with notice of his incompetency.

Incompetency of Servant—Knowledge of Fellow Servant—Notice to Master.*—The knowledge of an employee of the incompetency of a fellow servant is not notice to the master.

Fellow Servants.*—A locomotive fireman and a head hostler at a roundhouse, who has no power to employ or discharge firemen, are fellow servants.

Same.—A locomotive fireman and a roundhouse wiper are fellow servants.

APPEAL by defendants from Newton county circuit court. *Reversed.*

Damages for personal injuries. The petition alleges that the defendant company is, and at the times therein stated was, a railroad company; that on the 23d of December, 1893, the defendants Reinhart, McCook, and Wilson were appointed receivers of said railroad company by the United States circuit court for the district of Kansas; that at the city of Monett "the company had a roundhouse, turntable, switch yards, and coal chutes, where engines are cleaned, repaired, watered, coaled, and made ready to be used by defendant's agents, servants, and employees; that plaintiff was, on the 20th day of October, 1893, and prior thereto, an employee and in the service of the defendant railway company as locomotive fireman on a passenger engine numbered 56, on said railroad, running between Monett, Mo., and Neodesha, Kan.; that on the said 20th day of October, 1893, said engine No. 56 was taken out of defendant's roundhouse by its employees at the usual time preparatory to going out on its run, and placed on the coal-chute track in the switch yard at the usual and customary place for putting an engine that is shortly to go out on its run, and that shortly thereafter plaintiff took charge of said engine, as it was his duty to do, while it was standing on said track as aforesaid, and immediately began performing the duties required of him as such fireman in and about get-

*See note at end of case.

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ting said engine to take out passenger train numbered 1, going west, and that while plaintiff, in the discharge of his said duties, was examining the ash pan on said engine, to see if it had been properly cleaned, and was stooping over in front of the main drive wheel of said engine in the usual and customary and most convenient position for making such examinations, one Grant Sheldon, who was in the employ and service of said defendant railway company as an engine hostler, and who was an ignorant, incompetent, reckless, and unskillful servant, all of which the said defendant railway company well knew, or by the exercise of ordinary care and diligence might have known, got upon said engine, with the knowledge and permission of defendant, and, in the discharge of the usual and customary work and duty of an engine hostler, carelessly, recklessly, and negligently, and without ringing the bell, sounding the whistle, or giving any other warning, quickly and suddenly started said engine forward, and ran the same against the plaintiff, thereby throwing him down with his left hand upon the track rail in front of one of the drive wheels of said engine, the said wheel passing over said hand, mashing and mangling his hand, causing plaintiff great pain and suffering, and causing him to lose a great deal of time, and rendering it necessary to have his hand amputated above the wrist joint, to his damage in the sum of \$25,000; that the defendant railway company negligently and carelessly employed and retained in their employ, and required and permitted to work about and handle the engine aforesaid as hostler, the said Grant Sheldon, well knowing, or by the exercise of reasonable care might have known, that he was ignorant, reckless, unskillful, and incompetent to perform the duties of such hostler, and to handle said engine, and that by reason of the carelessness and negligence of the said defendant railway company in employing and retaining in their employ and permitting to handle said engine the said Grant Sheldon, and by reason of the ignorance, recklessness, unskillfulness, and incompetency of the said Grant Sheldon, the plaintiff was reck-

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lessly run upon by said engine, and thrown down and injured and damaged as aforesaid." The second count of the petition is the same as the first, except that, after alleging the character of the company, and that it had the roundhouse, turntable, etc., at Monett, it is further averred, "And that defendants J. W. Reinhart, John J. McCook, and Joseph C. Wilson are the duly appointed and qualified receivers of said railroad as aforesaid, in possession thereof, and operating same as aforesaid," and except, further, that it is charged that the engine was in a defective and dangerous condition. The answer of the company admitted the appointment of the receivers, denied the allegations of the petition, and pleaded contributory negligence on the part of the plaintiff. The receivers adopted the answer of the company, and then pleaded that no permission to sue them had been applied for or granted by the United States circuit court for the Eastern district of Missouri, or any court having jurisdiction of their receivership.

The facts developed on the trial were, substantially, that about 6.40 p. m. on the 20th of October, 1893, the plaintiff, while in the employ of the company as a locomotive fireman, went to his engine, which was standing on what is called the "coal-chute track," at Monett, Mo., to prepare to go out on his run. He lit the lamps on the engine, and, finding that the engine did not have enough coal, he left the engine, and went to the roundhouse, which was 40 or 50 feet distant, and asked for more coal. Then he returned to the engine, opened the valve that lets oil into the lubricator, opened the cylinder cocks, and then stooped down, within four or five feet of the cylinder cocks, with his hands on his knees, and with his head and shoulders under the main rod, which connects the drive wheels of the engine, and which communicates the power to the wheels, to examine the ash pan under the engine. While he was in the position described, the engine started forward. No bell was rung or whistle sounded. The main rod struck him on the head, and he lost his balance, and, to save himself

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from falling, he threw out his left hand upon the track rail, and one of the drive wheels ran over it, injuring it so that amputation became necessary. After his hand was run over, he raised up, and, as the gangway of the engine passed him, he saw a man getting off of the engine on the opposite side, and called to him for assistance, but the man paid no attention to him. He says that he knew the man's face, having seen him around the roundhouse, but did not then know his name; that the man was Grant Sheldon. The track on which the engine was standing had a slight grade towards the west, and the engine was a medium quick starter; that is, if "everything was tight" with the lubricator turned, and the cylinder cocks open, the engine would start, without any steam being turned on, when on a grade of this character. The plaintiff testified that, if the steam is turned on, it would necessarily escape from the cylinder cocks, and that no steam escaped from this engine. Grant Sheldon was employed as a wiper or fire puller in the roundhouse, and prior to the accident had never been employed as a hostler. The employees at the roundhouse rank—First, foreman, who in this case was J. R. Randall; second, head hostler, who was Peter Stringer; third, second hostler; fourth, third hostler; and, fifth, wipers or fire pullers, whose duties are to perform manual labor cleaning engines, and who are expressly prohibited by the rules of the company from moving an engine, either in or outside of the roundhouse, except in the immediate presence of a hostler. Sheldon, although not a hostler, had, before the accident, moved an engine in the yard, without the presence of a hostler. As to Sheldon's competency, the testimony is as follows: "Charles Andrews said he had heard complaints among the boys about the way he handled engines, and that the boys were afraid to haul fire under him; that he had complained to Stringer about him, but could not say whether it was before the accident to the plaintiff. David Loftin testified that he had heard the fire pullers complain, in the presence of Stringer, that Sheldon was not competent to handle an engine, but could not say that this was before

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the accident. James H. Coyle testified that one night Sheldon backed an engine into another engine, and broke the brake beam out of it, and knocked the fellow over that was underneath it; that this occurred a week or two before the accident to the plaintiff; that he complained to Stringer about Sheldon, because he would stop an engine, and then the engine would start up and roll away; that he heard Charlie Stringer complain to Peter Stringer about Sheldon, and Peter told him to block the engine good before he went under it, and told Coyle to do likewise; that he could not say exactly whether this was before or after the plaintiff got hurt. The plaintiff's counsel asked the witness Charles Andrews the following question: "Q. What was Mr. Stringer's habits there in regard to being temperate or intemperate when at work?" The defendant objected, the court overruled the objection, and the defendant duly excepted. The witness answered: "A. I have seen him drinking,—what I would call somewhat intoxicated." Again, the witness David Loftin was asked: "Q. You may tell how Mr. Stringer was regarded there as to being a safe and competent man to handle an engine prior to the time of this injury." The defendant again objected, the court overruled the objection, the defendant saved its exception, and the witness answered: "There was a good deal of complaint against him." The testimony shows that Randall, the foreman, alone had power to employ and discharge men, and that the head hostler had no such power, and that, in case anything went wrong, Stringer had no power to act, but had to send for Randall, who was alone authorized to act for the company at the roundhouse. Grant Sheldon testified that prior to the accident he was a wiper, and that he never had moved an engine, as he knew the rules of the company forbade his doing so; that when the plaintiff called for coal he was 15 or 20 feet outside of the roundhouse, and shortly afterwards he saw the engine start west towards the coal chute; that he supposed there was a hostler on the engine, and he ran to help get the coal, and when he stepped on the step he saw

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there was nobody in the cab ; that he heard somebody halloo, and he got upon the engine, and stopped it ; that he did not start the engine, and was not on it when plaintiff was hurt. Peter Stringer, the head hostler, testified that Sheldon was a wiper or fire puller, and that the rules of the company positively prohibited a wiper or fire puller to move an engine under any circumstances, and that he never heard of Sheldon moving an engine until after plaintiff was injured, and that he (Stringer) had no power to employ or discharge men, but was simply the head hostler at night, and got his orders from Randall. J. F. Randall testified that he was the foreman, and alone had power to employ and discharge men ; that Sheldon was employed as a wiper, and was prohibited by the rules of the company to move an engine under any circumstances. At the close of the plaintiff's case, and again at the close of the whole case, the defendants separately demurred to the evidence. The court overruled the demurrer, and defendants excepted.

Defendant asked, and the court refused to give, the following instructions : "(3) The court instructs the jury that notice to or knowledge by a fellow servant of plaintiff of the incompetency of Grant Sheldon is not notice to the defendant railway company ; and notice to the head hostler or crew foreman of the defendant of the incompetency of Sheldon was not of itself notice to said defendant, unless said head hostler or crew foreman had power to employ or discharge said Sheldon. (4) The court instructs the jury that plaintiff and Grant Sheldon, under the evidence in this case, were, at the time of the injury, fellow servants with each other, and plaintiff cannot recover for any negligent act of said Grant Sheldon, and that the only ground on which plaintiff can recover is that the defendant railway company was negligent in employing said Sheldon, or was negligent in retaining him in its employ, after notice to it that he was habitually careless and incompetent to perform the duties he was employed or directed to perform, or after it might have learned of such alleged incompetency or carelessness by the

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use of reasonable care." At the instance of the plaintiff the court gave the following instruction: "The court instructs the jury that any foreman for the master, though not the head foreman, is vice principal as to a servant if he has the control of the work in which the servant is engaged, and is the person intrusted by the master with authority to direct the servant how, when, and where to work. You are therefore instructed that if you believe, from the evidence, that, prior to the injury of plaintiff, Peter Stringer had control and direction of the men engaged in performing the work in and about the roundhouse in Monett, Missouri, and was intrusted by the defendant with authority to direct the said persons so working for said defendant when and where to work, then the knowledge of Peter Stringer would be the knowledge of the defendant." There was a verdict for the plaintiff for \$2,637 against all the defendants personally, and after due steps the defendants appealed to the St. Louis court of appeals, which court transferred the case to this court. The trial took place at the December term, 1895, and afterwards, at the May term, 1896, on motion of the plaintiff, and notice to defendants, the court amended the judgment *nunc pro tunc*, so as to provide that the judgment should be entered against the defendant company, and that such judgment be certified to the defendant receivers "to be satisfied out of any fund that may be liable to same."

L. F. Parker, for appellants.

W. Cloud and *J. T. Burgess*, for respondent.

MARSHALL, J. (after stating the facts). 1. This proceeding against the receivers appointed by the circuit court of the United States for the Eastern district of Missouri is without any permission or authority from that court, and hence cannot be maintained. The cause of action did not arise or accrue while the receivers were in charge of and conducting the business, and therefore the plaintiff does not come within the provisions of the act of March 3, 1887 (24 Stat. p. 554). The accident

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Jurisdiction.

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complained of occurred on the 20th of October, 1893, and the receivers were not appointed until December 23, 1893. Receivers are officers of court to hold and manage property which is in the registry of the court, and persons having any claim to property so situated must submit their claims to the court that has obtained jurisdiction over the *res*, and the court will not permit its officers to be sued in any other tribunal without its consent. This is not only a law of comity among courts, but is a jurisdictional necessity, for it is manifest that two courts could not, acting separately, successfully manage the property, or harmoniously distribute it. Beach, Rec. (Alderson's Ed.) §§ 229-240; Kerr, Rec. (2d Ed.) p. 196 *et seq.* The petition does not aver that the consent or permission of the United States circuit court to sue its receivers was asked or obtained before this action was begun, and there is a total lack of any evidence of such steps having been taken. The action cannot, therefore, be maintained, and the judgment against the receivers, or, as amended, that the judgment against the company be certified to the receivers, is reversed.

2. The case made against the defendant company by the pleadings is that it employed Grant Sheldon as a hostler at its roundhouse at Monett, knowing that he was unskillful, and incompetent to handle an engine, or that it might have ascertained that fact by the exercise of ordinary care; and that the plaintiff, a locomotive fireman in the defendant's employ, was injured, while in the discharge of his duty, by the carelessness of said Sheldon in starting the engine to which plaintiff was attached as such fireman without ringing the bell or sounding the whistle. This is the substance of the first count. The second count is the same, except that it contains an averment that the engine was in a defective or dangerous condition; but, as there is no evidence to support that averment, and no instructions were asked by the plaintiff predicated a right to recover upon the defective or dangerous condition of the machinery, the plaintiff must be

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regarded as having abandoned that count. We will therefore treat the case as resting upon the first count only. The evidence wholly failed to support the allegation that Sheldon was employed by defendant as a hostler. On the contrary, all the evidence shows that he was employed as a wiper or fire puller, and that the rules of the company positively prohibited a wiper or fire puller to move an engine under any circumstances, except in the immediate presence and under the direction of a hostler who was on the engine. The plaintiff produced some evidence that on at least one occasion before this accident Sheldon did move an engine, and backed it into another engine; but there is no evidence that the company, or any of Sheldon's superior officers, knew of this fact, and, on the contrary, the head hostler and the foreman both testify that they never knew of Sheldon moving an engine at any time before the accident. The plaintiff's witnesses Andrews, Loftin, and Coyle testify to hearing or making complaints against Sheldon, and that the fire pullers were afraid to go under the engine when he was moving it, but none of them would swear that this occurred prior to the accident to the plaintiff; and when it is remembered that the plaintiff was injured on the 20th of October, 1893, and that the trial at which this testimony was introduced took place on the 3d of January, 1896, the inability of the witnesses to locate these "talks" among "the boys," as to whether they were before the accident or afterwards, is easily understood. The witness Coyle also testified to hearing complaints made to Stringer, the head hostler, about Sheldon, but he was unable to state whether this was before or after the accident; he finally saying: "I do not know for certain. It was on or about that time, to the best of my knowledge,—about. It might have been prior to that, and it might have been afterwards, but it was about that time." When the evidence is analyzed, therefore, it amounts to this: That Sheldon was not employed as a hostler, as charged in the petition, but was employed as

wiper or fire puller, and was prohibited by the rules of the company from moving an engine, except when a hostler was on the engine directing him; that neither the head hostler nor the foreman had ever heard of Sheldon moving an engine before the accident; that Sheldon did move an engine once before the accident, but neither the head hostler nor the foreman ever heard of it; that the fire pullers and wipers complained about Sheldon, and at least one of them spoke to the head hostler about Sheldon, but it does not appear that this was before the accident; that Peter Stringer was the head hostler, and directed the men around the roundhouse as to what work they should do, but that he had no power to employ or discharge any one, and, if anything unusual occurred, he had to report to, and act under the orders of, Randall, who was the foreman and master mechanic, and whose office was within a few feet of the roundhouse, and who alone had power to employ or discharge the men.

The case was put to the jury by the court upon instructions which authorized a recovery by the plaintiff if the defendants employed Sheldon, and permitted him to move engines around the roundhouse or yards at Monett, and if Sheldon was unskillful or incompetent, and the defendant knew it, or by the exercise of reasonable care could have ascertained it, or kept him in its employ after it knew or might have known of his incompetency, and if Sheldon's incompetency or unskillfulness caused the injury to the plaintiff, and that, if Peter Stringer, the head hostler, had authority to direct the men in their work around the roundhouse, he was a vice principal, and his knowledge was the knowledge of the company. The instructions did not fit the issues, in that they did not require the jury to find that Sheldon was employed as a hostler. They simply required the jury to find that Sheldon was employed by the defendant, without specifying in what capacity, and then to find that the defendant permitted Sheldon to run engines around the roundhouse and yards, and, in order to carry knowledge of Sheldon's acts to the company so as to draw the inference of a permission from the

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company, the fact that Stringer had the right to direct the men around the roundhouse as to what work they should do was declared by the court to make Stringer a vice principal, so that his knowledge was the knowledge of the company: but neither this instruction, nor any other instruction given to the jury, required them to find that even Stringer knew that Sheldon had ever run an engine before the accident, or that Stringer had ever permitted Sheldon to do so. And the jury, if so required, could not have so found, for, as above pointed out, the evidence shows only one occasion prior to the accident when Sheldon ever moved an engine, and there is no evidence whatever that even Stringer ever heard of it, but, on the contrary, Stringer testified positively that he never had heard of it, and never had given him permission to do so, but that, on the contrary, the rules absolutely prohibited him from doing so. The case presented therefore does not show that the company employed Sheldon as a hostler, or that it ever permitted him to run an engine, or ever heard of his doing so, before the accident, and that the rules prohibited his moving an engine. Sheldon was employed as a wiper or fire puller, and there is no pretense that he was incompetent to do that work. There was, therefore, no evidence upon which to predicate the instructions given for the plaintiff. The third instruction given for the plaintiff lacked the essential element of requiring the jury to find that Stringer knew of Sheldon's incompetency to move an engine, and that Stringer permitted him to do so; and the jury could not so find because there was no evidence whatever adduced upon which the jury could have so found, but the evidence was all to the contrary. The instructions were further erroneous in that, while not being consistent with the issues as to Sheldon's employment as a hostler, and not specifying in what capacity Sheldon was employed, and assuming that there was evidence that defendant permitted him to move engines, and while declaring that, because Stringer directed the work of the men around the roundhouse he was a vice principal, and without requiring

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the jury to find that Stringer had any knowledge that Sheldon ran engines, or that he was incompetent, it was declared that Stringer's knowledge was the knowledge of the company.

It might be sufficient now to say that, if all the knowledge that Stringer is shown by this record to have had is assumed to have been possessed by the company, it would not make out a case against the defendant, for it would amount only to this: that Sheldon was em-
ployed as a wiper or fire puller; that he was
prohibited by the rules from moving an engine;

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that he never had moved an engine before the injury to plaintiff, and that he was not ordered or given permission to do so on that occasion, or given permission to do so at any other time prior to the accident. This is what the evidence shows was the knowledge of Stringer. It wholly fails to show any knowledge on Stringer's part which would impose a liability on the defendant. In *Dysart v. Railroad Co.*, 145 Mo., *loc. cit.* 88, 46 S. W. 752, WILLIAMS, J., said: "Plaintiff and the engineer were fellow servants. * * * It was essential to plaintiff's case to show, not only the incompetency of the engineer, but also that defendant failed to exercise reasonable care in employing and retaining him in its service. *Roblin v. Railroad Co.*, 119 Mo. 476, 24 S. W. 1011. 'There is no dispute as to this proposition of law, namely, that the master must use ordinary care in employing and retaining competent and suitable servants. This is a personal duty devolved upon the master, and he is liable for a failure to perform this duty, resulting in an injury to a fellow servant.' *Williams v. Railroad Co.*, 109 Mo. 482, 18 S. W. 1098. It is equally well established that the burden is on the plaintiff seeking to recover for injuries caused by the negligence of a fellow servant to show want of proper care on the part of the master in employing or retaining the latter. *Roblin v. Railroad Co.*, 119 Mo. 476, 24 S. W. 1011. If there was a failure to make this proof, then, without reference to any other questions in the case, the instruction,

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which resulted in a nonsuit, was entirely proper." The case then before the court was much stronger for the plaintiff than the case at bar, for there the employee complained of as incompetent was employed as an engineer, and it was shown that on a prior occasion he backed the engine when the signal was to go ahead, and it was further shown that his reputation was bad among the employees of the road with respect to care and caution; but there was no evidence that the company ever heard of these matters, nor that it was guilty of want of ordinary care in employing or retaining him. So the judgment was affirmed. The law imposes a duty upon the master to exercise ordinary care in employing competent and suitable persons to transact the master's business committed to their care, and the degree of care required of the master varies with the nature of the duties to be performed by the servant. The master is required to exercise greater care in the employment of a railroad engineer than in the employment of a brakeman or track hand. Wood, Mast. & S. (2d Ed.) § 418; Bailey, Mast. Liab. p. 54. So the master must exercise ordinary care in retaining servants in his employ, and, if he retains a servant who has proved himself incompetent to the knowledge of the master, the master will be liable. But this is the extent of the master's duty to a fellow servant. All other risks the servant assumes when he enters the master's employment. Wood, Mast. & S. (2d Ed.) § 416. If the servant's reputation is so generally known to be bad that it could have been easily ascertained upon inquiry, the master is liable, for he is negligent in not making the inquiry. Wood, Mast. & S. (2d Ed.) § 421; Bailey, Mast. Liab. p. 48. Applying these principles to this case, it appears that, as defendant employed Sheldon as a wiper or fire puller, it was not bound to exercise the same degree of care that it would if he had been employed as an engineer or hostler, and that no negligence is shown in employing him as a wiper, for there is no complaint as to his competency in that employment, nor was

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the injury to the plaintiff caused in any manner by any unskillfulness in discharging his duty as a wiper. The plaintiff's case must rest, then, upon the alleged knowledge of Stringer. Aside from the defects in the third instruction above noted, and the total absence of any proof that Stringer knew of or consented to Sheldon's moving an engine, the instruction is erroneous for the further reason that Stringer and the plaintiff were fellow servants, as were Sheldon and the plaintiff fellow servants. Stringer had no power to hire or discharge any one. Randall was the foreman and master mechanic in charge of the defendant's roundhouse, and all that was done there, and he alone had power to hire or discharge servants. He was the vice principal of the company. And it is not even pretended that he knew of or permitted Sheldon to run an engine, or ever heard anything about his competency or incompetency to do so. He hired Sheldon as a wiper, and no negligence is imputable to the defendant from that employment. In *Williams v. Railroad Co.*, 109 Mo. 475, 18 S. W. 1098, it was held that the knowledge of the foreman of the roundhouse (here, Randall) was the knowledge of the company, because "it was his duty to look after the engines and men, and make reports to his superior." *Bailey, Mast. Liab.* p. 65, lays down the rule that knowledge must be shown to have been possessed by the master, or "by one who has authority in the premises, or whose duty it is to convey it to one having such authority. Knowledge by one not sustaining such relation is not sufficient"; and, quoting from *Railroad Co. v. Collarn*, 73 Ind. 261, he says, "Notice to the master mechanic, whose duty is to employ or discharge the incompetent servant, will be notice to the master." Stringer occupied no such relation to the defendant company as would charge it with his knowledge. He was in no sense a vice principal. He was the head hostler, and as such was not of as much rank or dignity as an engineer. The plaintiff was a fireman, and he and the

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engineer were fellow servants. So he and Stringer were fellow servants. fellow servants, and Stringer's knowledge was no more the knowledge of the company than that of any other servant. We are not disposed to extend the doctrine of vice principal any further than was done in the Williams Case, *supra*. It follows that the third instruction given for the plaintiff was erroneous, and that the converse of that instruction embodied in instruction 3 asked by defendant should have been given. Instruction 4, asked by defendant, should have been given in any aspect of the case. It asserted perfectly correct principles of law, and bore upon the vital points at issue, which were not covered by any other instruction given. It follows that the judgment of the circuit court must be reversed, and the cause remanded for a new trial in conformity herewith. It is so ordered.

NOTES.

Incompetency of Fellow Servant—Notice to Master.—An employee's knowledge of the incompetency of a fellow servant of the same grade does not charge the master with notice. *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267; *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510; *Kidwell v. Houston & G. N. R. Co.*, 3 Woods (U. S.) 313; *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 34 Am. St. Rep. 620.

Fellow Servants—Roundhouse Employees and Trainmen.—An engineer and an engine cleaner have been held fellow servants. *Spencer v. Ohio, etc., R. Co.*, 130 Ind. 181. And a brakeman and a sand box-filler. *Louisville, etc., R. Co. v. Petty*, 67 Miss. 255, 41 Am. & Eng. R. Cas. 444, 19 Am. St. Rep. 304. Trainmen, generally, and an engine-wiper. *Ewald v. Chicago, etc., R. Co.*, 70 Wis. 420, 33 Am. & Eng. R. Cas. 326, 5 Am. St. Rep. 178. But in Texas it has been held that a hostler and engineer are not fellow servants. *Texas, etc., R. Co. v. Leighty* (Tex. Civ. App.), 32 S. W. 799.

CRESWELL

v.

WILMINGTON & N. R. Co.

(*Supreme Court of Delaware, June 21, 1899.*)

Injury to Employee—Liability of Master.*—The rule that the master is liable for an injury to his servant caused by the negligence of a fellow servant combined with negligence on the part of the master is applicable only where the negligence of the master was such that the law would hold him responsible if it had been the sole cause of the injury.

Appliances—Duty of Master.†—It is not the duty of the master to furnish the best appliances.

Same—Defects—Assumption of Risk.‡—A servant chargeable with notice of defects in appliances assumes the risk of injury from them by continuing to use them without objection, whether or not they are of the best kind or in the best possible condition.

Same—Insufficient Crews—Same.—The rules in regard to the assumption of risk by an employee are the same in the case of an insufficient number of men for the conduct of the work in which he is engaged as in that of defective appliances.

Fellow Servants.§—The engineer and conductor of the same train are fellow servants.

Combination of Causes.—A railroad company cannot be held liable for an injury resulting from the combination of a number of causes for no one of which it is liable.

Directing Verdict.—Where the evidence is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit it to the jury.

Harmless Errors.—A judgment should not be reversed because of harmless errors.

*See, generally, *note*, 12 Am. & Eng. R. Cas., N. S., 791; 12 Am. & Eng. Enc. Law (2nd Ed.) at page 905.

†See *Shadford v. Ann Arbor St. Ry. Co.* (Mich.), 6 Am. & Eng. R. Cas., N. S., 584, and *foot-note*.

‡See *notes*, 11 Am. & Eng. R. Cas., N. S., 484.

§See note at end of case.

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Evidence.—It was not error to refuse to admit immaterial and irrelevant evidence.

Same.—It was not error to refuse to allow certain witnesses to testify as experts, it not having been shown that they were qualified to testify as experts.

ERROR by plaintiff to Newcastle county superior court.
Affirmed.

Argued before NICHOLSON, CH., and SPRUANCE and GRUBB, JJ.

Anthony Higgins and Albert Constable, for plaintiff in error.
Lewis C. Vandegrift and George Gray, for defendant in error.

SPRUANCE, J. This was an action in the superior court for Newcastle county brought by the plaintiff, Mary Alice Creswell, the widow of George Creswell, against the defendant, the Wilmington & Northern Railroad Company, for the recovery of damages for the death of the said George Creswell, alleged to have been occasioned by the negligence of the defendant on the 10th day of April, 1896. Under the instruction of the court, the jury rendered a verdict for the defendant. To this instruction and certain rulings as to the admission of testimony the plaintiff excepted, and took the writ of error upon which the case comes into this court. The said George Creswell, while in the service of the defendant and in the act of coupling an engine of the defendant to a freight car of the Baltimore & Ohio Railroad Company, was crushed and killed between the said engine and car. At the time of the accident he was engaged in shifting cars upon the tracks of the defendant near Pigeon Point on the Delaware river, there to be transferred to barges. The engine was known as "Shifting Engine No. 2," and was used only in the barge work in which it was then employed. The shifting crew consisted of Creswell, the conductor, Tyrrell, the brakeman, and Slifer, the engineer. Slifer was not examined. Tyrrell was the only person examined who was present at the time of the accident, and his

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testimony furnishes all of the direct evidence we have upon the subject. His account is substantially as follows: Two empty freight cars which had just been pushed by this engine against two loaded freight cars were, from the impact, receding towards the approaching engine, Tyrrell being at the brake on the end of the car nearest the engine, with one foot on the brake platform (which was about eight feet above the platform to which the drawbar was attached), one leg on top of the car, holding the brake wheel, and with his back to the engine. He did not know how Creswell got to the place of the accident, or what he did before the accident. When he first saw Creswell he was standing outside of the rail, leaning in, with his face to the car and his back to the engine, and crushed between the sill of the car and the engine, the drawhead of the engine and the drawbar of the car having slid past each other. At the time of the collision he estimates that the speed of the engine was from three to four miles an hour, and the speed of the car was about a mile and a half an hour. The plaintiff claims that the death of Creswell was caused by the negligence of the defendant, by the combination and co-operation of the following causes, to wit: (1) The excessive speed of the engine; (2) the absence of brakes upon the engine; (3) the inequality in the height of the drawhead of the engine and the drawbar of the car; (4) the unsafe drawhead upon the engine; and (5) the insufficient number of men constituting the shifting crew. The speed of the engine, especially in view of the speed of the approaching car, was no doubt excessive; but this could have been regulated by the engineer according to his own judgment, or upon order or signal from Creswell, the conductor, unless the appliances for this purpose were not sufficient. There is no evidence of any such order or signal from Creswell, or of any unsuccessful attempt by the engineer to stop or slacken the speed of the engine. The engine was not equipped with brakes, but was controlled by a reverse lever, which, the defendant claims, is not unusual with shifting engines, and better adapted to the work in which this engine was employed

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than brakes. In respect to the inequality in the height of the drawhead of the engine and the drawbar of the car, the evidence was that the center of the drawhead on the engine was in the rear 33 inches above the top of the rail, and in the front about an inch lower. There was no direct evidence as to the height of the drawbar of this car. There was evidence of some measurements of certain other freight cars of the Baltimore & Ohio Railroad Company showing the center of the drawbars of the cars measured to be generally 34, and in one case 35, inches above the rail.

The plaintiff insists that the one-pocket drawhead used upon this engine was unsafe, and that a two or three pocket drawhead would not have slid past the drawbar of the car, and allowed the engine and car to come together as they did.

The defendant contends that the one-pocket drawhead used was better adapted to the particular work in which this engine was engaged, and for this purpose refers to the testimony that the work of shifting and coupling of cars at the time of the accident was preparatory to loading cars upon a barge, which work was also done by the same engine; that, in loading the cars, they were pushed by the engine from the wharf to the barge over a bridge or slip, which rose and fell with the barge, it being attached to the wharf by hinges and to the barge by pins and chains; that similar slips were used at other points on the river to which the cars were transported; that in this work it was necessary that the drawhead of the engine should be strong and allow considerable play; and that, in these respects and for this work, the one-pocket drawhead used was superior to the two or three pocket drawhead. It appears from the testimony that five is the usual number of a shifting crew in yard work where there are passing trains, many cars to be handled, and speed often necessary, but that in the barge work, in which Creswell was engaged, as there were no passing trains, comparatively few cars to be handled, and usually no need of great speed, a crew of three had long been used and found sufficient. There is no evidence that the engineer or brakeman was incompe-

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tent, or that they had not been selected by the defendant with due care. If Creswell omitted to give the proper order or signal to the engineer when he saw the engine approaching at a dangerous speed, or if he attempted the coupling when he saw the engine and car approaching each other at an unsafe speed, or if he attempted the coupling in an unskillful manner, he was guilty of negligence, which would defeat recovery; but, in the absence of any direct evidence as to what he did or omitted immediately before the accident, the inference of his negligence from the position in which he was found after the collision was not alone sufficient to justify the withdrawal of the case from the consideration of the jury.

In *Wheatley v. Railroad Co.*, 1 Marv. 305, 30 Atl. 660, it was said that, if the injury be caused by the negligence of a fellow servant, combined with negligence on the part of the master, the latter is liable.

Injury to Employee—Liability of Master.

This must be limited to cases where there has been negligence on the part of the master in the selection of the negligent fellow servant, or some other negligence of the master for which the law would hold him responsible, if it had been the sole cause of the injury. In other words, while contributory negligence of the servant injured will defeat his recovery against the negligent master, contributory negligence of a fellow servant will not defeat such recovery. *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493.

The material question is, was there any evidence of negligence on the part of the defendant which would have warranted the jury in finding a verdict for the plaintiff? The burden of proving such negligence was on the plaintiff. It was not incumbent on the defendant to show the cause of the accident, or that it was not caused by the defendant's negligence. The ground upon which a servant recovers against a master for injuries sustained in his service is that such injuries were caused by the violation or neglect of some duty which the master owed to the servant. If there was no such duty, there can be no such liability. It is not the duty of the

Appliances—Duty of Master.

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master to furnish appliances of the best and most improved kind. *Thorn v. Ice Co.*, 46 Hun, 497; *Spencer v. Railroad Co.*, 67 Hun, 196, 22 N. Y. Supp. 100.

In the recent case of *Railway Co. v. Archibald* (1898) 170 U. S. 671, 672, 18 Sup. Ct. 779, the supreme court said that it is the duty of the employer "to furnish appliances free from defects discoverable by the exercise of ordinary care. * * * Where an employee receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used. * * * He has a right to assume that the employer will use reasonable care to make the appliances safe, and to deal with those furnished relying on this fact, subject, of course, to the exception by which, where an appliance is furnished to an employee in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such defective appliance, if, with the knowledge above stated, he negligently continues to use it."

In *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573, the court said: "It is, as a general rule, true that a servant entering into employment which is hazardous assumes the usual risks of the service and those which are apparent to ordinary observation, and when he accepts or continues in the service, with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazards incident to the situation. *Gibson v. Railway Co.*, 63 N. Y. 449; *De Forest v. Jewett*, 88 N. Y. 264; *Sweeney v. Envelope Co.*, 101 N. Y. 520, 5 N. E. 358; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Williams v. Railroad Co.*, 116 N. Y. 628, 22 N. E. 1117." There is no liability on the part of the master in respect to risks which the servant has voluntarily assumed, the maxim being, "*Volenti non fit injuria.*"

After full consideration of the argument in behalf of the

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plaintiff, we are unable to accede to the modification of the well-established rule as declared in *Railway Co. v. Archibald*, *Davidson v. Cornell*, and <sup>Same-Defects-
Assumption of
Risk.</sup> many other cases, by adding that the defects must not only be obvious, but also necessary, in the sense that the appliance could not possibly be of a better kind or in better condition. The gist of the exception which discharges the master from liability is that the appliance is not of the best kind that the master could have furnished, or that it is not in as good condition as he could have put it; but that these defects being obvious, and known to the servant, he, by the continued use of such appliance, agrees to assume the risk of injury from such use, and thereby discharges the master from liability on that account. While the servant, by entering into a hazardous employment, assumes its ordinary risks, and while, by the continued use, without complaint, of apparatus known to him to be defective, he assumes the risks of such apparatus, he does not assume the risks of apparatus the defects of which are latent, unknown to him, and not discoverable by the exercise of due care. Whether the servant is chargeable with such knowledge and consequent assumption of risk depends upon the facts of each case. Direct proof of such knowledge is not always necessary. It is often to be inferred from the character of the apparatus or defect, or from the age, experience, or employment of the servant. Such knowledge and assumption of risk have frequently been inferred in cases similar to this. In *Railroad Co. v. Flanigan*, 77 Ill. 365, the plaintiff below was a freight conductor, whose duty in part was to couple cars. The court held that if a servant who enters a railway company's employ, and knows that the company is operating a class of cars that are unsafe, and continues in the employ, he will assume the risks and hazards of the service, and cannot recover for personal injury from the use of such a class of cars. In *Brooks v. Railroad Co.* (1891) 47 Fed. 687, the drawhead of a switch engine was too short. The court said: "The

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plaintiff, in accepting employment from the defendant as a switchman in the yard in which this engine was used, must be held to have assumed the risk of all injuries to himself ordinarily incidental to the situation, including such as were liable to occur in consequence of any visible defect in the machinery and appliances supplied for use in connection with his work. The alleged defect was visible, and should have been, if it were not in fact, known to the plaintiff. He cannot be heard to say that he did not know of the existence of the defect, or that he could not discover it; for he must be regarded as guarantying his own competency for the situation in which he was employed, which necessarily required the possession on his part of sufficient knowledge of engines, drawheads, and coupling apparatus, to be able to recognize, upon seeing it, a dangerous defect of the character described." In *Railway Co. v. Smithson* (Mich.) 7 N. W. 791, a brakeman was injured by unusual coupling in the cars. JUDGE COOLEY held that danger was apparent and obvious, and that there was no liability upon the part of the railroad company. In *Railway Co. v. Boland* (Ala.) 11 South. 670, the court said: "A view of the bumpers and drawheads, as attached to the car, should be sufficient notice to a man of average intelligence of the risk incident to the coupling of such a car. The risk is apparent and incident to his employment, and there is no liability on the part of the railway company." In *McLaren v. Williston*, 48 Minn. 299, 51 N. W. 373, the plaintiff was a brakeman. The bumper on the car was lower than that upon the engine. The court held that the plaintiff "assumed the risk of this condition of the cars and engine." To the same effect are *Brewer v. Railway Co.*, 56 Mich. 620, 23 N. W. 440; *Arnold v. Canal Co.*, 125 N. Y. 15, 25 N. E. 1064; *Muldowney v. Railroad Co.*, 39 Iowa, 615; *Belair v. Railroad Co.*, 43 Iowa, 662. It is not claimed that the drawbar or other coupling apparatus of the car of the Baltimore & Ohio Railroad Company, against which Creswell was crushed, was out of repair or of an unusual kind, or that he had never coupled cars of that

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company before. As was said by JUDGE SHIRAS in *Woodworth v. Railway Co.*, 18 Fed. 282: "When a person enters into the employ of a railroad company, he assumes all the usual risks and hazards. We all know it to be a fact that cars are received and coupled every day by the necessities of business, though having draw-heads of different make and construction."

Same—Insufficient Crews—Same.

The assumption of the risk arising from an insufficient number of men for the conduct of the work rests upon the same ground as the assumption of risk arising from the use of machinery known to be defective and dangerous. *Railroad Co. v. Barber* (1856) 5 Ohio St. 541, was an action for an injury sustained by a person while acting as conductor of a freight train. The court held that it is the duty of a railroad company to furnish proper machinery and appliances and a sufficient number of hands for the safe management of trains, and for such delinquency the conductor has a right to refuse to run his train. But when, under such circumstances, he takes charge and runs his train for a length of time without a sufficient number of hands, or with obvious defects in the machinery and appliances, he voluntarily assumes the risk and waives the obligation of the company in this respect as to himself, and, if injured by such delinquency, he is without remedy against the company. In *Railway Co. v. Rogers*, 6 C. C. A. 403, 57 Fed. 378, the plaintiff claimed that the defendant was negligent in not furnishing an adequate number of men to do certain work in which he was assisting when injured. The court said: "In our opinion, if a sufficient number of men were not furnished to assist in the work, that is a patent defect. A servant is bound to see patent and obvious defects in appliances furnished him, and assumes all patent and obvious risks, as well as those incident to the business; and when he knows, or ought to know, of the defect in the appliances, and continues to work with the same, and receives injuries therefrom, he is treated as being guilty of contributory negligence, and cannot recover." There is no evidence that any of the apparatus or appliances

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used at the time of the accident were out of repair, or that there was any latent defect in any of them. If, as claimed by the plaintiff, the reverse lever without a brake and the single-pocket drawhead on the engine were defective (*i. e.* not suitable for the use to which they were applied), these defects, as well as the risk in the use of such apparatus, were certainly obvious; that is, "discoverable by the exercise of ordinary care," "plainly observable," and "apparent to ordinary observation" by any person having the knowledge and experience requisite for the position held by Creswell. Besides this, Creswell had special opportunities to observe and know all of these things. He had, as conductor, been engaged in the same barge work at Pigeon Point for years before his death, frequently doing the coupling himself, and using the same engine without brakes, and equipped with the same reverse lever and single-pocket drawhead, and with a crew of only three, including himself, as at the time of his death. There is no evidence that he ever made any complaint as to the defective character or insufficiency of any of the apparatus, or as to the insufficiency of the crew. Under these circumstances, he must be presumed to have known the structure and character of these appliances and their defects, if such there were, and to have assumed the risk resulting from their use, and the risks from doing the work with a crew of three men. No citation of authority is required for the establishment of the proposition that a servant cannot recover from the master for injuries caused by the negligence of a fellow servant in the selection of whom the master had used due diligence. There has been much controversy as to who are fellow servants; but it is well settled that trainmen engaged in operating the same train are to be regarded as such. In *Stafford v. Railroad Co.*, 114 Ill. 244, 2 N. E. 185, the plaintiff, a switchman, and the negligent engineer of the same crew were held to be fellow servants. The court said: "Where one servant is injured by the negligence of his fellow servant, the duties of both being such as to bring them into habitual association, so that they may

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exercise an influence upon each other, promotive of proper caution, and the master is guilty of no negligence in the employment of the servant causing the injury, the master will not be liable for the injury." In *Railway Co. v. Britz*, 72 Ill. 256, the engineer, brakeman, and shovelers on a construction train were held to be fellow servants. In *McLaren v. Williston*, 48 Minn. 299, 51 N. W. 373, it was said by the court "that the plaintiff, the brakeman, took the risk of the negligent acts or conduct of his fellow servant, the engineer, in the common employment." In *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, it was held that the engineer and fireman of an engine running alone without a train were fellow servants, and that the fireman could not recover from the company for injuries caused by the negligence of the engineer. In *Wheatley v. Railroad Co.*, 1 Marv. 305, 30 Atl. 660, above cited, it was held that the fireman of one train and the brakeman or flagman of another train on the same division of a railroad were fellow servants, and that the company was not liable for injuries resulting to one of them solely from the carelessness of the other. There can be no question that Slifer, the engineer, was the fellow servant of Creswell, the conductor, and that there can be no recovery in this action for injuries caused by the negligence of the engineer.

Fellow Servants.

It is insisted by the plaintiff that, while Creswell might have been familiar with each of these appliances, and known the defects of each, and the danger from too small a crew, he did not understand the danger from the combination and co-operation of all of these defects. But there was nothing unusual in the use, in the combination or co-operation, of these instruments at the time of the accident. In coupling cars and other work of this engine and crew, these instruments could be used only in combination and co-operation and they had been so used under Creswell's direction for a long time, and he must be presumed to have known the dangers from such use. One cannot be held liable for the combination and co-operation

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of Causes.

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of any number of causes for no one of which he is liable; and, as we have shown none of the alleged causes of the accident are sufficient to render the defendant liable, it is impossible that the combination or co-operation of some or all of them should produce this result.

The first assignment of error is that the court erred in the direction to the jury to render a verdict for the defendant. In *Commissioners v. Clark*, 94 U. S. 284, the court said:

Directing Verdict. "Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." In *Randall v. Railroad Co.*, 109 U. S. 482, 3 Sup. Ct. 324, JUSTICE GRAY, delivering the opinion of the supreme court, said: "It is the settled law of this court that where the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. In *Railway Co. v. Jackson*, 3 App. Cas. 193, the house of lords held that it is for the judge to say whether any facts have been established by sufficient evidence from which negligence can be reasonably and legitimately inferred, and it is for the jury to say whether from those facts, when submitted to them, negligence ought to be inferred. In *Wheatley v. Railroad Co.*, 1 Marv. 315, 38 Atl. 661, the court said: "Where the evidence on the part of the plaintiff is such that, if a verdict is found for the plaintiff, the court would be constrained to set it aside, it is not only reasonable, but it is the duty, of the court to stop the case at that point." After a careful examination of the record, we are satisfied that there

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was no evidence of such negligence on the part of the defendant company as was sufficient to make it liable in this action, and no evidence from which the jury would have been justified in drawing the inference of such negligence. The first assignment of error is therefore overruled.

The remaining assignments of error are, in substance, as follows: Second and third, that the court erred in refusing to allow testimony as to drawheads used on other roads; fourth, that the court erred in refusing to allow testimony as to the course of business on another road, and how cars were put on barges of that road on Christiana creek; fifth, that the court erred in refusing to allow a witness to testify in reply to the question whether he had measured the height of the drawbars on "certain cars on the Baltimore & Ohio Railroad"; sixth, that the court erred in refusing to sustain the objection "to the above line of testimony as not in cross-examination, but as being an effort to inject into the plaintiff's case testimony in favor of the defendant"; seventh, eighth, and ninth, that the court erred in refusing to overrule, as not proper on cross-examination, certain questions as to the presence of Creswell, while certain appliances and conditions relating to loading cars on barges were as described by the witness on his direct examination; tenth and eleventh, that the court erred in refusing to allow certain witnesses to testify as experts.

In view of the ground upon which the first assignment of error is overruled, the remaining assignments are not important, even if some or all of the rulings objected to were erroneous. "No judgment should be ^{Harmless Errors.} reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the ruling was made." *Lancaster v. Collins*, 115 U. S. 227, 6 Sup. Ct. 33; *Fisher v. State*, 1 Pennewill (Del.) 388, 41 Atl. 184. All of the said remaining assignments of error are overruled upon the following grounds: The second and third, as immaterial, as it did not

Note

appear that the drawheads referred to were used under conditions similar to those in this case; the fourth, as immaterial, as it did not appear that the conditions were similar to those in this case; the fifth, as irrelevant, because it did not appear that the height of the drawbars measured by the witness was the same as that of the drawbar in this case, or that the witness knew of the height of the latter; the sixth, because (1) there was no motion to strike out the whole or any specified part of the cross-examination, (2) it does not appear from the objection or exception taken what part of the cross-examination was objected to, and (3) sufficient ground for the cross-examination had not been laid by the direct examination of the witness; the seventh, eighth, and ninth, because sufficient ground for the cross-examination had been laid by the direct examination of the witness; the tenth and eleventh, because it had not been shown that the witnesses were qualified to testify as experts in the manner proposed.

The judgment below is affirmed.

NOTE.

Fellow Servants—Conductor and Trainmen on Same Train.—The conductor and the members of his crew are held, according to the weight of authority, to be fellow servants. *Dunlavy v. Chicago, etc., R. Co.*, 66 Iowa 435, 21 Am. & Eng. R. Cas. 542; *Atchison, etc., R. Co. v. Moore*, 29 Kan. 632, 11 Am. & Eng. R. Cas. 243; *Cassidy v. Maine Cent. R. Co.*, 76 Me. 488, 17 Am. & Eng. R. Cas. 519; *Lawless v. Connecticut River R. Co.*, 136 Mass. 1, 18 Am. & Eng. R. Cas. 96; *Smith v. Potter*, 46 Mich. 258, 2 Am. & Eng. R. Cas. 140; *Rodman v. Michigan Cent. R. Co.*, 55 Mich. 57, 54 Am. Rep. 348, 17 Am. & Eng. R. Cas. 521; *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171; *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627, 5 Am. & Eng. R. Cas. 515; *Howland v. Milwaukee, etc., R. Co.*, 54 Wis. 226, 5 Am. & Eng. R. Cas. 578; *Whitman v. Wisconsin, etc., R. Co.*, 58 Wis. 408, 12 Am. & Eng. R. Cas. 214; *Pease v. Chicago, etc., R. Co.*, 61 Wis. 163, 17 Am. & Eng. R. Cas. 527; *Ragsdale v. Memphis, etc., R. Co.*, 3 Baxt. (Tenn.) 426; *Jackson v. Norfolk & W. R. Co. (W. Va.)*, 6 Am. & Eng. R. Cas., N. S., 455; *Norfolk & W. R. Co. v. Houchins' Adm'r (Va.)*, 8 Am. & Eng. R. Cas., N. S., 616.

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SELDOMRIDGE

v.

CHESAPEAKE & O. RY. CO.

(*Supreme Court of Appeals of West Virginia, April 22, 1899.*)

Appeal—Record.—If a record entry shows that the defendant demurred in writing to the plaintiff's evidence, and that the plaintiff joined therein, it is a sufficient entry to make the written demurrer a part of the record.

Appliances—Duty of Master.*—An employer is not bound to furnish the most approved and safest appliances, nor provide the best method and means of work for employees; and if the same are in use by him, and can be with reasonable care used with safety, it is all that can be required of the employer.

Assumption of Risk.†—An employee accepts service subject to risks incidental to it, and, when the appliances or means or methods of work are known to the employee, he can make no claim upon the employer to change them. He accepts them as they are, and, if injured therefrom, he cannot recover damages.

Same—Patent Dangers.‡—When an employee willfully encounters danger known to him, or patent or open to be seen and known, he cannot recover damages from his employer for injury therefrom.

Same—Working in Perilous Place.‡—When an employee assents to occupy the place prepared for him, and to incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care and expense, have been more safe. His assent has dispensed with that part of the master's duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no

*As to whether master must furnish best appliances, see *Shadford v. Ann Arbor St. Ry. Co.*, 6 Am. & Eng. R. Cas., N. S., 584, and *foot-note*.

†See *Bussey v. Charleston & W. C. Ry. Co.*, 11 Am. & Eng. R. Cas., N. S., 474, and *notes*, p. 484 *et seq.*

‡See *Middle Georgia & A. Ry. Co. v. Barnett*, 12 Am. & Eng. R. Cas., N. S., 532, and *note*, p. 537.

Note

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appear that the drawheads referred to. The precautions have

Evidence. conditions similar to those as immaterial, as cannot recover from his of an accident which could proper and prudent discharge representative, in such case, if or damages by reason thereof.

drawbar in this case, or of the latter; the sixth to Summers county circuit court. strike out the whole amination, (2) it is ception taken with view, for plaintiff in error. to, and (3) suit, for defendant in error.

not been laid. P. Walter Seldomridge, 27 years of age, had seventh, in years, up to the 18th of October, 1895, a fireman cross-ex

Same. Chesapeake & Ohio Railroad, and before that a section boss. He knew all about engines and railroad service, and, in fact, was a competent engineer.

qual had been recently crippled in the shoulder from a fall from engine, and the company placed him to watch at night engine, the only one operating on the few miles of the Gauley Branch, connecting with the Chesapeake & Ohio Railroad at Gauley Junction, and also to watch freight cars standing at that junction, because of some depredations which had been committed upon said cars. This engine lay overnight at Gauley Junction on said branch road. Twenty-two freight cars were pushed or placed on said branch railroad between 3 and 4 o'clock of the 18th of October. On that day Seldomridge landed at Gauley Junction to perform the service specified. He went with this engine from the Junction to Gauley Bridge, 1 1/2 miles distant. About 6 o'clock the engine was put in charge of Seldomridge by Sampson, its engineer, and Seldomridge then took it to Gauley Junction, and stopped it on the main line of the branch railroad, at a point 120 feet from the standing cars. In the evening, after dark, Seldomridge was visited at the engine by an old friend.

*See Alabama G. S. R. Co. v. Roach, 12 Am. & Eng. R. Cas., N. S., 869, *abs.*, and extensive note, p. 869 *et seq.*

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with whom he had there a considerable conversation. During this conversation an engine with some freight cars arrived on the main line of the Chesapeake & Ohio Railroad, which was close at hand, and this friend remarked to Seldomridge that the engine had come to pick up those standing cars. His friend left, and Seldomridge went under the engine to clean out the ash pan, and while he was there the other engine came on the Gauley Branch, and ran up against the freight cars for the purpose of coupling them with the cars already attached to it; but they failed to couple, for some reason not known, and the 22 standing cars started down the Gauley Branch, there being at this point a considerable down grade, and ran Seldomridge's engine over him while he was under the engine cleaning out the ash pan, cutting off both legs, from which injury he died. Seldomridge saw the cars standing on the track before dark. He had a lighted torch at night, and must have seen them while talking to his friend, and while going around the engine, they being only 120 feet off. How could he help seeing them? And he surely knew that the train had actually arrived, and was coming on the Gauley Branch to take out those standing cars. Shortly after the accident he told Richmond that he had heard that train coming, and heard it stop, and knew that it was coming to get out the cars, but he thought he had plenty of time to get the ashes out, and that he was almost done, and that he thought he had time to finish.

First, the point is made that we cannot consider the case, because the record does not show that the demurrer to evidence was filed, so as to make it part of the record. I should have said that the defendant demurred Appeal—Record. to the evidence, on which demurrer the court gave judgment for C. A. Seldomridge, administrator of Walter Seldomridge, for \$5,000, as fixed by the jury in its conditional verdict, and that the company has brought the case here. Does the record attest the demurrer to evidence? The record says that, "after all the evidence had been

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introduced before the jury, the defendant demurred to the plaintiff's evidence in writing, in which demurrer the plaintiff joined." Then we find a formal demurrer to evidence in writing and the evidence. How can we say there is no demurrer, under such circumstances? It would be exceedingly technical,—indeed, erroneous,—as the entry is in due form, and certainly sufficient. Hogg's Pleading and Forms makes the order read: "After hearing the plaintiff's evidence, the defendant demurred thereto, which demurrer was reduced to writing, and in which the plaintiff joined." Robinson's Forms reads (on page 121): "The defendant filed a demurrer to the evidence of the plaintiff, and the plaintiff filed (or entered) his joinder in the said demurrer." He gives no further form to identify the demurrer.

Is the railroad company liable for this lamentable accident? I do not see that the question of fellow servantry, though discussed in the case, arises, because no neglect is imputed to the train crew in backing the pick-up train. If, however, that question were material, it would be against the plaintiff, because those train hands were fellow servants with Seldomridge. *Jackson v. Railroad Co.*, 43 W. Va. 380, 6 Am. & Eng. R. Cas., N. S., 455, 27 S. E. 278, and 31 S. E. 258; *Railroad Co. v. Houchins' Adm'r* (Va.) 8 Am. & Eng. R. Cas., N. S., 616, 28 S. E. 578.

The turning point of the case lies in the question is the railroad company liable for not having an ash pit, to be used in cleaning out the ash pan? Every man has a right to conduct his business in his own way. The Gauley Branch was only 14 miles in length, and this one engine would make a trip from Gauley Junction to the other terminus and back each day. There was but one engine used, and it would hardly be expected that this little road would be furnished an ash pit for that one engine. "An employee cannot control the employer's business, nor prescribe the methods of conducting it. The employer is not liable to the employee for personal injuries received by him, although the employer might have adopted

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a safer method of conducting business. The employee assumes the risk ordinarily incidental to his employer's business. * * * 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." 3 Elliott, R. R. § 1289. "Furthermore, the servant takes the risk of the master's mode of conducting his business, though a safer one might be followed, if the servant fully knows the risk and continues to work." 14 Am. & Eng. Enc. Law, 845. "It is well settled, however, that the master may conduct his business in his own way, though another method might be less hazardous, and the servant takes the risk of the more hazardous method, as well, if he knows the danger attending the business in the manner in which it is carried on. Hence, a servant knowing the hazards of his employment as the business is conducted, if injured, cannot maintain an action against his employer, merely because he may be able to show that there was a safer mode in which the business might have been conducted, and, if it had been conducted in that mode, he would not have been injured." 1 Bailey, Pers. Inj. § 505. "The master is not bound to furnish for his workmen the safest and best machinery, nor to provide the best methods for the work, in order to save himself from responsibility for injuries to his servants. If the machinery and appliances which he has be in common use, and are such as can with reasonable care be used without danger to the employee, it is all that can be required of the employer." Berns v. Coal Co., 27 W. Va. 285. The same case says that the master need not resort to the most expensive methods, and he is not held to extraordinary care. So I do not see that the omission to provide an ash pit would alone render the company liable. When we say that the master is bound to provide a safe place in which to work, and safe appliances and machinery, we mean that they are to be safe against unforeseen accidents, and we do not mean

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that, if these are not the best, and the servant knows just how they are, the master is liable.

But grant, for argument, that the company was remiss in not providing an ash pit; Seldomridge accepted the post, and went to work, knowing there was no ash pit. If dangerous to work without it, his long railroad experience told him of that danger, and he assumed the risk. "When a servant enters

Assumption of Risk.

Patent Dangers—Same.

into the employment of a master, he assumes all the ordinary risks which are incident to the employment, whether the employment be dangerous or otherwise. If a servant willfully encounters dangers, which are known to him or are notorious, the master is not responsible for an injury occasioned thereby." *Berns v. Coal Co., supra.* Often have these doctrines been held by this court. *Humphreys v. Newport News & M. V. Co.*, 33 W. Va. 135, 39 Am. & Eng. R. Cas. 363, 10 S. E. 39; *Davis' Adm'r v. Coke Co.*, 34 W. Va. 500, 12 S. E. 539; *Stewart v. Railroad Co.*, 40 W. Va. 188, 20 S. E. 922; *Massie v. Coal Co.*, 41 W. Va. 620, 24 S. E. 644; *Reese v. Railroad Co.*, 42 W. Va. 333, 6 Am. & Eng. R. Cas., N. S., 783, 785, 26 S. E. 204; *Young v. Railway Co.*, 42 W. Va. 112, 4 Am. & Eng. R. Cas., N. S., 134, 24 S. E. 615; *Oliver v. Railroad Co.*, 42 W. Va. 703, 6 Am. & Eng. R. Cas., N. S., 783, 784, 26 S. E. 444; *Skidmore v. Railroad Co.*, 41 W. Va. 293, 23 S. E. 713. "An employer does not impliedly guaranty the absolute safety of his employee. In accepting employment the latter is assumed to have notice of all patent risks of which he is informed, or of which it is his duty to inform himself, and he is further assumed to undertake to run such risks." *Stewart v. Railroad Co.*, 40 W. Va. 188, 20 S. E. 922 (Syl. point 6); *Reese v. Railroad Co.*, 42 W. Va. 333, 6 Am. & Eng. R. Cas., N. S., 783, 785, 26 S. E. 204; *Oliver v. Railroad Co.*, 42 W. Va. 704, 6 Am. & Eng. R. Cas., N. S., 783, 784, 26 S. E. 444. "Where a servant assents to occupy the place prepared for him, and to incur the dangers to which he will be exposed

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thereby, having sufficient knowledge and intelligence to enable him to comprehend them, it is not a question whether such place might, with reasonable care and by reasonable expense, have been more safe. His assent has dispensed with that part of the master's duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have not been taken." 1 Bailey, Pers. Inj. § 504. When one enters upon a service, he assumes to understand it, and takes all the ordinary risks incident to the employment; and where the employment presents special features of danger, such as are plain and obvious; he also assumes the risk of those. *Skidmore v. Railroad Co.*, 41 W. Va. 293, 23 S. E. 713. These principles of assumption of risk by the servant of patent, notorious, and known dangers, or sources of danger, are sustained by the highest court in the land in *Tuttle v. Railway Co.*, 122 U. S. 189, 31 Am. & Eng. R. Cas. 217, 195, 7 Sup. Ct. 1166, and by authorities everywhere. See 1 Bailey, Pers. Inj. §§ 677, 796; 3 Elliott, R. R. § 1288. "Where an employee, after having opportunity of becoming acquainted with the risks of his situation, accepted them, he cannot complain if subsequently injured by such exposure." 14 Am. & Eng. Enc. Law, 842. On these principles it is apparent that the absence of an ash pit will not make the company liable—First because the company was not bound to furnish it; second, because Seldomridge knew it was not there, accepted service, and went to work without it, and thereby waived it, and assumed the risks of work without it.

There is another ground forbidding recovery. Seldomridge saw those standing cars. He saw the pick-up train arrive, and was informed and knew that it would back in to take these cars. The train, having arrived, would reasonably occupy but a few minutes in getting off the main track and moving to the Gaudley Branch. He could see it. He could hear it. He did see

Working in Per-
ious Place—
Same.

Contributory
Negligence.

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it. and hear it; yet he went under that engine, with imminent danger staring him in the face. Why did he go under it. then? He had all night before him. He assumes the risk. with eyes open to the danger, because, as he says, he thought he could finish before the train got in. He knew there was danger, for he said, after the accident, that he thought he could finish before the danger point of time arrived. What prudent man would go under an engine within 120 feet of freight cars, with a downgrade between them, knowing that an engine would bump against them. in a few minutes? In *Ward's Adm'r v. Railway Co.*, 39 W. Va. 46, 59 Am. & Eng. R. Cas., 503, 19 S. E. 389, this court held that "an employee cannot recover from his employer for injuries received by reason of an accident which could have been averted by the employee's proper discharge of the duties of his employment; nor can the personal representative of such employee, in such case, if death ensue, maintain an action for damages." "A servant, having knowledge of danger about him, must use diligence and care in protecting himself from harm." *Stewart v. Railroad Co.*, 40 W. Va. 188, 20 S. E. 922. So, contributory negligence of Seldomridge in going under that engine just at that dangerous time would also forbid recovery. He had danger-signal lamps. He put none upon his engine to let the trainmen know he was there. I should have mentioned the case of *Railroad Co. v. Weese*, 32 Fla. 212, 13 South. 436, where the complaint was that no pit was prepared that plaintiff could stand in while wiping the engine, and no signal lamps were furnished him to warn the other employees, and the court held that where the employer does not furnish safe implements, and does not pretend to do so, and this fact is fully known to the employee, he waives this duty on the part of the employer, and cannot recover for injuries.

Complaint is made that there was no side track on which to place the engine. Seldomridge knew this. The principles as to the ash pit apply to the side track. Mention is made of the absence of a signal light at the junction of the Gauley

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Branch with the Chesapeake & Ohio Road, but I do not see what this has to do with the engine. The plaintiff's own evidence in this case shows that Seldomridge knew of, saw, realized, and intentionally encountered the danger, and, therefore, that alone would sustain the demurrer. Gerrity's Adm'r v. Haley, 29 W. Va. 98, 11 S. E. 901. On the whole evidence, the case is to me plain against the plaintiff. Feeling and sympathy for the unfortunate Walter Seldomridge and his mother might decide the case for the plaintiff, but law does not.

Though I should have done so earlier in this opinion, I will quote, as applicable to this case, from the opinion of JUDGE GREEN in the case just cited: "This case is, of course, entirely different from those cases where, in any work, dangerous appliances were used, which the employer knew were dangerous, but the servant did not, and from those where defective machinery was furnished by the employer, which he knew was defective, but the servant did not, as in Cooper v. Railroad Co., 24 W. Va. 37, and from those where a master had notice of defects and promised to remedy them. A very different case would be presented if the plaintiff's intestate had been engaged in some work the dangers of which, the jury might infer, he was ignorant of, and the employer aware of. The law is thus stated in Berns v. Coal Co., 27 W. Va. 296,"—citing that case to show that if the employee "willingly or willfully encounters dangers, known to himself, or notorious, the master is not liable. For these reasons, we reverse the judgment, and enter judgment for the defendant.

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WILSON

v.

LOUISIANA & N. W. R. Co.

(Supreme Court of Louisiana, June 21, 1898.)

Original judgment amended so as to amount to \$1,000; otherwise reaffirmed.

Due Care in Starting Trains.—It is the duty of the party controlling a railroad train to advise himself, before it starts, not only as to one part of the existing situation, but of the whole, and govern himself accordingly.

Injury to Employee on Repair Train—Assumption of Risk—Duty of Conductor.*—Though a train be a "repair train," and the employees thereon may have assumed, in accepting employment thereon, that they may be in greater danger of accident than they might be under other circumstances, they have the right to assume that, this very fact of increased danger being known to the conductor, he will guide his conduct so as to minimize the danger by the increased care and precautions which the occasion calls for.

Same—Derailment—Care Due in Running Train on Unsafe Tracks.—A railroad company which permits its tracks to become unsafe should be held to an increased responsibility for the manner in which its trains are run on such a track.

(Syllabus by the Court.)

APPEAL by defendant from parish of Claiborne Third judicial district court. *Modified and affirmed.*

John A. Richardson, for appellant.

J. C. Theus, Dormon, Reynolds & Dormon, and *McClendon & Seals*, for appellee.

NICHOLLS, C. J. Plaintiff asked for a judgment against the defendant for damages for injuries received by him through the derailment of a car operated by officers and employees of the defendant company, on which car he was riding at the time. He averred that he was an employee of said company at the time, and on said car in the

Case Stated.

*See note at end of case.

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discharge of his duty as such; that the accident was caused by the negligence and carelessness of the parties in charge. The case was tried by the court, which rendered judgment in favor of the defendant. Plaintiff appealed, and on appeal the judgment was altered to one of nonsuit. The pleadings and facts of the case were identical with those of *Smith v. Same Company*, 49 La. Ann. 1325, 22 South. 359. The case itself is reported in 49 La. Ann. 1330, 22 South. 1007. Plaintiff renewed his demand in the present suit. Defendant pleaded the general issue. After defendant had answered, pleading the general issue, defendant filed a plea of estoppel, alleging that plaintiff had instituted suit against it for the identical cause of action, in which he set up the cause of the injury; that he could not change the judicial admission of his first suit; that he could not add to nor take from the same, so as to show a different cause for the injury. This exception was based upon the claim that the allegations of plaintiff in his second were inconsistent with those in his first suit, and sought to change the issues between the parties. Plaintiff's allegations in his first petition, touching the accident, were as follows: "That said derailment and injuries and loss were occasioned by the gross, wanton, and criminal negligence of said railroad company and its servants, agents, and employees, who were superior in authority to plaintiff; that at said time and place said train and car on which plaintiff was riding was thrown from the track by one or more pieces of timber or wood falling or being carelessly dropped by the employees from the engine tender or bin or other places of storing or carrying wood or timber on said train or locomotive, or some of the attachments thereto, which caught under the wheel or wheels of said train of cars or locomotive, or both, which derailed and threw said car on which petitioner was riding and all or a part of the train, including locomotive and tender, from the track, and in the wreck he was damaged by the fall and being struck by falling timbers and cross-ties and the car or cars and other parts of the train or locomotive or tender, and other causes

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occasioned by said wreck; that the wreck and damage to petitioner were caused by the said defendant company failing to provide proper and safe places or apartments for storing or carrying said wood or timber, and from the failure of said company and its employees who were in command of the train to have said wood or timber properly loaded or stored, and from the careless and negligent handling of said wood and timber by the employees and servants of said company, and which wood or timber fell from the place where it was stored or piled, or by the servants or employees of said company's careless and negligent handling of said wood or timber while said train was running or in motion; that it was no part of petitioner's duty to superintend the loading of said wood or timber, and that said injury and loss were caused by no negligence or fault of his, but wholly by the negligence and fault of the defendant company or its servants and employees in charge of the train, or for the want of necessary appliances for the safety of the employees of the company.' In plaintiff's second petition he averred that at said time and place said car on which petitioner was riding was thrown from the track by a piece of timber or wood falling from the tender or usual place of carrying wood on said train, locomotive, or attachments thereto, which caught under the tracks or wheels and axles of said car on which petitioner and others were riding, which derailed said car; which car, after running off the rails onto the roadbed and rotten ties, ran onto or struck a rotten bridge or trestle of said company, which gave way, and precipitated petitioner and others and said car and cross-ties to the ground, a distance of about 12 feet; that at the time of said wreck said train was being run at a high and dangerous rate of speed over a dangerous and unsafe track with rotten cross-ties, and the rails on said tracks were low and sunken in places and high in other places, and the cross-ties and roadbed, together with the unsafe condition of the rails, and the great and dangerous rate of speed, caused violent rocking, jumping, and shaking of

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said locomotive, tender, and cars; that the defendant company did not provide safe and proper apartments for storing and carrying said wood, and said company and its agents and employees who were in command of petitioner caused said firewood to be improperly loaded and carelessly and negligently piled at least three feet above the outer wall or rim of said tender or wood bin, without there being any guard or other protection to prevent said wood or timber from falling over the outer wall or rim of said wood bin or tender, and that said wreck was caused by the fall of said wood or timber, and the above alleged reckless running and defective roadbed, etc.; that it was no part of petitioner's duty to superintend the loading or storing of said wood or timber, or to control the rate of speed, or to examine or repair the track, roadbed, or anything in connection therewith, and his only duties were to obey his superiors in command, he being a common laborer, and having no dominion or control over any part of said train or roadbed, or anything connected therewith, other than as a common laborer; and that the said injury and loss were caused by no negligence or fault of his, but wholly by the fault of the defendant company and its agents and vice principals in charge of said train, and for want of necessary appliances for the safety of the employees of said company, and the defective roadbed and track and reckless running, etc., as above stated. In defendant's plea of estoppel it asked that all allegations of plaintiff's petition which were different from or changed the allegations and judicial admissions in the suit first filed be stricken out, and that no evidence be permitted to be received under the same. No separate action was taken upon this exception. The case was tried twice before a jury. The first trial resulted in a verdict of \$5,000 for the plaintiff, but the verdict was set aside, and a new trial granted. The second trial resulted in a verdict of \$2,500 for plaintiff, and judgment was rendered in accordance therewith, though the court, in refusing an application to have the verdict set aside, and a new trial ordered, expressed its disapproval of the verdict, assigning as its reason

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for entering judgment that he thought the litigation should be brought to an end.

The first suit of the plaintiff against the defendant was, by consent of parties, taken up at the same time with that of *Smith v. Railroad Co.*, and upon the same testimony, except in so far as testimony as to the extent of injuries received by each, and the amount of the damage claimed by each, made special testimony necessary. In the opinion in the *Smith Case*, 49 La. Ann. 1328, 22 South. 361, the court said: "As the case was left by the witnesses, it seems clear that the piece of wood was the proximate cause of the accident, but, without showing directly that the stick of wood was on the track through the fault of the defendant, its servants or agents, the company is not connected with the proximate cause, so as to make it responsible. The break in the continuity of the testimony is in the manner in which the stick occasioned the derailing of the train, and by whose fault it was placed in position to produce the same." It was in view of the possibility of plaintiff's being able in a second suit to supply this missing link that the judgment—originally a final one against him—was altered to one of nonsuit. The testimony taken upon the first trial was considered in the second, both sides introducing additional evidence. Plaintiff introduced two new witnesses, whose testimony was to the effect that at the time of the accident they were riding upon a flat car directly in rear of the tender on which the fire wood for the train was piled up; that, as they were sitting, they faced the tender; that directly in front of, and facing one of them, a man by the name of Crawford was sitting on the rear end of the tender. Each one of them testified to having seen the piece of wood which the pleadings refer to fall from the rear end of the tender to the track between the tender and the flat car just behind, and upon which they were sitting; that immediately afterwards there was a violent jerking of the cars, followed by the derailment of the same. Neither saw the piece of wood strike the ground, nor knew how or where it came in contact with the cars.

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Both say that Crawford did not touch the wood, or have anything to do with its fall. They differ somewhat as to the point from which it fell; one stating it fell from a point near the eastern side of the tender, the other from the western side. But we think the establishment of the particular point from which it fell an immaterial fact, except in so far as it might tend to affect the credibility of those witnesses. We do not understand defendant to attach any importance to it, other than for that purpose. The character of those two witnesses was not impeached. The effect of their respective statements is weakened only in so far as the fact that they were not in accord as to the point from which the stick of wood fell might be calculated to throw doubt upon their accuracy,—if that fact were important. Crawford was not put upon the stand. From whatever side the piece of wood fell, it obviously struck in such a manner as to occasion, as the immediate and direct result of its falling, the derailment of the cars. The question is, how came it to fall? Plaintiff, in his pleadings, says the wood upon the tender was piled three feet high, and left there without guards, while defendant undertook to show that it was only two feet high at the middle, and that the fireman straightened it out after it had been placed upon the tender. There is very considerable difference in the testimony as to the rate of speed at which the train was running at the time of the accident. It is claimed by plaintiff that the train, being behind time in consequence of having had to take on a quantity of cross-ties, was being hurried forward in order to reach Athens before the passenger train coming from Homer should reach that place. One of the witnesses said that Mr. Beardsley, the manager of the road, hurried the conductor, giving him (he said) the "high ball" (orders to go faster) several times. Mr. Beardsley, though on the train at the time, did not take the stand as a witness. The testimony, we think, shows that the roadbed, the ties, and the track were in very bad condition at the point where the accident occurred, and for some distance in front and in rear of that place. We are satisfied that the

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stick of wood was detached from its position by the rocking of the cars, caused by rapidly running cars over the uneven and defective roadbed and track at that point. We are also satisfied that the immediate cause of the derailing of the cars was the falling of this piece of wood, and its being caught under the wheels or tracks of one of the cars. It is contended that the plaintiff was one of the parties who loaded the tender; that he went on the train voluntarily as an employee of the corporation, with knowledge of the situation and condition of the road (if, in fact, it was in bad condition), and that in accepting service he assumed the risks of employment taken under such conditions. Employees entering the service of a railroad company have a right to assume, should it fail to comply with its duty of keeping its roadbed, ties, and track throughout in safe condition, that it will at least meet and compensate its failure in this respect by steps taken by it, and those having charge of its trains, to remedy and save the situation from danger for the benefit of its passengers and employees by special care taken and precaution resorted to in the running of the trains themselves over dangerous places. We do not think that employees, by accepting service with a badly-equipped railroad corporation, accept, as a matter of course, the double risk of insufficient and bad tracks and careless and negligent handling of cars over dangerous places. Two juries have found the facts of the case in favor of the plaintiff, and we see no good reason for holding them to have been in error in their conclusions. We see no question of law standing in opposition to an affirmance of the judgment on the facts so found, though we are of the opinion that the amount found as damages is too high. No action was taken in the lower court upon defendant's plea of estoppel.

It is insisted that the exception was well founded. We do not think so. It is rarely possible for a person injured by the derailment of a car to know with certainty to what particular cause it was attributable. In cases of that char-

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acter a plaintiff's pleadings are made usually as general as safety will permit them to be made so as to enable him to take advantage of the facts which may develop on the trial. He may sometimes, by too minute particularity, be held down on a first trial to specific allegations as then existing; but if, on plaintiff's demand, being met by a general denial, the case should terminate in a judgment of nonsuit, plaintiff would have the right, in drafting a second petition, to avail himself of knowledge of the actual facts of the case as made known to him through the testimony taken on the first trial. The allegations made in the first case as to the facts of the occurrence could certainly not be classed as "admissions" made by him from which he could not recede. In the case at bar plaintiff insists still that the falling of the stick of wood was the direct immediate cause of the derailment of the car on which he was riding. He simply adds thereto certain other facts as concurring contributing causes. We think the judgment should be amended by reducing the amount of the damages according to the plaintiff by the verdict and judgment from \$2,500 to \$1,500, and it is hereby so ordered and decreed.

On Rehearing.

(May 29, 1899.)

A rehearing was granted in this case for the reason that on examining the testimony scattered through three different transcripts a portion of the same had escaped the court's attention. The statement made by the court that Beardsley, the manager of the defendant company, was on the train at the time of the accident, and that he had not testified in the case, was erroneous. The Beardsley who was on the train was the son of the manager or superintendent, and not the superintendent himself, and he was placed upon the stand, and positively denied having given the orders to increase the speed of the train; to the giving of which orders several of defendant's witnesses testified. The engineer to whom the order was declared to have been given made a similar denial. The testimony of the case is utterly irreconcilable.

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We do not know the witnesses, nor did we have the advantage of seeing them upon the stand. Two juries have rendered verdicts in plaintiff's favor. The first verdict was set aside by the district judge, and plaintiff's counsel calls our attention to the fact that, while declining to set the second one aside on motion for a new trial, the judge expressed very strongly his disapprobation of the result reached, stating that he was more convinced than ever that plaintiff had no right to a judgment. That is true, but the judge's remarks seem to refer more to what he seems to have considered the law applicable to the case than to the facts. He was of the opinion that, although the track was out of order, yet the particular train to which the accident happened was a "repair train"; that plaintiff knew the condition of the track, and the dangerous character of the duty in which he was engaged, and therefore assumed the risk of the dangerous service. He did not say that he did not think the accident was occasioned by the bad condition of the track. We were inclined ourselves to think that the latter fact, standing by itself, and independently of the falling off from the tender of the piece of wood, which the testimony shows did so fall off, would not have caused the derailment of the train, even at the rate at which it was going; that the accident was occasioned by the concurrence of three facts—the bad condition of the tracks, the speed of the cars, and the particular manner in which the wood was placed on the tender. We did not think the wood as placed would have fallen from the tender simply as the result of the speed of the train had the track been in good condition, nor that it would have fallen even with the track in the condition in which it was had the speed been regulated so as to conform to what was required by the entire actual situation. We thought that the wood was not placed on the tender in the manner in which it should have been placed there to meet the requirements of a rapidly running train over a bad track; that, as it was, rapid running over a bad track had caused some of the wood in the tender, which had not been placed

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there in the manner to meet such a condition of things, to gradually work its way to the back of the tender, and to fall out, and by falling out to pass under the wheels of the car, and derail the train. One of the difficulties in the case was that the wood as placed in the tender was placed there by the plaintiff himself and the other parties who were working as laborers in repairing the track in putting ties on the train, and, incidentally in placing the wood in the tender. We were of the opinion that these men, however, could not have known in advance that the train would be run as it was afterwards probably run; and, besides this, the fireman, Sol Sephus, testified that after it was placed in the tender he had himself to some extent straightened it out. Our judgment proceeded upon the theory that it was the duty of the party who controlled the train to have advised himself before it started not only as to one part of the existing situation, but of the whole, and to have governed himself thereafter accordingly; and that, while it was true that this train was a "repair train," and the parties thereon may have assumed, in accepting employment, that they might be in greater danger of accident than they would have been under other circumstances, they had the right also to assume that, this very fact being known to the conductor, he would guide his conduct so as to minimize the dangers by the increased precautions and the care which the occasion called for. We do not think that the conductor, as representing the defendant company, had afforded to its employees the full measure of protection to which they were entitled. We are of the opinion, and are still of the opinion, that a railroad company which permits its tracks to become unsafe should be held to an increased responsibility for the manner in which its trains should be run over such a track. The direct contradiction of the witnesses of the parties as to the most important facts brought es-

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pecially to our attention in our last examination of the transcripts in the case, coupled with the disagreement between two juries and the district judge, have caused us to hold this cause under advisement a longer time than is usual, for the reason that we have been in great doubt as to what the proper course would be to pursue under the circumstances. After a most careful consideration of this case as presented to us, we adhere to our original judgment, except as to amount. We are of the opinion that the amount for which we have rendered judgment in favor of the plaintiff against the defendant is too large, and it is hereby reduced from \$1,500 to \$1,000. As so amended, our original judgment must remain undisturbed, and it is so ordered.

MONROE, J., takes no part, as the case was submitted previous to his appointment to this court.

NOTE.

Injury to Employee on Repair Train—Assumption of Risk.—When an employee accepts employment upon a construction train for the purpose of finding and repairing washouts caused by a severe storm, with a knowledge of all the facts, and of the purpose for which the train started, he assumes the extrahazardous risks of such employment; and there can be no recovery for injuries or death occasioned in the course of such employment, if no negligence appears on the part of the company in the selection of employees in charge of the train, or in the careless running of such train. *Vaughn v. California C. R. Co.*, 83 Cal. 18, 23 Pac. Rep. 215.

King v. Chicago & N. W. Ry. Co

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KING

v.

CHICAGO & N. W. RY. CO.

(*Supreme Court of Iowa, April 8, 1899.*)

Duty of Master to Furnish Safe Place to Work—Presumptions.*—
An employee of a railroad directed to work in its car, in the absence of knowledge to the contrary, has a right to presume that the floor of the car is not in a defective condition; and in an action by the employee for injuries sustained while at work in such car, because of a hole in its floor, where the evidence as to whether he was chargeable with notice of the defect is conflicting, a verdict in his favor will not be disturbed on appeal on the ground of insufficiency of evidence.

APPEAL by defendant from Clinton county district court.
Affirmed.

Hubbard, Dawley & Wheeler, for appellant.

T. W. Hall, for appellee.

PER CURIAM. Ties were being loaded on a car by first placing them on a dolly, on which they were carried to the door. The plaintiff, with a pick, drew them in, and they were then properly placed by two others. While doing this, he stepped into a hole in the car floor, about 6 inches wide and 10 inches long, 14 inches from the door jamb, and 5 or 6 inches from the south wall, and sustained injury. According to his testimony, there were snow and straw on the floor, and a number of pieces of bark about the hole, when he pulled his leg out, and, though he looked, he did not see or know of the hole until he stepped into it. Other witnesses say the hole was in plain sight, and had been mentioned on the car. He entered the car at 3.30 p. m. of February 10th, and the accident occurred about 20 minutes later. The plaintiff was

*See notes, 11 Am. & Eng. R. Cas., N. S., 484 *et seq.*

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directed to do this work, and, in the absence of knowledge, had the right to assume the floor to be in a safe condition. In view of his statements with reference to straw on the floor, bark about the hole, and the character of his work, we think the question of whether it was seen by plaintiff, or might have been seen by the exercise of ordinary care, was for the jury to determine. If the bark was about or over the hole, it might not have been so obvious as to preclude the conclusion that he saw it, or ought to have seen it. To the contention that defendant cannot be charged with notice of its existence, it may be said that, even if this was essential to recovery, there was evidence tending to show that the wood about the hole was in a decayed condition. While we might not have reached the same conclusion as did the jury, we are not at liberty to disturb their verdict. The judgment against the defendant is affirmed. Affirmed.

INDIANA, I. & I. R. Co.

v.

BUNDY.

(Supreme Court of Indiana, March 9, 1899.)

Safe Place to Work—Duty of Master.*—Although railroad companies are required to construct their roadways and appurtenances in such a manner as will enable their employees to perform the labor required of them with reasonable safety, a railroad company, as a general rule, cannot be held liable for nonobservance of this duty if it maintains them in a fashion generally approved and adopted by the first-class railroads of the country.

Same—Same—Negligence—Question for Jury.—Where the evidence tends to show that, while the general mode of constructing interlocking switch devices is to leave the wires uncovered from the derail to the distant signal, yet it also tends to prove that in switch yards, and places where a large amount of car handling is required, the generally approved and usual method of first-class

*See notes at end of case.

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roads is to box the wires at such places, in an action for injuries to defendant's brakeman resulting from an uncovered wire at such a place, the question of defendant's negligence is for the jury.

Same—Same—Presumptions.*—While a railroad employee is held to diligence for his own safety, he has a right to presume that the employer, with respect to the same object, has performed his duty, and invested all places and situations with such safeguards as ordinary prudence requires.

Employee's Knowledge of Danger—Question for Jury.—The question of the brakeman's knowledge of the exposed wires, and his means of knowledge, by the exercise of reasonable caution was a question for the jury, as there was evidence tending to make applicable the rule that a railroad employee is not bound to know of latent perils, nor required to hunt after them.

Evidence.—The trial court, while permitting the defendant company to give evidence of the practice of railroads generally in the construction of interlocking switches, properly denied it the right to show particulars in construction, other than upon the line of its own road.

Same.—A foreman of a switch crew of defendant, who had worked over and about the open wires in question, was properly permitted to testify that prior to plaintiff's injury he had repeatedly notified defendant's general superintendent that the wires were liable to be the cause of such injuries.

Same—Rules.*—Defendant's rules, which it was claimed made it the duty of plaintiff to have inspected the open wires in question, and which were printed on time-tables to which he had access, were offered in evidence. And he testified that he sometimes got the conductor's copy of the rules. *Held*, that the rules were properly rejected for lack of other evidence showing that defendant had received them, or had knowledge of their contents.

Instructions.—Where it appears from one entry of the clerk of the trial court that requested instructions were presented before argument, but another entry is that "the jury having heard the remainder of the evidence, and argument of counsel, the court now proceeds to instruct the jury," it will be concluded, in the absence of other proof, that the tender of the instructions was timely.

Same—Exceptions.—It is sufficient to save exceptions by writing on the margin of each the words, "Refused and excepted to," to be signed by the judge and dated; and where an exception is so preserved and the instruction shows from its nature the party excepting, both the instruction and exception are properly in the record, although the marginal note does not disclose such party.

*See notes at end of case.

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Same—Same.—To be saved by a bill of exceptions or order of court, what occurred in the way of exceptions to the giving of instructions must be stated in the bill or order as facts, and be authenticated by the signature of the judge.

Same.—Defendant was not prejudiced by the refusal to give a requested instruction, the substance of which was contained in other instructions which were as favorable as it was entitled to have presented.

Dangerous Place to Work—Duty to Warn Servant.*—In such action, defendant could not establish freedom from negligence by showing that the construction of the switch device in question was similar to the construction of similar devices upon other first-class railroads, without further showing, if such construction was liable to cause injuries to employees working about the device, that it had given notice of the danger, or given plaintiff an opportunity to observe it.

Same—Same—Custom of Other Railroads.—In such action, what was the general usage of first-class railroads with respect to the construction of such switch devices was a pertinent question: but how such devices had been constructed by first-class railroads, perhaps in exceptional instances, was not a proper inquiry.

Same—Employee's Knowledge of Danger.—Mere knowledge on the part of defendant as to the existence of the interlocking switch device in question, and that it required wires to extend along the track, did not render him chargeable with notice as to the particular ground occupied by the wires.

APPEAL by defendant from Lake county circuit court.
Affirmed.

F. S. Fancher and H. K. Wheeler, for appellant.

E. D. Crumpacker and Grant Crumpacker, for appellee.

HADLEY, J. The evidence discloses that the appellant owned and operated a railroad extending from Streator, Ill., to Knox, Ind., and in connection therewith operated a leased line from Wheatfield, Ind., a station on their main line, to North Buffalo, Mich. Appellee, who was plaintiff below, went into the employment of appellant in December, 1891, as a brakeman on a freight train, and continued in the same capacity till December 22, 1894, when, while attempting to couple cars in the switch yard at North Judson, Ind., he fell over uncovered signal wires

Case Stated.

*See notes at end of case.

along the track, and his arm was caught between the dead-woods and was crushed. North Judson is a station at which appellant's road, running east and west, is crossed by the Erie and Panhandle Railways, running north and south, which three companies maintain at North Judson an interlocking switch device. The east signals on appellant's road are operated by two wires, less in size than telegraph wire, running eastward from the crossing on the south side of appellant's main track, 300 feet, to the derail. They at that point cross under the track to the north side, and thence extend eastward, parallel with, and 42 inches from, the north rail of the main track, 1,200 feet, to the distant signal. These wires are boxed from the crossing to the derail. From that point eastward to the distant signal they are uncovered, and rest upon pulleys set in the tops of posts, 3 inches from the ground, and about 40 feet apart. The ground over which the wires run is sandy. The operating wires are similarly constructed west of the crossing, except that on the west the wires are boxed for a distance of 360 feet. The appellant, among others, maintains a side track south of its main track, east of the crossing, which extends to the eastward about 700 feet east of the distant signal, and, west of the crossing, a side track on the north side of its main track, extending westward about half a mile, and about 1,000 feet west of the west distant signal. The Erie maintains "yards" on the east of the crossing, and the Panhandle "yards" are on the west of the crossing, and north of appellant's tracks. The interchange of cars among these roads was so considerable as to make it necessary for appellant to maintain at this point a switch engine, and a switching force of five men, including engineer and fireman. This switching crew performed all the switching at this point. It would collect the cars from the yards of the other two companies, and place them in train order,—those to go west on appellant's side track above described west of the crossing, and those to go east on the side track east of the crossing,—to be taken out by appellant's through freight trains from the west and east

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ends, respectively, of said side tracks. Soon after appellee's employment, in 1891, appellant constructed interlocking switches at Dwight and Momence, Ill., and in September, 1892, constructed the one at North Judson, and also had a similar device at Magee and Laporte, on the New Buffalo Branch. At these several points the wires from the derail to the distant signals were uncovered, and constructed in a manner similar to the one at North Judson. At Dwight the exposed wires were on the south side of the main track, and from a siding on the opposite side of the main track appellee had frequently coupled cars to his train, performing the work from each side of the side track, but usually from the north side. At the other points where interlocking systems were maintained, except North Judson, no switching or coupling or uncoupling of cars was done in the vicinity of the exposed wires. For a period of two years after the construction of the interlocking systems, and next before the accident, appellee made from two to four trips a week over the road; two-thirds of the trips being from Streator to New Buffalo, and one-third to Knox, via North Judson, passing the latter place 25 or 30 times in daylight. His station in travel was on top of the train, or in the cupola of the caboose. The outside walls of the freight cars projected $2\frac{1}{2}$ feet outside the rails. Appellee was occasionally on the station platform at North Judson in daylight, but never walked on the ground along any part of the uncovered wires to reach the platform. The wires operating the switch and signals are boxed for 300 feet eastward from the station platform, and 360 feet westward. Six days before the injury, appellant had opened an extension of its road to South Bend, and discontinued and removed its switching crew from North Judson, thus imposing upon train crews the duty of switching and picking up cars at the latter place. Appellee was returning from his third trip to South Bend, and at 12.30 o'clock a. m. was called upon to couple a car to his train at a point from 325 to 340 feet east of the crossing. It was

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dark, and appellee had in his hand a lighted lantern, with which he twice signaled the engineer to back slowly, and, being occupied in observing the movement of the train, at the proper moment attempted to step in and make the coupling, but lodged his foot under the open wires, and, falling towards the train, threw himself forward in an effort to reach the deadwoods, to avoid falling across the rail; and thus his arm was caught between the deadwoods and crushed, making amputation above the elbow necessary. This was appellant's first attempt at coupling or uncoupling cars in that vicinity, or east of the crossing. He had never seen the open wires at that station. He had never been informed that they were open. He did not know they were open, and did believe they were all boxed, at that crossing. No objection to this complaint is urged by appellant, and the questions discussed all arise under the motion for a new trial. The negligence charged against the appellant is in maintaining the wires along the side of its road in an uncovered and exposed condition, at a point where its employees are required to go in to couple and uncouple cars. The insufficiency of the evidence to sustain the judgment below is urged by appellant.

It is a familiar rule that railroad companies are required to construct their roadways and appurtenances in such a manner as will enable their employees to perform the labor required of them with reasonable safety. *Railway Co.*

v. Sandford, 117 Ind. 265, 19 N. E. 770; Same

Safe Place to
Work—Duty
of Master.

v. Wright, 115 Ind. 378, 385, 16 N. E. 145, and

17 N. E. 584. This rule requires a railroad company, in any structure erected by it, to have regard for the safety of its employees while engaged in discharging their duties in relation thereto. The environments of the situation, the nature and extent of the services required of its employees, must have potent consideration, and such structure accomplished in a manner that has in view the highest degree of safety that ordinary care will provide. The appellant is excused if it maintains its roadway and appendages in a fashion gener-

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ally approved and adopted by other first-class railroads of the country. But in this case the evidence tends to show that, while the general mode of constructing interlocking switch devices is to leave the wires uncovered from the derail to the distant signals, yet it also tends to prove that in switch yards, and places where a large amount of car handling is required, the generally approved and usual method of first-class roads is to box the wires at such places. Without any doubt, the evidence is of a character to carry to the jury the question of appellant's negligence in maintaining uncovered wires at the place of appellee's injury.

Appellant further insists that, aside from the question of its negligence with respect to the open wires, there can be no recovery, for the reason that the danger, whatever it was, was apparent and known to appellee, and assumed by him, in his continued voluntary service with the company. It is a well-established rule that one entering the service of a railroad company must do so with his eyes open, for he will be held to assume all the usual and obvious dangers incident to the employment. He must heed appearances and note consequences, and if, by his carelessness, he overlooks that which he might have observed by the exercise of ordinary care, his want of knowledge will be no excuse in case of injury. *Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Railway Co. v. Buck*, 116 Ind. 566, 573, 19 N. E. 453; *Railway Co. v. Roesch*, 126 Ind. 445, 447, 26 N. E. 171; *Same v. Lang*, 118 Ind. 579, 583, 21 N. E. 317. But, while the employee is thus held to diligence for his own safety, he has the right to repose confidence in the prudence and caution of his employer, and may rightfully presume that the employer, with respect to the same object, has performed his duty, and has invested all places and situations with such safeguards as ordinary prudence requires. *Railroad Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. 380; *Railroad Co. v. Duel*, 134 Ind. 156, 33 N. E. 355, and cases cited.

Same-Same-
Negligence-
Question for
Jury.

Same-Same-
Presumptions.

The evidence adduced is not of a character to warrant this court in saying, as a matter of law, that the risk of the open wires was assumed by appellee. There was evidence that there were two light-colored wires, "less than telegraph wires," drawn over, and four inches above, a sandy roadbed. Appellee was a rear-end brakeman on a through freight train, and his post of duty in travel was on top of his train, or in the cupola of the caboose. The line of wires was 12 inches out from the outer walls of the moving freight cars, and not observable from the top of the train. Appellee had passed the wires 25 or 30 times in daylight, but before the accident had not been on the ground at any point along the uncovered wires east of the crossing, and did not know they were uncovered, and believed they were boxed. The wires were boxed, with boards about 18 inches wide on top, and 6 inches high, for a distance of 300 feet east and 360 feet west of the crossing. The boxed wires on the east side were on the south side of the main track for the first 300 feet from the crossing. Appellee had been several times on the station platform at the crossing, and had observed the boxed wires on the south side of the main track, but had not observed that the boxing ceased 300 feet to the east, or that at that point the wires crossed the main track to the north side, and proceeded thence eastward to the distant signal uncovered, and had not been notified, and did not know, that such was the fact. The accident occurred about midnight. Appellee walked for some distance on the north side of the main track, along the exposed wires, about a rod distant, with a lighted lantern in his hand, to where the car stood that he was directed to couple to his train. He, and the backing train, arrived at the standing car about the same time. He signaled twice with his lantern to back slowly. His mind was absorbed in the moving train, and the exact moment when he must act to make the coupling. His line of vision at the time and place of the injury was necessarily above the wires. It is clear that upon these facts the question was with the jury to say, upon the whole evidence, whether appellee had

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assumed the risk of the open wires. *Railway Co. v. Grames*, 136 Ind. 39, 34 N. E. 714; *Car Co. v. Parker*, 100 Ind. 181, 197, and cases cited; *Rush v. Mining Co.*, 131 Ind. 135, 30 N. E. 904; *Evans v. Express Co.*, 122 Ind. 362, 23 N. E. 1039. Appellant cites numerous cases in support of its contention that the risk was an assumed one. But it must be borne in mind that the rule contended for is relative, and not absolute, and its application must be determined by what constitutes reasonable and ordinary care, under the facts of each particular case. In the case of *Railroad Co. v. Ostman*, 146 Ind. 452, 45 N. E. 651, the plaintiff's decedent was killed by a cattle chute that stood within 13 inches of the outer wall of a passing locomotive cab, and 8½ feet high, with board wings and gates, and could be easily seen by the trainmen for a half mile in either direction. The deceased, as a locomotive fireman, had passed the chute twice each week for 16 months, and had frequently aided in switching cars by it. At the time of his injury he was engaged in switching, and having carelessly thrust his head out of the cab window, and thus riding with his face to the rear, he collided with the chute and was killed. In the case of *Pennsylvania Co. v. Finney*, 145 Ind. 551, 42 N. E. 816, the injured party, from inattention, was knocked off the train, by a water crane that stood 17 feet high, and 4 feet from the track, and which he had passed almost daily for six months, and could see it for half a mile from either direction. In the case of *Paper Co. v. Webb*, 146 Ind. 303, 45 N. E. 476, the plaintiff was injured by being caught by a projecting oil cup and clutch on a revolving shaft. The shaft and projecting clutch were fully exposed. He had worked in the mill about two years, and about the particular machine for about three weeks, and had oiled the very clutch that caught him. In these and other cases cited, of similar import, the court held that the servant had assumed the risk, but the material facts in these cases are not analogous to the facts under consideration. The danger in these cases was easily apparent, was immediately present, and stood out so prominently as to press

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observation upon the servant of ordinary intelligence. We do not mean to say that, to charge the servant with an assumption of the risk, the evidence of danger must be as strong and cogent as it appears in these cases; but we do say that the presence of danger must be obvious from such appearances as will put a man of ordinary prudence and caution upon his guard, or the servant will be excused. Duty had taken appellee along the exposed wires whereby he was hurt. He knew that the distant signals of interlocking switch devices were operated from the tower by wires, but, according to his testimony, his observation had been that the wires were covered through switching yards of other roads, and left exposed where no car handling was required. East of the crossing, and near the station platform, where he had been a number of times in daylight, the wires with which the eastern signals were operated were constructed on the south side of the main track, and boxed with boards from the crossing eastward for about 18 rods. If any presumption will arise from this situation, it will be that the wires continue on the south side of the main track to the distant signal. Surely, under the evidence adduced, there could be no presumption arise that at a point about 18 rods east of the crossing the wires ceased to be boxed, and there crossed from the south to the north side of the main track, and thence along the north side to the signal. Furthermore, it may well be doubted, if a person of ordinary vision, standing on the station platform, can see two light-colored wires, "less than telegraph wires," beginning 300 feet away, and stretched 4 inches above a sandy background, and, if possible to see them, whether the situation was such as to attract the attention of a man of ordinary caution to the fact. Appellee was not bound to know of latent perils, nor was he required to hunt after them, but he is exonerated if he heeded such cautionary manifestations as would put a man of ordinary prudence and caution upon inquiry. We think it is clear that the question of appellee's knowledge of the exposed wires, and his means of

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knowledge, by the exercise of reasonable caution, was a question for the jury.

Appellant insists that the court erred in denying it the right to show that other first-class roads had their interlocking switch devices constructed in the manner
Evidence. similar to the one in controversy. The court permitted appellant to give evidence touching the practice of railroads generally in the construction of interlocking switches, but denied it the right to show particulars in construction, other than upon the line of appellant's road. In this the court committed no error. *Railroad Co. v. Mugg*, 132 Ind. 168, 175, 31 N. E. 564; *Railway Co. v. Wright*, *supra*; *Bassett v. Shares*, 63 Conn. 39, 27 Atl. 421; *Colf v. Railroad Co.*, 87 Wis. 273, 276, 58 N. W. 408.

The court permitted, over appellant's objection, one Harvey, who was foreman of the switch crew at North Judson, and had worked over and about the open
Same. wires in question, to testify that prior to appellee's injury he repeatedly notified appellant's general superintendent that the exposed wires within the yard limits at North Judson were very dangerous to the men at work around and over them, and also to state the superintendent's reply. This decision of the court is fully supported by the case of *Railway Co. v. Wright*, 115 Ind. 393, 16 N. E. 145, and 17 N. E. 584, and cases there cited.

Appellant's rules 607 and 608 for the government and information of employees were offered in evidence. Appel-

Same—Rules. lant's learned counsel say in their brief, "These rules were offered in evidence for the purpose of showing that it was the duty of Bundy to examine the condition of all machinery, tools, tracks, cars, engines, or whatever he might undertake to work with, before he made use of the same, and ascertain their condition, for his own safety." The law required of Bundy such inspection and examination of all places and appliances where and with which he was put to work as a man of ordinary care and caution would make in a like situation, and it can hardly

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be claimed that the rules refused enjoined upon the employee a higher degree of care. Bundy, appellee, went into the service of the company in December, 1891, and the rules in question were promulgated in September, 1893. The evidence tended to show that the rules were printed on time-table No. 28. Bundy, on cross-examination, denied that he ever received a copy of the rules, and claimed he never had, as his own, a copy of time-table 28, but sometimes got the conductor's, and had access to copies of said table to be found in the caboose. No effort was made by appellant to prove that a copy of the rules was ever given or tendered to Bundy, or his attention directed to them, except as was shown by his cross-examination, with result as indicated above. Neither was there any effort made by appellant to prove that Bundy had violated any provision of the rules offered. *Railway Co. v. Mugg*, 132 Ind. 173, 31 N. E. 564. Without some further evidence that appellee had received the rules, or had knowledge of their contents, the court was warranted in excluding the evidence.

Another reason for a new trial is that the court erred in refusing to give to the jury certain instructions, and in giving of its own motion certain other instructions. Appellee claims that the instructions asked by appellant and refused are not in the record, because prematurely presented. The recitals of the clerk in the record show that (December 4, 1896) "thereupon, before the argument, the defendant now tenders to the court, and asks the court to give to the jury at the proper time, certain written instructions, which are by the court refused, and the defendant separately excepts to each instruction refused to be given by the court; and said exceptions are indorsed on the margin of each of said instructions, and said exceptions are respectively signed by the court, and are thereupon ordered filed and made part of the record, without a bill of exceptions, and are in the words following." There follow 21 instructions, on the margin of each of which are these words, "Refused and excepted to this December 4, 1896. JOHN H. GILLETT,

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Judge;" and upon the same day the further entry and recital, "And the jury having heard the remainder of the evidence, and argument of counsel, the court now proceeds to instruct the jury, and each party at the time now excepts to each instruction given by the court to the jury, and their respective exceptions are noted upon the margin of said instructions, and respectively signed by the court, which instructions so given by the court, and the said exceptions thereto, are now likewise ordered filed, and made a part of the record herein, and the same are in the words following, to wit." Next follow 13 instructions, with the words following indorsed on each: "Given and excepted to December 4, 1896. JOHN H. GILLET, Judge." It is insisted by appellee that, since it appears from the first entry that "before the argument" the defendant tenders its instructions, and in the subsequent entry of the same day that "the jury having heard the remainder of the evidence, and argument of counsel, the court now proceeds to instruct the jury," we must construe the record as disclosing that appellant presented its instructions to the court, and obtained the court's rulings thereon, and reserved exceptions, before the close of the evidence, and that inasmuch as the record does not show that appellant's instructions were again presented, rulings had, and exceptions reserved, after the close of the evidence, therefore it affirmatively appears that the tender of the instructions was untimely, and presents no question for this court. We cannot agree with the learned counsel for appellee in this instance. Even if this court was bound by the recitals of the clerk, we could not give the record the construction contended for. The recital is that "before the argument" (not before the close of the evidence) the defendant presented its instructions, to be given "at the proper time." And even if the tender was made before the evidence closed, as insisted, that will furnish no reason why appellant's right to exceptions should be prejudiced. The preparation of instructions is a delicate task, and should always be performed with deliberation and care, and should never be postponed till

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after the evidence is closed, only in exceptional cases, and as to exceptional facts. There are most excellent reasons why the fair and cautious attorney should prepare his instructions before, or during the progress of, the trial, and tender them to the court at the earliest moment, that he may have time for full consideration. It is the duty of the court not to act adversely upon instructions until the evidence is all in, unless it seems clear that they are improper under any possible evidence, in which case, if the court in fact acts, and indorses his refusal thereon, during the progress of the evidence, and subsequently withholds them from the jury, it cannot be said that the party thereby loses his right to exceptions, if timely taken. All inferences are in favor of the right action of the court, and upon the record before us, we conclude that, without regard to the stage of the trial at which the instructions were presented, it was the duty of the court to act upon them, and that it did act upon them, in view of all the evidence, and that the exceptions reserved by appellant related to the act of the court, whenever that duty was actually performed, at any time before final submission.

It is further insisted by appellee that appellant failed to save exceptions to the refusal of the court to give to the jury the instructions asked. Burns' Rev. St. 1894, § 544, provides that it shall be sufficient to save exceptions by writing on the margin of each instruction the words, "Refused and excepted to," to be signed by the judge and dated. The instructions asked by appellant had indorsed on the margin of each: "Refused and excepted to December 4, 1896. JOHN H. GILLETT, Judge." It is true that these marginal notes do not disclose which party excepted, but it was a ruling that did not concern appellee, and one about which he could not complain, nor be entitled to an exception; hence, it must be held that they were the exceptions of appellant. The instructions asked by

Instructions.

Same-Exceptions.

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appellant and refused, and the exceptions thereto, are therefore properly in the record.

The instructions given by the court of its own motion are in the record, both by order of court and bill of exceptions, but it is urged by appellee that appellant has saved no exceptions thereto. Outside the recitals in the ~~Same-Same.~~ order book set out above, no exceptions by either party appear anywhere in the record, except that there is written on the margin of each of the instructions so given to the jury the following words: "Given and excepted to December 4, 1896. JOHN H. GILLETT, Judge." Exceptions to instructions must be saved in the manner prescribed by statute, or by order of court or bill of exceptions. *Railway Co. v. Dunn*, 138 Ind. 18, 36 N. E. 702, and 37 N. E. 546; *Childress v. Callender*, 108 Ind. 394, 9 N. E. 292; *Fromlet v. Poor*, 3 Ind. App. 425, 430, 29 N. E. 1081. Recitals in an order book are not a statutory mode. Section 544, *supra*. To be saved by a bill of exceptions or order of court, "what occurred in the way of exceptions to the giving of instructions must be stated in the bill or order as facts, and be authenticated by the signature of the judge." *McKinsey v. McKee*, 109 Ind. 209, 212, 9 N. E. 771. The bill of exceptions before us recites, "Be it remembered that at the proper time after argument the court, of its own motion, gave to the jury the following instructions, numbered one to fourteen, inclusive." Then follow 14 instructions, each having written at the bottom the words: "Given and excepted to December 4, 1896. JOHN H. GILLETT, Judge." And following the last are these words: "And these were all the instructions given by the court in the above-entitled cause. JOHN H. GILLETT, Judge Lake Circuit Court." Nowhere in the bill is it stated as a fact, or even recited, that either party took or reserved exceptions. It therefore follows that we must look exclusively to the words, "Given and excepted to," written on the margin or at the bottom of each instruction, in determining the sufficiency of the exceptions. Without extrinsic support,

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there seems nothing for them to stand upon. Both parties were equally affected by the instructions, and both equally entitled to exceptions. But which party took them is not affirmatively shown. The law permits no such uncertainty in appeals. This court cannot be called upon to reverse the court below, unless error is clearly presented by the record, properly authenticated. *McKinsey v. McKee, supra*. To be sufficient to reserve exceptions to the giving of instructions, the marginal memoranda should also state the party in whose behalf the exceptions are allowed. The record discloses no exceptions on behalf of appellant to the instructions given by the court, and hence no question arises upon them in this court.

We come now to the final inquiry. Did the court err in refusing to give to the jury the instructions asked by appellant? Numbers 2, 12, 15, and 16 are the only ones discussed in appellant's brief. The second, in substance, Same. stated that the plaintiff charged in his complaint that the defendant had two wires extending along the north side of its main track east of the crossing at North Judson; that said wires were uncovered and exposed, and that plaintiff had no knowledge, or means of knowledge, that said wires were uncovered; and that if the jury believed that the plaintiff frequently worked at North Judson, around and over said wires, and by the exercise of ordinary diligence he could have discovered them, then it makes no difference in this case whether or not he actually discovered them. The court informed the jury, in its No. 4, that a servant assumes, not only the ordinary risks of the employment, but he also assumes every risk due to defective appliances of which he had knowledge, or of which he is put upon notice by circumstances coming to his knowledge, which would be reasonably calculated to put a person of ordinary prudence upon his guard as to the existence of such defects, and in No. 5 charged: "If the plaintiff had actual knowledge that the uncovered wires were at the place where he was injured, that

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destroys his right of action. If he ought to have known them, or been on his guard against them, the result must be the same." Reading Nos. 4 and 5 together, they cover all the facts embraced in the appellant's request No. 2, and more, and put the case in a light quite as favorable to the appellant as did its own, and quite as favorable as appellant was entitled to have it presented.

Appellant's request No. 12 is as follows: "(12) The court instructs the jury that if you believe from the evidence that the plaintiff received the injury complained of while coupling cars on the company's main track at North Judson, Indiana, then the defendant is required to construct its wires no better and safer along the main track than other first-class railroads constructed similar wires along their main tracks, and, if you believe from the evidence that other first-class railroads constructed such wires by leaving them open and exposed as the defendant did, then your verdict should be for the defendant." This falls short of an accurate statement of the law. It is too narrow. Appellant cannot

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to Work—Duty
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establish freedom from negligence by showing the construction of its switch device to be similar to the construction of like devices upon another first-class railroad without further showing, if the construction may be dangerous to employees at work about it, that it had given notice of the danger, or given the servant such an opportunity to observe it as would have put a reasonably prudent person upon his guard. Furthermore the proper inquiry is not what other first-class railroad companies have done,—perhaps in exceptional instances,—but what is the general usage in this regard. This instruction contains no such limitation.

**Same—Same—
Custom of
Other Railroads.**

Nos. 15 and 16 state the same proposition in slightly different language, the substance of which is that if the jury believe that, prior to plaintiff's injury, he knew that an interlocking switch device was maintained by appellant at North Judson, and that it

**Same—Employ-
ee's Knowledge
of Danger.**

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required wires to extend along the track for its operation, then he was bound to look, and see the wires extended along the track where he worked, and, if he fell over them and was injured, he cannot recover. This implies that if appellee knew the method of operating interlocking switches, and that one was at North Judson, then he was bound to know the particular ground occupied by the wires, without reference to appellee's opportunity for observation or inquiry, or to the number of tracks running east from the crossing, or the particular side of the track occupied, or appeared to be occupied from the only point of view ever had by appellee. Such a rule would utterly strip appellee of all protection afforded by ordinarily prudent and cautious conduct in his situation. Nos. 15 and 16 were also rightfully refused. The instructions given by the court covered all the material facts and phases of the evidence, and stated the law applicable thereto with admirable precision and clearness.

We have reviewed all of the alleged errors discussed by the learned counsel for appellant, and we find no error in the record. Judgment affirmed.

NOTES.

Duty of Master to Provide Safe Place to Work.—See *notes*, 12 Am. & Eng. R. Cas., N. S., 537.

See also *note*, 11 Am. & Eng. R. Cas., N. S., 484, stating general rule as to assumption of risks arising from defective appliances, unsafe surroundings, etc.

Injuries to Employees—Knowledge of Rules.—See *Chicago, B. & Q. R. Co. v. Oyster*, 12 Am. & Eng. R. Cas., N. S., 655, and *note*, p. 668.

Dangerous Place to Work—Duty to Warn Servant.—See 14 Am. & Eng. Enc. Law 897.

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PITTSBURG, C., C. & ST. L. RY. CO.

v.

MOORE.

(*Supreme Court of Indiana, March 30, 1899.*)

Harmless Error.—When it clearly appears from the record that the judgment rests upon a good paragraph of the complaint, the overruling of a demurrer to a bad paragraph is not available error on appeal.

Sufficiency of Pleading—Review.—When a pleading is tested by demurrer it can neither be strengthened nor weakened by other parts of the record.

Master and Servant—Assumption of Risk.—The rule that an employee assumes all the obvious and ordinary perils incident to his employment is not affected by the "Co-employees' Liability Act" of Indiana.

Pleading.—The complaint sufficiently showed that the place of injury was within the corporate limits of the city, although such fact was not expressly alleged.

Death of Employee—Excess of Speed within City Limits.*—A railroad company cannot escape liability for the death of an employee killed by its train moving within city limits at a speed, and under conditions prohibited by an ordinance of the city, upon the ground that such ordinance was for the protection of the general public only.

Relief Association—Relieving from Liability—Validity of Contract.†—A contract between a railroad company and its employee under which the only obligation assumed by the latter is that, if injured by the fault of the company, he will not seek double compensation, by claiming benefits from a relief fund and also damages in an action against the company for the injury, and under which he is at liberty, if injured in the service of the company, to accept benefits from the relief fund or to maintain an action at law against the

*See *E. St. Louis Connecting Ry. Co. v. Eggman* (Ill.), 9 Am. & Eng. R. Cas., N. S., 438 and *note*.

†See *Johnson v. Charleston & S. Ry. Co. (S. Car.)*, 12 Am. & Eng. R. Cas., N. S., 761 and *foot-note*, p. 762; *Pittsburg, C., C. & St. L. Ry. Co. v. Cox* (Ohio), 7 Am. & Eng. R. Cas., N. S., 152.

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company, does not come under the statute declaring null and void any contract relieving a railroad from liability to an employee for future negligence, nor is it contrary to public policy; and in an action against a railroad for the death of an employee the full release of the company from liability on account of the death by deceased's widow, in consideration of benefits accepted under such a contract, where she is the sole beneficiary named therein, will prevent recovery in her behalf.

Wrongful Death—Right of Action.—Under section 285 Burns' Rev. St. 1894 of Indiana, where an intestate had a cause of action for the injuries which have resulted in his death, his personal representative has a right of action, not for the benefit of his estate, but for compensation to those who by the death become the parties injured by the wrongful act which caused the death.

Same—Action in Behalf of Next of Kin—Rights of Beneficiaries.—Where under such statute the intestate had a cause of action for the injuries which resulted in his death which he has not released, his representative has a right of action for the use of the next of kin; and if such kin are the widow and child of deceased, no act of the widow, without the lawful consent of the child, can prevent recovery in behalf of the child.

APPEAL by defendant from Miami county circuit court.
Reversed.

N. O. Ross and G. E. Ross, for appellant.

McConnell & Jenkins, Nelson & Myers, Chas. A. Cole and M. N. Mahoney, for appellee.

HADLEY, J. Appellee brought this action to recover damages for the death of her husband, alleged to have been caused by the negligence of appellant. The complaint is in three paragraphs, to each of which a demurrer was overruled. The answer was in three paragraphs, a demurrer to the second of which was sustained. The reply to the third paragraph of answer was in three paragraphs, and a demurrer to the third paragraph thereof was overruled. The cause thus at issue was tried by the jury, which returned a special verdict assessing the plaintiff's damages at \$8,000. A judgment for \$8,000 was rendered in favor of the appellee. The action of the court upon the demurrers, and in overruling appellant's motion for a new

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trial, for a *venire de novo*, for judgment on special verdict, in arrest of judgment, and to modify the judgment, is separately assigned as error.

The principal facts covered by the complaint are as follows: On the 5th day of July, 1893, plaintiff's decedent, Henry E. Moore, entered the employ of appellant, as night operator, at its yard office in the city of Logansport, where and in which capacity he continued until February 16, 1894, when he received injuries resulting in his death; that on the fatal night, while engaged in discharging the duties imposed by his said employment, about 8.45 p. m., he had received by wire, and under directions of appellant had delivered, an order to the conductor and engineer of freight train No. 77, while the same was running west through the yards at a rate of 4 or 5 miles an hour; and when decedent turned from delivering said message, to return to his post of duty, and while in the line of duty, and without fault or negligence on his part, one of appellant's locomotive engineers, in the employ of appellant and in charge of appellant's locomotive, drawing appellant's wreck train upon appellant's main track, so carelessly and negligently ran said locomotive and wreck train eastward through said yards, with the engine reversed, the tender in front, and so carelessly and negligently managed and operated said locomotive and train, without giving any warning, or displaying any light, or ringing a bell or sounding a whistle, and at a speed of 20 miles an hour, as to, and did, without warning and without notice to plaintiff's decedent, negligently run upon and over the body of plaintiff's decedent, causing his death. In the second paragraph it is further averred that Logansport is a city of 16,000 inhabitants, and at the time of the injury to plaintiff's decedent said city had ordinances in force requiring trains to be run through said city after sunset at a speed not exceeding 6 miles per hour, and that trains and locomotives being run backward, or with tender in front, should carry signal lights in front, and should be announced

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by ringing the bell and sounding the whistle, and that said engineer so in the employ of appellant, and so in charge of appellant's said locomotive and wreck train, negligently ran said locomotive and tender backward at a speed of 20 miles per hour, within the limits of said town, without ringing the bell or sounding the whistle, or displaying any signal light in front of said tender, in violation of said city ordinance. Appellee concedes that the complaint is grounded upon the first branch of the fourth clause of what is known as the "Co-employees' Liability Act" (section 7083, Burns' Rev. St. 1894), which reads as follows: "Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any * * * locomotive engine or train upon a railway."

Appellant's learned counsel first assail the complaint for failure to disclose in either paragraph some duty owing by appellant to the deceased that had not been performed, their contention being that all the perils pleaded were obvious and ordinary risks assumed by the deceased. When it clearly appears from the record that the judgment rests upon a good paragraph of complaint, the overruling of a demurrer to a bad paragraph is not available error on appeal. Therefore, without considering the sufficiency of the first paragraph of complaint, which is urged upon our attention, we pass to the second, which sets out the facts in greater detail, and to which the special verdict seems to have been especially directed.

Appellee insist that, if any fundamental fact is insufficiently alleged, we may read it into the complaint from the findings of the jury. This is not the law. When a pleading is tested by demurrer, it must stand or fall by its own averments. It can find neither weakness nor strength from other parts of the record.

Sufficiency of
Pleading--
Review.

Insurance Co. v. Replogle, 114 Ind. 1-7, 15 N. E. 810; Cole v. Gray, 139 Ind. 396-399, 38 N. E. 856; Runner v. Scott, 150 Ind. 441, 50 N. E. 479. There is no longer any ground

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for contention over the rule that an employee assumes all the obvious and ordinary perils incident to his employment, and we find nothing in the statute relied upon by appellee to lessen the degree of diligence and responsibility required of the servant for his own protection.

Master and
Servant—
Assumption
of Risk.

Looking then to the facts pleaded in the second paragraph of complaint, for unperformed duty of appellant to the deceased, it is first insisted that it does not sufficiently show that the accident occurred within the corporate limits of the city of Logansport. It is averred that appellant maintained yards, and a telegraph office therein, "at" the city of Logansport; that the deceased was employed as operator in said telegraph office; that it was his duty to receive and deliver orders to train crews passing said office; and in passing from said office to deliver an order to train No. 77, westward bound on the main track, he was required to pass over a number of other tracks, etc., and was killed by the negligent act of the engineer, etc.; that the city of Logansport is an incorporated city of \$16,000 inhabitants, and had in force on the fatal night an ordinance, etc. In criminal pleading, in laying the venue, an approved form is to charge that the crime was committed "at Cass county"; and the above averments, we think, sufficiently show that the place of injury was within the corporate limits of the city of Logansport,

While we apply the rule that a servant must look out for his own safety, and heed, at his peril, all open and ordinary dangers, we must also give force to the correlative rule, equally well established, that the servant himself, observing due care, has a right to believe, and to rely upon his belief, that the master has done his duty in the promotion of safety; and in this instance the deceased had a right to believe that appellant would obey the city ordinance which forbade the running of trains through the city at a greater rate of speed than six miles an hour, and that required all backing trains, or reversed engines with tenders in front, after night, to

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carry a light in front, and to sound the whistle and ring the bell. A disregard of the ordinance, under section 7083, *supra*, will extend to the engineer in the employ of appellant, and in charge and management of its locomotive and train; and if said ordinance was disobeyed by said engineer, as averred, the jury would have the right to impute such disobedience as negligence. *Swindell v. State*, 143 Ind. 153-168, 42 N. E. 528; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843. It will not do to say, as appellant contends, that the deceased, being in the service of the company, and familiar with the needs of the service, in running trains backward and forward through the yards, and sometimes at a great rate of speed, was not entitled to the protection afforded by the ordinance. The power of a city to pass such an ordinance is conferred as a police power for the protection of the public, and all the public; and because the deceased happened to be in the service of the company, within the inhibited territory, presents no reason for depriving him of its protection. *Railway Co. v. Eggman* (Ill. Sup.) 9 Am. & Eng. R. Cas., N. S., 438, 48 N. E. 981; *Railroad Co. v. Gilbert*, 157 Ill. 354, 41 N. E. 724; *Bluedorn v. Railroad Co.*, 108 Mo. 439, 18 S. W. 1103. It follows, therefore, that the jury had the right to find, if the evidence warranted, that obedience to the city ordinances was a duty owing by appellant to the deceased, and its violation was not an assumed risk, but negligence of appellant.

Death of Em-
ployee—Excess
of Speed within
City Limits.

The second paragraph of the complaint is good. The special verdict finds that Logansport is an incorporated city of 18,000 inhabitants; that the deceased was injured within the corporate limits of the city; that at the time of the accident the city had in force ordinances forbidding the running of trains through the city at a greater rate of speed than six miles an hour; that all engines running backward, with tender in front, after sunset, should display a bright light in front, and ring the bell continuously, while passing through the city; that these ordinances were being violated

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at the time of the injury. And in other respects the record affirmatively shows that the judgment rests upon the second paragraph of the complaint. We will, therefore, not consider the sufficiency of the first and third paragraphs of complaint.

The next question arises upon the sustaining of the demurrer to the second paragraph of the answer. This answer is pleaded to the whole complaint. It counts upon a contract of membership held by the deceased in an organization known as the "Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh," of which appellant was one; "that

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from Liability
- Validity of
Contract.

said department and its funds were managed by said lines without expense to the fund, and that they guarantied the payment of all its obligations, and made up all deficiencies in the fund to meet the payment of all benefits due its members; that said relief department had a set of rules and regulations by which it and its members were governed, and to which all persons assented, and agreed to be bound by, when they became members thereof, a copy of which was filed with, and made a part of, said answer; that the decedent on the 7th day of October, 1893, made application and became a member on the terms of the regulations by which said department was operated, and continued such member until his death; that his application, made over his own signature, contained this express stipulation and agreement, to wit: 'And I agree that the acceptance of benefits from the said relief fund, for injury or death, shall operate as a release of all claims for damages against said company, arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute such further instrument as may be necessary formally to evidence such acquittance.' " The Book of Regulations (a part of the contract) contained the following further provision, to wit: "Should a member, or his legal representatives, bring suit against either of the companies now associated in administering the relief department, or that may hereafter be associated, for damages on account of

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injury or death of such member, payment of benefits from the relief fund on account of the same shall not be made until such suit is discontinued. If prosecuted to judgment or compromise, any payment of judgment or amount in compromise shall preclude any claim upon the relief fund for such injury or death." The answer further alleges that the appellee, Anna B. Moore, his then wife, was made his beneficiary in said fund, and, in event of his death, should receive the death benefit therein provided for, which was \$500, and that after his death she did receive from said fund, as such death benefit, said sum of \$500, and executed and delivered to the appellant her instrument in writing releasing it from all further liability. The question arises, did the acceptance by the plaintiff of the death benefit from said relief department release her claim against appellant for the wrongful death of her husband, or does her act come under the protecting provisions of section 5, Acts 1893 (Acts 1893, p. 294, c. 130; Burns' Rev. St. 1894, § 7087)? The language of the statute is, "All contracts made by railroads * * * with their employees, or rules, or regulations adopted by any corporation, releasing or relieving it from liability to any employee having a right of action under the provisions of this act, are hereby declared null and void." Appellant insists that the contract set out in said second answer does not come within the provisions of the statute, while the contrary is maintained by the appellee. It will be noted that the inhibition of the statute is against the making of any contract exonerating a railroad company from a future liability to an employee. The statute attempts only to forbid such contracts as release the company from liability to an action under the provisions of the act, and the act provides, and seeks to regulate, no rights of action except such as spring from the negligence of the company or its employees. The only purpose of the statute, therefore, is to prohibit the making of contracts relieving a railroad from liability for future negligence of itself and certain of its employees. Is the contract pleaded such a one? It shows:

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That a number of railroads constitute the Relief Department of the Pennsylvania Lines West of Pittsburgh, of which appellant was one. That the associated roads assume control and administration of the department without cost to the fund. That they contribute largely to the fund. That they guaranty that the benefits stipulated for with employees shall be paid in full. That membership therein is voluntary. That the employee is entitled to his benefits, if disabled from any cause,—from sickness, from accident, from his own fault as well as from the fault of the company. If disabled without fault of the company, the living or death benefit may be drawn from the fund without question. If by the fault of the company, he may, after injury, elect whether he will accept the benefits from the fund, or pursue his remedy at law against the company. And that, when he signs the contract, the only obligation assumed is that, if injured by the fault of the company, he will not seek double compensation, by pursuing both the relief fund and the company. It further shows, in effect, that when disability comes, and all the facts and conditions are known to him, he is at perfect liberty to then choose between the relief fund and the treasury of the company,—whether he will accept the sure and immediate benefits from the fund, or take his chances in the courts against the company,—and that an adoption of one course shall be held to be an abandonment of the other. This is the essence of the contract pleaded. It bears no semblance to an absolute contract for the release of the company from liability, under the provisions of the statute.

The question here involved is not a new one to the courts. It has long been the law that a railroad shall not contract against liability for its future negligence, as being against public policy, in that such a right would induce carelessness for the safety of employees; and similar contracts with relief associations have often been before the courts of the country for construction. In *Johnson v. Railroad Co.*, 163 Pa. St. 127, 29 Atl. 854, the court, having under review a contract in all material respects like the one here, says:

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"But, even in cases of injury through the company's negligence, there is no waiver of any right of action that the person injured may thereafter be entitled to. It is not the signing of the contract, but the acceptance of benefits after the accident, that constitutes the release. The injured party, therefore, is not stipulating for the future, but settling for the past. He is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby." In the case of *Ringle v. Railroad Co.*, 164 Pa. St. 529, 30 Atl. 492, in construing a contract the same in terms as this one, the court says: "In the present case there is an additional agreement that the plaintiff shall 'execute such further instrument as may be necessary formally to evidence such acquittance,' and it is argued that no such release has been executed by plaintiff. But it is not necessary that it should be. The acceptance of benefits is the substance of the release, and the agreement for a further instrument is by its express terms a mere formality for convenience of evidence." In the case of *Otis v. Pennsylvania Co.*, 71 Fed. 136, the contract considered was identical with the one pleaded in this answer; and, concerning it, *BAKER, J.*, says: "As a general proposition, it is unquestionably true that a railroad company cannot relieve itself from responsibility to an employee for an injury resulting from its own negligence, by any contract entered into for that purpose before the happening of the injury; and, if the contract under consideration is of that character, it must be held to be invalid. 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

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waive his rights 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." In *Shaver v. Pennsylvania Co.*, 71 Fed. 931, RICKS, J., reached the same conclusion from the consideration of a similar contract. Again, in *Railway Co. v. Cox*, 55 Ohio St. 497, 45 N. E. 641, the supreme court of Ohio expressed its view of a similar contract in the following words: "This claim arises, we think, from a misconception of the contract,—in assuming that by the contract the employee releases some future right of action against the company. On a previous page we have undertaken to show that such is not the case, that there is no waiver of any cause of action which the employee may become entitled to, and that it is not the signing of the contract, but the acceptance of benefits after the accident, that constitutes the release. When that occurs, he is not stipulating for the future; he is but settling for the past. He accepts compensation for injury already received." The same view is held by the supreme court of Iowa, announced in *Donald v. Railway Co.*, 93 Iowa, 284, 61 N. W. 971, and by the supreme court of Maryland in *Fuller v. Association*, 67 Md. 433, 10 Atl. 237, and by the supreme court of Nebraska in *Railway Co. v. Curtis*, 71 N. W. 42; and to the same effect is the case of *Maine v. Railway Co.* (Iowa) 70 N. W. 630, and that of *Lease v. Pennsylvania Co.*, 10 Ind. App. 47, 37 N. E. 423. The contract forbidden by the statute is one relieving the company from liability for the future negligence of itself and employees. The contract pleaded does not provide that the company shall be relieved from liability. It expressly recognizes that enforceable liability may arise, and only stipulates that, if the employee shall prosecute a suit against the company to final judgment, he shall thereby forfeit his right to the relief fund, and, if he accepts compensation from the relief fund, he shall thereby forfeit his right of action against the company. It is nothing more or

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less than a contract for a choice between sources of compensation, where but a single one existed, and it is the final choice—the acceptance of one against the other—that gives validity to the transaction.

But appellee contends that some of the cases cited above arose in states having no similar statute, and that the question of the railroad's contractual relief from liability was propounded as being against public policy, and not as in violation of a statute, and hence should not be accepted as authority. The answer to this is that the statute also rests upon public impolicy, or it has nothing whatever to stand upon. The right to contract upon subjects of themselves lawful, by persons *sui juris*, is beyond legislative control, so long as the right is exercised without injury to the public. The right to contract is inherent, and is inseparably connected with the right to own and control property, and "is a primary prerogative of freedom." 2 Whart. Cont. § 1061. Therefore, in construing the act in question, it must be assumed that the legislature intended to prohibit only such contracts as injuriously affected the public; and can it be said that a contract providing that in the future, when an injury may be suffered, the injured party shall then be free to choose which of two remedies will be most useful to him and most to be preferred, is against public policy? We do not see why, and are constrained to hold that the contract pleaded in the second answer is not within the inhibition of section 7087, *supra*, and that the same may be pleaded as a defense. We are mindful that this court, in the case of *Railway Co. v. Montgomery*, 49 N. E. 582, held a view of this question at variance with the opinion herein expressed, and which, after a more thorough examination of the decided cases, we find to be in conflict with the very decided weight of authority. Indeed, the cases seem now to be in substantial accord. The case of *Miller v. Railway Co.*, 65 Fed. 305 (the only case relied upon as authority upon this question) was subsequently appealed to the United

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States circuit court of appeals, Eighth district, and the doctrine of the lower court inferentially disapproved, by the court announcing, in substance, that the authorities were all the other way, though the question here was not decided, as not being necessary to a disposition of the case. *Railway Co. v. Miller*, 22 C. C. A 264. So far as the case of *Railway Co. v. Montgomery*, *supra*, is in conflict with the opinion herein announced, the same is disapproved.

As before stated, the second answer goes to the whole complaint. The plaintiff, as administratrix, sues for the use of herself, as widow, and for the infant child of the decedent, under section 285, Burns' Rev. St. 1894 (section 284, Horner's Rev. St. 1897).

Wrongful
Death—Right of
Action.

Under this statute, if the intestate had a cause of action against appellant for his injuries, death ensuing therefrom, a right of action accrued to his personal representative for the use of his next of kin. Whether the right of the administratrix was but a continuation of the intestate's right to sue, as contended by appellant, or whether it was a newly-created right, as our cases hold, is unimportant here. However it may be, the right exists only by virtue of the statute, and exists, not for the benefit of the intestate's estate, but as a source of compensation to those who by the death become the parties injured by the wrongful act of the defendant. *Hilliker v. Railway Co.* (Ind. Sup.) 52 N. E. 607.

The deceased at the time of his death had not elected whether he would accept compensation from the relief fund,

or seek his damages by action at law against

Same—Action in
Behalf of Next
of Kin—Rights
of Beneficiaries.

the appellant. Subsequent to his death the plaintiff, as widow, and who was named in the contract as the sole beneficiary of the death

benefit, accepted the stipulated amount, \$500, in full satisfaction, and executed to appellant a release from further liability. Appellant contends that, since the widow was the sole beneficiary named in the contract with the relief department, her acceptance of the full sum extinguished all further claim against the company. We cannot assent to

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this proposition. Before death came to Moore, he had a cause of action against appellant that he had not released. Upon his death the law conferred a right of action upon his representative for the use of his next of kin,—for the use of his child as well as for the use of his widow; and no act of the latter, without the lawful consent of the child, will deprive the child of its benefit. The widow could only release what she was entitled to. *Railway Co. v. Wymore* (Neb.) 58 N. W. 1120. The answer avers that after the death of her husband, and after she had become a beneficiary in a right of action against the company, without fraud she agreed with appellant, and accepted the \$500 death benefit in full satisfaction of her claim growing out of the death of her husband; and there is perceived no sufficient reason why she should not be bound by it. But her release in no way affected the rights of the child, and for the use of the child's estate, in her representative capacity, the plaintiff has the right to maintain this action. It follows that as the second answer was pleaded to the whole complaint, and is good only as to a part, the demurrer thereto was properly sustained.

The third paragraph of answer was partial, and was addressed only to so much of the complaint as sought a recovery for the use of the widow. It averred that after the death of her husband, in consideration of \$500, she fully released the appellant. The plaintiff replied to the third answer in three paragraphs. In the third paragraph she set up substantially the same facts and exhibits as were set out in the second paragraph of answer, and averred that the \$500 was received by her under and in pursuance of her deceased husband's contract with said relief department, and not otherwise, and that said contract was invalid and void. To this paragraph of reply a demurrer was overruled, which forms the basis for appellant's fifth assignment of error. The question presented by this reply is the same as that considered at length as arising upon the second paragraph of answer, and, for the reasons there given, we hold that the

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court erred in overruling the demurrer thereto. For this error the cause must be reversed. Judgment reversed and cause remanded, with instructions to sustain appellant's demurrer to the third paragraph of reply to third paragraph of answer, and for further proceedings in accordance with this opinion.

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v.

HOSEA.

(*Supreme Court of Indiana, April 7, 1899.*)

Constitutionality of "Employers' Liability Act." *—The "Employers' Liability Act" of Indiana (Burns' Rev. St. 1894, sections 7083—7087) is constitutional.

Relief Association—Relieving from Liability—Validity of Contract. †—A contract between a railroad company and its employee under which the only obligation assumed by the latter is that, if injured by the fault of the company, he will not seek double compensation, by claiming benefits from a relief fund and also damages in an action against the company for the injury, and under which he is at liberty, if injured in the service of the company, to accept benefits from the relief fund or to maintain an action at law against the company, does not come under the statute declaring null and void any contract relieving a railroad from liability to an employee for future negligence.

Wrongful Death—Right of Action.—Under section 285 Burns' Rev. St. 1894 of Indiana, where an intestate had a cause of action for the injuries which have resulted in his death, his personal representative has a right of action, not for the benefit of his estate, but for compensation to those who by the death become the parties injured by the wrongful act which caused the death.

Same—Action by Representative in Behalf of Next of Kin—Rights of Beneficiaries.—Where under such statute the intestate had a cause of action for the injuries which resulted in his death which

*See Pittsburgh, C., C. & St. L. Ry. Co. v. Montgomery (Ind.), 9 Am. & Eng. R. Cas., N. S., 792 and *note*, p. 816.

†See Pittsburgh, C., C. & St. L. Ry. Co. v. Moore (Ind.), *ante*.

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he has not released, his representative has a right of action for the use of the next of kin; and if such kin are the widow and child of deceased, no act of the widow, without the lawful consent of the child, can prevent recovery in behalf of the child.

Pleading.—Where an answer is pleaded in bar of the whole action, and is sufficient as to a part only, a demurrer thereto is properly sustained.

Issues—Waiver—Appeal.—A question not argued in counsel's brief will be deemed waived.

APPEAL by defendant from Clark county circuit court.
Affirmed.

S. Stansifer, for appellant.

Laurent A. Douglass, for appellee.

HADLEY, J. This action is for the death of appellee's decedent, who was a resident of this state, and who died in the city of Louisville, Ky., of injuries there received in coupling cars while in the service of appellant as a switchman, and leaving surviving him appellee, his widow, and one child. The complaint, pleading the Kentucky statute commonly known as "LORD CAMPBELL'S ACT," and which in all material respects is similar to ours upon the same subject, is in two paragraphs. Each paragraph rests upon section 1 of the act of 1893, approved March 4, 1893 (Acts 1893, p. 294; Burns' Rev. St. 1894, § 7083). The first paragraph of the complaint charges that the injury was caused by and because of the negligent violation by the engineer of a rule of the company for his guidance. The second paragraph charges the same things as to the engineer and fireman. Demurrers to each paragraph of the complaint were overruled. Answer in three paragraphs,—the first a general denial; the second a special plea in bar; and the third, the same as the second, pleaded as a partial defense in bar of the widow's right of recovery. A demurrer to the second paragraph was sustained. Trial on denial and partial answer, and judgment for plaintiff for \$2,350 for benefit of child. The errors assigned call in question the action of the court in overruling the demurrer to each paragraph of

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constitutional, the complaint is bad." No objection to either paragraph of the complaint is pointed out, except that both are obnoxious to the constitution. Appellant propounds the following as the questions presented by this appeal: "(1) Constitutionality of the corporation employers' liability act of March 4, 1893, and especially the fifth section. (2) Whether contracts of the kind in this case are within the meaning of section 5; and, if so, whether the section is violative of the obligation of the contract in this case, entered into before the act. (3) Whether acceptance of benefits by the death beneficiary of a deceased employee, member of appellant's voluntary relief department, bars an action on death."

The first question propounded has been decided by this court adversely to appellant's contention in the case of *Railway Co. v. Montgomery*, 152 Ind. 1, 9 Am. & Eng. R. Cas., N. S., 792, 49 N. E. 582. The question had full consideration in that case, and we are content with the conclusion there arrived at.

The first branch of the second proposition, namely, "whether contracts of the kind in this case are within the meaning of section 5" of the act of March 4, 1893, has also recently received consideration by this court in the case of *Railway Co. v. Moore* (decided March 30, 1899) 53 N. E. 290. The contract reviewed in the *Moore Case* is identical in terms with the contract pleaded in the second paragraph of answer in this case, and in the former we held that the contract was not one to release or relieve the railroad company from future liability, but a contract that, in the event of injury, the injured party would then, after injury, elect between two sources of compensation, and that his election of one would preclude his rights to the other; and hence the contract was one not forbidden by section 5 of said act, and must be considered, and its validity determined, in the same manner as if the act of 1893 had not been adopted. We adhere to the views expressed in the *Moore Case*, and it would therefore be a needless waste

Constitutionality
of "Employers'
Liability Act."

Relief Associa-
tion—Relieving
from Liability—
Validity of
Contract.

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of effort to consider the constitutional question presented upon the fifth section of said act. The complaint discloses that the decedent left surviving him the plaintiff, his widow, and one child. The second paragraph of the answer is pleaded in bar of the action, and appellant's learned counsel, in his able and ingenious brief, earnestly insists that the widow's acceptance, as the sole beneficiary named in her deceased husband's application to and contract with the relief department of the death benefit, released all right and cause of action against appellant for wrongfully causing the death of her husband, his insistence being that death, under the provisions of section 285, Burns' Rev. St. 1894 (section 284, Horner's Rev. St. 1897), does not create a new or independent cause or right of action, but only continues, to his personal representative, the right or cause of action vested in the intestate before his death; that the paramount thing for which damages may be recovered is the same whether the recovery is by the intestate in his lifetime, or by his personal representative after his death; and "the action, whether for injury or death, being bottomed on the same wrong, it follows that the power to contract in regard to the injury carries with it the right to contract with regard to death as a result of the injury." If we could accept the premise as sound, we could approve the logic. But, if the premise is false, the conclusion fails. It is conceded that the death statute of Kentucky, pleaded with the complaint, is similar, in effect, to our section 285 (284), *supra*, and appellant confines the discussion to the interpretation that should be placed upon the latter statute. Section 285 (284) reads as follows: "Where the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the

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same manner as personal property of the deceased." It is beyond controversy that at common law a cause of action arising out of an injury to the person died with the death of either party, and that whatever cause or right of action is now maintainable exists by virtue of the statute. The right is of legislative origin, and in its creation the legislature had the power to provide for whose benefit it should exist, and the terms and conditions upon which it can be maintained. There appears no warrant in the statute for the assertion that it was the legislative intent to keep alive the cause or right of action vested in the intestate. It is true that the right of action provided by the statute must rest upon the same wrongful act or omission, and be tested and established by the same facts and rules of evidence; that is to say, if the facts supported an action in the intestate against the defendant for a wrongful act or omission, and he did not or could not avail himself of it, upon his death therefrom the statute gives an action, for the same cause, to his representative for the use of his widow and children. *Railroad Co. v. Tindall*, 13 Ind. 366, 369; *Railway Co. v. Thompson*, 107 Ind. 442, 444, 8 N. E. 18, and 9 N. E. 357. But, even if the actions are grounded upon the same wrong, it is more reasonable and logical to hold that the intent of the legislature was to create a new and independent right of action upon the failure of another for the same wrong; that is, in cases where the damage resulting from the wrong is transferred to others. By this enactment, it was the obvious purpose of the legislature to prevent the wrongdoer from escaping the civil consequences of his act in a case where his wrong reaches the degree of causing death. The statute expressly recognizes that, when death ensues from a wrongful act, the next of kin are the persons damnified, and the action is given to compensate them for the damages sustained thereby. In no sense can the action given by statute be said to be the same as that resting in the intestate before his death, further than that the source is the same. In the former the right comes by the

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common law; in the latter by statute. In the former the elements of damage that were recoverable were for bodily pain and suffering, loss of time and health, and expenses incurred in providing medical attendance and nursing; in the latter the damages are confined to pecuniary loss. To the widow is allowed, for example, the amount of damages sustained by her in the loss of such support as she was receiving, and was likely to receive, from her husband, to be measured by his present and prospective earnings, less the sum required for his personal support and other family obligations. To his child is allowed, not only for the loss of his support during infancy, but also for the loss of parental care and training for the duties of active life. *Board v. Legg*, 93 Ind. 524, 529, and cases cited. In the former the recovery inured to benefit of the injured party; in the latter the recovery is for the exclusive benefit of the widow and child, no part of it going to the intestate's estate. The fact that the action is lodged in the personal representative of the deceased furnishes no valid ground for argument. As the action inures to the benefit of the widow and children, and, upon their failure, to the next of kin, it may often be found impracticable for all the beneficiaries to join as plaintiffs; and doubtless, as a matter of convenience, the legislature provided a trustee for them in the personal representative of the decedent. We therefore conclude that section 285 (284), *supra*, ^{Wrongful Death}_{—Right of Action.} should be construed as creating a new and inde-

pendent right of action for the use of the next of kin, its validity to be tested by the right of the intestate to maintain an action for the same wrong, had he lived. This view finds support in the following authorities: *Burns v. Railroad Co.*, 113 Ind. 169, 171, 15 N. E. 230; *Hamilton v. Jones*, 125 Ind. 176, 25 N. E. 192; *Elliott, R. R.* § 1361; *Pym v. Railroad Co.*, 4 Best & S. 396; *Hanna v. Railroad Co.*, 32 Ind. 113; *Hilliker v. Railroad Co.* (Ind. Sup.) 52 N. E. 607.

The case of *Hecht v. Railway Co.*, 132 Ind. 507, 54 Am. & Eng. R. Cas. 75, 32 N. E. 302, is urged upon us as declaring

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a different interpretation of the statute. We cannot accept this case as an authority upon the question we have here. The question before the court in the Hecht Case was entirely different, and rested upon entirely different grounds. The intestate, in his lifetime, had successfully prosecuted an action for his injuries, and had received payment of the judgment, and had thereby extinguished his right of action before his death; and the question there considered and decided by the court was that the intestate, having exhausted his right of action by a recovery of all the damages resulting from the wrongful act, could not have maintained another action therefor had he lived, and hence no action accrued, under the statute, for the use of his widow and children. If we construe the language of the court in the light of the question under consideration, we are unable to find anything in support of appellant's contention that the cause or right of action conferred upon the personal representative of the deceased is the same right or cause of action that was vested in the deceased in his lifetime. The court expressly says on page 512, 132 Ind., and page 304, 32 N. E., that "it is true, in a certain sense, that section 285 (284), *supra*, gives a new right of action in favor of the widow and children." It follows, therefore, that whatever may be said with respect to the power of the intestate to contract away his right of action against the appellant, he surely had no power to bargain away his family's right of action given by statute against the one wrongfully causing his death.

The widow, as beneficiary, accepted the death benefit of \$1,000, and released appellant from liability. But her release in no way affected the rights of decedent's child. She could release only what she was entitled to. *Railway Co. v. Moore, supra.* She sues in her representative capacity, as well for the child as for herself as widow.

The second answer is pleaded in bar of the whole action, and is only sufficient as to a part. The demurrer thereto

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by Representative
in Behalf
of Next of Kin
Rights of Beneficiaries.

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was properly sustained. Appellant's counsel suggests an extraterritorial question, namely, whether the sufficiency of the complaint is to be determined by the laws of this state or Kentucky, where the accident and death occurred. But he has not argued the question in his brief, and we must, therefore, deem it to be waived. *Telegraph Co. v. Kilpatrick*, 97 Ind. 42; *Fairbanks v. Meyers*, 98 Ind. 92; *Kennell v. Smith*, 100 Ind. 494; *Daniels v. McGinnis*, 97 Ind. 549. Finding no available error in the record, the judgment should be affirmed. Judgment affirmed.

Pleading.

Issues—Waiver
—Appeal.

PENNSYLVANIA CO.

v.

EBAUGH.

(*Supreme Court of Indiana, May 10, 1899.*)

Constitutionality of Employers' Liability Act.*—The "Employers' Liability Act" of Indiana (Burns' Rev. St. 1894, § 7083) is constitutional.

Assignments of Error—Instructions.—Where instructions given and refused are made part of the record by order of the trial court, and are fully set out in the order, they are properly in the record, although no filing of the instructions is disclosed.

Same—Same.—The following assignment of error is sufficient to challenge each instruction. For "error of the court in refusing to give to the jury each of the instructions, severally asked, numbered 1, 2, 3," etc., each being a word of distribution.

Master and Servant—Assumption of Risk.†—A railroad employee assumes all the ordinary dangers of his employment, which are known to him, or which by the exercise of ordinary diligence would have been known to him.

Same—Same—Defects.—A railroad employee cannot recover from

*See *Pittsburgh, C., C. & St. L. Ry. Co. v. Hosea* (Ind.), *ante*.

†See notes, 11 Am. & Eng. R. Cas., N. S., 484 *et seq.*

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the company for an injury suffered in the course of his employment, from defective machinery, or the dangerous condition of the track, after he has knowledge of such defect or dangerous condition, or by the exercise of ordinary care might have had such knowledge.

APPEAL by defendant from Marion county circuit court.
Reversed.

Samuel O. Pickens, for appellant.

W. I. Rooker, for appellee.

HADLEY, J. Appellee brought this action against appellant to recover damages for the loss of an arm which resulted from injuries received while attempting to couple cars while in the service of appellant as a brakeman on one of its freight trains. The complaint is in three paragraphs. A demurrer to each was overruled. Answer in general denial. Verdict and judgment for appellee. Error is assigned upon the overruling of the demurrers to the complaint, in overruling appellant's motion for judgment upon answers to interrogatories, notwithstanding the general verdict, and in overruling appellant's motion for a new trial.

The negligence charged in the first paragraph relates to the order of the conductor to the plaintiff to couple two cars of different construction,—the drawbars of one being higher than the drawbars of the other, and the deadwoods so negligently constructed and maintained that the cars were but eight inches apart when the deadwoods collided,—which conditions were known to the defendant, and unknown to the plaintiff, and on account of which conditions the plaintiff, in attempting to couple said two cars, was caught between them, held fast, and injured. The second, in addition, alleged that the north rail of the track where the plaintiff was ordered to make the coupling had a strong, sharp splinter of iron protruding therefrom, and that, when the plaintiff stepped in to make the coupling, said splinter penetrated his shoe and held him fast, whereby he was injured. The third

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charges that the night was very dark, and the plaintiff, acting under the rules and regulations of the company, and orders of the conductor, took his station at the standing car, and signaled for the backing and slowing up of the train, but, instead of coming back slowly, the conductor negligently cut two cars from the rear of the backing train, that, unrestrained, rushed violently and unexpectedly upon and injured him.

Appellant requested the court to charge the jury that if they found the plaintiff was injured solely by the negligence of the conductor of the train, and that the defendant was free from fault in employing said conductor or in

retaining him in its service, such injury was the result of the negligence of a co-employee, and

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of Employers'
Liability Act.

that they should find for the defendant. Appellant's counsel says in his brief: "The overruling of the demurrer to each paragraph of the complaint, and the refusal to give said instruction to the jury, present the question of the validity of the employers' liability act." No objection is made to either paragraph of the complaint, nor to the refusal of the court to give said instruction No. 20, further than that the act of 1893 (Acts 1893, p. 294; Burns' Rev. St. 1894, § 7083), upon which it is claimed they rest, is obnoxious to the constitution. Since the brief was written, this court has decided the question here propounded adversely to the position assumed by the appellant. *Railway Co. v. Montgomery*, 152 Ind. 1, 9 Am. & Eng. R. Cas., N. S., 792, 49 N. E. 582; *Railway Co. v. Hosea* (at this term) 53 N. E. 419.

The correctness of certain instructions given and refused is challenged by appellant's motion for a new trial. Appellee submits that the instructions given and refused are not properly in the record, because no filing of the

same is disclosed. Both sets are made part of the record by order of court, and both are fully

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Error—Instruc-
tions.

set out in the order. This brings them properly into the record. *Close v. Railway Co.*, 150 Ind. 560, 50 N. E. 560.

Appellee also contends that neither the instructions given nor those refused are in the record so as to question them

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severally. The alleged error is stated in the motion for a new trial as follows: For "error of the court in refusing to give to the jury each of the instructions, severally asked, numbered 1, 2, 3," etc. For "error of the court in giving to the jury each of the instructions given by the court numbered 1, 2, 3," etc. "Each" is a word of distribution,—implies severalty,—and the assignment is sufficient to challenge each instruction of each set. *Railroad Co. v. McCorkle*, 140 Ind. 613, 40 N. E. 62.

Instruction 19 given by the court is as follows: "(19) If you find from a fair preponderance of the evidence that plaintiff, without any fault or negligence on his part, while exercising due care, sustained the injury complained of, by reason of the roadbed at the point where he was working being out of repair, as charged in the complaint, and that such condition was unknown to the plaintiff, and that such condition was known to the defendant, or had so long continued or was of such a nature that it would have been known to the defendant by the exercise of ordinary diligence on the part of the defendant, so as to have avoided said injury, then your verdict should be for the plaintiff." The defendant requested, and the court refused to give, the following: "(5) The court instructs you further, as a matter of law, that an employee of a railroad company cannot recover from the company for an injury suffered in the course of the business in which he is employed, from defective machinery used therein, or from the dangerous condition of the track, after he has knowledge of such defective or dangerous condition, or by the exercise of ordinary care might have had knowledge of such defective or dangerous condition." The objection urged against instruction 19 is that it limited the plaintiff's assumption of risk to the defects in the roadbed of which he had actual knowledge. It is a rule of universal acceptance by the courts of this country that an employee assumes all the ordinary dangers of his employment, which are known to him, or which by the exercise of ordinary diligence would

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have been known to him. It is alike the duty of the employer and employee to be diligent in the discharge of their reciprocal duties, for the avoidance of personal injury to the latter; and both are alike bound to know, and will be chargeable as knowing, all facts and conditions that a person of ordinary caution and prudence, in a like situation, would have discovered. Neither may close his eyes nor carelessly neglect observation and inquiry for the safety of the employee, and find immunity on the ground that he did not have actual knowledge of the danger. In such cases constructive knowledge has the same force and effect as actual knowledge. *Reitman v. Stolte*, 120 Ind. 314, 22 N. E. 304; *Railroad Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631; *Lamotte v. Boyce*, 105 Mich. 545, 63 N. W. 517; *Barnard v. Schrafft*, 168 Mass. 211, 46 N. E. 621; *Stubbs v. Oil Mills*, 92 Ga. 495, 17 S. E. 746. It is a familiar rule that a party is entitled to have the jury instructed in the law as applicable to all material questions of fact involved in the case, and to have the law applicable thereto clearly, correctly, and fully stated; and if a court proceeds on his own motion, and employs his own language in the performance of this duty, he must state the law correctly and fully upon all questions of fact in evidence to which he directs the jury's attention; and, if he has overlooked any material question of fact to which evidence has been adduced, either party so desiring may tender and request the giving of an instruction covering the omitted fact; and if the instruction so requested is pertinent, and correctly states the law, and is tendered at the proper time, it is the duty of the court to submit it to the jury. Whether appellee had had such reasonable opportunity to know the defective condition of appellant's roadbed at the place of injury as that a person of ordinary diligence and regard for his own safety would have taken notice of was a material fact not covered by instruction 19 given by the court, and is covered, and the law correctly stated, in No. 5 requested by appellant and refused. *Stone Co. v. Summit*

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(Ind. Sup.; at this term) 53 N. E. 235. In this case it is said, "To sustain such allegation, however, the evidence must show that the employee not only had no knowledge of the defect, but could not have known the same by the exercise of ordinary care." For error of the court in giving to the jury instruction 19, and refusing No. 5, requested by appellant, the judgment must be reversed. As the question upon the overruling of appellant's motion for judgment upon the answers to interrogatories, notwithstanding the general verdict, is not likely to arise upon a retrial of the cause, we deem it unnecessary to review it. Judgment reversed and cause remanded, with instructions to grant a new trial.

Same-Same-
Defects.

LOUISVILLE, N. A. & C. RY. CO.

v.

WAGNER.

(*Supreme Court of Indiana, May 23, 1899.*)

Employers' Liability Act—Fellow Servant Rule and Assumption of Risk.*—In an action against a railroad company for personal injuries to one of its employees, the statute of Indiana, providing that where an injury results from the negligence of any person in the service of a corporation, to whose orders the injured party at the time was bound to conform and did conform, the injured person being himself without fault, the corporation shall be liable, places the case upon a principle different from that in support of the co-servant rule and the assumption of risk; and the plaintiff in such an action is entitled to recover for injuries sustained while conforming, as it was his duty to do, to the orders of defendant's foreman, through the latter's negligence, although the foreman, in addition to giving orders, did a portion of the manual work in which plaintiff was engaged when injured.

Same.—Subdivision 2 of section 1 of such statute, is not nullified by the specification and enumeration contained in subdivision 4 of

*See *Pennsylvania Co. v. Ebaugh* (Ind.), *ante*.

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such section. Each subdivision specifies different employees, but in common they distinguish employees clothed with the responsibility and authority of the employer.

APPEAL by defendant from Clark county circuit court.
Affirmed.

E. C. Field, W. S. Kinnan, M. Z. Stannard, and Elliott & Elliott, for appellant.

C. L. & H. E. Jewett, for appellee.

HADLEY, J. The special verdict of the jury discloses the following facts: Ine Cunningham was the duly-constituted foreman of a gang of 10 or 12 men, common laborers, of whom the appellee was one, all, including Cunningham, employees of appellant, and engaged in loading car trucks, composed of four wheels, axles, and gearing, and weighing about 2,500 pounds, upon a flat car, for transportation. By the method pursued, which was the usual and ordinary way, the trucks were placed upon the rails occupied by the flat car, to be loaded about 50 feet distant. Then two wooden skids 15 feet long, made for and suitable to the purpose, were arranged by placing ends on top of the flat car and the other ends upon the rails towards the trucks. The 10 or 12 men, including appellee, were all subject to the orders of Cunningham, and were bound to conform, and did conform, to his orders. Ordinarily the men, being placed about the truck, some to the sides and three to the rear, two outside and one between the skids, by their united effort, under the orders of Cunningham, would push the trucks along rapidly, and, by the momentum attained, would be able to carry the trucks halfway up the skids before stopping, and, when a stop was made, Cunningham, in addition to giving orders, would chock the trucks with a piece of timber. From the first stop to the top of the car movement was made by short stages. On the occasion of appellee's injury it had been raining, and the skids were slightly wet. The men were directed to their places about the truck by Cunningham, appellee taking his place in the rear, between the skids, in conformity to Cunningham's

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order. The truck was put in motion, and forced more than two-thirds of the way up the skids, where it stopped, and began slipping back; whereupon, while appellee was exerting his strength in pushing at the truck, and without any notice or warning to appellee, Cunningham ordered the men to "get out of the way, and let her go." The other men obeyed the order immediately, and the truck at once rushed back and down the skids, striking appellee in the breast, precipitating him backward to the track, his arm falling across a skid, where it was run over by the truck, and crushed. Appellee had no warning or knowledge that said order would be given by Cunningham, and could not escape from between the skids, or from the descending truck, after it was given. The other men could have held the truck until appellee could have escaped from between the skids, if they had been requested or ordered by Cunningham so to do. Appellee and the said other men engaged with him in attempting to load said truck were at the time and place of appellee's injury bound to conform, and were conforming, to the orders of Cunningham in all things respecting the loading and letting go of said truck. Appellee was without fault. Appellant's demurrer to the complaint was overruled; also its motion for *venire de novo*, for judgment in its favor on the special verdict, and for a new trial. Error is assigned upon each ruling of the court; but the special verdict fully supports the averments of the complaint, and the only proposition discussed relates to the plaintiff's right to recover under the averments of his complaint, and the verdict returned in support thereof. The discussion centers around the second subdivision of section 1, p. 294, Acts 1893 (section 7083, Burns' Rev. St. 1894; section 5206s, Horner's Rev. St. 1897), commonly known as the "Employers' Liability Act," which is in these words: "First. That every railroad or other corporation, except municipal, operating in this state, shall be liable in damages for personal injury suffered by an employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases:

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* * *. Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose orders or direction the injured employee at the time of the injury was bound to conform and did conform."

The question we have here is not to be controlled by the general doctrine of fellow servants or of assumed risks; hence the cases cited by appellant upon these questions cannot be accepted as authorities in the case at bar.

The statute above set out is clear and free from ambiguity. We cannot interpret it. We may only read it. *Bradbury v. Wagenhorst*, 54 Pa.

Employers' Liability Act - Fellow Servant Rule and Assumption of Risk.

St. 180; *Ezekiel v. Dixon*, 3 Ga. 146; *Barstow v. Smith, Walk.* (Mich.) 394; *Noble v. State*, 1 Iowa, 325; *Rosenplaenter v. Roessle*, 54 N. Y. 262; *Scott v. Reid*, 35 U. S. 522; *Black*, *Interp. Laws*, p. 35; *Suth. St. Const.* § 234. It provides that when an injury results from the negligence of any person in the service of a corporation, to whose orders the injured party at the time was bound to conform and did conform, the injured party being himself without fault, the corporation shall be liable. The statute places the case upon a principle different from that in support of the co-servant's rule and the assumption of risk. The test here is three-fold: (1) Was the offending servant clothed by the employer with authority to give orders to the injured servant that the latter was bound to obey? (2) Did the injury result to the latter from the negligence of the former while conforming to an order of the former that the injured servant was at the time bound to obey? (3) Was the injured party at the time of injury in the exercise of due care and diligence? If these three things concur, appellee exhibits a good cause of action.

The complaint charges that the defendant is a railroad corporation; that the plaintiff and one Cunningham were, at the time of plaintiff's injury, employees of the defendant; that Cunningham at the time, as a part of his duty and service to the defendant, had the control and management of the servants of the defendant as a foreman in the work of loading trucks; that the plaintiff and other employees so en-

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gaged were subject to the orders and control of said Cunningham, and were at the time bound to conform, and did conform, to the orders of Cunningham in all things pertaining to the loading of said trucks; and that the plaintiff and said other employees took their places about the truck—the plaintiff in the rear and between the skids—in conformity to the order of Cunningham, and, while so conforming to said order, and while in the exercise of due care and diligence, and when the truck was two-thirds the way up the skids, the plaintiff was injured by the negligence of Cunningham in giving orders to those pushing at the truck to loose the truck, and “let her go,” without giving the plaintiff warning or an opportunity to escape. These averments are all established by the special findings of the jury. And the jury also finds that the other men might and would have held the truck long enough for the plaintiff to have safely escaped if they had been requested or ordered by Cunningham to do so.

In this case the plaintiff was in a dangerous place in obedience to the orders of Cunningham, whom he was at the time bound to obey, and, without giving the plaintiff warning or a chance to escape, as he might have, and ought to have, done, Cunningham ordered the men to loose the truck. The men instantly obeyed, as they were bound to do, and thus precipitated the truck upon the plaintiff, crushing his arm. The order to loose the truck was the proximate cause of plaintiff's injury. And it was both directing the plaintiff into a dangerous situation, that he was thus bound to enter, and then ordering the truck turned loose upon him without warning, that constitutes the actionable wrong. See *Wild v. Waygood* [1892] 1 Q. B. 783; *Wright v. Wallis*, 3 Times Law R. 779; *City Council of Sheffield v. Harris*, 101 Ala. 564, 14 South. 357.

Subdivision 2 of section 1, *supra*, is not nullified by the specification and enumeration contained in subdivision 4 of said section, as is urged by appellant. Both subdivisions are equally parts of the same section, and relate to the same subject-matter. Each sub-

Same.

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division specifies different employees, but in common they distinguish employees of a superior rank,—employees clothed with responsibility and authority of the employer,—and both must be governed by the same rules of interpretation. The section must be construed as a whole. Black, Interp. Laws, p. 146. The facts found bring this case within the spirit and letter of the statute. We find no error in the record. Judgment affirmed.

TROXLER

v.

SOUTHERN RY. CO.

(*Supreme Court of North Carolina, March 21, 1899.*)

Injury to Employee—Failure to Furnish Safe Appliances—Negligence of Fellow Servants.*—Where a railroad employee is injured through the absence of proper appliances, the injury cannot be attributed to the negligence of a fellow servant.

Same—Same—Automatic Car-Couplers—Negligence Per Se.†—The failure of a railroad company to equip its freight cars with modern self-coupling devices is negligence *per se* continuing up to the time of an injury sustained by an employee in coupling cars by hand, and renders the company liable, whether such employee was negligent in the manner of making the coupling or not.

APPEAL by defendant from Guilford county superior court.
Affirmed.

F. H. Busbee, for appellant.

C. M. Stedman and *D. Schenck, Jr.*, for appellee.

CLARK, J. The plaintiff was injured in attempting to couple cars of the defendant on which there were no automatic car couplers, but in lieu thereof skeleton draw-heads, of unequal height. The court below held that the absence of automatic couplers, in general use,

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*See note, 12 Am. & Eng. R. Cas., N. S., 791 *et seq.*

†See note at end of case.

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was negligence *per se*, and refused to submit an issue whether the injury was not caused by the negligence of a fellow servant, and refused to instruct the jury, as prayed, that the plaintiff was guilty of contributory negligence if he could, by proper care, have coupled the cars by hand without accident.

The duty to furnish proper and safe appliances is that of the common master, and injury caused by their absence

**Injury to Em-
ployee—Failure
to Furnish Safe
Appliances—
Negligence of
Fellow Servants.**

cannot be attributed to the negligence of a fellow servant. Troxler v. Railway Co., 122 N. C. 902, 30 S. E. 117; Wright v. Railway Co., 122 N. C. 959, 10 Am. & Eng. R. Cas., N. S., 151, 30 S.

E. 348. It has been heretofore held, in Greenlee v. Railway Co., 122 N. C. 977, 11 Am. & Eng. R. Cas.,

**Same—Same—
Automatic Car-
couplers—Negli-
gence Per Se.**

N. S., 45, 30 S. E. 115, that failure of a railroad company to equip its freight cars with modern self-coupling devices is negligence *per se*, con-

tinuing up to the time of an injury sustained by an employee in coupling cars by hand, and renders the company liable, whether such employee was negligent in the manner of making the coupling or not. The same ruling had been previously made as to the duty of furnishing automatic car couplers on passenger trains in Mason v. Railroad Co. (1892) 111 N. C. 482, 53 Am. & Eng. R. Cas. 183, 16 S. E. 698. Where the negligence of the defendant is a continuing negligence (as the failure to furnish safe appliances, in general use, when the use of such appliances would have prevented the possibility of the injury), there can be no contributory negligence which will discharge the master's liability. This has been repeatedly and uniformly held. Norton's Case, 122 N. C. 911, 29 S. E. 886; McLamb's Case, 122 N. C. 873, 29 S. E. 894; Cone v. Railroad Co., 81 N. Y. 206, 2 Am. & Eng. R. Cas. 57. The failure to provide the necessary appliances is the *causa causans*. The defendant, however, frankly asks us to reconsider and overrule Greenlee's Case. That case was the expression of no new doctrine, but the affirmation of one as old as the law, and founded on the soundest princi-

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ples of justice and reason, to wit: That when safer appliances have been invented, tested, and have come into general use, it is negligence *per se* for the master to expose his servant to the hazard of life or limb from antiquated and defective appliances which have been generally discarded by the intelligence and humanity of other employers. *Witsell v. Railway Co.*, 120 N. C. 557, 27 S. E. 125. This must be so, if masters owe any duties to their employees, and unless economy of expenditures on the part of the railroad management is to be deemed superior to the conservation of the lives and limbs of those employed in their operation. In the twelfth annual report of the interstate commerce commission (1898), published by authority of the United States government, upon returns made by the railroad companies themselves, it is stated (at page 88): "Since the enactment of the law in 1893 [requiring automatic couplers] there has been a decreasing number of casualties. There were 1,034 fewer employees killed, and 4,062 fewer injured, during the year ending June 30, 1897, than during the same period in 1893. The importance of this subject will be realized when the yearly casualties to railway employees are compared with those which occurred during the recent war. In the Spanish-American war there were 298 killed and 1,645 wounded. In 1897, there were 1,693 men killed and 27,667 injured, from all causes, in railway service. From coupling and uncoupling cars alone 219 less were killed, and 4,994 less were injured, in 1897 than in 1893, when the law was enacted. The number of such employees killed has been reduced one-half, and the number of injured, also, practically reduced one-half. The reduction in the number of accidents from all causes largely exceeded (by nearly three to one), in a single year, the entire casualties resulting from the prosecution of the late war." Thus, in four years from 1893 to 1897, notwithstanding the increase of thousands of miles of railways, and over 100,000 of employees, and the further fact that the railroad corporations have been able to procure from the interstate commerce commission an extension of

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the time at which the law of congress imposing a penalty for operating any cars without self-couplers will come into force, the shadow of the law has procured so general an attachment of these self-couplers that 5,213 fewer employees were killed and wounded in coupling and uncoupling cars in 1897 than in 1893. Can it, therefore, be seriously contended that the absence of such safety appliances is not a negligence *per se*, rendering the railroad company liable for damages? As these appliances have been patented and more or less in use for over 30 years, it should not have required an act of congress to enforce their universal adoption. Failure to adopt them, after being so long and widely known and used, was negligence in the defendant upon the principles of the common law. Witsell's Case, *supra*. The act of congress imposing a penalty for failure to add the appliances, after January 1, 1898, in no wise affected the right of any employee to recover for damages sustained by the negligence of any railroad company to attach them. The action of the interstate commerce commission in extending the date at which such act should come into force (by virtue of authority given in the act) could not set aside the principle of law that failure to adopt such appliances was negligence *per se*, nor have any other effect than to postpone the date at which the United States government would impose the prescribed penalty upon all railroads engaged in interstate commerce failing to equip all their cars with automatic couplers,—a penalty which is imposed irrespective of whether any accidents occur from such failure or not. The indifference of railroad companies shown in not adopting these life and limb saving appliances is all the greater since their cost is comparatively small. Indeed the interstate commerce commission, in the above cited report (page 89), state that, considering the less expense required in repairs, they are an actual saving. They say: "Figures submitted by one of the leading railroad companies indicate that the adoption of the automatic coupler will result in saving a very large sum annually, in comparison with the expense incurred in former years in applying and maintain-

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ing the link and pin type; and this does not take into account the reduced cost to the roads which must result from fewer suits for damages by injured employees." And, further, that, there being too much slack in the old pin and link for the brake to act economically or successfully, the automatic coupler "makes the requirements of railroad operation better, as well as minimizes the danger to employees. Witsell v. Railway Co., 120 N. C. 557, 562, 27 S. E. 127, it is said: "If an appliance is such that the railroads should have it, the poverty of the company is no sufficient excuse for not having it." But not only, as above, the use of self-couplers would be an actual economy to the defendant; but that it is amply able to put on these appliances, if it was not, is shown by the published report of the defendant company that its gross earnings for the year 1895 (when this injury was inflicted) were over \$17,000,000, and its net earnings, over and above all expenses, were more than \$5,000,000 (Poor, R. R. Manual, 1898, p. 792),—figures which, for the year just past, have risen to over \$20,000,000 gross earnings and over \$6,000,000 net earnings. With such an array as above of the terrible cost of life and limb by failure to use appliances to avoid coupling and uncoupling cars by hand (in doing which the plaintiff was injured), the small expense—nay, actual economy—of adopting them, and the ample means the defendant possesses, we cannot reverse our ruling in Greenlee's Case, that it is negligence *per se* in any railroad company to cause one of its employees to risk his life or limb in making couplings which can be made automatically without risk.

This matter of requiring these great corporations to protect the traveling public, and their employees as well, by the adoption of all safety appliances which have come into general use, is so important that we have gone into the subject at this length. Ordinarily owned by great syndicates out of the state in which they operate, and their management, at all events, removed from any subjection to that sound public opinion which is so great a check upon the conduct of individuals, and of government itself, the sole protection left to

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the traveler and the employee alike is the application of that law which is administered impartially, and which can lay its hand fearlessly upon the most powerful combination, and protect with its care the humblest individual in the land. The subject is one of transcendent importance; for, notwithstanding the partial adoption of these appliances, and consequent reduction in casualties, the twelfth annual report of the interstate commerce commission shows (page 77) that for the year ending June 30, 1897, on the railroads engaged in interstate commerce (which alone report to that commission), there were still 43,168 casualties, of which 6,437 resulted in death. Of these, 1,693 killed, and 27,667 wounded, were railroad employees, among whom 214 were killed and 6,283 wounded in coupling or uncoupling cars. In our own state, the report of the North Carolina railroad commission for 1898 (pages 250, 251) shows that for the year ending June 30, 1898, the railroads reported 879 persons killed and wounded (of whom 99 were killed), and of these 23 of the killed, and 599 of the wounded, were employees,—total, 622. As, of the 9,000 employees reported in this state, 4,000 (according to the usual ratio) were employees engaged in the actual operation of the trains, it follows that in this state 1 such employee in every $6\frac{1}{2}$ was in that year injured or killed. In view of such mortality rivaling, that of the bloodiest wars, this court cannot reverse its declaration heretofore, which is sustained by every sentiment of justice and humanity, that where a life and limb saving appliance, like automatic car couplers, has come into general use, and its partial adoption has in four years, notwithstanding the increase in railroad mileage and employees, decreased the injuries and deaths from coupling cars one-half, the failure to adopt and use it is negligence *per se*. Considering the economy in money of using such appliances, as well as the ample revenues of the defendant, it is passing strange that it, or any other railroad company, should have delayed till now, or even till 1895, to protect the lives and limbs of their employees in this particular, or that there should have been need of an act of congress

Note

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or the verdict of a jury to stimulate considerations of humanity towards their patrons and their employees. Counsel for the defendant read, as a part of his argument, a clipping from a newspaper, and repeats in his brief, that a noble English lord, who was a railroad manager as well as an hereditary member of parliament, had changed his party affiliations because the one to which he had belonged had advocated the enforced adoption of self-couplers upon English railways. That simply shows that one such manager, at least, possesses a lordly disregard for the thousands of deaths and injuries of employees yearly caused by the lack of safety appliances; and it may be there are others who entertain sentiments of higher allegiance to the net earnings of the syndicates that employ them than to those great principles which every political party professes to advocate as being for the best interests of the public. But the hostility of one or more railway managers towards the matter cannot affect the impartial enforcement of the sound legal principle that employees and the traveling public alike have a right to be protected against any dangers which can be avoided by the adoption of safety appliances which have been tested by experience, and which have come into general use. In the present case, the defendant has the less excuse because there was uncontradicted testimony, not only that automatic car couplers were in general use at the time of the injury (March, 1895), but that the skeleton drawheads, in attempting to make a coupling with which the plaintiff was injured, were defective in that they were of different heights from the ground, and evidence that the cars could not have been coupled with a stick, or in any other manner, except by hand. No error.

NOTE.

Automatic Couplers.—See *Greenlee v. Southern Ry. Co.* (N. Car.), 11 Am. & Eng. R. Cas., N. S., 45.

The adoption of automatic couplers has been made obligatory by 27 U. S. Statutes at Large, p. 531.

Similar statutes have been adopted in Illinois, Iowa, Massachusetts, Michigan, Nebraska, and New York.

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NEW YORK, N. H. & H. R. Co.

v.

O'LEARY.

(*Circuit Court of Appeals, First Circuit, April 14, 1899.*)

Objections to Evidence.—All objections to evidence in the course of a trial must be so specific as to give the other side, if possible, full opportunity to obviate them at the time.

Instructions.—It was proper to refuse a requested instruction, which, if granted, would have taken from the jury the issue of plaintiff's care for his own safety on an incomplete statement of facts.

Federal Courts—Common Law Questions.—In an action for personal injuries by a railroad employee against the company, questions arising under a common law count for negligence are to be determined in a federal court, not by the decisions of the state courts, but by a reference to all the authorities, and a consideration of all the principles underlying the relations of master and servant.

Appliances—Duty of Master—Presumptions.*—An employee has the right to assume that the employer will use reasonable care to make appliances safe, and has a right to deal with those furnished relying on that assumption.

Same—Defects—Assumption of Risk.*—An employee assumes the risk of only those defects in the master's appliances which are known to him or plainly observable by him.

Same—Negligence of Agent—Liability of Master.†—So far as the safety of machinery and appliances for the use of employees is concerned, the neglect of the master's agent is the master's neglect.

Negligence—Pleading—Harmless Error.—A refusal to take counts for statutory negligence from the jury was not prejudicial to defendant, where the declaration contained a common law count, and the only negligence alleged was sufficient at common law to support the verdict.

Harmless Error.—To warrant the reversal of a judgment, there must not only be error, but the error must be such as to have worked injury to the party complaining.

*See notes, 11 Am. & Eng. R. Cas., N. S., 484 *et seq.*

†See extensive note, 12 Am. & Eng. R. Cas., N. S., 791; 12 Am. & Eng. Enc. Law (2d Ed.) *sub tit.* Fellow Servants, at p. 950.

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ERROR by defendant to the Circuit Court of the United States for the District of Massachusetts. *Affirmed.*

Robert W. Nason and *Thomas W. Proctor*, for plaintiff in error.

Edward H. Pierce, for defendant in error.

Before **COLT** and **PUTNAM**, Circuit Judges, and **WEBB**, District Judge.

PUTNAM, Circuit Judge. The plaintiff below (now defendant in error) was a brakeman on the freight trains of the plaintiff in error (defendant below). The accident occurred in December, 1897, on the Providence Division, on the main line of the railroad of the plaintiff in error, between two stations, each of which is within the limits of the city of Boston. It is a matter of common knowledge, of which the jury was entitled to avail itself, that on this portion of the line a very large amount of traffic is done; thus making reasonable diligence on the part of the plaintiff in error in caring for its roadbed and its appurtenances to include great promptness and vigilance. The cause of the accident was a guy, supporting a derrick, which was stretched over the tracks of the plaintiff in error by one O'Connell, who was working outside the line of the railroad, under a contract with the city of Boston, changing the location of Stony brook. O'Connell had previously had a guy over the track, but on December 15, 1897, he moved his derrick, and, in that connection, stretched another guy, or moved the old one; the record on this point not being clear, and it not being a matter of any importance for this case whether it was one or the other. O'Connell testified that he had obtained permission from the plaintiff in error, through its superintendent, to move the guy, or to run the additional one, whichever it was. His testimony as to this was not contradicted nor questioned. This is important, showing that O'Connell was not a trespasser in stretching the guy, and that the plaintiff in error knew in advance that it was to be stretched, and so had the opportunity of exercising

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proper vigilance and care to prevent it from being set so low as to endanger the operation of its railroad. The guy was stretched on the afternoon of December 16th. There was evidence pro and con on the issue whether instructions had been given by the section foreman that the guy must be at least 22 feet above the track. But its height had not been measured, and the record does not show that the flagman who was left by the section foreman to watch the work was given any instrument with which he could measure it. The plaintiff below testified that he came into Boston on a freight train that night on track 2, there being four tracks at that point, and that he did not observe the guy, nor come in contact with it. He would not necessarily have done the latter unless he had been standing on a car, and the guy might have been higher over track 2 than over 3, where he was injured. The next morning his train ran out on track 3, and while he was standing on the top of a car, with his back to the head of the train, exchanging signals with the conductor, the guy struck him in the neck, and caused the injury for which this suit was brought. There was no evidence nor presumption that he either saw the guy in its new position, or that he could have seen it unless he omitted attending to his duties as a brakeman exchanging signals.

There are three counts in the declaration. The third is the usual count at common law, charging negligence on the part of the plaintiff in error, and alleging care on the part of the defendant in error. Each of the other counts closes with the allegation that it is based on St. Mass. 1887, c. 270. The first refers to that part of the statute which relates to the condition of "ways, works and machinery" of an employer, and the second to that part which relates to the negligence of a person in the service of a common employer, "entrusted with and exercising superintendence." The damages claimed under the third count were \$20,000, and under each of the others \$4,000, the maximum allowed by the statute. The verdict was a general one for \$3,625. Each of the counts which refer to the statute alleges every

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fact necessary to hold the plaintiff in error liable under the common-law count; so that, as also the damages awarded were less than the statutory maximum, the condition of the plaintiff in error could not have been in any manner impaired by the fact that the jury, in determining its verdict, let it turn on the statutory counts rather than on the common-law count, or *vice versa*. This observation relates, not only to the question of damages, but to all the other matters involved in the suit. There were sundry exceptions taken by the plaintiff in error to the rulings of the court on matters of evidence, and a great many exceptions to its rulings and refusals to rule in connection with its charge. The bill of exceptions states that it contains all the evidence except that relating to the extent of the injuries to the defendant in error, which is not material to any exception taken. We are therefore in a condition to determine, not merely how far any ruling or refusal to rule was theoretically correct, but how far it affected the proper result of the suit.

During the course of the trial the court admitted, subject to exception by the plaintiff in error, evidence of the contents of a letter from the road master of the plaintiff in error, permitting the derrick to be moved, and giving directions to the section foreman to send a flagman to do the necessary flagging. This evidence was admitted after the witness, who was the section foreman, had been asked whether he could find the letter, and had answered with an unqualified "no." The only objection found in the record is as follows: "The witness was asked by the plaintiff the contents of the letter. To this the defendant objected." It is impossible to tell from this whether the objection was to the subject-matter of the letter, or to the admission of its contents without further evidence of its loss. The witness' positive answer that he could not find the letter was sufficient to justify the court in admitting proof of its contents, in the absence of anything showing that either party desired to examine the witness

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further. But, independently of this, if the defendant below had intended to object on the ground that the original of the letter should be produced, it should have stated the grounds of the objection, in order that the court or the other party might have been put on guard, and have made further examination of the witness, if it was deemed proper, and thus possibly have entirely obviated all doubts. The rule has been laid down over and over again by the supreme court, and in such explicit terms as ought to terminate all assignments of errors of this character. It applies wherever the evidence objected to could be admitted under any circumstances. A full statement of it will be found in *Noonan v. Mining Co.*, 121 U. S. 393, 400, 7 Sup. Ct. 911; and a reference to the general principles underlying it is given in *Railroad Co. v. O'Reilly*, 158 U. S. 334, 335, 15 Sup. Ct. 830. Its pith is that all objections in the course of a trial must be so specific as to give the other side full opportunity to obviate them at

Objections to
Evidence.

the time, if, under any circumstances, that can be done. The defendant below also objected, in the same general way, to a conversation between one Gaffney, who had charge of the work for O'Connell, and the section foreman, in which the latter forbade the work until a permit from the corporation's officials should be obtained. It would be sufficient to say, also, to this, that this objection was in general terms. All the testimony of this class, however, including the letter, was wholly immaterial, and could not in any way have prejudiced the defendant below. Its effect, and the only effect which any of it could have had, was to satisfy the jury that O'Connell was not a trespasser in stretching the guy, and that the defendant below consented to its being done, and so had notice in advance thereof, as we have already said. This was proved by the testimony of O'Connell to which we have already referred, and therefore we have no occasion to consider further this line of exceptions.

The plaintiff in error requested the following instruction :

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"If the plaintiff, knowing that work was going on beside the track with the derrick, and that the guy Instructions. was stretched across the track, which was likely to be moved, paid no attention to it at all, he cannot be said to have been in the exercise of due care, and cannot recover."

The defects appearing on the face of this are frequent in requested instructions, which, instead of merely stating a rule of law, attempt to set out in detail, hypothetically or otherwise, the facts in evidence. It gives only a portion of the elements of the case, in any view of it; and, on this partial statement, it requests the court to take this issue from the jury. It forgets that the plaintiff below had a right to assume that, if the guy was moved, the defendant below would see to it that it was not left in a dangerous position, and also that there was no evidence that he paid no attention "at all," or that he had, or would have had, any opportunity to learn when the guy would be moved, or that he had, under the circumstances, any opportunity to pay any attention to the matter of its changed position. The court properly instructed the jury that it might consider the fact that this work was going on as an element, in passing on the degree of care used by the plaintiff below, which, on the proofs, was all that the court was required to do, so far as concerns the subject-matter of this request. To have gone further, as the defendant below requested, would have been to have taken from the jury the issue of the plaintiff's care on an incomplete statement of facts.

So far as the statute applies to the first and second counts of the declaration, the plaintiff in error is correct in maintaining that the questions are local, and are ordinarily to be determined by the decisions of the state courts.

But so far as concerns the relations to this case Federal Courts
—Common Law
Questions. of the common law, in *Railroad Co. v. Baugh*, 149 U. S. 370, 13 Sup. Ct. 914, as well as elsewhere, the supreme court holds that questions of this character are to be determined by a reference to all the authorities, and a

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consideration in the principles underlying the relations of master and servant. In *Railway Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, the court, at pages 671 and 672, 170 U. S., and pages 779 and 780, 18 Sup. Ct., observed that an employee has a right to assume that the employer will use reasonable care to make appliances safe, and has a right to deal with those furnished, relying on that assumption. The court also upheld the court below in striking from a requested instruction expressions charging on the employee, in this particular, the necessity of the exercise of ordinary care in ascertaining the condition of his employer's appliances, and left resting on him the peril only of defects "known to him or plainly observable by him." This decision emphasizes the insufficiency of the requested instruction.

The plaintiff in error has treated the case, so far as it depends on the common law as a question of the relations of common employees to each other. It presents no such issue.

The law on this topic is epitomized in *Railroad Co. v. Baugh*, *ubi supra*; and *Railway Co. v. Barrett*, 166 U. S. 617, 619, 17 Sup. Ct. 707, rules on the precise point here. There it is said that, so far as the safety of machinery and appliances for the use of employees is concerned, the neglect of the agent of the principal is his neglect. On this rule, a large portion of the requested instructions of the plaintiff in error drops out.

The plaintiff in error contends that the guy complained of was not within the statute, so far as it relates to "ways, works or machinery," and there, also, that was not sufficient evidence for the jury of any negligence of any person intrusted with superintendence, within the statutory meaning. Evidently the learned judge who tried the case in the court below felt difficulties in resting it on either the first or second count, and apparently he did not consider it of importance whether

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Duty of Master—
Presumptions.

Same—Defects—
Assumption of
Risk.

Same—Negli-
gence of Agent—
Liability of
Master.

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less Error.

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or not they were taken into consideration. He observed that "the case stated in three ways in the declaration may well apply to the facts"; and also he said that whether or not the guy was a defect, within the statute, it was such a defect at common law as would hold an employer liable under the circumstances detailed by him. Therefore it seems to us that, on the evidence in the record, the court did not deem it necessary to distinguish between the several counts. Only one verdict was rendered, and, as we have already said, the plaintiff in error could suffer no detriment by its being assigned to either of the counts. The plaintiff in error nevertheless has assigned a number of errors based upon requests to the court to take the first and second counts from the jury. Under the circumstances which we have explained, the refusal of these requests could not have prejudiced it, and therefore the exceptions based thereon are immaterial, and could not require us to set aside the verdict. *Decatur Bank v. St. Louis Bank*, 21 Wall. 294, 301; *Sullivan v. Mining Co.*, 143 U. S. 431, 434, 12 Sup. Ct. 555. Indeed, the case comes, in this particular, within the strict rule of the supreme court, inasmuch as it appears beyond doubt that these alleged errors could not have prejudiced the plaintiff in error. *Railroad Co. v. O'Reilly* (already cited) 158 U. S. 334, 337, 15 Sup. Ct. 830. In *Sullivan v. Mining Co.*, at page 434, 143 U. S., and page 556, 12 Sup. Ct., the supreme court uses the following expressions: "Upon all the facts in the case, the judgment was one which must necessarily have been rendered." In the case at bar the "facts" were those found by the jury. To whichever count it assigned its verdict, it must, as we have already said, have found all the facts alleged in the third count, and therefore, in any event, sufficient to support the verdict. It therefore becomes unimportant whether or not the court was in error on the question whether the guy concerned "ways, works or machinery," or in regard to the alleged negligence of a person charged with superintendence in the statutory sense.

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In any view of the case, facts enough being found to sustain the verdict on the third count, the judgment must stand.

We can go further. On the whole case there is, as we have already said, the uncontrovertible presumption that the defendant below, in operating this part of its line, was bound to great vigilance and care. There is undoubted evidence that it knew that the guy was to be stretched over the track; that it had ample opportunity to provide in advance that it should be set at a proper height; that omission to accomplish this was negligence towards the plaintiff below; that there was no evidence, within the expressions of *Railway Co. v. Archibald*, already cited, that he knew of the defect, or that it was plainly observable by him; and the circumstances of the case show that, performing his duties as he was required to perform them, he could not easily have known it. So that, on the whole case, if the verdict had been for the defendant below, the court below would have been required, as the rule is now practically applied, to have set it aside. On the whole, on the uncontrovertible **Harmless Error.** facts of the case, a verdict and judgment for the plaintiff below were the only verdict and judgment which could properly have been rendered; and therefore the rule applies which is stated in *Decatur Bank v. St. Louis Bank*, already referred to, at page 301, that, to warrant the reversal of a judgment, there must not only be error, but the error must be such as to have worked injury to the party complaining.

All the other alleged errors are covered by what we have already said, or are so clearly not errors as not to require any expression of our views about them. The judgment of the circuit court is affirmed, with interest, and the defendant in error recovers his costs in this court.

SOUTH CAROLINA & G. R. CO.

v.

THURMAN.

(*Supreme Court of Georgia, March 16, 1899.*)

Injury to Brakeman—Lex Loci—Employee's Knowledge of Defective Appliances—Statutory Provision—Instructions.*—When an action by an employee against a railroad company to recover damages for a personal injury inflicted by the company, through its agents, while he was in its employ, is tried in a different state from that in which the contract of employment was made and in which the injury was received, the right of the plaintiff to recover, and the rule as to what conduct on his part shall or shall not constitute a defense to the action are governed by the *lex loci*, and not by the *lex fori*. (a) Under the constitution of the state of South Carolina, "knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." Therefore, on the trial of a suit in the courts of this state, instituted by a coupler or brakeman against a railroad company, to recover damages for an injury sustained by him while in its service in the state of South Carolina, alleged to have been occasioned because of its negligence in furnishing him with unsafe and defective machinery, it was not error for the court to give in charge to the jury the above-quoted portion of the fundamental law of South Carolina on the subject.

Case at Bar.—The charge of the court fully and fairly covered the issues in the case, and, if there was any error at all in omitting to charge any of the requests presented by counsel for the defendant, such error was immaterial, and harmless. The verdict was not without evidence to support it, and accordingly this court will not interfere with the discretion of the trial judge in refusing to grant a new trial.

(Syllabus by the Court.)

*See notes at end of case.

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ERROR by defendant from city court of Richmond. *Affirmed.*

Jos. B. & Bryan Cumming, for plaintiff in error.

Boykin Wright, for defendant in error.

LEWIS, J. Suit was brought by John J. Thurman against the South Carolina & Georgia Railroad Company, a corporation chartered both under the laws of South Carolina and of this state, for a personal injury he received while in its service in the capacity of brakeman and car coupler in the company's yard at Hamburg, S. C. The action was instituted in the superior court of Richmond county, where the company had its principal office in this state. It appears that the petitioner received personal injuries while undertaking to couple an engine to a caboose, the particular work to which he had been assigned then being to couple this engine to cars that were being switched in the company's yard. The principal, if not the only, ground of negligence relied on for a recovery was the failure of the company to furnish a proper engine for the purposes of this work; it being alleged that the particular engine in question was unfit and not properly equipped for switching and drilling cars in the yard, in that it had no drawbar attached to the bumper of the tender, no step on the rear, or rod for holding by, and too short a bumper, thus causing the tender or rear of the engine, when it came in contact with the caboose, to leave no sufficient space to accommodate the human frame, or to prevent the body from being mashed and crushed between the tender and the caboose. There was testimony tending to show that, while this engine might have been properly used upon the main line of the railroad, it was not, on account of its short bumper, adapted to the service of switching and drilling cars and making up trains in the yard; that the plaintiff was engaged in this work for the first time with this particular engine, at night; had succeeded in coupling one car with it before he was injured, but, on account of its being night, and the celerity with which he

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was required to discharge his duties, he did not observe its condition until after he was hurt, and did not know it was unsafe or defective. On the other hand, there was testimony going to sustain the company's contention that such an engine was often used for this particular purpose, and could have been used, in the exercise of due caution, with perfect safety; and that the plaintiff did know the character of the engine with which he was operating before he received his injury.

Error is assigned in the motion for a new trial upon the following charge of the court: "Under the law of South Carolina, knowledge on the part of the plaintiff that the machinery was defective or not suited for the purposes intended, will not be a bar to recovery by plaintiff, if the injuries received were the result of the negligence of the defendant." There was no dispute as to what was the law of South

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man—Lex Loci—
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ances—Statutory
Provision—
Instructions.

Carolina bearing upon this subject. Attached as an exhibit to the plaintiff's petition was a copy of section 15 of article 9 of the constitution of that state, which contains the provision quoted in the first headnote. There can be no question as to the soundness of the principle announced in that headnote, regarded as a general rule of law. It is true that the courts of one state enforce the laws of another as a matter of comity merely, and that the exercise of this comity may be limited by the policy of any particular state where the laws of a foreign jurisdiction are sought to be enforced; and in this connection it is suggested by counsel for the company that it is contrary to the declared policy of Georgia that a railroad employee should recover for injuries received in the use by him of defective machinery, when he knew of its dangerous condition, but nevertheless voluntarily subjected himself to the hazard of using the same. We do not, however, see anything in the South Carolina rule which is so repugnant to any declared policy of this state as would justify its courts in ignoring the constitutional provision of our sister state bearing upon the subject under discussion.

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This particular point was considered by the supreme court of the United States in the case of Railroad Co. v. Babcock, 154 U. S. 190, 198, 14 Sup. Ct. 978. It appeared in that case that suit was instituted in the state of Minnesota against a railroad company for a personal injury which occurred in the state of Montana, and the law of the latter state was applied to the case for the reason that, while the action was brought in a Minnesota court, the contract of employment between the company and its servant was made in Montana, and he was injured in that state. In the opinion delivered by MR. JUSTICE WHITE he cites approvingly the decision in the case of Herrick v. Railway Co., 31 Minn. 11, 16 N. W. 413, wherein it was held that: "To justify a court in refusing to enforce a right of action which accrued under the laws of another state because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interest of our own citizens." It is insisted, however, that, while the law of South Carolina was correctly stated in the charge complained of, the provision in question merely furnishes a rule of evidence; that the rules of evidence applicable to the trial of a case are those of the forum in which the case is tried; and, accordingly, the Georgia law of evidence on this point should have controlled, the South Carolina rule being contrary thereto. It is true that under the laws of this state, when a servant uses a dangerous machine knowing it to be dangerous, he cannot recover for an injury caused by its defective condition. It is contended that this principle in our law raises a presumption, more or less conclusive, of negligence. We do not think, however, this principle has any reference to rules of evidence at all. It is simply declaratory of the doctrine, which has, in this state, been accepted as sound, that the use by an employee of dangerous machinery, with full knowledge of its condition, constitutes such negligence as will defeat a recovery against his master. The law of South Carolina does not undertake to declare that such con-

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duct on the part of a servant will not amount to presumptive evidence of negligence, but provides, in effect, that, notwithstanding such negligence on the part of an employee, he shall nevertheless be entitled to recover, provided his injury was directly traceable to neglect on the master's part to properly guard his safety. In other words, the constitutional provision of South Carolina relates, not to a remedy, nor to any particular rule of evidence governing parties in the introduction of evidence, but to a substantial right thereby sought to be preserved. Its effect is to declare that what would, at common law, or under the laws of other states, constitute a complete defense to an action by an employee, shall not relieve a master from liability in the state of South Carolina. It gives to the employee a cause of action which he could not otherwise assert. A declaration filed in the courts of that state, though it might admit that the plaintiff used dangerous machinery with full knowledge of its condition, would not be demurrable on this account; whereas such a petition filed in the courts of this state would be clearly demurrable if alleging a cause of action arising in Georgia, for the simple reason that, tested by our laws, it would show upon its face that the plaintiff had no legal cause of complaint against the defendant. In the case of *Railroad Co. v. Mitchell*, 95 Ga. 79, 22 S. E. 124, it appeared that the plaintiff, while an employee of a railroad company, was injured by a locomotive of the defendant in the state of Alabama, and that under the laws of that state the company was liable to answer in damages for personal injuries received by an employee in the service or business of the employer, when such injuries were caused "by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business" of the employer. The testimony in that case tended to show that the defendant, at the place where the plaintiff was injured, had allowed its track to become so full of coal and coke as to render it obviously "dangerous for men to switch around at night," and that the injuries complained of were attributable to these

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obstructions on the track. The law of Alabama was applied as the rule governing the rights of the parties in that case, and it was accordingly held that the verdict in the plaintiff's favor was not unwarranted. Our conclusion therefore is that in the present case the South Carolina rule was properly applied. It was, of course, notwithstanding the constitutional provision of that state that knowledge by an employee of the dangerous condition of machinery will not defeat a recovery by him for injuries received by reason of its use, proper for the jury to consider the fact (if proven) that the plaintiff was aware of the defective condition of the engine causing his injuries, with a view to determining whether or not he exercised due care under the peculiar circumstances that surrounded him. This principle was, however, fully covered by the charge of the court, as will appear from the following extract therefrom: "It was the plaintiff's duty to know whether there was anything in the construction of the tender and cab requiring more care than was required in an ordinary case of coupling, if he had a reasonable opportunity to discover the fact, provided these things were open and obvious, and not hidden. If he had such knowledge, or ought to have had it, as just stated, then you will consider the existence of such knowledge in ascertaining whether he exercised the care which an ordinary prudent man would exercise under the circumstances. If he did not, he cannot recover.

2. In several of the grounds of the motion for a new trial complaint is made of the refusal of the court to charge certain written requests, and exception is also taken to various portions of the charge as given relating to matters not specifically dealt with above. We do not think there is sufficient merit in any of these exceptions, however, to demand special attention or discussion in this opinion. After carefully considering the same in connection with the entire charge, we have concluded that none of them are well founded, as the instructions given to the jury fully, fairly, and comprehensively covered all the issues

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involved in the trial. It follows that, the verdict not being without evidence to support it, there was no abuse of discretion by the judge in refusing to grant a new trial. Judgment affirmed.

NOTES.

Actions for Personal Injuries—Lex Loci.—See South Carolina & G. R. Co. v. Thurman (Ga., March 16, 1899), 10 Am. & Eng. R. Cas., N. S., 232, and *foot-note*.

Assumption of Risk from Defective Appliances.—See generally Bussey v. Charleston & W. C. Ry. Co., 10 Am. & Eng. R. Cas., N. S., 474, and extensive *note*, 484 *et seq.*

ATCHISON, T. & S. F. RY. CO.

v.

TAYLOR.

(*Supreme Court of Kansas, July 8, 1899.*)

Injury to Employee—Defective Appliance—Liability of Company.*—A railroad car became broken and dangerous to handle along a line of railway where the common law of the master's nonliability for injuries to his servants except through his own negligence obtained. An employee of the railroad company, without fault upon his own part, was injured in handling the car. There was no evidence tending to show knowledge or opportunity to acquire knowledge upon the part of the railroad company of the dangerous condition of the car, nor any evidence as to how long it had been in that condition. *Held*, the railroad company is not liable to the injured employee.

(Syllabus by the Court.)

ERROR by defendant from Sedgwick county district court.
Reversed.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error.

Amidon & Conly, for defendant in error.

*See *note*, 12 Am. & Eng. R. Cas., N. S., 744.

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DOSTER, C. J. This was an action by James S. Taylor against the Atchison, Topeka & Santa Fe Railroad Company, to recover damages for bodily injuries negligently inflicted upon him as an employee of the company in the territory of Oklahoma. The plaintiff was a brakeman on one of the defendant's freight trains. His train was going north, and had stopped at the city of Guthrie to do some switching and other necessary work. A part of the work to be done was the moving of some freight cars, which had been left standing on a side track before the train upon which plaintiff was employed arrived. The drawbar at one end of one of these cars had been pulled out, so that it could not be coupled in the ordinary way. It was fastened to another car by means of a chain, which, as arranged, had more "slack," or a greater length, than should have been allowed to it. The plaintiff did not observe the condition of this car, nor the fact that it had been fastened to the other by means of the chain. In the performance of his duties he was riding upon the top of this car as it was pushed by the engine. The engineer stopped quite suddenly. The slack of the chain before mentioned ran out to its full length. This at once arrested the motion of the car, causing it to rebound in the opposite direction. This unexpected occurrence threw the plaintiff off his balance, and against another car, causing the injuries of which he complains. The negligence charged in the petition was that of the engine men in stopping the engine and attached cars with unnecessary suddenness. The case, however, was not tried upon the theory of their negligence, but was tried upon the theory of the negligence of the railroad company, as master, for allowing the broken car to stand upon the side track without repair, and without warning to the plaintiff of its dangerous condition. Counsel for both parties, in their briefs, admit that the case was tried upon this theory, and such is also manifest from the record. We shall, therefore, pay no attention to the variance between the plaintiff's petition and his evidence. The jury found a verdict in the plaintiff's favor, and, in addition thereto, made special

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findings of fact, one of which was that the common-law liability of the master for injuries received by a servant in his employ alone obtained in Oklahoma; that is, the statutes of that territory give no right of action to an employee for injuries negligently inflicted upon him by a co-employee or fellow servant. The jury also found that the engine men were not guilty of negligence in suddenly stopping the engine, so that, even if they were to be regarded in law as vice principals, or, in other words, as the master, no recovery could be had because of their conduct. They also found that "the car in question had been out of repair long enough, under the rules of the company, for the servant of the road, whose duty it was to see to repairs, by the exercise of ordinary care, to have had the car repaired." But another finding stated that there was no evidence as to how long the car in question had been out of repair. This last-mentioned finding was in conformity to the truth. There was no evidence as to the time when the drawbar pulled out, no evidence as to the time when it had been chained to the other car, no evidence as to when it had been set on the side track at Guthrie, and no evidence as to how long it had remained there; neither was there any evidence as to the existence of any rules of the company requiring its servants or employees to observe and report the damaged condition of cars from which a presumption of previous knowledge by the superior employees of the company could be drawn. At the time of the trial, but not at the time of the accident, the company had a rule upon the subject. The jury also found that, at the time of the accident, it was the duty of conductors to see that cars broken as the one in question was were properly chained for the purpose of switching in the yards. The jury also specially found as follows: "Q. 11. Were any servants or agents of the defendant company guilty of negligence directly contributing to plaintiff's injury? A. Yes. Q. 12. If you answer the last question 'Yes,' state what was the official position of said servants or agents of defendant company. A. Conductor. * * * Q. 36. Was not the plaintiff, and all other brake-

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men and conductors on the division, hired, among other things, for the purpose of chaining up, and bringing to a place where they could be repaired, cars in which the coupling apparatus had become so defective that they could not be repaired by the train crew? A. Yes. Q. 37. Was the drawbar in question so out of repair that it could not ordinarily be repaired by the train crew of which the plaintiff was a member? A. Yes. Q. 38. If you answer the last question 'No,' was the train crew, or either member of it, guilty of negligence directly contributing to the plaintiff's injury in failing to repair the drawbar? A. No evidence."

It is difficult to tell, from these findings, whether the jury meant to impute negligence to the conductor of the train with which the plaintiff was working, or the conductor of the train in which the car became broken, and from which it was set out on the side track at Guthrie. It is, however, to be assumed that the former one was meant, and counsel on both sides have so argued. The fact, however, as shown by the evidence, was that this conductor knew nothing whatever about the damaged condition of the car. He was at the station house at the time the accident occurred, and it is certainly not to be presumed that his duties required him to examine this and all other cars his subordinate employees were required to handle, to determine for them whether such cars were in a fit and safe condition. One of the jury's findings, and an answer made by one of the witnesses, would seem to charge a car inspector at Arkansas City, Kan., with knowledge of the broken condition of the car in question; but, from the whole of the evidence, it is plain that his knowledge was acquired subsequently to the time of the accident. The case, therefore, may be generalized in statement of facts as follows: A railroad car became broken and dangerous to handle along the line of defendant's road, where the common law of the master's nonliability for injuries to his servants, except through his own negligence, obtained. A servant, without fault upon his own part, was injured in handling the car. There was no evidence show-

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ing knowledge, or opportunity to acquire knowledge, upon the part of the master or any of his vice principals, of the dangerous condition of the car, nor any evidence as to how long the car had been in that condition. Under such a state of facts, the common law does not hold the master liable for the servant's injuries. The rule is plainly and forcibly stated in Wood, Mast. & Serv. § 382. "The servant, seeking to recover for an injury, takes the burden upon himself of establishing negligence on the part of the master and due care on his own part, and he is met by two presumptions, both of which he must overcome, in order to entitle him to a recovery: First, that the master discharged his duty to him by providing suitable instrumentalities for the business, and in keeping them in condition; and this involves proof of something more than the mere fact that the injury resulted from a defect in the machinery. It imposes upon him the burden of showing that the master had notice of the defect, or, in the exercise of that ordinary care which he is bound to observe, he would have known of it. When this is established, he is met by another presumption, the force of which must be overcome by him, and that is that he assumed all the usual and ordinary hazards of the business. To overcome the force of this presumption he must show that the injury did not arise from an obvious defect in the instrumentalities of the business, or from a hazard incident to the business, but from causes that were previously unknown by him to exist, or from extraordinary causes, and not from causes that he ought to have foreseen, and can be fairly said to have assumed, or some legal excuse for taking the risk, if known to him, which strips his act of the imputation of negligence, and overcomes the presumption that he voluntarily took the risk upon himself. These are absolute burdens imposed upon the servant, and he is not relieved from their force by showing that an injury resulted to him in consequence of defective or improper instrumentalities employed in the business, but must go further, and show that

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the defects producing the injury were not known to him, but were known, or ought to have been known, to the master, or that he performed the service at the risk of the master."

To supply the lack of evidence in such cases as this, there is no presumption of knowledge by the master. In actions by passengers there is a presumption of knowledge by the master—the railroad company—of defective and dangerous conditions of its machinery and cars, growing out of its ownership and control over them; but not so in the case of an employee or servant. In the case of *Railway Co. v. Salmon*, 11 Kan. 83, which was an action by a railway employee, the district court had instructed the jury as follows: "I instruct you that the mere, naked, unexplained fact of a collision of two trains of cars operated by the same railroad company raises the presumption of negligence on the part of the company." This was held to be error, MR. JUSTICE VALENTINE, in the opinion, saying: "All of this would have been correct if the deceased had been a passenger, but it was certainly incorrect if the deceased was only an employee of the company. The said collision was the only proof of negligence on the part of the railroad company introduced on the trial. A collision always presumptively shows negligence, but whether negligence of the company, or negligence merely of some one or more of its officers, agents, or employees, is the important question in this case. As between the railroad company and a passenger, the negligence of any officer, agent, employee, or servant of the company is the negligence of the company itself; but, as between the railway company and one of its employees, the negligence of another employee—a co-employee—is not at all the negligence of the company. *Dow v. Railway Co.*, 8 Kan. 642. Therefore, while a collision presumptively proves negligence on the part of the company, as between the company and a passenger, yet it never proves negligence on the part of the company, as between the company and one of its employees. It is a general rule that one employee does not represent the principal any more than any other employee, and negligence

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between co-employees is not at all the negligence of the principal. This rule has its exceptions. As to railroad companies, the general manager, the general superintendent, the general officer for the employment or discharge of the other agents and servants of the railway company,—indeed, any other general officer,—would probably be the representative of the company, and, in fact, the company, as between the company and all other persons, whether such persons were employees or not. But proof of a collision does not at all show negligence on the part of any one of these general officers. It tends more properly to show negligence on the part of the brakeman, the fireman, the engineer, the conductor, or some other inferior officer or servant of the company, who has a more close and direct connection with the collision." The principle thus decided is applicable to the case before us. The judgment of the court below is reversed, and a new trial ordered. All the justices concurring.

LEAK

v.

CAROLINA CENT. R. CO.

(Supreme Court of North Carolina, May 5, 1899.)

Injury to Brakeman—Defective Foreign Car—Liability.*—In an action for injuries to defendant's brakeman, alleged to have resulted from a defective "stirrup" provided for his use, it was proper to instruct that the fact that the appliance was attached to a foreign car was no defense to defendant's liability for defects in foreign cars used by it being the same as for defects in its own cars.

Same — Same — Contributory Negligence. — Plaintiff in hastily mounting such car in the performance of his duties had no opportunity to inspect the "stirrup" before putting his foot on it, and, therefore, was not guilty of contributory negligence in using it unless the "stirrup" was palpably defective.

Master and Servant—Defective Appliances—Degree of Care Required of Each.*—In such action, it was error to instruct that the

*See notes at end of case.

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law imposes upon the employer the duty of exercising greater care to protect the employee from injury on account of defective appliances than is required of the latter in protecting himself from such danger, both being bound to use such care as a prudent man would ordinarily use under similar circumstances; and the relative degree of care required depending upon all the circumstances surrounding the respective parties.

APPEAL by defendant from Mecklenburg county superior court. *Reversed.*

Burwell, Walker & Cansler, for appellant.

Jones & Tillett, for appellee.

DOUGLAS, J. The plaintiff was a brakeman and switchman, and his contention is that in attempting, in the discharge of his duties, to get on the car while in slow motion, the "stirrup" under the corner of the car, provided for his use, was defective, and, when he put his foot upon it, gave way, precipitating him on the rail, whereby his foot was crushed by the car wheel. The court properly instructed the jury that the fact that this was a "foreign" car—*i. e.* a car belonging on another road—was no defense, for

Injury to Brakeman—Defective Foreign Car—Liability.

it was the defendant's duty to have such car, as well as its own, inspected before using it for passengers or employees, and its liability for defects is the same in both cases. *Mason v. Railroad Co.*, 111 N. C. 482, 16 S. E. 698; *Miller v. Railroad Co.*, 99 N. Y. 657; *Jones v. Railroad Co.*, 92 N. Y. 628. Indeed, the plaintiff could sue both companies (*Railroad Co. v. Snyder* [Ohio Sup.] 45 N. E. 559), and, if it was the fault of the first company, the latter could recover against it (*Moon v. Railroad Co.* [Minn.] 48 N. W. 679). In *Johnson v. Railroad Co.*, 81 N. C. 453, where a brakeman was injured by the breaking of the rod from a defect discoverable upon an ordinarily careful inspection, but which was unknown both to plaintiff and defendant, and the plaintiff had no reasonable opportunity for inspection, it was held that the defendant was liable, because it had failed to have the rod inspected. Here

the plaintiff, hastily mounting the car in the performance of the duties required of him, had no time or opportunity to inspect the stirrup before putting his foot on it, and was not liable for contributory negligence, unless it had been palpably defective,—as broken and hanging down. But we think that the third prayer for instruction given by the court at the request of the plaintiff was too general in its terms, and therefore liable to mislead the jury. It is as follows: "That the law imposes upon the employer the duty of exercising greater care of protecting the employee from injury due to the defective condition of appliances than is required of the employee in guarding against accident." This may or may not be true, according to circumstances. The true rule is that both are bound to use reasonable care,—such care as a prudent man would ordinarily use under similar circumstances; and the relative degree of care required depends upon a consideration of all the circumstances surrounding the respective parties. This is nearly always a mixed question of law and fact, to be determined by the jury under proper instructions from the court. For this error in the charge of his honor a new trial must be ordered. New trial.

Same—Same—
Contributory
Negligence.

Master and Ser-
vant—Defective
Appliances—
Degree of Care
Required of
Each.

NOTES.

Inspection of Foreign Cars.—See *Union Stock-Yards Co. v. Goodwin*, 12 Am. & Eng. R. Cas., N. S., 502, and *notes*, 511.

Duty to Furnish and Maintain Safe Track and Machinery—Degree of Care.—See *Chicago, B. & Q. R. Co. v. Oyster*, 12 Am. & Eng. R. Cas., N. S., 655, and *note*, 668.

Inspection of Appliances—Reasonable Care Required of Both Master and Servant.—SCOTT, J., in *L. S., etc., Co. v. McCormick*, 14 Ind. 440, 5 Am. & Eng. R. Cas. 474, said: "When a master employs a servant to do a particular kind of work, with a particular kind of implements and machinery, the master does not agree that the implements and machinery are free from danger in their use, but he agrees that such implements and machinery, to be used by such servant, are sound and fit for the purpose intended, so far as ordi-

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nary care and prudence can discover, and that he will use ordinary care and prudence in keeping them in such condition and fitness : and the servant agrees that he will use such implements with care and prudence.

Employees — Due Care.—A servant in the performance of his duties is bound to exercise ordinary care for his own safety, or that degree of care which prudent persons usually exercise under similar circumstances ; and, if he is injured by failure to exercise such care, his master is not liable. *Florida Cent. & P. R. Co. v. Mooney*, 12 Am. & Eng. R. Cas., N. S., 722. See also *note*, p. 736.

LOUISVILLE & N. R. CO.

v.

MILLIKEN'S ADM'R.

(Court of Appeals of Kentucky, June 13, 1899.)

Death of Brakeman—Mail Crane—Contributory Negligence—Presumptions.—Plaintiff's intestate, defendant's brakeman, when last seen alive, was sitting on top of a car with his feet hanging over its side, in a position to be struck by a mail bag hanging on a mail crane which the train was approaching ; and his body was found in close proximity to the detached mail bag. *Held*, that the presumption was, not that he was guilty of negligence, but that he, while unconscious that the movable arm of the crane was being pulled down, was struck by the mail bag and knocked off.

Contributory Negligence—Question for Jury.—It appeared from the evidence that the duties of defendant's brakemen required them to be on top of the cars, and that, as they could not stand up all the time, it was customary for them to rest themselves by sitting with their feet hanging over the side ; and that the accident would not have happened had the crane in question been no nearer the track than was required and customary. *Held*, that the question of deceased's contributory negligence was for the jury.

Proximity of Mail Cranes—Liability of Railroads.*—As the federal government furnishes the mail catchers on cars, a railroad company is not responsible for the proximity of a mail crane erected by it, if the crane is no nearer than the length of the mail catcher makes necessary.

*See note at end of case.

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Speed—Assumption of Risk.*—Where a railroad has a right to run its trains at any rate of speed, a brakeman sitting with his feet hanging over the side of a car, assumes the risk of his feet coming in contact with a mail bag on a crane by reason of the oscillation of the train caused by a high rate of speed.

Contributory Negligence — Opinion Evidence. — The question whether it is carelessness on the part of a brakeman to sit on top of a car with his feet hanging over its side is for the jury to determine by means of common knowledge and observation, and not from the opinion of witnesses.

APPEAL by defendant from Oldham county circuit court.
Reversed.

B. D. Warfield and D. H. French, for appellant.

Carroll & Carroll and B. H. Young, for appellee.

HOBSON, J. Appellee's intestate, was a brakeman in the employ of appellant, and on October 4, 1896, was killed at Camden Station, between Louisville and Cincinnati, by reason, as alleged, of the negligence of the company. Appellant insists that no negligence was shown, and this is the first question to be determined.

The mail train did not stop at that station, and to catch the mail bag there was what is known as a "mail crane" erected on the side of the road. At the time required by law, the postmaster hung the mail bag on this crane. This was 10 minutes before the time of the mail train. The postmaster was also the agent of the railroad, but that is immaterial; for in hanging out the mail bag he was acting as postmaster, and not for the company. The train on which appellee's intestate was employed came along soon after the mail bag was hung out. The crane has a movable arm at the top, and when the mail bag is put on this movable arm is pulled down, and the bag is fastened on between that and the arm below, so that, as the mail car passes, the postal clerk can turn out an iron lever on the side of the car, and take in the bag. When the bag is pulled off, the movable arm of the crane flies up again. Just before reaching this

*See notes, 11 Am. & Eng. R. Cas., N. S., 531 *et seq.*

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station, the intestate was sitting on the top of one of the freight cars, with his feet over the side; it being a freight train which did not stop at that station. He was on the side of the car next to the mail bag. The bag hung so that a man sitting on the top of this car, with his feet hanging down over the side of the car, would come in contact with it if he allowed his feet to hang naturally. This appears from actual photographs taken of the car passing this crane, with a man on it sitting as the intestate was, which have been filed with the record. Just after the car passed the crane it was observed that the movable arm flew up, and the intestate was missing from the top of the car. On examination, he was found about 60 feet from the crane, in the direction in which the train was going, and the mail bag a few feet from him, and between him and the crane. His neck was broken by the fall. No one saw the occurrence, and we are left to determine entirely from the circumstances how it occurred.

It is insisted that the proof does not show that his feet came in contact with the mail bag as he passed the crane, or that he was knocked off in this way. It is true

Death of Brake-
man—Mail Crane
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Negligence—Pre-
sumptions.

he might have kicked at the mail bag, and so became entangled with it, and lost his balance; but negligence is not to be presumed against

him. The flying up of the arm of the crane, and the finding of his body and the mail bag so near together, make it clear to us that his striking the bag is the cause of the fall; and as, when last seen, he was in a position when this result would naturally follow, without any fresh action or impulse on his part, it seems to us the more natural conclusion that, while sitting there and unconscious of the movable arm of the crane being pulled down, he was struck by the bag and knocked off.

It is insisted for appellant that, even if this is true, there can be no recovery; and we are referred to the case of *Sisco v. Railway Co.*, 145 N. Y. 296, 39 N. E. 958, as sustaining this conclusion. In that case a brakeman, while going up a

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ladder on the side of a freight car, was struck by the stationary arm of a mail crane, and knocked off, receiving injuries from which he died. The crane in that case had stationary arms, but was otherwise similar to the one before us. Both are required to be erected by the United States government, so that mails can be taken by moving trains. In both the mail bag is required to hang close enough to the car that the lever or sweep attached to the car by the postal authorities may take in the bag. In that case, the court, after showing that the contrivance was a useful one, which defendant had to maintain, held that there could be no recovery, because there was no proof that the crane was placed nearer the track than cranes upon other roads, or that it was practicable to place a crane at a greater distance, or to construct it with a shorter arm, and have it answer the purpose in view. Among other things, the court said: "It was not found, nor was there any evidence upon which a jury could infer, that the crane in question could be placed any further from the track than it was and perform the function for which it was designed. The plaintiff was bound to show a state of facts indicating negligent construction or location, to raise a question for the jury upon this point. It was not sufficient for him to show an injury, or that operating the device involved danger to the brakeman. He took the risk of all the structures necessary and reasonably adapted to the business of the railroad. The burden was upon him to show that the appliance, concededly useful in the business of the defendant, was improperly constructed or located, and this he wholly failed to do. Proof that it was dangerous was not enough. He was bound to go further, and show that the defendant might, by the use of reasonable care, have accomplished its purpose, and at the same time protected its employees from the danger."

This seems to us to be a fair statement of the law. But in this case there was evidence that the crane was not upright, but leaned towards the road about four inches. The swing of the arms and the hanging of the bag, always on the

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side next to the road, would have a tendency to pull the upright post over. This would throw the bag nearer the car, the greater the inclination became. It was also in proof that this crane was set some four and one-half inches nearer the track than other cranes from which the mail was taken. If this proof was true, this mail bag hung something like eight inches nearer the track than required by the government; and if it had hung eight inches further off, from the photographs exhibited, it would seem that the intestate would not have been knocked off. We cannot, under this evidence, say that he failed to show that the defendant might, by the use of reasonable care, have accomplished its purpose, and at the same time protected its employees from the injury. There was therefore sufficient evidence of negligence to submit the case to the jury, and the court did not err in refusing to give the peremptory instructions asked for. There was

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proof that the duties of the brakemen required them to be on top of the cars, and that on long runs, it was impracticable for them to stand up all the time they were on top of the cars, and so it was customary for them to sit on the side of the car, as the intestate was sitting when hurt, this being as safe a place as any other for the purpose. Under the proof, the question of contributory negligence was properly left to the jury.

Appellant asked the court to give this instruction: "The court instructs the jury that if they believe from the evidence that the mail crane at Camden station, in the petition complained of, was not put closer to the track than necessary for the mail catcher furnished by the United States government to take the mail bag therefrom, then the mail bag being in that position was not negligence in the company, and the jury cannot find against the defendant on account of the position of the said mail crane." This instruction was refused, and the idea was not sufficiently presented by any other instruction given, as to whether the mail bag was in fact any closer

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to the track than required for the catcher to take it as the mail car passed. The evidence was very conflicting on this subject. If it was not, the jury should have found for the defendant, and they may not have understood this from the other instructions. The government furnishes the lever on the side of the car. It requires the railroad to erect the cranes so that this lever will catch the mail bag. Although this may endanger the brakemen, and although it may place the crane closer to the track than really necessary, the railroad company is not responsible; for it has no power to make the levers on the car longer, or to prescribe when the mail shall be hung on the crane.

The court also erred in allowing proof to the jury of the unusual speed of the train at the time of the accident. Appellant has a right to run its train at any rate of speed it chose, and if, from the oscillation of the train, the intestate's feet were swung out in contact with the mail bag, by reason of the unusual speed of the train, this was one of the risks incidental to the business in which the intestate was engaged, which he assumed in entering the service. The court should have told the jury that the intestate, when he engaged in the service of appellant as brakeman, assumed all the risks usually incidental to the business, and, if by reason thereof he received the injury, there could be no recovery. If the oscillation of the train caused him to strike against the mail bag, and to be knocked off, this would be one of the risks incidental to the service, unless the crane was closer to the track than it should reasonably have been placed for the lever on the car to catch the bag, and but for this the accident would not have occurred. On another trial appellee should introduce in chief all her evidence tending to show how the injury occurred or negligence on the part of the appellant, and the evidence in rebuttal should be confined to matters brought out by the evidence for the defense.

The court erred in allowing testimony that it was not improper or an act of carelessness for a brakeman to sit on top

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of a car at the side, with his feet hanging down. In *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, the United States supreme court said: "The question whether the place where the plaintiff stood on the wharf was reasonably safe was one of the questions to be determined by the jury, depending on common knowledge, and requiring no special training or experience to decide, and upon which, therefore, no opinions of witnesses were admissible." To same effect, see 1 Whart. Ev. § 509. It was proper to prove by the witnesses what the custom was in regard to sitting on the side of cars, and all facts known to the witnesses showing the reasons for it. But the conclusion whether it was proper or improper for a brakeman to ride in this way on the side of a rapidly moving train, considering the objects along the side of the track and the other dangers incident thereto, was a question for the jury, to be determined by common knowledge and observation, and not from the opinion of witnesses, to whose judgment the jury might defer, instead of exercising their own, as the law contemplates they should do. The judgment is therefore reversed, and cause remanded for a new trial and further proceedings not inconsistent with this opinion.

NOTE.

Mail Crane Near Track—Negligence.—Plaintiff's intestate, a fireman, was acting in the line of his duty, looking out for signals at night, and while so doing, and in the exercise of care and caution, he was struck by a "mail catcher." Two other accidents had previously occurred from the same cause, of which the company had notice. *Held*, the company was guilty of gross negligence in having omitted to place the "mail catcher" a safe distance from the track. Even if the fireman was guilty of negligence in leaning out from the side window of the locomotive while upon the lookout for signals, his negligence was slight in comparison with that of the company. *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 272, 11 Am. Ry. Rep. 75.

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MYERS

v.

CHICAGO, ST. P., M. & O. RY. CO.

(*Circuit Court of Appeals, Eighth Circuit, May 29, 1899.*)

Death of Brakeman—Low Bridge—Liability of Master.—In an action for the death of a brakeman, which resulted from a low bridge under which the freight car upon the top of which he was standing was passing, it appeared that deceased's employer, the defendant railroad company, built such bridge at the height prescribed by the city authorities; that whiplashes, or telltales, were suspended over the track at proper points; and that the company gave its employees, including deceased, verbal notice that they could not ride under such bridge standing fully upright on all freight cars which might be in its trains. *Held*, that there was no evidence that defendant was guilty of negligence.

Assumption of Risk.*—Deceased having had actual knowledge of the height of the bridge, having ridden under it daily for 50 days before the accident, had assumed whatever risk the height of the bridge might impose upon him while in the discharge of his duties.

ERROR by plaintiff to the Circuit Court of the United States for the District of Minnesota. *Affirmed.*

C. D. O'Brien and *Thomas D. O'Brien*, for plaintiff in error.

Thomas Wilson and *L. K. Luse*, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. In this case the Chicago, St. Paul, Minneapolis & Omaha Railway Company, the defendant in error, was charged with culpable negligence in maintaining an overhead bridge across its tracks at a street crossing, which was too low, as it is claimed, to permit brakemen, when on the top of freight

Case Stated.

*See *Gusman et al. v. Caffery Cent. Ref. & R. Co.*, L't'd, et al. (La.), 8 Am. & Eng. R. Cas., N. S., 463, and note, p. 470.

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cars, to pass thereunder with ordinary safety. The bridge to which this charge relates was located in the city of Hudson, Wis., and the plaintiff's husband, Edward Myers, who was a brakeman in the service of the defendant company, was knocked off from the top of one of its cars while he was passing under the bridge in the discharge of his customary duties, on a moving freight train, and was instantly killed. The accident occurred about noon on February 14, 1896. The trial court directed a verdict for the defendant company at the close of all the evidence, and the sole question for consideration is whether such instruction was properly given.

The evidence in the record shows that, at the place in the city of Hudson where the accident occurred, the defendant's track is laid for some distance in a cut, and that the track where thus laid is spanned by three overhead wooden bridges, one being at the crossing of Eighth street, one at the crossing of Seventh street, and one at the crossing of Third street. The distance between the Eighth and Seventh street bridges was about 442 feet, and between the Seventh and Third street bridges about 1,171 feet. The track slopes from the east to the west, the direction in which the train was moving when the accident occurred, the descent being at the rate of about 53 feet per mile, which appears to have been the lowest feasible grade, considering the character of the country. The deceased passed safely under the first, or Eighth street, bridge, but was knocked off by the middle, or Seventh street, bridge. The bottom of the Eighth street bridge was about 20 feet above the top of the rail, while the bridges at Seventh and Third streets were somewhat lower, the bottoms thereof being about 18 feet and 1 inch higher than the top of the rail. The several bridges in question were built by the railroad company at the height prescribed by the proper city authorities of the city of Hudson, and, if they had been built higher, they would have impaired the use of the streets to some extent by making the approaches to the bridges inconveniently steep. For that reason the

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several bridges were built at the height last indicated. The testimony showed without contradiction that the deceased had passed under these bridges as a brakeman altogether about 50 times, and possibly more, shortly before the accident occurred, and that he had also been warned before the accident that the bridges were not of sufficient height—that is to say, the Seventh and Third street bridges—to permit a man to ride thereunder while standing fully upright on the top of the highest freight cars which sometimes passed over the defendant's road. Whiplashes, or telldales, were also suspended over the track at proper points before reaching the several bridges,—that is to say, east of Eighth street and intermediate the bridges,—which were in good condition when the accident occurred.

On this state of facts, which is all that the testimony discloses, we think that there was no substantial evidence to convict the defendant company of culpable negligence. It appears to have had good and sufficient reasons for constructing its bridges at the height above the track at which they were built, and for not giving them a greater elevation. It gave its employees, including the deceased, verbal notice that they could not ride under these bridges standing fully upright on all freight cars which might be in its trains, and, lest this warning might at times be unheeded, it suspended whiplashes above its track, at proper points to remind its employees of danger immediately before the bridges were reached. Besides, the deceased had actual knowledge of the height of the bridges, having ridden under them daily for at least 50 days before the accident occurred. These facts not only rebut the charge of negligence, but show, beyond peradventure, that the deceased had assumed whatever risks the height of the bridges might impose on him while in the discharge of his duties. *Brossman v. Railroad Co.*, 113 Pa. St. 490, 6 Atl. 226; *Carbine v. Railroad Co.* (Vt.) 17 Atl. 491; *Smith v. Railroad Co.*, 42 Minn. 87, 43 N. W. 968; *Devitt v. Railroad Co.*, 50 Mo. 302-305; *Southern Pac. Co.*

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v. Seley, 152 U. S. 145-155, 14 Sup. Ct. 530; *Gibson v. Railway Co.*, 63 N. Y. 449, 453. The case at bar is clearly distinguishable from *Railroad Co. v. Mortenson*, 27 U. S. App. 313, 11 C. C. A. 335, and 63 Fed. 530, in which case this court held that it was for the jury to determine whether a railroad company was guilty of negligence where it appeared that it had built a bridge across a river the top of which was too low to allow brakemen to ride through the same while standing upright on many of the cars in use on its road, and had given its employees no warning of the danger by whiplashes or otherwise. The case is also clearly distinguishable from *Railroad Co. v. Carpenter*, 12 U. S. App. 392, 5 C. C. A. 551, and 56 Fed. 451, also decided by this court, where a railroad company likewise failed to give any warning, by whiplashes or otherwise, of the danger incident to passing under an overhead bridge which was too low to admit of a person standing upright on the top of an ordinary freight car, and a stockman rightfully on the top of the train, who was ignorant of there being such a bridge, was injured while passing thereunder. The accident which occurred in the present case was probably attributable to momentary thoughtlessness on the part of the deceased, and was due to a risk of the employment, which the deceased must, in any event, be held to have voluntarily assumed. The judgment below is therefore affirmed.

CALDWELL, Circuit Judge (dissenting). It is elementary that it is the absolute duty of the employer to furnish the employee a reasonably safe place to work, having regard to the kind of work and the place and conditions under which it must necessarily be performed. Some kinds of work are necessarily attended with dangers to the employee which the employer cannot remove or abate by the exercise of reasonable care and diligence, and, when this is the case, the employee takes upon himself all the risks incident to the employment. But the employee does not take upon himself extraordinary and unnecessary risks,—dangers which do not inhere in the business, but are the result of the want of rea-

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sonable care and diligence on the part of the employer. Where, by the exercise of ordinary care and diligence, the employer can make safe, or render less dangerous, the place where the employee is required to work, it is his duty to do so, and, failing in this duty, he is guilty of a continuing act of culpable negligence. The sound rule on this subject is stated by the supreme court in this language:

"Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that, in all occupations which are attended with great and unusual danger, there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries, following a disregard of such precautions, will otherwise be incurred, and this fact should not be lost sight of." *Mather v. Rillston*, 156 U. S. 399, 15 Sup. Ct. 464.

The employer cannot relieve himself from this absolute duty, and from all responsibility for failing to discharge it, by simply advising his employees that he does not intend to perform it. Notice that he does not intend to perform his duty in this regard is not equivalent to its performance, and does not relieve him from the duty or from liability for injuries resulting from his failure to perform it. The employee takes all the risks incident to the business, whatever it may be, when that business is conducted in a reasonably prudent and careful manner, and with a due regard for the safety of the

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employees. Dangers which needlessly imperil human life, and which can be removed at little cost, are not dangers necessarily incident to the operation of a railroad, but are dangers which it is the duty of the railroad to remove. The necessities of laboring men are often very great. The necessity of providing food for themselves and families may drive them to accept employment at the peril of their lives. But an employer does not obtain a license to kill his employees with impunity by proclaiming his purpose to subject them to unnecessary and needless perils,—to perils that a reasonably prudent man, having a due regard for human life, would remove. Common humanity demands this. Moreover, the state has an interest in the lives of her citizens, and will not permit an employer needlessly to imperil the lives of his employees. The very highest consideration of public policy demands an enforcement of this rule. And the peril is unnecessary and needless where, as in this case, it can be removed at slight expense. Notice of the unnecessary peril in such case goes for nothing. As long as the needless peril is maintained, the employer is guilty of culpable negligence, and when, by reason of such needless peril, an employee is killed, the law presumes he was exercising due care to escape the peril, and the employer is responsible for his death, unless he can prove affirmatively that the employee was guilty of negligence. In such cases the death of the employee testifies that he was in the faithful discharge of his duties and in the exercise of due care, and that his death is the result of the needless peril to which he was subjected.

An application of these reasonable and well-settled principles to the facts of this case will demonstrate that the defendant company was guilty of culpable negligence in erecting and maintaining these bridges.

The defendant's track runs through a cut in the city of Hudson on a grade of 53 feet to the mile. Over this cut are erected and maintained three overhead bridges where as many streets cross the cut. These bridges are in close

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proximity to each other. Their overhead timbers are at the exact height to strike the head of a brakeman when standing on the top of a box car, in the discharge of his duty. The bridges could have been built high enough to permit the safe passage of brakemen under the bridge, without making the grade of the street any steeper than it is, by a slight extension of the approaches on either side, which could have been done at a trifling expense. There never existed, therefore, any necessity for placing the overhead timbers at this deadly height. It was an act of gross negligence to do so. After their erection, there was not only no insurmountable impediment, but no impediment whatever, in the way of removing the danger by increasing the height of the bridges. The height of the bridges was not determined by a competent engineer, or indeed by any engineer at all, but, in the language of the majority opinion, "by the proper city authorities of the city of Hudson." While this admission exculpates the company's engineer, it convicts the company of negligence. If the defendant can erect three such bridges, it can erect thirty if there are so many streets crossing the cut, and thus make sure of the death of every brakeman who attempts the faithful discharge of his duty at that place.

The sound rule on this subject was announced by this court in the case of *Railway Co. v. Carpenter*, 12 U. S. App. 392, 5 C. C. A. 551, 56 Fed. 451. We there said:

"The weight of judicial opinion, as well as of sound reason, is in favor of the view that railway companies are under an obligation to all persons who have a right to be on the top of their trains in the discharge of any duty so to construct their overhead bridges, or overhanging structures adjacent to their tracks, that they will not expose such persons to unnecessary risks, or to perils that can easily, and without any great outlay, be avoided."

Owing to the heavy grade of the railroad at the point where this accident occurred, it was essential to the safety of the train and its proper management for the brakeman to be on top of the cars to receive and transmit signals, and,

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when necessary, to operate the brake. The proper discharge of these important duties required the constant and unremitting application of all his faculties. He must keep his eyes on the conductor, or rear brakeman, and be ready to receive and transmit signals to the engineer, and he must also be in readiness to apply the brake; his duty and the safety of the train demanded this.

Where a railroad company erected cattle chutes so near its track that a brakeman, while on the ladder of a box car, was struck by one of the chutes, the supreme court of Wisconsin, speaking by CHIEF JUSTICE RYAN, said:

"If a uniform custom of railroad companies to use structures unnecessarily dangerous to persons employed in operating trains had been proved, we should hesitate gravely before holding that the custom could excuse the danger. A positive acquiescence, scienter, of one so employed, might, indeed, take away his right of action for injury incurred by such a structure. But there is public, as well as private, interest. The operation of railroad trains is essentially highly dangerous, and it is a duty of railroad companies, too plain for discussion, to use all reasonable skill to mitigate, tolerating nothing to aggravate, the necessary danger. This is not merely a private duty to individuals concerned, but a public duty to the state, concerned in the welfare of its citizens. And no custom, however uniform or universal, which unnecessarily exposes railroad employees to loss of life or limb, would seem to satisfy a duty which may be regarded as an implied condition of their charters. We use the word 'unnecessary,' advisedly, distinguishing 'necessity' from 'convenience.' A convenience may be so great as to be regarded as a practical necessity. But a convenience merely to lessen a little the labor of driving cattle into cars can hardly rank as a necessity, or excuse such proximity of cattle chutes to the track as to jeopardize life and limb of persons operating trains." *Dorsey v. Construction Co.*, 42 Wis. 583.

The case at bar is stronger than the case last cited; for in

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that the brakeman was not, at the time he was killed, in the discharge of any duty which was calculated to absorb all his faculties. He was simply ascending or descending the ladder which led to the top of the box car.

And, where a brakeman was injured by coming in contact with the overhead timbers on a bridge, this court said :

"Andrew Mortenson, the defendant in error, was in the employ of the Northern Pacific Railroad Company, the plaintiff in error, as head brakeman on a freight train running between Brainerd, Minn., and Fargo, N. D. In making this trip, the train crossed a bridge having overhead tie beams. This bridge was within the limits of the company's yards at Fargo. The duties of the defendant in error required him to be upon the top of his train while passing through the Fargo yards and over this bridge. His usual position was on top of the second or third car from the engine, and he had to stand on the running board of the car in a position that would enable him to receive the signals of the conductor and rear brakeman and transmit them to the engineer. On the 22d day of March, 1890, while standing on the running board of a furniture car in the proper position to receive and transmit the signals, and in the attitude of doing so, as the train passed over the bridge he was struck on the head by one of the overhead timbers of the bridge, and received the injuries for which this suit was brought. Furniture and refrigerator cars, which are in common use on the defendant's road, are about two and one-half feet higher than ordinary box cars. The defendant in error had crossed the bridge in safety a dozens times or more while standing on the top of box cars." 27 U. S. App. 314, 11 C. C. A. 335, and 63 Fed. 530.

And the verdict of the jury finding the defendant company guilty of negligence was upheld by the court.

And see opinion of this court in *Railway Co. v. O'Brien*, 4 U. S. App. 229, 234, 1 C. C. A. 354, and 49 Fed. 538; *Id.*, 161 U. S. 451, 16 Sup. Ct. 618.

But it is said that the brakeman in the case at bar was guilty of contributory negligence. In reference to this defense

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it may be observed: First, in the courts of the United States this defense is one which the defendant must prove; second, the rule is that, to establish contributory negligence, "the evidence against the plaintiff must be so clear as to leave no room to doubt, and all the material facts must be conceded or established beyond controversy" (Field, Dam. 519; Beach, Contrib. Neg. § 447; *Railway Co. v. Sharp*, 27 U. S. App. 334, 11 C. C. A. 337, and 63 Fed. 532; *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281; *Bluedorn v. Railway Co.*, 108 Mo. 439, 18 S. W. 1103; *Weller v. Railroad Co.*, 120 Mo. 635, 23 S. W. 1061, and 25 S. W. 532); third, where the injury results in instant death, as in this case, "the law, out of regard to the instinct of self-preservation, presumes the deceased was, at the time, in the exercise of due care, and this presumption is not overthrown by the mere fact of injury: the burden rests upon the defendant to rebut this presumption" (*Flynn v. Railroad Co.*, 78 Mo. 195, 212).

The presumption arising from this natural instinct of self-preservation stands in the place of positive evidence, and is sufficient to warrant a recovery, in the absence of counter-vailing testimony. *Johnson v. Railroad Co.*, 20 N. Y. 65. 69; *Adams v. Iron Cliffs Co.* (Mich.) 44 N. W. 270; *Railway Co. v. Price*, 29 Md. 420, 438; *Railroad Co. v. Nowicki*, 46 Ill. App. 566; *The City of Naples*, 32 U. S. App. 613, 16 C. C. A. 421, and 69 Fed. 794; *Allen v. Willard*, 57 Pa. St. 374; *Schum v. Railroad Co.*, 107 Pa. St. 8; *Fox v. Railroad Co.* (N. C.) 31 S. E. 848; *Cameron v. Railway Co.* (N. D.) 77 N. W. 1016. Nor is this presumption applied only when no one witnesses the accident. It has its application in all cases. and may be strong enough to overcome the testimony of an eyewitness. In the case of *McGhee v. Kennedy's Adm'r*, 66 Fed. 502, 13 C. C. A. 608, and 31 U. S. App. 366, a witness testified that the deceased saw the train, and attempted to get over before it, and whipped up his horses to do so. The circuit court of appeals stated that, "if that were true, it would have been the duty of the court below to charge the jury to return a verdict for the receivers." But the court said:

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"It is very improbable that, if Kennedy had seen the train coming, he would have attempted to cross when so far from the track that he could not reach it with his wagon wheels before the coming of the train. The presumption of fact, and of law, too, would be against the existence of such wanton and reckless negligence, and the plaintiff was entitled to have the jury weigh the credibility of Miss Caldwell's evidence in the light of the circumstances."

This presumption has been twice applied by the supreme court of the United States. In *Railway Co. v. Griffith*, 159 U. S. 603, 610, 16 Sup. Ct. 105, a case in which death did not result from the accident, the court said:

"Since the absence of any fault on the part of a plaintiff may be inferred from circumstances, and the disposition of persons to take care of themselves, and to keep out of difficulty, may properly be taken into consideration (*Railroad Co. v. Gladmon*, 15 Wall. 401), it is impossible to hold, in the light of this evidence, as matter of law, that the conduct of plaintiff was such as to defeat a recovery."

The court in this case ignores this well-established rule that it will be presumed that the deceased was in the exercise of due care, and, in the absence of all evidence of negligence, indulges in the presumption that "the accident which occurred in the present case was probably attributable to momentary thoughtlessness on the part of the deceased, and was not occasioned through any want of ordinary care on the part of the defendant company." The assumption that the brakeman's death was "probably attributable to momentary thoughtlessness" illustrates the extremely dangerous character of these overhead structures, for the maintenance of which, at their deadly height, there was not the slightest necessity. But the law will not permit a railroad company needlessly to erect and maintain structures that inflict on its employees the penalty of death for "momentary thoughtlessness." It will be observed that the penalty is inflicted for a supposed momentary forgetfulness of himself and his own safety, not for a momentary forgetfulness of his duties and the safety of

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the train. Under the rule laid down by the majority of the court, the brakeman's condition is desperate indeed. If he thinks of himself and his own safety instead of his duties and the safety of the train, he imperils the safety of the train and loses his situation, and, if he is so intent on the discharge of his duties that he forgets himself and his own safety but for one moment, he loses his life. Momentary thoughtlessness, however, is not proved, but only assumed as probable. But contributory negligence is never to be assumed or presumed.

The law, instead of presuming, as the court does, that the brakeman's death was "probably attributable to momentary thoughtlessness," presumes that "he was in the exercise of due care and in the discharge of his appropriate duties." What the brakeman was doing at the moment he was killed, whether he was so intently and earnestly engaged in the discharge of his necessary duties that he had neither time nor opportunity to think of himself, or take action for his own safety, and died a martyr to duty, or whether his death was the result of momentary thoughtlessness, are questions for the jury, upon the consideration of all the facts and circumstances of the case.

But it is said telltales, or whiplashes, were suspended over the track to warn brakemen that the train was approaching the bridges. But telltales do not always tell of the danger. They may be wafted by the wind where they will not touch the brakeman at the moment of passing them, or the brakeman's faculties and physical energies may be so engaged in the necessary and efficient discharge of his duties at the moment of passing that the light touch upon his hat or clothes of the suspended whiplashes will not be felt, and, at the same time, his vision may be so intently focussed on the conductor, or other brakeman, for the purpose of receiving or transmitting signals, that neither the whiplashes nor the overhead timbers will fall within the line of his vision. On this point the remarks of the supreme court of Wisconsin in *Dorsey v. Construction Co.*, *supra*, are strikingly in point:

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"The safety [says CHIEF JUSTICE RYAN] of railroad trains depends largely upon the exclusive attention of those operating them to the track, and to the trains themselves. It is not for the interest of railroad companies, or of the public,—with like, if not equal, concern in the safety of trains,—that persons so employed should be charged with any duty or necessity to divert their attention. And it appears to us very doubtful whether persons operating railroad trains, and passing adjacent objects in rapid motion, with their attention fixed upon their duties, ought, without express proof of knowledge, to be charged with notice of the precise relation of such objects to the track. And, even with actual notice of the dangerous proximity of adjacent objects, it may well be doubted whether it would be reasonable to expect them, while engaged in their duties, to retain constantly in their minds an accurate profile of the route of their employment and of collateral places and things, so as to be always chargeable, as well by night as by day, with notice of the precise relation of the train to adjacent objects. In the case of objects so near the track as to be possibly dangerous, such a course might well divert their attention from their duty on the train to their own safety in performing it. * * * It is a question for the jury whether, under all the circumstances, he could have avoided the accident by the exercise of reasonable care. His general knowledge of the position and danger of the cattle chute, his means of knowledge, at the time, of its nearness to him, his necessity of being where he was when he was injured, and his care or want of care for his own safety, under all the circumstances, were proper questions for the jury. * * * Under a sudden pressure of duty, we cannot say that the respondent was bound to exercise the same measure of judgment which we do now in reviewing his conduct. That would appear to require of him a deliberation and circumspection which the necessity of his duty might preclude."

Manifestly, three bridges in such close proximity, on a steep grade, with suspended whiplashes, are much more

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dangerous than a single bridge in plain view, on a level road, without suspended whiplashes. It is not the law that a railroad company may, with impunity, needlessly erect and maintain a deathtrap, if it only advises its employees of the fact that it has set the trap for them. It is not the law that, if an employee providentially escapes death at the trap 50 times, he may then be killed with impunity because he was not sooner killed. It is not the law that his previous escape is, in itself, proof of negligence, when he is finally caught in the trap and killed, but, on the contrary, the presumption is that he was in the exercise of due care and in the faithful discharge of his duties, and that his death was the result of the defendant's culpable negligence in needlessly maintaining such dangerous structures.

But the question of the negligence of the defendant, and the question whether the plaintiff was guilty of contributory negligence, are not questions of law, but questions of fact for the jury. A jury is much more competent to determine these questions than the judges of this court; but, whether this be so or not, the plaintiff in this case has a constitutional right to have them determined by a jury.

In the case of *Railroad Co. v. Stout*, 17 Wall. 657, the supreme court said:

"Although the facts are undisputed, it is for the jury, and not for the judges, to determine whether proper care was given, or whether they establish negligence."

In the case of *Jones v. Railroad Co.*, 128 U. S. 443, 9 Sup. Ct. 118, the circuit court instructed the jury to render a verdict for the defendant upon the ground that the plaintiff had been guilty of contributory negligence, but the supreme court reversed the judgment. The court, speaking by MR. JUSTICE MILLER, said:

"But we think these questions (of negligence) are for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not

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decide such questions as this as well as others. * * *
Instead of the course here pursued, a due regard for the respective functions of the court and jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would have secured a sound verdict."

In the case of *Railway Co. v. Ives*, 144 U. S. 409, 417, 12 Sup. Ct. 679, the court said :

"It is only where the facts are such that all reasonable men must draw the same conclusions from them that the question of negligence is ever considered one of law for the court."

See *Railroad Co. v. Foley*, 3 C. C. A. 589, 53 Fed. 459; *Bronson v. Oakes*, 40 U. S. App. 413, 22 C. C. A. 520, and 76 Fed. Rep. 734.

The opinion of a majority of the court does not express the conclusion "all reasonable men," or any considerable number of such men, would draw from the evidence in this case. The questions are questions of fact, which neither the majority nor the minority of this court is empowered to decide. The constitutional mode of ascertaining the sense of reasonable men on disputed questions of fact in common-law actions is by the verdict of 12 jurymen, and not by the opinions of the judges. It was because the people knew the judges were poor judges of the facts that they committed their decisions to a jury, and every day's experience confirms the wisdom of their action. The plaintiff has a constitutional right to have the facts of her case tried by a jury. The judgment of the circuit court should be reversed, and the cause remanded, with directions to grant a new trial.

McGeary v. Old Colony R. R.

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McGEARY

v.

OLD COLONY R. R.

(*Supreme Court of Rhode Island, Nov. 22, 1898.*)

Injury to Employee—Evidence.*—A witness having testified that he did not hear any signal, a question calling for the opinion of the witness as to whether he was in a position to hear a signal, if there had been any, was properly excluded.

Negligence—Instructions.—As the accident might have happened had both plaintiff and defendant been using due care, it was proper to refuse to instruct the jury to find defendant guilty of negligence if it appeared that plaintiff was using due care.

Railroads—Due Care.*—In an action against a railroad for injuries to its employee, it was not error to refuse to instruct that a railroad corporation was bound to use more care than an ordinary person.

Negligence and Contributory Negligence.†—In such action, plaintiff cannot recover, if both his negligence and that of defendant contributed directly to the result; no matter whether plaintiff's negligence was small or great.

Jurors.—Where there is no proof supporting a claim that a juror was disqualified it must be disregarded.

Sufficiency of Evidence—Review.—In such action, where it does not appear on appeal whether a verdict for defendant was based on a finding of contributory negligence or on a finding of no negligence, and there is evidence tending to show contributory negligence, such verdict will not be disturbed.

Same.—In such action, it appeared that plaintiff was caught between the car he was unloading and a car which was run in on the side track in the usual way; that the usual signal was given of the approach of the car; and that plaintiff's position between the cars could not be seen by any one on the approaching train. *Held*, that negligence on defendant's part did not appear from such evidence.

*See notes at end of case.

†See *note*, 11 Am. & Eng. R. Cas., N. S., 869.

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Orrin L. Bosworth, for plaintiff.

Frank S. Arnold, for defendant.

PER CURIAM. The first exception is to the refusal of the court to permit a question to be put to Edward Sharkey, a witness for the plaintiff, on his examination, as to whether or not any signal was given by the defendant or its agents of the approach of the train or cars which occasioned the injury to the plaintiff. The witness was asked, "Did you hear any signal?" to which he answered, "No." He was then asked, "Were you in a position to hear any if there had been any?" This question was objected to by the defendant's counsel, the objection sustained, and the question ruled inadmissible. Thereupon the plaintiff duly excepted. We think the question was properly excluded, because it called for an opinion of the witness. He should have been inquired of as to what his position was, leaving it for the jury to determine whether or not he was in a position to hear a signal or not.

Case Stated.

Injury to Em-
ployee—Evi-
dence.

The second, third, fourth, and fifth exceptions do not appear to have been allowed, and we do not consider them for that reason.

Negligence—
Instructions.

The plaintiff sought to have the court instruct the jury that, if the accident might have happened when the plaintiff was using due care, that fact should be the measure,—drew the line as to whether the defendant was using due care. The court refused to give the instruction. We think properly; for, clearly, the accident might have happened even if both plaintiff and defendant were using due care, and therefore it does not follow that the defendant was guilty of negligence because of the happening of the accident when the plaintiff was using due care. The sixth exception is overruled.

The court instructed the jury that "the rights of a corporation are precisely the same as the rights of an individual. The duties of a corporation are not changed because they have a charter. A corporation is bound to the same degree

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of skill and care,—to exercise the same degree of care which a private individual would be bound to exercise in the same circumstances; no more, no less."

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Railroads—Due
Care.

Plaintiff's counsel desired the court to add to this instruction that a corporation or a party having experience and knowledge in the management of cars was bound to use more care than an ordinary person. Thereupon the court charged the jury that "a person who undertakes any employment is bound to exercise the care which belongs to that employment. If he does not know how, so much the worse for him. If he does not know how, he is still bound. A person who operates machinery is bound to exercise care in operating it; and a person who does not understand machinery is bound to exercise care also. * * * It is not a question of who exercises more or less negligence. It is not a question of the weight of negligence. If the effect was the result of negligence on both sides, the plaintiff cannot recover, no matter whether his negligence was small or great, if they both contributed directly to the result." We think that this charge fairly stated the rules applicable to the case, and that the plaintiff's seventh exception should be overruled.

Negligence and
Contributory
Negligence.

The plaintiff asks for a new trial, also alleging that one of the jurors was disqualified to act because in the employment of the defendant corporation. No proof, however, is furnished of that fact, and we must therefore disregard the claim.

Jurors.

Another ground of the petition for a new trial is that the verdict is against the evidence, and the weight of the evidence.

Sufficiency of
Evidence—
Review.

No special findings were asked for or returned, so that we are unable to say whether the verdict for the defendant was based on a finding that the plaintiff was guilty of contributory negligence, or that the defendant was not negligent. An examination of the testimony shows that the plaintiff went between the cars for the purpose of climbing onto one of them to assist in the removal of a board on the car, or that, having removed the

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board, he was in the act of getting down from the car onto the track, when he was caught; that, instead of placing himself between the cars, he might have got onto the car, or left it by the platform alongside of the car, by going around two or three cars standing on the track. The jury may have found that the plaintiff was guilty of contributory negligence in thus going between the cars, instead of going around them, and climbing upon or leaving the car which he and his companion were unloading by the platform. We cannot say that the jury would have erred in so finding.

Again, on the issue of negligence there is evidence that the train, which was run onto the side track, and came into contact with the car between which and the car the plaintiff was assisting in unloading the plaintiff was caught, was run onto the side track in the usual way; that the usual signal, the ringing of the bell on the engine, was given of its approach; and that the position of the plaintiff between the cars was such that no one on the train could have seen him,—testimony which would have supported a verdict that the defendant was not guilty of negligence. New trial denied, and case remitted to the common pleas division, with direction to enter judgment on the verdict.

Same.

NOTES.

Opinion Evidence.—In an action for personal injuries at a crossing, the court allowed several witnesses to testify that they were near the crossing at the time and did not hear any bell or whistle, and that, in their opinion, they would have heard it if the bell had rung or the whistle sounded. *Held*, that the evidence was properly admitted. *Chicago & A. R. Co. v. Dillon*, 32 Am. & Eng. R. Cas. 1, 123 Ill. 570, 15 N. E. Rep. 181, 13 West. Rep. 286; *affirming* 24 Ill. App. 203.

Master and Servant—Care Required of Master.—(1) *Generally.*—The company must do everything that can reasonably be done for the safety of its employees. *Gulf. C. & S. F. R. Co. v. Wells*, (Tex.) 16 S. W. Rep. 1025. See also *Bennett v. Syndicate Ins. Co.*, 39 Minn. 254, 39 N. W. Rep. 488.

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Reasonable Care.—The duty of railroad companies is to use all reasonable care not to expose employees to risks beyond those incident to the employment, and for injuries to employees resulting from a breach of this duty, or from other negligence, those companies are liable in damages. *Richmond & D. R. Co. v. Williams*, 39 Am. & Eng. R. Cas. 326, 86 Va. 165, 9 S. E. Rep. 990. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. Rep. 285; *Harrison v. Central R. Co.*, 31 N. J. L. 293.

Where an employee is where his general duty requires him to be, the master is bound to have knowledge of such fact, and this knowledge imposes upon the master the general obligation to exercise reasonable care to prevent his exposure to extraordinary peril. *Pennsylvania Co. v. O'Shaughnessy*, 41 Am. & Eng. R. Cas. 479, 122 Ind. 588, 23 N. E. Rep. 675; *Slater v. Jewett*, 5 Am. & Eng. R. Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627; *Missouri Pac. R. Co. v. Watts*, 22 Am. & Eng. R. Cas. 277, 63 Tex. 549.

When a master has done all that can be reasonably required of him to prevent risks to his servants, he has done all that he owes them. *Smith v. Potter*, 2 Am. & Eng. R. Cas. 140, 46 Mich. 258, 9 N. W. Rep. 273; *Kelly v. Forty-second St., M. & St. N. A. R. Co.*, 33 N. Y. S. R. 816, 58 Hun 93, 11 N. Y. Supp. 344.

Ordinary Care.—The measure of diligence imposed by law on railroad companies in reference to employees, and on the conduct of the latter in reference to their employer companies, is ordinary diligence, or common prudence. *Central R. & B. Co. v. Lanier*, 83 Ga. 587, 10 S. E. Rep. 279. The company must use ordinary care and reasonable skill for the safety of its employees. *Louisville, N. A. & C. R. Co. v. Graham*, 124 Ind. 89, 24 N. E. Rep. 668; *Sexton v. Turner*, 89 Va. 341, 15 S. E. Rep. 862.

He is bound to exercise only ordinary and reasonable care, and if he has failed, and in consequence of such failure the servant has been injured, he may recover of the master, provided he is without fault on his part and has not voluntarily and with knowledge of the danger assumed the risks or the consequences of the master's negligence. *McEnanny v. Kyle*, 8 N. Y. S. R. 358; *King v. Boston & W. R. Corp.*, 9 Cush. (Mass.) 112.

The duty which a railway corporation owes to section hands employed in taking care of its roadbed is that of ordinary care, and what constitutes such care varies with varying circumstances. *Britton v. Northern Pac. R. Co.*, 47 Minn. 340, 50 N. W. Rep. 231.

It is part of the personal duty of the master to give direction to the work he undertakes, and to prescribe a system for conducting it. This may be done by rules when necessary, or by the personal guidance of managers and foremen. In so doing the master must

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use ordinary care for the safety of his employees. *Schroeder v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 436, 108 Mo. 322, 18 S. W. Rep. 1094; *Foster v. Missouri Pac. R. Co.*, 115 Mo. 165, 21 S. W. Rep. 916.

Care of Prudent Persons.—An employer must exercise, for the safety of one serving him, such care and caution as an ordinarily prudent person would exercise under similar circumstances. *Austin & N. W. R. Co. v. Beatty*, 73 Tex. 592, 11 S. W. Rep. 858.

The test of liability is not whether the master omitted to do something which he could have done, and which would have prevented the injury, but whether he did anything which, under the circumstances, in the exercise of ordinary care and prudence he ought not to have done, or omitted any precaution which a prudent and careful man would or ought to have taken. *Leonard v. Collins*, 70 N. Y. 90.

When a workman is employed in a dangerous service, as in repairing a car on a railroad track, which requires him to get under it, the measure of duty his employer owes him, in running another car in on the track, is "that degree of care which very careful and prudent men exercise in their own affairs." *Louisville & N. R. Co. v. Davis*, 91 Ala. 487, 8 So. Rep. 552.

Not the Same Care as Required for Passengers.—The duty and obligation which the law exacts from railroad companies towards its employees is not as high as that towards its passengers; they being common carriers, the law imposes a very high degree of care in the carriage of passengers, and makes them almost insurers of the safety of their passengers. But in regard to employees a different rule of care is applicable from that which is held towards passengers. *Woodworth v. St. Paul, M. & M. R. Co.*, 5 McCrary (U. S.) 574, 18 Fed. Rep. 282; *East Tenn., V. & G. R. Co. v. Maloy*, 31 Am. & Eng. R. Cas. 352, 77 Ga. 237, 2 S. E. Rep. 941; *Norfolk & W. R. Co. v. Williams*, 89 Va. 165, 15 S. E. Rep. 522.

While extraordinary care and caution are due from the company to passengers, ordinary care only is due to the employee. (WRIGHT, J., dissenting, and holding that, under the statute, the same rule is applicable to both.) *Hunt v. Chicago & N. W. R. Co.*, 26 Iowa 363.

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OLSON

v.

MINNEAPOLIS & St. L. R. Co.

(*Supreme Court of Minnesota, May 2, 1899.*)

Injury to Employee—Boarding and Jumping from Moving Train—Scope of Employment, or License.—From the evidence in this action it appeared that on arriving at a terminal yard as a brakeman on one of defendant's incoming freight trains, plaintiff, in accordance with a well-established custom among brakemen, changed his clothing, leaving his working suit in the caboose or way car, although he knew that it was not at all probable that said caboose would be attached to the outgoing train to which he would next be assigned for duty. Assuming that because of such custom plaintiff would have a right, as a licensee, to return to the yard and to the caboose for the purpose of obtaining his clothes, it is held that this license would not justify him in going upon a caboose attached to a moving train, in search of his clothing, or in jumping from one of the platforms of said caboose, when through with the search. While engaged in these acts he was not in the service of defendant in the line of his employment, nor was he acting within the scope of his license. He had no cause of action against defendant for an injury caused by his coming in contact with a defectively constructed switch stand when jumping from the caboose.

(Syllabus by the Court.)

APPEAL by defendant from Hennepin county district court.
Reversed.

Albert E. Clarke, for appellant.

F. D. Larrabee, for respondent.

COLLINS, J. Appeal from an order denying defendant's motion for a new trial in a personal injury action. Taking plaintiff's statement as true (and the jury must have so found) the only facts which we deem important in disposing of the case are as follows: Plaintiff had been in defendant's service as a brakeman upon freight trains for over one year

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when the injuries were received. There were two freight train yards at Minneapolis, the northern terminus of the road,—one known as the "Cedar Lake Yard," where outgoing trains were made up, and from which they started; and the other, about 40 rods southerly, called the "Kenwood Yards," the end of the trip for all incoming freight trains. On the day in question plaintiff came into the yard last mentioned as a brakeman on train numbered 57 (conductor, Williams), arriving at 2.50 p. m., or within one hour thereafter. Just before the train reached the yard, plaintiff changed his clothes, leaving, as seems to have been a custom among brakemen, his working suit in the caboose or way car. He left the train at or near the yard, and, after going to his boarding house, near by, visited the train master's office, to see if he had been bulletined for his next trip. He found no orders, went away, and about 7 p. m. returned to the office. He then asked for a pass to Albert Lea, his home, to be used upon passenger train No. 6, which left Minneapolis that evening, his object being to go home on business. The train master stated that his next trip out would be at 5.20 next morning, on No. 34, but if he would go out and find another brakeman, by the name of Gilson, and induce him to go out on No. 34, next morning, the pass would be furnished, and he could go to Albert Lea. Plaintiff returned in a short time with Gilson, but meantime the train master had been informed of the sickness of a brakeman who was bulletined to go out at 10.40 p. m. on train No. 32 (conductor, Campbell), and therefore declined to issue the pass. After some conversation it was agreed that plaintiff should go to Albert Lea that night as a brakeman on No. 32, while Gilson should go out next morning on No. 34. During this conversation plaintiff stated to the train master that he was tired and sleepy, having been on duty the previous night, and before going out would have to get his working clothes out of Conductor Williams' caboose, which, as he well knew, had, in accordance with the custom, been moved up into the Cedar Lake yard. At this the train master informed plaintiff

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that he could go out to the yard and sleep in Conductor Campbell's caboose until the train started, and for this purpose gave him a note to the other brakeman, there being at least two on each train, which required the latter to do certain preparatory work so that plaintiff could "sleep in the caboose as long as possible,—till leaving time." Taking this note, plaintiff, accompanied by Gilson, went to one or two places in the city, and then to the Cedar Lake yard, where they found the caboose which was to go out on No. 32 (conductor, Campbell), and delivered the note to the other brakeman, Tyler, to whom it was addressed. It should be stated here that all freight train men were shifted about from train to train, but that each conductor retained his own caboose; so that it was very improbable that plaintiff, or any other brakeman, would go out with the conductor in charge when he came in, and of course equally as improbable that the caboose attached to the outbound train would be that brought in with the incoming train. The plaintiff understood this thoroughly, for he had changed conductors and cabooses, as well as trains, nearly every trip, during his term of service. Plaintiff and Gilson left the caboose which was to go out with No. 32, to search for the one in which the clothes had been left. It was then dark. They went to several without finding the one they were looking for. Finally the plaintiff saw a train moving out of the yard,—No. 58,—which was due to leave at 8.45 p. m., and, thinking that the caboose attached might be the one he was looking for, stepped up on the rear platform, and entered, with Gilson. It was not the Williams caboose. After exchanging a few words with one of the trainmen, who happened to be in the caboose, plaintiff passed out upon the front platform, and attempted to step down upon the ground. According to his version of the affair, his foot caught under the throw bar of a switch, negligently located near the track and improperly constructed. He was thrown against the switch stand, and from there upon the ground in such a

position that the rear wheels of the caboose ran over his left arm.

We shall assume, for the purposes of this case, that if, on these facts, plaintiff is entitled to recover, there exists no other ground for a reversal of the order appealed from, and the verdict in plaintiff's favor cannot be set aside. We shall also assume that the evidence as to the custom prevailing among brakemen to change clothing as they approached terminals, and to leave their working clothes in the cabooses at the end of trips was of such a nature as to warrant the jury in finding that such brakemen were licensed by defendant to do this very thing,—to leave their clothing in any caboose which happened to be attached to the train on which they had made a trip, and without regard to what was almost a certainty that with the next train to which they were assigned there would be another conductor, and a different caboose. Assuming this, it would seem to be true that these brakemen had the right to subsequently visit these cabooses for the purpose of obtaining their clothing, and in so doing again became licensees. Counsel for defendant concedes this. But it does not follow from the fact that they were licensed to remove their clothing from the cabooses that the right could be exercised at all times and under all circumstances, or that an unreasonable use of this license could be made. It is elementary that the defendant company owed no duty to plaintiff if he was not, when injured, engaged in serving it in the line or within the scope of his employment. Although he was in its general service, the defendant could not be liable for injuries received while plaintiff was engaged in an enterprise foreign to his employment. If Olson was acting for himself when he got on the way car, or when he got off and encountered the switch, and was not exercising his right as a licensee in a reasonable manner, the defendant did not fail in the performance of its obligation, was not derelict, and is not liable for the unfortunate result; for it was only bound to exercise reasonable care while plaintiff was acting

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within and under his license, not when he went beyond, and was upon its trains or on its premises without justification. And defendant duly performed its duty when it furnished safe appliances and a safe place for plaintiff while he was engaged in the line of his duty. It was not negligent if at the time and under the circumstances it owed him no duty. We have stated the manner in which plaintiff's injuries were received, and it is clear that he was licensed, not only to go to Williams' caboose to get his clothing, but also to Campbell's caboose, that he might obtain a few hours' sleep before the train started and his labors began; and while so occupied in a reasonable manner he would be acting within the scope and line of his employment. If, while sleeping in the caboose, a collision had occurred involving defendant's negligence, and plaintiff had been injured, it is quite probable that under the doctrine of *Rosenbaum v. Railway Co.*, 38 Minn. 173, 36 N. W. 447, damages could have been recovered. And probably, had he been run down in a negligent manner while in the yard, without fault of his own, an action could have been maintained. But the present case is altogether different, and to support this verdict we should be obliged to hold that, having a license to go to one caboose to get his clothes, he had the right in the nighttime to go all over the yard, and finally to jump upon another, attached to a moving train, make search for his clothing, and then, with the train still in motion, to jump off in the darkness in a yard filled with side tracks, switches, and other necessary appliances, to say nothing of switching engines and moving freight cars. Some of the reported cases have gone quite far in sustaining verdicts where the question was a close one with respect to the line of duty when the accident occurred, but not one of these approaches this on the facts. The plaintiff was not acting within the line of his duty, nor within the scope of his employment, when jumping from the caboose, nor was he within his license.

Reference has been made to the *Rosenbaum Case*, and

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plaintiff's counsel insists that it warrants the verdict here. There is no ground for this view. Rosenbaum was rightfully on the train, and it was the duty of the company to provide a safe track. Here plaintiff was wrongfully upon a moving train. Nor was he injured by anything which happened to the train, but by the act of jumping off. Counsel for plaintiff urges, in his brief, that his client was in fact acting under defendant's orders at the time of the injury, and calls attention to the testimony found in folios 91 to 97, Paper Book. An examination of the testimony, which is the conversation between plaintiff, Gilson, and the train master at the latter's office at the time it was agreed that plaintiff should go out on No. 32, pretty conclusively shows that, if he had obeyed the train master's directions or orders, there given, he would have been asleep in Conductor Campbell's caboose when the accident happened, not far from 9 p. m., instead of pursuing a train in motion, and jumping on and off the platforms of the attached caboose as it moved through the yard. No injuries would have been received if the train master's directions had been promptly followed. The verdict is set aside, and, as defendant's counsel moved for a verdict before the case was submitted to the jury, which motion should have been granted, and subsequently moved for judgment notwithstanding the verdict, the court below is ordered to cause judgment to be entered in defendant's favor on the remanding of the case.

Whitton v. South Carolina & G. R. Co
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WHITTON

v.

SOUTH CAROLINA & G. R. CO.

(Supreme Court of Georgia, March 16, 1899.)

Injury to Conductor While Acting outside Scope of Employment—Contributory Negligence—Nonsuit.*—When, in the trial of an action brought by the widow of a conductor against a railroad company for his homicide, it affirmatively appeared from the evidence that he was in charge of, and directing, the movements of the train by which his death was caused, and that, instead of confining himself to the line of his duties on that occasion, which did not include coupling and uncoupling cars, he voluntarily, and in the absence of any emergency so requiring, went between two cars, one of which he knew to be in a defective condition, for the purpose of unchaining or uncoupling the same, the conclusion follows that he was "outside of duty, and at fault," and consequently there was no error in granting a nonsuit.

(Syllabus by the court.)

ERROR by plaintiff from Richmond city court. *Affirmed.*

C. T. Ladson, J. T. Pendleton, and M. P. Carroll, for plaintiff in error.

Jos. B. Cumming, for defendant in error.

SIMMONS, C. J. Mrs. Whitton sued the South Carolina & Georgia Railroad Company for damages for the homicide of her husband. Upon the close of the evidence for the plaintiff, the trial judge granted a nonsuit, to which the plaintiff excepted. Whitton, the husband, was the conductor of a construction train. This train was made up for the purpose of removing wreckage from the line of the railroad. In making it up, there was one car which had no bumper or draw-head at one end, and which was attached to another car by

*See notes at end of case.

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means of a chain. The train went upon a trip, and returned to the city of Augusta, Ga., where it was determined to detach the defective car from the others. The crew of the train consisted of several persons whose main duty seems to have been to gather up the wreckage on the line of the road, Whitton, the conductor, and a flagman. The defective car being without bumper or drawhead, there was nothing to prevent its contact with the other car in case of a movement of the train or in taking up or letting off slack. The conductor sent the flagman to a crossing for the purpose of flagging this train when it became necessary, and he himself undertook to unchain the defective car from the other. Before going under and between the cars, he placed a piece of wood in front of the wheels of the car which was attached to, and immediately behind, the defective one, for the purpose of preventing it from running upon him in case the engine and other cars should move forward. While the conductor was under the car, unfastening the chain, the flagman, without any command from the conductor, gave the engineer the signal to move forward. The engineer obeyed the signal, and moved the train forward, dragging the car over the stick of wood. The conductor was crushed between the cars and killed. Under this state of facts, the court granted a nonsuit, holding that while the evidence showed the flagman, a servant of the company, was negligent, the conductor was also in fault.

In this state the law is that an employee who has been injured by the negligence of a co-employee is *prima facie* entitled to recover from the company upon showing either that he was free from fault or that the company was in fault. Evidence of either of these things puts the burden upon the company to prove the contrary of one of them. If, however, the employee, in making out his case by showing that the company was negligent, shows that he also was negligent or in fault, the company is relieved of the necessity of introducing evidence to show negligence on the part of the employee. If the evidence shows that the employee, by his negligence,

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contributed to the injury, the court should grant a nonsuit. Applying this rule, we think that the facts of this case show that, although the servants of the company were negligent in moving the train forward without warning to the conductor, he also was negligent in undertaking to unchain this defective car. There is no evidence in the record tending to show that it was any part of the duties of the conductor to uncouple this car. As far as the record discloses, it was a voluntary act upon his part. The evidence does show that it was the duty of the flagman to couple and uncouple cars. It is true that the evidence also shows that the conductor had sent the flagman forward to the crossing for the purpose of signaling the engineer, but no reason appears for the conduct of the conductor in voluntarily assuming the duties of the flagman. As to the management of this particular train, the conductor was the vice principal of the company. It was his duty to be where he could superintend the whole train, and not without a pressing emergency ought he to have abdicated his position of authority, and assumed the duties of a subordinate. He must have known that it was dangerous to go under and between the cars, because of the defective condition of one of them. He showed a knowledge of this by placing the wood in front of the wheels of the car next to the defective one. In the case of *Sears v. Railroad Co.*, 53 Ga. 630, this court held: "It is not the duty of the conductor of a freight train to couple and uncouple cars, except in the case of a pressing emergency, of which the jury must judge. If he is killed performing such service, in the absence of such emergency, he is not without fault, and his widow cannot recover damages from the railroad company." This ruling was reaffirmed in the same case when it came twice afterwards to this court. 59 Ga. 436; 61 Ga. 279. In the present case, there is nothing in the evidence to show that it was the duty or any part of the duty of Whitton, the conductor, to uncouple cars, or that there was any pressing emergency upon him to do so in order to save life or limb, or to prevent a collision with another train. According to

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the ruling in the case of *Railway Co. v. Ray*, 70 Ga. 674, the plaintiff in the court below should have shown affirmatively that, at the time her husband was killed, his duty required him to be at the place the injury occurred. For the reasons given above and others which might be mentioned, we think the court was right in granting a nonsuit. Judgment affirmed. All the justices concurring.

NOTES.

Employees Injured While Voluntarily Coupling Cars—Liability of Master Where Act Not Within Scope of Duties.—Where it is not within the scope of an employee's duties to couple cars, and he is injured through his want of experience while voluntarily undertaking to do so, there can be no recovery for his injury. *Sears v. Central R., etc., Co.*, 53 Ga. 630, 61 Ga. 279; *Cole v. Chicago, etc., R. Co.*, 71 Wis. 114, 5 Am. St. Rep. 201, 33 Am. & Eng. R. Cas. 274; *Shugart v. Norfolk, etc., R. Co. (Va.)*, 22 S. E. Rep. 484; *Gardner v. Michigan Cent. R. Co.*, 58 Mich. 584, 24 Am. & Eng. R. Cas. 435; *Burns v. Boston, etc., R. Co.*, 101 Mass. 50.

Employees Injured While Acting outside Scope of Duties—Liability of Master Where Employee Was Equally Chargeable with Notice of Danger.—There can be no recovery for an injury received by an employee while acting outside of the duties of his employment, if he was chargeable with notice of the danger to the same extent as the railroad company. *Houston, etc., R. Co. v. Fowler*, 56 Tex. 452, 8 Am. & Eng. R. Cas. 504; *Galveston, etc., R. Co. v. Lempe*, 59 Tex. 19, 11 Am. & Eng. R. Cas. 201; *Pittsburgh, etc., R. Co. v. Adams*, 105 Ind. 151, 23 Am. & Eng. R. Cas. 408; *Warmell v. Maine Central R. Co.*, 79 Me. 397, 31 Am. & Eng. R. Cas. 272; *Atlanta, etc., R. Co. v. Ray*, 70 Ga. 674, 22 Am. & Eng. R. Cas. 281; *East Line, etc., R. Co. v. Scott*, 68 Tex. 694; *Hawley v. Chicago, etc., R. Co.*, 71 Iowa 717.

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CROUSE

v.

CHICAGO & N. W. Ry. Co.

(Supreme Court of Wisconsin, Feb. 21, 1899.)

Injury to Employee—Contributory Negligence.—In an action against a railroad by its engineer for personal injuries alleged to have been caused by its negligence in building a culvert too small, and by allowing it to become out of repair and unsafe, and by failure to patrol the track, and warn plaintiff of a washout which caused the accident and which was attributable to the inadequacy of the culvert, it was not proven as matter of law that plaintiff was guilty of contributory negligence in running the train in violation of a rule of the company requiring engineers to use certain precautions to avoid such accident during storms, etc., as the evidence on this point was conflicting.

Same—Proximate Cause—Sufficiency of Special Verdict.—In such action, the question as to proximate cause was sufficiently answered by a finding in the special verdict that such culvert was negligently constructed and unsafe, so that an ordinary rain-storm would wash it out, and was not properly inspected on the night in question, and that plaintiff was injured in consequence of the washout, without contributory negligence on his part.

Question for Jury.—The question whether such rain-storm was an extraordinary one was for the jury to determine, as the evidence on this point was conflicting.

Evidence—Medical Experts.*—In such action, after medical experts had answered a long hypothetical question including all the details of plaintiff's physical condition, treatment, etc., from the time of his injury to the time of the trial, it was not error to allow them, in answer to a question, to state the cause of plaintiff's condition.

Special Verdicts.—The material issues of the case were all covered by the special verdict; hence it was not error to refuse to give certain questions proposed by defendant for the special verdict.

*See notes at end of case.

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Damages—Wife's Services as Nurse.*—In such action plaintiff was entitled to recover for the value of his wife's services in nursing him while he was suffering from the effects of his injuries.

Evidence—Permanent Injuries—Annuity Tables.†—The annuity tables found in the Rev. St. of Wisconsin, showing the expectancy of life, are admissible in actions for permanent injuries to aid in determining the amount of damages, but they do not form an exact mathematical basis for the estimation of damages.

Burden of Proof.‡—The burden was on plaintiff to prove that such culvert was negligently constructed and maintained, so as to be inadequate.

Track—Definition—Burden of Proof—Statute.—Under the statute providing, in substance, that where any railroad employee is injured, * * *, by a defect in a track, etc., which could have been discovered by reasonable care, proof of such defect shall be presumptive evidence of knowledge thereof on the part of the railroad, the word "track" includes the roadbed; but such statute does not affect the burden of proof where the question is whether there was an original defect in such culvert before the washout, the presumption of knowledge of the defect on the part of the railroad not arising until plaintiff has shown that a defect existed.

Burden of Proof.—Notwithstanding such statutory provision, the burden of proof was on plaintiff to show that defendant's failure to discover the washout in time to prevent the accident was the result of negligence, even after it was shown that the washout existed, as it also appeared that it had occurred within a few hours prior to the accident, and that the company had, in fact, no notice of it.

Damages—Evidence.§—In such action it was error to refuse to charge, as requested, that the fact that plaintiff was married could not be considered in determining the amount of damages.

Defective Culvert—Railroad Not An Insurer.—Reasonable and ordinary care to make such culvert safe was the duty of the company to its employees; but it was not in law an insurer of its safety.

Submission of General Verdict with Special Verdict.—It is error to submit a general verdict in connection with a special verdict where full instructions on the general propositions of law involved are given, and thus to inform the jury of the effect of their answers to the special questions.

*See notes at end of case.

†See note, to *Rooney v. N. Y., N. H. & H. R. Co.* (Mass.), *ante* p. 425 and note, p. 433.

‡See note, 12 Am. & Eng. R. Cas., N. S., 735.

§See notes at end of case.

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APPEAL, by defendant from Rock county circuit court.
Reversed.

This is an action for personal injuries. On and prior to July 26, 1896, the plaintiff was a locomotive engineer in the employ of the defendant, running between Oshkosh and Janesville. On the night of July 26th, at about 10.50 o'clock, the plaintiff was running the engine, attached to a freight train, southward over the defendant's railroad, and ran into a washout about a mile and a half north of the city of Janesville, and was seriously injured. The washout had occurred during a heavy rainstorm on the evening in question, and it was located at a place where there had been for many years a small, wooden culvert. The complaint charges the defendant with negligence in originally building the culvert too small, and by allowing it to become out of repair and unsafe, and by digging away the supporting earth and gravel on one side of the culvert, thus rendering the roadbed weak, and by failure to patrol the track, and warn the plaintiff of the washout. The evidence showed that the plaintiff left Oshkosh, with his freight train, at a little after 4 o'clock in the afternoon, and that about 8 o'clock in the evening, when between Juneau and Clyman, it rained; that at Koshkonong he was flagged, and stopped his train, and the section foreman of that section told him that his section was all right, and to go ahead. The rain continued, and near Milton Junction he could see that it had been raining hard. He stopped at Milton Junction long enough to get a clearance slip for Janesville, which is eight miles distant, and left Milton Junction at about 11.15 p. m. It was dark and rainy, with occasional flashes of lightning. He testifies that his train, at the time of the accident, was going 10 or 12 miles an hour, and there is testimony on the part of some of the other train employees that it was going from 15 to 18 miles an hour. After going under the bridge called "Black Bridge," by a flash of lightning he suddenly saw in the track a black place 50 or 60 feet in front of him, looking like a bridge. He knew there was no bridge there, and that

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it must be a washout. He had 26 cars in his train, and testifies that it was impossible to stop before reaching the washout, so he opened the throttle, and made a run for it. The engine went over the washout, being pressed forward by the weight and momentum of the train behind, and stopped suddenly off the rails. The plaintiff was thrown against the fire box, and seriously injured. A special verdict was demanded and rendered as follows, and, in connection therewith, a general verdict was rendered for the plaintiff: "(1) Was the culvert in question so constructed and maintained as to conduct through it the water which it was intended to conduct through, not only in ordinary showers, but in severe showers, that would naturally occur during a series of years, and which could reasonably be anticipated? Ans. It was not. (2) Was the culvert in question negligently and carelessly constructed and maintained by the defendant company, or its agents or employees, so as to render it inadequate for the purpose for which it was constructed? Ans. It was. (3) Was the said culvert carefully and thoroughly inspected from time to time by the employees of the company whose duty it was to give such inspection? Ans. It was not. (4) Did the nearness of the gravel pit to the culvert, in the month of July, 1896, render said culvert unsafe, in view of the water that might be conducted through it? Ans. Yes, it did. (5) Was the rainstorm on the night of July 26, 1896, extraordinary, unusual, and unexpected in its character, or unprecedented, and one which had only occurred at such long and irregular intervals that it would not be anticipated by men of ordinary prudence in their business calculations? Ans. It was not. (6) Might the washout in the track have been discovered by the defendant railway company by reasonable and proper inspection, and in time to have prevented the accident? Ans. Yes, it might. (7) Was the storm which occurred on the night of July 26, 1896, one likely to cause damage to the defendant's roadbed and track, where the culvert in question was situated? Ans. It was. (8) Was the defendant's servant Stageman guilty of any

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negligence in not properly and carefully inspecting the road near where the culvert was, on the night in question? Ans. He was. (9) Was the plaintiff in the exercise of ordinary care at and prior to the time of his injury? Ans. He was. (10) Was the plaintiff injured, on the night in question, in consequence of the washout, without contributory negligence on his part? Ans. He was. (11) What damages has the plaintiff sustained in consequence of the injury received on the night in question? Ans. \$20,000." Judgment was entered on the verdict for the plaintiff, and the defendant appeals.

Fish & Cary, for appellant.

Fethers, Jeffris, Fifield & Monat, for respondent.

WINSLOW, J. (after stating the facts). 1. It was very strenuously insisted by the defendant's counsel on the argument of the case that the evidence showed that the plaintiff was guilty of contributory negligence as a matter of law. In this connection the following rules of the railroad company, with which the plaintiff was familiar, were put in evidence: "Rule 128. Freight and special trains must not pass over any switch at a speed exceeding ten miles an hour." "Rule 410. The protection of the trains of the company from accident during storms, and from danger of the track and bridges being washed out by sudden and heavy rains and rise in streams, especially if they occur in the night, is of the greatest importance, and all employees in the operating department are directed to familiarize themselves with the following instructions, and carry them out strictly." "Rule 414. Conductors and engineers on the road, when overtaken between stations by such storms or indications of high water which will cause damage, will proceed with great caution, keeping their trains under complete control, and at such speed that they can be stopped, after coming in sight of any obstruction or damage to track, in time to prevent accident. They will stop to examine bridges and culverts or other places liable to be damaged by high

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water, and, if they find any indication of danger from proceeding with their trains, will, on the arrival at the first telegraph station, call up the agent or operator, and report to the office of their respective division superintendents for instructions, and will not proceed until such instructions are received." The evidence showed that the plaintiff was an experienced engineer, 42 years of age, and had run trains over this section of road for upwards of 16 years. It is claimed that the plaintiff, by his own statement, shows that he was operating his train at a negligently high rate of speed as he approached this culvert, and that he violated rules 128 and 414, above quoted, and that by reason of such violation of rules the accident happened. We are not able to agree with the contention that contributory negligence was proven as matter of law. While it appears that there were very heavy rainstorms at or near Janesville during the afternoon and evening in question, it does not appear conclusively that the plaintiff knew that these storms were so severe or unusual in their nature as to call for the exercise of the precautions demanded by rule 414, above quoted. The plaintiff testified that an ordinary rain commenced to fall when his train was two miles south of Juneau, and that it rained while they were running about seven miles, and then stopped; that at Milton Junction he could see that it had been raining a little harder, and there was water standing in the fields; that it was then raining, but not heavily, and continued to rain until they reached the washout. There is nothing inherently improbable in his testimony, nor is the testimony of opposing witnesses so conclusive on the subject as to render the plaintiff's testimony incredible. It does not appear by undisputed testimony that the train "was overtaken between stations by such storms or indications of high water" as would require him to proceed with great caution under rule 410. There was testimony from which this fact might be well found, but it is not conclusively proven. Nor does it appear that there was

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any switch at, or in the immediate vicinity of, the washout, by reason of which the speed should have been reduced to 10 miles an hour under rule 128.

2. It is argued that proximate cause is not found by the verdict, and hence that the judgment cannot be sustained. When a train plunges through an unsafe bridge, there is little room to speculate on proximate cause. If the bridge was constructed for the passage of heavy trains over it, and was negligently and unsafely constructed, the destruction of a train, and the loss of human life thereon, must necessarily be contemplated by any reasonable man who built it. He cannot say that he did not anticipate an accident. Such a claim would be puerile. As well might a municipal corporation, who have left an open pit in a street, defend on the ground that it could not anticipate that a traveler would fall into it. The question as to proximate cause was sufficiently answered when it was found that the viaduct was negligently constructed and unsafe, so that an ordinary rainstorm would wash it out, and was not properly inspected on the night in question, and that the plaintiff was injured, in consequence of the washout without contributory negligence on his part.

Same—
Proximate
Cause—Suffi-
ciency of Special
Verdict.

3. In this connection it is urged that the verdict of the jury to the effect that the rainstorm on the night in question was not an extraordinary and unprecedented storm is contrary to the evidence. Examination of the evidence, however, convinces us that the question was fairly one for the jury.

Question for
Jury.

4. It is also urged that it was error to allow certain medical experts to answer a long hypothetical question, which, after stating in detail the particulars of the plaintiff's injury, related at length the plaintiff's symptoms, treatment, and physical condition from that time to the time of the trial, and upon this statement asked the witnesses what, in their judgment, was the cause of the plaintiff's condition. To this question the witnesses each replied that the plaintiff's condition was the

Evidence—
Medical Experts.

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result of the injuries received by him in the accident. There was no error in the admission of the question. A question precisely similar in form was approved in *Selleck v. City of Janesville*, 100 Wis. —, 75 N. W. 975.

5. The defendant proposed 23 questions for the special verdict, and the court refused to give them, and submitted instead 11 questions. The refusal to give the questions asked is now assigned as error. Many of the questions asked by the defendant are lengthy and involved, and careful examination of the issues convinces us that the material issues of the case were all covered by the special verdict as submitted; hence it was not error to refuse the defendant's request. What is said upon this general subject in *Ward v. Railway Co.* (decided herewith) 78 N. W. 442, will be found applicable here.

6. It appeared by the evidence that plaintiff's wife had nursed the plaintiff for a year, and the plaintiff's counsel argued to the jury that the plaintiff was entitled to recover the value of his wife's services in so nursing him, and said, "He is entitled to his wife's services, and no one can take them from him."

Damages—Wife's
Services as
Nurse.

To this remark the defendant objected on the ground that the plaintiff could not recover for his wife's services, because it was her duty to nurse him. In ruling on the question the court said: "The defendant company is not entitled to the services of a man's wife, and her services belong to her husband, as disclosed by the evidence here. If she has been compelled to nurse him in consequence of the injury, I see no reason why it is not a proper charge." To this remark exception was taken. We think there was no error in this ruling. The authorities are not uniform on the subject, but we think the court's ruling sustained by the better reason. The defendant should not be allowed to profit by reason of the loving care of the wife. *Varnham v. City of Council Bluffs*, 52 Iowa, 698, 3 N. W. 792; *Railway Co. v. Holman* (Tex. Civ. App.) 39 S. W. 130; *Brosnan v. Sweetser*, 127 Ind. 1, 26 N. E. 555.

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7. The plaintiff offered in evidence the annuity tables found in the Revised Statutes of Wisconsin (St. 1898, p. 2461), and the same were received in evidence under objection and exception. Mr. Fethers, in his argument to the jury, after computing the amount Crouse earned in a year, and adding to it the annual cost of nursing and physician's services, making the whole amount \$1,798, spoke as follows: "We have, then, under the lowest figure given by the testimony, a money loss of \$1,798 a year to George Crouse,—\$1,798 a year cash. Under the annuity tables, taking the lowest figure,—and you are entitled, under the testimony in this case, to consider if he will not live on beyond it, but taking that low figure according to the annuity tables,—his money loss would be \$19,247.59. At 41—say you start there; he was born on the 8th of January, I think, and he was injured on the 26th of July, so his nearest birthday would be nearer 41 than to 40 and you get about 40½ he was then; but say that his nearest birthday is 41—his actual money loss would be \$19,039.12. The difference between the two years, whichever is considered, is only \$200. In other words, more than \$19,000, considered from the standpoint of the expectancy of the annuity tables, in connection with the other testimony, would be his actual money loss should he live to that time." Counsel for defendant objected to the argument, and asked the court to instruct the jury that it was an improper argument to make on the question of damages, and the court replied: "I think that is proper. I overrule the objection." To the ruling of the court the defendant excepted. Mr. Jeffris, in his argument to the jury, said, in respect to these annuity tables, as follows: "After this accident, Mr. Crouse may live 10, 20, 30, yes, he may live 40, years, but we are not entitled to forty years' pay for his service and 40 years' time. But the supreme court has laid down the rule upon which these things are figured on their present purchase value. If a man is paid the cash, it is limited to something like ten years." To the remark of Mr. Jeffris counsel for defendant objected upon the ground

Evidence—Per-
manent Injuries—
Annuity Tables.

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that it was an improper argument to make to the jury, and asked the court to instruct the jury that they were not to pay any attention to it. Thereupon the court ruled as follows: "Court: Well, I shall not instruct the jury any such thing." The defendant thereupon excepted to the ruling of the court, and the court then said of its own motion: "Yes, I instruct the jury that his remarks in regard to the annuity tables, I think, are proper." To such remark and ruling of the court the defendant excepted. In view of the fact that the annuity tables were admitted in evidence, counsel for defendant requested the court to charge the jury as follows: "The annuity table received in evidence was received upon the theory that it would afford you some aid in determining the amount of damages. The table is not a rule for you to follow in assessing the damages. The makers of the annuity table did not take into account several things important in this case, namely, that the man injured might die before the end of his expectancy of life of some disease not caused by the injury; that he might not be willing to work to the end of his expectancy of life; that he might, before the end of his expectancy of life, be rendered incapable of work by disease not caused by the injury, and that he might be rendered incapable of work by reason of other accidents and injuries." This instruction was refused, and defendant excepted. While the authorities are not entirely uniform on the question of the admission of standard tables showing the expectancy of life in injury cases where death has not resulted, it seems that the weight of authority is in favor of their admissibility. See note to *Railway Co. v. Yates*, 40 Lawy. Rep. Ann. 553, where the authorities are collated (s. c. 25 C. C. A. 103, 79 Fed. 584). This court held the annuity tables admissible in *McKeigue v. City of Janesville*, 31 N. W. 298 (which was a death case), "not as forming a legal basis upon which the jury might determine the probable length of the life of the deceased, but as evidence which the jury might consider with all the other evidence in the case upon that point." We see

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no very good reason why such tables should be admissible in a death case upon the question of probable length of life, and not in a case of personal injury, where damages for permanent injuries are sought. In both cases the question of probable length of life is an important one, which the jury must consider if they find for the plaintiff. It is true, the annuity tables are more favorable to the defendant than the tables of expectancy of life, but of this the defendant cannot complain. But it must be very certain that such tables do not form a mathematical basis for the estimation of damages as they were used with the direct sanction of the court in this case. You cannot take the amount a man was earning when injured, and multiply it by the figures in an annuity table, and thus reduce his damages to exact figures by the rules of arithmetic. This was done in this case, and the court said it was proper, and the verdict of the jury is so near the amount so figured out as to give ground for believing that the jury considered it as a rule to follow. Of course, there is no such rule. There are many other elements in the problem which must be considered. The plaintiff's ability to labor would almost certainly decrease with years, or by natural disease, or he might not desire to continue in his arduous employment. So we think the court erred in approving the mathematical rule laid down by the plaintiff's counsel, as well as in refusing the instruction offered by the defendant upon the subject. *Hunn v. Railroad Co.*, 78 Mich. 513, 44 N. W. 502; *Harrison v. Railway Co.*, 116 Cal. 156, 47 Pac. 1019; *Goodhart v. Railroad Co.* (Pa. Sup.) 35 Atl. 191.

8. In connection with each of the second, third, sixth, and eighth questions of the special verdict the defendant requested an instruction, in substance, that the burden of proof in each case rested upon the plaintiff, and that they must be satisfied to a reasonable certainty by the preponderance of the evidence, in order to answer the question in the affirmative. These instructions were all refused, nor was the substance of them given. Certainly it was applicable to the second ques-

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tion,—as to whether the culvert was negligently constructed and maintained,—and should have been given.

Burden of Proof.

But it is claimed that the rule as to burden of proof as to all these questions has been changed by the terms of section 1, c. 220, Law 1893 (now subdivision 1, § 1816, Rev. St. Wis. 1898). This statute provides for a recovery where a railroad employee, without contributory negligence, is injured by a defect in any locomotive engine, car, rail, track, machinery, or appliance required by said company to be used in and about the business of such employment, when such defect could have been discovered by reasonable and proper care, tests, and inspection; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of the company. While we think the word "track," in this law, clearly includes the roadbed upon

which the track rests, we do not see how the law affects the question of burden of proof as to

*Track—Definition
—Burden of Proof
—Statute.*

the second question. That question inquires whether there were original defects in the culvert before the washout. Until the plaintiff has shown that there were such defects, the law does not begin to apply. He must first show the defects, and must necessarily show them by preponderance of the evidence, and then the presumption of knowledge of the defect steps in. As to question 6 and 8, the argument is somewhat different, but still we think the instruction should have been given. By answers to these ques-

Burden of Proof.

tions the jury were to say whether the washout could have been discovered by defendant's employees by the exercise of reasonable care in time to prevent the accident, and whether the track walker was negligent in not properly inspecting the track. As to the sixth question, doubtless the law raised a presumption, on a showing that the washout existed, that the company had knowledge of it; but this was a mere disputable presumption of fact, and when it appeared that the washout had occurred within a few hours, and that the company in fact had no notice, the question whether the washout had existed so long under the circumstances that

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the company, by proper inspection, should have learned the fact, or was negligent in not knowing it, was still a question for the jury, and one upon which the burden of proof was still upon the plaintiff. The law raised a presumption of knowledge of the washout, but not a presumption of negligence from want of knowledge. These remarks apply to the eighth question with equal force.

9. Upon the question of damages the court was requested to charge that the fact that the plaintiff was married was not to be considered in arriving at the amount of the damages, but refused. This charge should have been given.

~~Damages—
Evidence.~~

10. One sentence of the charge seems to convey the idea that it was an absolute duty resting on the railway company to make the culvert safe, thus making the company an insurer.

It seems probable from the context that this was not the intentional, but simply an inadvertent, use of language, but we call attention to it because there must be a new trial. Reasonable and ordinary care and prudence to make it safe, considering its uses and purposes, is the duty imposed on the company, and which it cannot delegate. It does not insure safety.

~~Defective Culvert
—Railroad Not
An Insurer.~~

A general verdict was rendered under a long, general charge in connection with the special verdict. While no specific objection appears in this case to the submission of

~~Submission of
General Verdict
with Special
Verdict.~~

such general verdict, attention is called to the discussion of the propriety of this course in the case of *Ward v. Railway Co.*, decided herewith.

What is there said is precisely applicable to the present case. We have found no other questions which seem necessary to be discussed. Judgment reversed, and action remanded for a new trial.

NOTES.

Hypothetical Questions.—In an action for personal injuries, a question put to a physician assumed that the injured person had good health prior to the injury, and then recounted the facts connected with the injury and the care taken of her for the next three days, before the witness visited her professionally, and after re-

citing the injuries and symptoms then existing, concluded, "What would you say was the cause of these injuries?" *Held*, that the form of the question might not be commendable, but it called for nothing that was improper. *Haviland v. Manhattan R. Co.*, 40 N. Y. S. R. 773, 61 Hun 626, *mem.*, 15 N. Y. Supp. 898; *affirmed* in 131 N. Y. 630, *mem.*, 43 N. Y. S. R. 962, *mem.*, 30 N. E. Rep. 864, *mem.*

A physician may, in answer to a hypothetical question, state that in his judgment the tremor and impairment of the nervous system with which plaintiff is afflicted are due to the injury for which the action is brought. *McClain v. Brooklyn City R. Co.*, 40 Am. & Eng. R. Cas. 254, 116 N. Y. 459, 22 N. E. Rep. 1062, 27 N. Y. S. R. 549; *affirming* 42 Hun 657, *mem.*, 6 N. Y. S. R. 49.

Personal Injuries—Damages—Nursing by Family.—The value of the services of the daughters of plaintiff who nursed him, but made no charge for such services, is inadmissible in an action for personal injuries. *Chicago, B. & Q. R. Co. v. Johnson*, 24 Ill. App. 468.

In an action by a father for injury to his child, it appeared that the father, who had had experience as a nurse himself, in that capacity took the entire charge of the child. *Held*, that while plaintiff was entitled to recover the value of his services as a nurse, he was not entitled to recover in addition thereto what he might have made had he not abandoned the business engagement. *Barnes v. Keene*, 132 N. Y. 13, 29 N. E. Rep. 1090, 42 N. Y. S. R. 853.

If a child suffers physical injury through the negligence of a railway company, its father is entitled to recover, as part of his damages, reasonable compensation for the services of both his wife and himself in nursing the child. *Schmitz v. St. Louis, I. M. & S. R. Co.*, 46 Mo. App. 380.

It is error, in an action by a mother for personal injury to her minor child, to direct the jury to include in the assessment of the damages the value of the care given by the mother to such son owing to the injuries received by him, if there is no evidence of the value of such care. *Mauerman v. St. Louis, I. M. & S. R. Co.*, 41 Mo. App. 348.

See *note*, 12 Am. & Eng. R. Cas., N. S., 195.

Personal Injuries—Damages—Evidence.—In an action for personal injuries, evidence that the plaintiff is a married man and has a family is improperly admitted. *Stephens v. Hannibal and St. Joseph R. Co. (Mo.)*, 38 Am. & Eng. R. Cas. 110, 96 Mo. 207; *Dayharsh v. Hannibal & St. J. R. Co.*, 103 Mo. 570, 23 Am. St. Rep. 900; *Mahaney v. St. Louis & H. R. Co.*, 108 Mo. 191, 18 S. W. Rep. 895; *Louisville, etc., R. Co. v. Binion*, 107 Ala. 645; *Shaw v. Boston, etc., R. Corp.* 8 Gray (Mass.) 45; *Chicago v. O'Brennan*, 65 Ill. 160; *Pittsburg, etc., R. Co. v. Powers*, 74 Ill. 341.

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LOUISVILLE & N. R. Co.

v.

BROWN.

(Supreme Court of Alabama, April 4, 1899.)

Injury to Brakeman—Willful Negligence—Pleading.*—The complaint alleged that the death of defendant's brakeman was the result of negligence on the part of its fireman, in giving a signal to the engineer to back the engine, and in failing to inform the engineer that deceased was on the track between the tender of the engine and a car for the purpose of uncoupling them, when he knew that deceased was in such position, and when he knew that the engineer did not know of deceased's peril. *Held*, that the complaint, in order to charge that the death was the result of wanton or intentional wrong on the part of the fireman, should have alleged that the fireman willfully or wantonly or with reckless indifference failed to discharge the duty resting upon him, or that he was conscious at the time that his conduct would probably result in injury to the brakeman.

Same—Contributory Negligence.—In an action for the death of an employee, alleged to have resulted from simple negligence, contributory negligence is a good plea.

Instructions.—It is error to instruct on a point not raised by the pleadings.

Same—Proximate Cause.—If such death was the result of contributory negligence on the part of deceased in knowingly assuming a position of danger and defendant's negligence in failing, when aware of his peril, and when it was possible to avoid the injury, to use all preventive means, defendant's negligence would be the proximate cause of the death; but an instruction stating this doctrine is erroneous, if it also assumes that deceased could not have been guilty of other contributory negligence constituting the proximate cause of his death, notwithstanding such negligence on the part of defendant.

Wrongful Death—Measure of Damages.*—Such action having been in behalf of deceased's estate, and no data having been fur-

*See notes at end of case.

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nished by which the jury could determine the probable value of such estate on the assumption that his life had not been cut off, their verdict should have been for such sum only as would pay for the support of those dependent upon him, to the extent he was accustomed to contribute to that end, during his life's expectancy, as computed in *Railroad Co. v. Trammell*.

APPEAL by defendant from Mobile county circuit court.
Reversed.

The court at plaintiff's request gave to the jury the following charges: (b) "The court charges the jury that, even if James L. Brown knew of the rule in question, and violated it, and even if he was guilty of contributory negligence, this would constitute no defense to the fifteenth and sixteenth counts of the complaint, if the plaintiff has proven the allegations of these counts." (c) "The court charges the jury that, if the plaintiff has satisfied you of the truth of the allegations of the fifteenth or of the sixteenth counts of the complaint, then you must find for the plaintiff, whether James L. Brown was guilty of contributory negligence or not, and whether he knew of and violated the rule of the defendant or not."

Thos. G. Jones, for appellant.

Harry T. Smith, for appellee.

MCCLELLAN, C. J. The complaint originally contained nineteen counts. At the trial below all but five counts were stricken out or withdrawn, and the trial was had upon these five, numbered respectively 9, 11, 15, 16, and 19. They each count upon the wrong of one McDonald, a fireman, as of a person at the time in the charge and control of an engine. The ninth count avers that plaintiff's intestate, James L. Brown, "was killed by reason of the fact that while he was upon defendant's track, between the tender of the engine and a box car, engaged in the performance of his duties as a brakeman in uncoupling said engine from said box car, and while he, the said fireman, knew that said Brown was in such perilous position, and while he knew that the engineer was

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moving, or about to move, said engine towards the said Brown with such force and violence as to greatly endanger his life, he, the said fireman, failed to notify said engineer of the said perilous position of said Brown, although it was his duty as such fireman to have so notified said engineer, and by reason of said failure on the part of said fireman said engineer ran said train back upon said Brown with such force and violence as to throw him to the ground, and kill him." The eleventh count avers that "Brown was killed by reason of the fact that while he was about to go upon defendant's track between said engine and car for the purpose of uncoupling them, as was his duty, said fireman negligently allowed said engineer to remain unaware of the fact that said Brown was about to go between said engine and car, although he, said fireman, well knew said fact, although it was his duty as such fireman to have informed the engineer of said perilous position of said Brown, and by reason of all which said engineer backed his train against said Brown, and killed him." The fifteenth count ascribes the casualty to the fact that Brown, in the discharge of his duties, was between the tender and a car for the purpose of uncoupling them; that the fireman knew this, and knew also that the engineer was not aware of Brown's perilous position; and that, although it was the fireman's duty to have informed the engineer of Brown's position, yet he nevertheless failed to do so, and in consequence of such failure the engineer backed his train against Brown, and killed him. The sixteenth count avers that Brown was killed by reason of the fact that, "although he was in a perilous position in the performance of his duties, to wit, between said engine and said car, and although this fact was unknown to the engineer and was well known to said fireman, and although said fireman knew that it would greatly imperil the life of said Brown for the engineer to continue to back said train, and although it was the duty of such fireman to have so informed said engineer, he nevertheless failed to inform his said engineer of the said perilous position of said Brown, by reason of which the engineer backed his

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train against said Brown, and killed him." The averment as to the cause of Brown's death in the nineteenth count is as follows: "Said Brown was killed by reason of the fact that at the time when he was about to go between the tender of said engine and one of the cars attached thereto for the purpose of uncoupling them, he, the said Brown, signaled for slack, and it was the duty of said fireman upon said engine to communicate said signal to said engineer, but said fireman, well knowing that Brown was about to go or had gone between said tender and car for the purpose of uncoupling them, and that it would endanger his life to run said tender back further than was necessary to give slack thereto, and well knowing that the engineer was not aware of the position of said Brown, and being charged with the duty of communicating to the engineer the signal given by said Brown, negligently communicated a wrong signal to said engineer, and instructed him to back up instead of give slack, by reason of which said engineer moved said engine and tender a greater distance than was proper for the purpose simply of giving slack, by reason of which said Brown was stricken to the ground and killed." To each of these counts the defendant pleaded not guilty and contributory negligence. The plaintiff thereupon moved the court to strike out the pleas of contributory negligence on the ground that each of the counts of the complaint charges "that the injury arose from conduct on the part of the servants of the defendant which was the equivalent to wanton or intentional wrong, and the plea of contributory negligence cannot, therefore, be pleaded as a defense to either of said counts, or to the whole complaint containing said counts." The court granted this motion, and struck said pleas.

It is clear, we think, that neither one of the counts of the complaint presents a case of wanton or willful misconduct on the part of the fireman. At the most they severally allege only negligence on his part. It is averred that he knew Brown's peril, that by giving the proper signal or information to the engineer

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Brown's safety would have been conserved in spite of the perils which his position involved, and that with a consciousness that the engineer was unaware of the situation, he, the said fireman, failed to give such signal or information. It is not averred that he willfully or wantonly so failed, or that he was conscious of his failure, but, to the contrary, the express averment in some of the counts and the necessary implication in the others is that the fireman negligently failed to give the proper signal. To the implication of willfulness, or wantonness, or reckless indifference to probable consequences, it is essential that the act done or omitted should be done or omitted with a knowledge and a present consciousness that injury will probably result; and this consciousness is not to be implied from mere knowledge of the elements of the dangerous situation, for this the party charged may have, and yet act only, negligently and inadvertently in respect of the peril; but it must be alleged either in terms that he willfully or wantonly or with reckless indifference failed to discharge the duty resting upon him, or that he was at the time conscious that his course would probably result in disaster. Of course, these necessary averments may be proved by the circumstances. The jury may, in a proper case, infer such consciousness, willfulness, or wantonness from his knowledge of the existing perilous conditions. But that this may be done is no excuse for the pleader's pretermission of their averment. *Railroad Co. v. Burgess* (Ala.) 25 South. 251; *Id.*, 114 Ala. 587, 22 South. 169; *Railroad Co. v. Markee*, 103 Ala. 160, 15 South. 511; *Railroad Co. v. Swope*, 115 Ala. 287, 22 South. 174; *Railroad Co. v. Hall*, 105 Ala. 599, 17 South. 176; *Railroad Co. v. Burgess*, 116 Ala. 509, 22 South. 913. It follows that the trial court erred in sustaining plaintiff's motion to strike defendant's pleas of contributory negligence from the files. The counts to which they were addressed do not "charge that the injuries arose from conduct on the part of the servants of the defendant which

Same—Contributory Negligence.

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was equivalent to wanton or intentional wrong," as set forth in the motion. And, this being true of all the counts upon which the trial was had, the court similarly erred in giving charges (b) and (c) for plaintiff, and in refusing to give the several charges requested by the defendant to the effect that plaintiff could not recover for the wanton or willful misconduct of defendant's engineer and fireman. That issue was not in the case.

Instructions.

This case involves an application of another well-established principle of law going to defendant's liability, notwithstanding negligence on the part of plaintiff's intestate. It is this: Where the injured party is negligent in assuming a position of danger in such degree and so contributing to his hurt as that his fault will leave him without a right of recovery for any primary negligence of the other party, by which we mean any negligence which has, from the point of view of the person inflicting the injury, no relation to the other party's situation, yet he may, nevertheless, recover if the person charged with the wrong and injury became aware of his peril in time to avoid injuring him by the proper use of all preventive means at his command, and listlessly, inadvertently, negligently failed to resort to such means in conservation of his safety, provided he is himself free from negligence after he becomes conscious of his danger. In such case the original negligence of the injured party, whereby he is placed in a perilous position, does not, in a legal sense, contribute to the result; it is a remote, not a proximate, cause; it is a condition indeed, rather than a cause remote or proximate; and the law ascribes the disaster solely to a want of due care on the part of the person controlling the agency of the injury, but for whose negligence no hurt would have been done notwithstanding the injured party's original fault. We need not enlarge in the discussion of this doctrine. It obtains in the common law of England (*Davies v. Mann*, 10 Mees. & W. 546), and has been often recognized and declared by this court (*Tanner's Ex'r v. Railroad Co.*, 60 Ala. 621; *Frazer*

Same—Proximate Cause.

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v. Railroad Co., 81 Ala. 185, 1 South. 85; Railroad Co. *v.* Womack, 84 Ala. 149, 4 South. 618; Railroad Co. *v.* Webb, 97 Ala. 308, 12 South. 374; Railroad Co. *v.* Hurt, 101 Ala. 34, 13 South. 130; Railroad Co. *v.* Burgess, 116 Ala. 509, 22 South. 913. There may be some expressions in the opinion in Railway Co. *v.* Lee, 92 Ala. 262, 9 South. 230, on this subject, and in respect of willfulness and the like, which are to be taken as shaded and modified by the later decisions cited above. Counts 15 and 16 of the complaint present a case falling within the principle just stated, if it be assumed that Brown, plaintiff's intestate, was negligent in placing himself between the tender and car just before he was hurt. With this assumption these counts proceed in legal contemplation upon the theory that Brown's negligence brought him into a position of peril, which became known to the fireman in time for the engine to have been stopped short of the injury, had he promptly informed the engineer of the situation; that he negligently failed to give the engineer this information, or the proper signal; and that such failure caused the death of Brown. It was no answer to these counts that Brown was guilty of negligence in assuming the perilous position. Such negligence was remote, not proximate, and hence not contributory in a material sense. It produced merely a condition upon which the alleged negligence of the fireman operated to Brown's death, and did not co-operate with the fireman's negligence as a joint cause of the disaster. But it does not follow that there could have been no negligence on the part of Brown which could have proximately contributed to the injury as laid in these counts. He might have been at fault in failing to make proper effort to extricate himself after becoming aware of his peril, and such fault may have combined with the fireman's negligence to cause the result. Hence it is that to such a count contributory negligence may be pleaded; and when such plea is interposed its sufficiency should be tested by demurrer, and not by a motion to strike; nor, of course, can the insufficiency of the plea be assumed in

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instructions given to the jury. Charges (b) and (c), before referred to, given for plaintiff, were asked and given upon the erroneous notion that counts 15 and 16 charged wantonness or intentional wrong, and, as we have said, should have been refused, because no such charge was made in any count of the complaint. Taking the counts in question to charge negligence of the defendant operating upon a known perilous position assumed by Brown, these charges were yet bad, in that, while Brown's negligence in assuming the position may not have been a proximate cause of his injury, yet he might have been guilty of other negligence in the premises which was proximate and contributory, and which would have defeated the action. Moreover, a plea to these counts denying negligence on the part of the fireman after he became aware of Brown's peril, and affirming contributory negligence on the part of Brown in being at the place where he was killed, would have been a complete defense to them; as also, indeed, would be a want of proof or disproof under the general issue that the fireman knew of Brown's peril. If it should be made to appear, under proper issues on another trial, that Brown signaled the fireman for the engine to "come back," that the latter communicated this signal to the engineer, that the engineer put the engine in motion in compliance with this signal, and that Brown then went in between the tender and car, and was killed by the tender running against or upon him in the movement of the train for which he had signaled, then, in such case, the affirmative charge should be given for the defendant. Again, if Brown signaled for "slack" only, and the fireman misinterpreted his signal, and directed the engineer to "come back," and Brown went in between the cars on the assumption that they would be moved only sufficiently to give "slack," and they were moved with the force and violence incident to coming back, and in consequence of such increased momentum beyond that necessary to give slack Brown was killed, the plaintiff would be entitled to recover, unless the jury should find that Brown

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 was guilty of contributory negligence in going between cars moving at the rate these were at the time, or that he violated a rule of the company, known to him, which forbade brakemen to go between cars moving at all, if it be not made to appear that such rule was impracticable of observance consistently with the duties imposed upon and required of brakemen by the defendant company. And there may be other possible categories of fact in the case, but we deem it unnecessary to attempt to set them hypothetically down here. It is also unnecessary for the purposes of another trial, we think, to pass upon the other questions reserved on the record before us, further than to say that, as the evidence fails to furnish any data by which the jury could determine the probable value of Brown's estate on the assumption that his mortality had not been untimely cut off, their verdict should have been for such sum only as would suffice to pay for the support of those dependent upon him, to the extent he was accustomed to contribute to that end, during his life expectancy, as computed in the case of *Railroad Co. v. Trammell*, 93 Ala. 350, 9 South. 870. Reversed and remanded.

Wrongful Death
—Measure of
Damages.

NOTES.

Pleading Willful Negligence.—A count which alleges that an injury was caused by willfully running a train at a high rate of speed, but fails to allege that the purpose of such conduct was to inflict the injury, and fails to allege that the person so doing was chargeable with notice that the injury would result from such conduct, is bad as a count for willful injury. *Louisville & N. R. Co. v. Anchors* (Ala.), 11 Am. & Eng. R. Cas., N. S., 658. See also *Birmingham Mineral R. Co. v. Jacobs*, 49 Am. & Eng. R. Cas. 263, 92 Ala. 187; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; *Chicago & E. I. R. Co. v. Hedges*, 25 Am. & Eng. R. Cas. 550, 105 Ind. 393; *Sherfey v. Evansville & T. H. R. Co.*, 121 Ind. 427; *Jacob v. Louisville & N. R. Co.*, 10 Bush (Ky.) 263.

Wrongful Death—Computation of Damages—Rule in *Railroad Co. v. Trammell*.—The action was brought by the decedent's widow as

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administratrix, she being the only member of his family, and the evidence showing that the deceased earned one dollar per day ; that he "always carried his money home and spent it on his family," and that he was forty years old. *Held*, that the recovery should be for such a sum as, at legal interest, would give the widow \$150 per year for twenty-seven years, the probable duration of life of a person of that age, and exhaust the principal at the end of that period. *Louisville & N. R. Co. v. Trammell*, 93 Ala. 350, 9 So. Rep. 870.

CARLSON

v.

CINCINNATI, S. & M. R. Co.

(*Supreme Court of Michigan*, June 28, 1899.)

Injury to Employee on Track at Crossing—Due Care—Lookouts.*—
A section hand at work on the track at a public crossing is not entitled to rely on a rule of the company requiring an employee to be on the rear car of a train backing across a public highway to see that the crossing is clear, but must be reasonably diligent in avoiding injury from moving cars, as such a rule is for the protection of the public, and not of the company's employees.

ERROR by defendant to Bay county circuit court. *Reversed.*

Plaintiff had been in the employ of the defendant as a section hand in its yards at West Bay City for about five years. One of his duties was to clean the tracks at the highway crossings, one of which was at Main street. Defendant has four tracks across this street, and the Michigan Central Railroad three. While plaintiff was at work picking out the dirt between the planking and the rails a switch engine backed against and seriously injured him. The engine had backed down the track to within about 300 feet of the crossing. The crew consisted of the conductor (who was also yard master), engineer, fireman, and two switchmen. The inten-

*See note at end of case.

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tion was to cross the highway to a point two miles distant. The semaphore was against the right to cross. The engineer gave the customary signals by whistling to the signalman in control of the semaphore. After giving this signal, the engine stood there some time before receiving notice from the signalman to cross. Plaintiff saw the engine, and stood there watching it for 10 or 15 minutes. He testified, "I watched it so long, because I was afraid of it, and wanted to see which way it was going." He then went to work, and looked up twice at the engine while at work. The conductor had left the engine, and gone into the interlocking tower, where plaintiff saw him. Plaintiff stood with his back towards the engine, or, as he expressed it, "with my back sideways towards the engine." He went to work, "feeling satisfied that the engine would not come where he was." Upon receiving notice from the tower, the engineer backed up, and when the engine reached the crossing it was going five or six miles an hour. The trainmen were in the cab with the engineer. No one stood upon the footboard on the back of the tender. The coal was piled up on the tender so high that those in the cab could not well see over it. Rule 40 of the defendant reads as follows: "In no case must a train be backed over a public crossing or highway, unless there is a man on rear car to see that crossing is clear; nor must a car be cut loose and allowed to run over a public crossing or highway unless there is a man on same." The signalman in the tower and the conductor saw that plaintiff was paying no attention as the engine approached near him, halloed to him, and did all in their power to attract his attention, but without avail. The court instructed the jury that the employees upon the engine were fellow servants, and that for their acts the defendant was not liable. The theory upon which the case was left to the jury appears from the following charge: "I charge you that, if the plaintiff was free from fault, and if this accident happened by reason of a regulation of that road permitting the running of an engine through and across the streets of the city without any look-

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out, the defendant is liable. I do not think it is liable on any other theory." The gates at this crossing, which were about 200 feet apart, were down on account of the passing of a train upon the Michigan Central just before, and the coming of this switch engine. Just how far the plaintiff was from each gate is not shown by the record. He evidently was within less than 100 feet of one of them.

Geer & Williams (E. W. Meddaugh, of counsel), for appellant.

Simonson, Gillett & Courtright, for appellee.

GRANT, C. J. (after stating the facts). The only ground of negligence upon which plaintiff could recover was that submitted to the jury, *viz.* the failure to have an employee stand upon the footboard of the tender to warn him. The object of the rule requiring an employee to be upon the footboard when backing across public highways is for the protection of the public, and not of the employees of the company. *Rohback v. Railroad*, 43 Mo. 147. There was no more danger to the defendant in working upon this crossing than there was at any other part of the tracks in the yard outside the highway. There is no testimony tending to show that employees understood that this rule was intended for a protection to them, or that the plaintiffs so understood it. Evidently he knew that he was going into a place of danger; that it was his duty to keep a sharp lookout for his own protection; and that he did not rely upon such a warning, because he stood there 10 to 15 minutes, waiting for this engine to pass over. All the witnesses who testified upon the subject, both those for the defendant, as well as for the plaintiff, testified that it was the plaintiff's duty to watch out for approaching cars, and to get out of the way. One of the rules of the company provides: "Trackmen may expect trains at any moment, and must always be on the lookout and prepared for them." It is expected, and it is not unreasonable, that trackmen should look out for approaching trains and engines, and especially in yards where they may

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be expected at any moment. There was a train going upon another road, and there was a mill near by, making some noise. The law did not permit the plaintiff to rely upon his sense of hearing alone. Obviously he did not intend to, but it is certain that he did. He knew that the engine might come that way. The engineer had signaled for the right to cross. There is nothing to show that he did not hear this signal. The gates were closed. A glance at his surroundings would have warned him of danger. A glance every few seconds towards this engine would have disclosed its approach. Such precaution would not have interfered with his work, and, if it would, there is nothing to indicate that the defendant prohibited him from taking it, or that it expected him to work without taking it.

Keefe v. Railway Co., 92 Iowa, 182, 60 N. W. 503, is very similar in its facts to this case. The plaintiff was struck by the tender of an engine which was backing up. The court said: "The presence of the tracks and cars thereon, and the movement of engines, were constant warnings to him of danger. It is the duty of persons employed in such places to be reasonably diligent in guarding against accidents, and especially to observe and keep out of the way of moving engines and cars. They have no right to rely wholly upon the persons in charge of them to prevent accidents, but must use due care to avoid danger. These rules are founded upon the necessities of the business of operating railways. They are reasonable and just, and are fully sustained by the decisions of this and other courts." Where plaintiff, an employee, stood with his back to the approaching cars, and did not look back or watch for the moving engine, and was struck, it was said: "It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected. We see in the facts disclosed no negligence on the part of the defendants, and if, by any means, negligence could be imputed to them, surely the plaintiff, by his negligent

inattention, contributed directly to the injury." *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835. Under circumstances somewhat similar, the supreme court of Massachusetts held that an employee had no right to abandon the use of his eyes, and rely upon a warning from every car that might be shunted upon the track where he was working. *Lynch v. Railroad Co.*, 159 Mass. 536, 34 N. E. 1072. See, also, *Schaible v. Railway Co.*, 97 Mich. 318, 56 N. W. 565; *Daly v. Railway Co.*, 105 Mich. 193, 63 N. W. 73. The plaintiff was clearly guilty of contributory negligence. It is unnecessary to discuss the other points raised. Judgment reversed, and new trial ordered. The other justices concurred.

NOTE.

Injury to Employee while at Work on Track.—See *Weiss v. Bethlehem Iron Co.* (C. C. A.), 12 Am. & Eng. R. Cas., N. S., 305, and *note*, p. 317.

It is the duty of a section hand who is at work upon a side track in the yard of a railroad company, and who knows that it is customary to shunt or kick cars along the tracks in the yard, unattended, for the purpose of making up trains, and that cars have just been run onto the track where he is at work, to keep a lookout for moving cars; and if he fails so to do, and is injured by a car coming down upon him unattended, he is guilty of such contributory negligence as will bar a recovery. *Schaible v. Lake Shore & M. S. R. Co.*, 97 Mich. 318, 56 N. W. Rep. 565.

Plaintiff was an employee of the defendant, doing repair work in one of its yards. He had long experience, and knew that switch engines were constantly moving to and fro making up trains. While working with his back toward approaching cars, in a place where the view was unobstructed, he was run over and injured by cars moving slowly. *Held*, that he was guilty of contributory negligence which would prevent a recovery. *Aerkfetz v. Humphreys*, 53 Am. & Eng. R. Cas. 459, 145 U. S. 418, 12 Sup. Ct. Rep. 835. See also *Myers v. Indianapolis, etc.*, R. Co., 113 Ill. 386, 1 N. E. Rep. 899.

But in *Louisville & N. R. Co. v. Potts*, 92 Ky. 30, 17 S. W. Rep. 185, it was held that where a servant of the company was in a proper place on the track in the discharge of his duty, he was not willfully negligent in not looking out for cars, of the approach of which he had no warning. See also *Erickson v. St. Paul & D. R. Co.*, 41 Minn. 500, 5 L. R. A. 786, 43 N. W. Rep. 332.

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LOUISVILLE SOUTHERN R. CO.

v.

HOOE.

(Court of Appeals of Kentucky, Nov. 5, 1898.)

Railroad in Street—Damage to Abutting Property—Personal Annoyance.*—In an action for damage caused by the operation of a steam railroad in a city street to abutting property, it was not error to instruct that the jury might consider in assessing damages whether the personal annoyance caused the occupant of the property by the operation of the railroad (if there was any) would conduce to a diminution of the value of the property, it appearing from the evidence that such property, plaintiff's residence, was constantly filled (when the windows were raised) with smoke; that sparks and cinders from engines fell thereon; that the railroad made two sharp curves in the immediate vicinity of the house, which had a tendency to increase the volume of smoke, sparks and cinders from defendant's engines at such points; and that a disagreeable, screeching noise was made thereby, which was not usually made by running trains.

Same—Verdict—Appeal.—A verdict for \$900, in such action, will not be disturbed on appeal, the residence being worth, before the construction of the railroad, between \$5,000, and \$6,000; and its value being in a large measure destroyed by the annoyance and discomfort caused the occupant by the operation of the railroad.

APPEAL by defendant from Mercer county circuit court.
Affirmed.

Thos. W. Bullitt and Bullitt & Shield, for appellant.

Guthrie & Vanarsdal and Bell & Bell, for appellee.

CHICAGO, R. I. & P. RY. CO.

v.

PARKS.

(Supreme Court of Kansas, Nov. 5, 1898.)

Frightening Horses—Sounding Whistle without Cause—Liability of Railroad.†—In order to render the master liable for a wrongful act of his servant, it must appear that the act was done either at the

*See note, 1 Am. & Eng. R. Cas., N. S., 48; 10 Am. & Eng. Enc. Law (2nd Ed.) 1122, 1123.

†See extensive note, 5 Am. & Eng. R. Cas., N. S., 282 *et seq.*

master's command, or in connection with the performance of some service or the transaction of some business for him. But an engineer in charge of an engine, and engaged in moving cars over the railroad of his employer, acts for the master in sounding the whistle and in giving signals at road crossings, as well as in moving his engine and train, unless it appears that the act is done from some personal motive of the engineer, and is disconnected from the service of the master; and where he causes a team crossing a public highway in close proximity to his engine to run away, by negligently and unnecessarily blowing the whistle of his engine as a signal while it is standing still, the railway company is liable for the injury resulting from the wrongful act.

Instructions.*—Where the court has given general instructions to the jury, fairly stating the law applicable to the case, it is not error to refuse instructions asked covering the same ground, though clothed in different language; and *held*, that no error was committed in giving and refusing instructions in this case.

(Syllabus by the Court.)

ERROR by defendant from Smith county district court.
Affirmed.

M. A. Low and *W. F. Evans*, for plaintiff in error.

H. H. Reed, *J. T. Reed*, and *D. M. Relihan*, for defendant in error.

WILLIAMSON *et al.*

v.

GORDON HEIGHTS RY. CO.

(*Court of Chancery of Delaware, May 11, 1898.*)

Charters—Construction of.†—A street railway charter, entitling the company to condemn private property, etc., provided that it should become void upon failure to complete and operate the road within two years from the passage of the granting act. The supplement to such act authorizing the company to construct a branch road, condemn private property, etc., merely provided in this connection that the company should be subject to all the duties and responsibilities imposed upon it by the original act. *Held*, that the company by its failure to complete and operate the branch road within two years from the passage of the supplemental act forfeited the right to condemn and enter upon complainant's lands.

*See extensive *note*, 5 Am. & Eng. R. Cas., N. S., 282 *et seq.*

†See notes at end of case.

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P. L. Cooper, Jr., for complainant.

Willard Saulsbury, for respondent.

NICHOLSON, CH., in delivering the opinion of the court, said: "There is no rule of construction more fixed and unyielding than that requiring strict construction of grants to corporations. Based upon sound considerations of public policy, and upon reasoning which has never been questioned, it would be mere waste of words for me to discuss it at this late date, or to comment upon the many cases cited by the counsel for the complainants in support and illustration of the rule. It seems to be none too strongly expressed by CHIEF JUSTICE BLACK when he says: 'In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. This is the rule sustained by all the courts in this country and in England.' *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. St. 22."

NOTES.

Charters—Construction.—The general rule as to the construction of charters of corporations is that the charter is to be construed most strictly against the corporation and in favor of the public in order to determine what powers have been conferred. *Eversfield v. Mid-Sussex R. Co.*, 5 Jur. N. S. 776, 3 De G. & J. 286; *Parker v. Great Western R. Co.*, 7 M. & G. 288, 49 E. C. L. 288; *Stourbridge Canal v. Wheeley*, 2 B. & Ad. 792, 22 E. C. L. 185; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. Rep. 957; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1; *Grand Lodge v. Waddill*, 36 Ala. 318; *Spring Valley Water Works v. San Francisco*, 52 Cal. 111; *Central, etc., Road Co. v. People*, 5 Colo. 39; *Hooker v. New Haven, etc., Co.*, 15 Conn. 321; *Florida, etc., R. Co. v. Pensacola, etc., R. Co.*, 10 Fla. 145; *Singleton v. Southwestern R. Co.*, 70 Ga. 464, 48 Am. Rep. 574; *St. Louis, etc., R. Co. v. Haller*, 82 Ill. 208; *Miners' Bank v. U. S.*, 1 Greene (Iowa) 553; *Maddox v. Graham*, 2 Metc. (Ky.) 73; *New Orleans, etc., R. Co. v. New Orleans*, 34 La. Ann. 429; *Baltimore v. Baltimore, etc., R. Co.*, 21 Md. 50; *Atty.-Gen. v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 361; *State v. Payne*, 129 Mo. 468; *Lake v. Virginia, etc., R. Co.*, 7 Nev. 294; *De Lancey v. Rockingham Farmers' Mut. F. Ins. Co.*, 52 N. H. 581; *Morris Canal, etc., Co. v. Central R. Co.*, 16 N. J. Eq. 419; *Pennsylvania R. Co. v. National R. Co.*, 23 N. J. Eq. 441; *Jersey City v. Morris Canal, etc., Co.*, 12 N.

J. Eq. 547; *Black v. Delaware, etc., Canal Co.*, 24 N. J. Eq. 474; *Jersey City Gaslight Co. v. Consumers' Gas Co.*, 40 N. J. Eq. 427; *Auburn, etc., Plank-road Co. v. Douglass*, 9 N. Y. 444; *McAden v. Jenkins*, 64 N. Car. 796; *Currier v. Marietta, etc., R. Co.*, 11 Ohio St. 228; *Dugan v. Bridge Co.*, 27 Pa. St. 303, 67 Am. Dec. 464; *Com. v. Erie, etc., R. Co.*, 27 Pa. St. 356, 67 Am. Dec. 471; *Packer v. Sunbury, etc., R. Co.*, 19 Pa. St. 211; *Citizens' R. Co. v. Africa*, (Tenn.) 42 S. W. Rep. 485; *Talmadge v. North American Coal, etc., Co.*, 3 Head (Tenn.) 337; *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306.

The same is true whenever a corporation claims any other power that is in derogation of common right, or infringes in any way upon the rights of the public or of particular individuals. *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Pike County v. Griffin, etc., Plank Road Co.*, 9 Ga. 475; *Alabama G. S. R. Co. v. Gilbert*, 71 Ga. 591; *Snell v. Buresh*, 123 Ill. 151; *Edward v. Lawrenceburgh, etc., R. Co.*, 7 Ind. 711; *Coolidge v. Williams*, 4 Mass. 145; *Auburn, etc., Plank-road Co. v. Douglass*, 9 N. Y. 444; *New York, etc., R. Co. v. Kip*, 46 N. Y. 546, 7 Am. Rep. 385; *Farnsworth v. Goodhue*, 48 Vt. 209.

Illustrations.—A corporation is not authorized to appropriate private property to public uses without the consent of the owner, unless it appears, either by the express words of the act of incorporation or by necessary implication therefrom, that the legislature intended to confer such authority upon the corporation. *Thacher v. Dartmouth Bridge Co.*, 18 Pick. (Mass.) 501.

An act to incorporate a dock company cannot be construed, by mere implication, to take away the rights of the adjoining shore owner to the water in front of him; and a power to enlarge and extend its wharf, though given by express words, must be construed so as to authorize such extension in front of lands of the company only. *Keyport, etc., Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 13, *affirmed* 18 N. J. Eq. 511.

TERRITORY OF NEW MEXICO

v.

UNITED STATES TRUST CO. OF NEW YORK *et al.*

(*Supreme Court of the United States, Dec. 5, 1898.*)

Exemption from Taxation—"Right of Way" Defined.*—By the act of July 27, 1866, the Atlantic and Pacific Railroad Company is

*See *Chicago, M. & St. P. Ry. Co. v. Cass County et al.* (N. Dak.), 11 Am. & Eng. R. Cas., N. S., 813, and *note*, p. 821.

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granted a right of way 100 feet in width on each side of said railroad, where it may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables and water stations, and such "right of way" is exempted thereby from taxation within the territories. *Held*, that, even if the railroad did not obtain the fee in such public land by virtue of the act, the "right of way" granted thereby is real estate of corporeal quality, and not a mere right of passage; and that whatever is erected thereon is a part thereof, and exempt from taxation if within a territory.

APPEAL by the Territory from the Supreme Court of the Territory of New Mexico. *Affirmed*.

Frank W. Clancey, for appellant.

Victor Morawetz and *C. N. Sterry*, for appellee.

JUSTICE MCKENNA, in delivering the opinion of the court, said: "The phrase right of way, besides, does not necessarily mean the right of passage merely. Obviously, it may mean one thing in a grant to a natural person for private purposes, and another thing in a grant to a railroad for public purposes, as different as the purposes and uses and necessities, respectively, are.

In *Keener v. Railroad Co.*, 31 Fed. 128, MR. JUSTICE BREWER defined the words right of way as follows: 'The term right of way has a twofold significance. It sometimes is used to mean the mere intangible right to cross,—a right of crossing, a right of way. It is often used to otherwise indicate that strip which the railroad company appropriates for its use, and upon which it builds its roadbed.' "

MR. JUSTICE BLATCHFORD said in *Joy v. St. Louis*, 138 U. S. 44, 45 Am. & Eng. R. Cas. 655, 11 Sup. Ct. 256: "Now, the term 'right of way' has a twofold signification. It is sometimes used to describe a right belonging to a party,—a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed.' That is, the land itself, not a right of passage over it. So, this court in *Railway Co. v. Roberts*, 152 U. S. 114, 14 Sup. Ct. 496, passing on a grant to one of the branches of the Union

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Pacific Railway Company of a right of way 200 feet wide, decided that it conveyed the fee. The effect of this decision is attempted to be avoided by saying that the distinction between an easement and the fee was not raised. The action was ejectment, and was brought in Kansas, and under the law of that state title could be tried in ejectment. Title was asserted by Roberts, who was plaintiff in the state court, and this court evidently considered it involved in the case. The language of MR. JUSTICE FIELD, who delivered the opinion of the court, would be unaccountable else. The difference between an easement and the fee would not have escaped his attention and that of the whole court, with the inevitable result of committing it to the consequences which might depend upon such difference.

Washburn in his work on Easements, on page 10, says: 'Whether the thing granted be an easement in land or the land itself may depend upon the nature and use of the thing granted.' To sustain this view the learned author cites *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159. In that case the court said: 'Whenever a grant is made of a right or easement in lands which fall within the class sometimes described as "noncontinuous,"—that is, where the use of the premises by the grantee for the purpose designated in the deed will be only intermittent and occasional, and does not embrace the entire beneficial occupation and improvement of the land,—the reasonable interpretation is that an easement in the soil, and not the fee, is intended to be conveyed. Among the most prominent of this class of easements is a way.' An ordinary way, of course, the court meant, one the use of which would be noncontinuous,—only intermittent and occasional; but a way not of that character, whose use would be continuous, not occasional, and which would embrace the entire beneficial occupation and improvement of the land, might require the fee for its enjoyment.—certainly would require more than a mere right of passage. 'Unlike the use of a private way,—that is, discontinuous,—the use of land condemned by a railroad company is perpetual

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and continuous.' *Railroad Co. v. Trimmer*, 53 N. J. Law, 3, 20 Atl. 761.

But, if it may not be insisted that the fee was granted, surely more than ordinary easement was granted,—one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property.

In *Smith v. Hall*, 72 N. W. 427, the supreme court of Iowa says, speaking of the right of way of a railroad: 'The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad, which is usually a permanent improvement,—a perpetual highway of travel and commerce,—and will rarely be abandoned by nonuser. The exclusive use of the surface is acquired, and damages are assessed, on the theory that the easements will be perpetual; so that ordinarily the fee is of little or no value unless the land is underlaid by a quarry or mine.'

'The right acquired by the railroad company, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive.' *Hazen v. Railroad*, 2 Gray, 580.

In *Railroad Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032, the supreme court of California sustained an action of ejectment for land constituting a part of the right of way granted to the Central Pacific Railroad by the act of July 1, 1862, by language similar to the grant in the case at bar.

Distinguishing the case from *Wood v. Turnpike Co.*, 24 Cal. 474, in which it was held that 'a road or right of way is an incorporeal hereditament, and ejectment is maintainable only for corporeal hereditaments,' the court said: 'We think that case plainly distinguishable from this. Here there was a special grant of a right of way two hundred feet in width on each side of the road. This grant is a conclusive determination of the reasonable and necessary quantity of land to be dedicated to the public use, and it necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land

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embraced within the grant. It is true the strip of land now actually occupied by the roadbed and telegraph line may be only a small part of the four hundred feet granted, but this fact is of no consequence. The company may at some time want to use more land for side tracks, or other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so.' The court quoted and approved the views expressed in *City of Winona v. Huff*, 11 Minn. 119 (Gil. 75), that 'for a mere easement perhaps an action of ejectment would not lie; but wherever a right of entry exists, and the interest is tangible, so that possession can be delivered, an action of ejectment will lie.' The same distinction was made in *Railroad Co. v. Trimmer*, *supra*, and the court said that, if the interest of the railroad company was a naked right of way, it would constitute no such right of possession of the land itself as would sustain the action; for such a right would be an incorporeal one, upon which there could be no entry, nor could possession of it be given under an *habere facias possessionem*. In this case it was held that the interest taken by the railroad was not an easement.

The interest granted by the statute to the Atlantic & Pacific Railroad Company, therefore, is real estate of corporeal quality, and the principles of such apply. One of these, and an elemental one, is that whatever is erected upon it becomes part of it. There are exceptions to the principle, but, as we are not concerned with them, we need not state them. Applications of the principle to railroads are illustrated by the decisions of this court and by those of other courts: As to rails put down against him from whom purchased (*Railroad Co. v. Cowdry*, 11 Wall. 459; *U. S. v. New Orleans R. Co.*, 12 Wall. 362; *Thompson v. Railroad Co.*, 132 U. S. 68, 40 Am. & Eng. R. Cas. 373, 10 Sup. Ct. 29), even though the contract of purchase provided that the property should remain that of the vendor and he has a right to remove the same (*Porter v. Steel Co.*, 122 U. S. 267, 7 Sup. Ct. 1206, and cases cited); in determining the relation of the

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 rails to the right of way (*Joy v. St. Louis*, 138 U. S. 1, 45 Am. & Eng. R. Cas. 655, 11 Sup. Ct. 243). In this case MR. JUSTICE BLATCHFORD said: "The track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident. A right of way is of no particular use to a railroad without a superstructure and rails; the track is a necessary incident to the enjoyment of the right of way." See, also, *Palmer v. Forbes*, 23 Ill. 300; *Hunt v. Iron Co.*, 97 Mass. 279; *City of New Haven v. Fair Haven & W. R. Co.*, 38 Conn. 422.

The principle has also illustrations in cases of taxation. *People v. Cassity*, 46 N. Y. 46; *Appeal Tax Court of Baltimore City v. Baltimore Cemetery Co.*, 50 Md. 432; *Osborne v. Humphrey*, 7 Conn. 335; *Parker v. Redfield*, 10 Conn. 490; *Lehigh Coal & Nav. Co. v. Northampton Co.*, 8 Watts & S. 334; *Chicago, M. & St. P. Ry. Co. v. Board of Sup'rs of Crawford Co.*, 48 Wis. 666, 5 N. W. 3; *City of Richmond v. Richmond & D. R. Co.*, 21 Grat. 604; *Mayor, etc., of Baltimore v. Baltimore & O. R. Co.*, 6 Gill, 288; *Osborn v. New York & N. H. R. Co.*, 40 Conn. 491; *Richmond & D. R. Co. v. Commissioners of Alamance*, 84 N. C. 504. 7 Am. & Eng. R. Cas. 339; *Inhabitants of Worcester v. Western R. Corp.*, 4 Metc. (Mass.) 564, 5 Am. & Eng. R. Cas., N. S., 705.

It is urged, however, that the rule of construction declared in *Railroad Co. v. Dennis*, 116 U. S. 665, 6 Sup. Ct. 625, and the cases there cited and approved, and repeated in *Railroad Co. v. Thomas*, 132 U. S. 184, 10 Sup. Ct. 68; *Railroad Co. v. Alsbrook*, 146 U. S. 294, 13 Sup. Ct. 72; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 306, 14 Sup. Ct. 592; *Railroad Co. v. Pendleton*, 156 U. S. 667, 15 Sup. Ct. 413; and *Turnpike Co. v. Sandford*, 104 U. S. 578,—determines in favor of appellant's contention. That we do not think so is probably sufficiently indicated, but we cite the cases to preclude the thought that they have been overlooked, or that the rule announced by them is questioned. Indeed, we regard it as salutary, and not impaired by our decision which simply rests on the terms of the statute."

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BOYLE

v.

FARMERS' LOAN & TRUST CO.

(Two Cases.)

HUNTINGTON v. SAME.

(Circuit Court of Appeals, Fifth Circuit, May 31, 1898.)

Foreclosure—Purchaser Delaying to Comply with His Bid—Title to Earnings.*—The purchaser of a railroad under a foreclosure sale is not entitled to the earnings of the road during the time he has delayed complying with his bid.

APPEALS by respondent from the Circuit Court of the United States for the Eastern District of Texas. *Affirmed.*

No. 661.

J. A. Baker and *R. S. Lovett*, for appellant.

L. W. Campbell, *M. F. Mott*, and *J. P. Blair*, for appellee.

No. 662.

J. P. Blair, *J. A. Baker*, and *R. S. Lovett*, for appellant.

L. W. Campbell and *M. F. Mott*, for appellee.

No. 663.

J. P. Blair, for appellant.

L. W. Campbell and *M. F. Mott*, for appellee.

NOTE.

Foreclosure of Railroad Mortgage—Right of Purchaser to Earnings before Completion of Sale.—A purchaser of a railroad at a foreclosure sale is not entitled to the net earnings of the road between the time of sale and possession by him, where the delay in delivering possession was due to his failure to comply promptly with the terms of sale. *Osterberg v. Union Trust Co.*, 93 U. S. 424.

ST. LOUIS, A. & S. R. CO. *et al.*

v.

O'HARA *et al.*

(Supreme Court of Illinois, Dec. 21, 1898.)

Receiverships—Lien for Cars—Mortgages—Priority.*—Where a railroad is in charge of a receiver for administration as a trust fund for the payment of incumbrances, a claim accruing about three

*See notes at end of case.

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months prior to the appointment of the receiver, for cars furnished, which were necessary to the successful operation of the road, is entitled to priority over mortgages existing when the claim accrued.

Same—Validity of Claim for Car Rentals.—A claim for car rentals was properly allowed in favor of one who furnished necessary cars for the use of the road when he was managing the road for the purchaser at a foreclosure sale (which was subsequently set aside for non-compliance with the terms of sale), as a credit against funds which came into his hands while he was in charge of the road.

Railroads—Officers—Right to Salary.—An officer of a railroad corporation cannot recover salary, unless the same is fixed by resolution or by-law passed by the board of directors.

APPEAL by defendants and others from Third district appellate court. *Affirmed.*

Patton, Hamilton & Patton, John C. Lanphier, Edward S. Robert, and Eleneious Smith, for appellants.

Ralph Crews and Seth F. Crews, for appellees.

NOTES.

Receiverships—Antecedent Claims for Car Rentals—Priority.—See *Grand Trunk Ry. Co. v. Central Vermont R. Co.*, 12 Am. & Eng. R. Cas., N. S., 865, and *note*, 866.

Same—Prior Operating Expenses and Betterments—Fosdick v. Schall.—In *Thomas v. Peoria & R. I. R. Co.* (C. C., N. D. Ill., 1888), 36 Am. & Eng. R. Cas. 381, HARLAN, J., stated the rules laid down in *Fosdick v. Schall* by the supreme court of the United States as follows: "(1) When a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment, from the income during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable. (2) As it frequently happens, when a railroad company becomes pecuniarily embarrassed, that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided, and as in this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt, the presumption is that every railroad mortgagee, in accepting his security, impliedly

agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. Consequently the income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. (3) If anything is taken from the current debt fund, and put into that which belongs to the mortgage creditors, the court may require, as a condition of an order to take possession of the mortgaged property and hold the future income for the mortgagees, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees, notwithstanding the mortgage, may, in terms, give a lien upon the profits and income; for, until possession of the mortgaged premises is actually taken, or something equivalent done, the whole earnings belong to the company, and are subject to its control. (4) So, also, if no order is made, when a receiver is appointed, that will, in terms, save the rights of creditors furnishing supplies, equipment, labor, etc., if it appear, in the progress of the cause, that bonded interest has been paid, additional equipment provided, or lasting or valuable improvements made, out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business; because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and, if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its hands as, if practicable, to restore the parties to their original equitable rights. (5) While ordinarily this power is confined to the appropriation of the income of the receivership, and the proceeds of mortgaged assets that have been taken from the company, cases may arise that will require the use of the proceeds of the sale of the mortgaged property in the same way; as when, before the appointment of the receiver, or in the administration of the cause, income applicable to the payment of old debts for current expenses is taken and used to make permanent improvements in the fixed property, or to buy additional equipment."

Same—Same—Diversion of Current Earnings.—When the current earnings of a railroad which ought in equity to have been employed to pay current debts contracted before the receiver's appointment

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for labor, supplies and the like, have been applied by the company to the payment of interest due mortgage creditors, or to pay for additional equipments for the road, or for valuable and lasting improvements, it is competent for the court to restore what has thus been improperly diverted, and to direct such current debts to be paid out of the income in the receiver's hands before anything derived from that source goes to the mortgage creditors. *Addison v. Lewis* (Va.), 9 Am. & Eng. R. Cas. 702; *Burnham v. Bowen* (U. S.), 17 Am. & Eng. R. Cas. 308; *Calhoun v. St. Louis & S. E. R. Co.*, 14 Fed. Rep. 9. And payment of the current debts may, if necessary, be enforced by the sale of the property. *Burnham v. Bowen* (U. S.), 17 Am. & Eng. R. Cas. 308.

LOUISVILLE & N. R. CO. *et al.*

v.

CENTRAL TRUST CO. OF NEW YORK *et al.*

(*Circuit Court of Appeals, Sixth Circuit, June 1, 1898.*)

Sale by Receiver—Track Rentals—Preferential Claims.—A claim for track rentals accruing subsequent to a mortgage of the lessee's property is not entitled to priority of payment over the mortgage debt out of the proceeds of a sale under the mortgage by a receiver, where it appears that the lessee was not insolvent during the period, for which rent is claimed; and that such period terminated 2 years prior to the possession of the receiver, although during such period the net earnings of the mortgaged road were applied to the payment of the interest on its bonds, and to the improvement of the mortgaged property.

Same—Equitable Claims.—In order to constitute an equitable claim upon the current income of a railroad, it must appear that the creditor asserting the claim at the time the debt was contracted, did, in fact, or presumably, rely upon an expectation of being paid out of such fund.

Same.—Claims for track rentals, are as a general rule, no more entitled to priority of payment than claims for rentals of rolling stock.

APPEAL by interveners from the Circuit Court of the United States for the District of Kentucky. *Affirmed.*

Helm Bruce, for appellants.

A. P. Humphrey, for appellees.

POLLOCK

v.

MAYSVILLE & B. S. R. Co.

(*Court of Appeals of Kentucky, Jan. 28, 1898.*)

Right of Way—Adverse Possession*—Forfeiture—Trespass.—Certain land was granted to defendant by deed as a right of way, upon condition that it should construct its railroad within a reasonable time. Defendant allowed the land to be subsequently sold at a sheriff's sale; and its purchaser deeded it to plaintiff, who took immediate possession. Defendant, 34 years after the land had been granted to it as a right of way, and 16 years after plaintiff had been in possession of it as its owner, entered upon the land and began for the first time to construct its road. *Held*, that plaintiff had held the land by adverse possession for fifteen years prior to the trespass, and was entitled to maintain an action of trespass.

Same—Legal Title.—Legal title to real estate can be acquired by adverse possession for 15 years.

Same—Nonuser.—Defendant's easement had been forfeited by its failure to construct the road within a reasonable time.

Same—Title of Grantor—Evidence.—The deed conveying the right of way to defendant should not have been considered as evidence in the case, no competent evidence having been introduced to show a title in its grantor.

Measure of Damages.—The measure of damages in such case is the actual value of the ground taken, and the damage done to the remainder of plaintiff's land by such taking, and such damages as plaintiff may be entitled to for the forcible entry or trespass upon his enclosure.

APPEAL by plaintiff from Lewis county circuit court. *Reversed.*

W. C. Halbert, for appellant.

Wadsworth & Cochran, for appellee.

NOTE.

Easement—Loss by Adverse Possession.—An easement, however acquired, is lost by continuous adverse possession for the statutory period. *McKinney v. Lanning*, 139 Ind. 170; *Louisville, etc., R. Co. v. Quinn*, 94 Ky. 310, *citing* 6 Am. & Eng. Encyl. of Law (1st Ed.) 147; *Hook v. Joyce*, 94 Ky. 450; *New York, etc., R. Co. v. Benedict*, 169 Mass. 262; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Horner v. Stillwell*, 35 N. J. L. 307; *Jewett v. Jewett*, 16 Barb. (N. Y.) 150; *Woodruff v. Paddock*, 130 N. Y. 618, *affirming* 56 Hun (N. Y.) 288; *Taylor v. Hampton*, 4 McCord L. (S. Car.) 96, 17 Am. Dec. 710; *Galveston v. Williams*, 69 Tex. 449.

LEWIS

v.

RIO GRANDE W. RY. CO.

(Supreme Court of Utah, Oct. 8, 1898.)

Public Lands—Right of Way—Pre-emption—Priority of Occupation.*—A railroad company, duly organized in Utah, having filed a copy of its articles and proofs of organization with the secretary of the interior, made a preliminary survey for its line in 1876, including the land in controversy, completed its location before November, 1877, commenced grading and continued to grade in 1878, and completed its road in 1879, from which time the road has been operated. A map and profile of a section of 20 miles of its railroad were filed with the secretary of the interior, under the act of congress of March 3, 1875, and the same were approved December 22, 1881. *Held*, that the approval of the map and profile by the secretary had the effect of perfecting the grant of the right of way, which by relation took effect as of the date of the location of the road. *Held*, further, that respondent, who purchased improvements in November, 1877, from parties who had occupied the lands in summer for dairy purposes, moved on the quarter section in which the demanded tract is situated May 1, 1878, with intent to pre-empt the same, made pre-emption filing August 7, 1885, and obtained patent July 2, 1890, was not the prior occupant, was chargeable with notice of the company's occupancy at the time respondent made settlement, and took title subject to the right of way of the appellant, purchaser of the road.

Same—Construction of Patent.—Under the facts above stated. *held*, that respondent's patent did not relate back so as to divest the company of its easement, and it was immaterial that the patent contained no reservation of the right of way.

(Syllabus by the Court.)

APPEAL by defendant from Fourth district district court.
Reversed.

Bennett, Harkness, Howat, Bradley & Richards and Thurman & Wedgwood, for appellant.

J. W. N. Whitecotton, for respondent.

*See notes, 1 Am. & Eng. R. Cas., N. S., 618; 11 Am. & Eng. R. Cas., N. S., 883.

MAXSON

v.

MICHIGAN CENT. R. CO.

(*Supreme Court of Michigan, May 24, 1898.*)

Contracts of Agents—Admissibility of Evidence.*—In an action by one injured while an employee of the defendant railroad company on an alleged parole contract, by which it was claimed defendant agreed to furnish plaintiff with work as long as he lived, the alleged consideration being plaintiff's refraining from prosecuting for damages, statements of defendant's agent through whom it was claimed such contract was entered into, made several years after the alleged transaction, were inadmissible to establish such contract.

Same—Authority of Division Superintendents.—It was error to submit to the jury the question whether or not a division superintendent had authority to make such contract for the company, such authority not being within the scope of his ordinary powers, and plaintiff having failed to show original authority on the part of such superintendent, or ratification by the company.

Same—Ratification—Evidence of.—The mere fact that plaintiff was employed for the company, after the accident, to perform services of which he was capable was not evidence either to sustain the alleged contract or of ratification.

ERROR by defendant to Wayne county circuit court. *Reversed.*

Russel & Campbell, for appellant.

Lehman Bros. (Navin & Sheehan, of counsel), for appellee.

NOTES.

Agents—Admissions as to Past Transactions.—The rule is well established that the declarations of an agent are only admissible as to matters within the scope of his authority, and only as to transactions then going on, and not as to past events, even though he may continue still to act as agent generally, or in other matters. *International & G. N. R. Co. v. Ragsdale*, 67 Tex. 24, 2 S. W. Rep. 515; *Bevis v. Baltimore & O. R. Co.*, 26 Mo. App. 19; *Coyle v. Baltimore & O. R. Co.*, 11 W. Va. 94; *McComb v. North Carolina R. Co.* 70 N. Car. 178; *Milwaukee, etc., R. Co. v. Finney*, 10 Wis. 388; *Treadway v. Sioux City, etc., R. Co.*, 40 Iowa 526; *Verry v. Burlington, etc., R. Co.*, 47 Iowa 549; *Virginia, etc., R. Co. v. Sayers*, 26 Gratt. (Va.) 328; *Union Pac. R. Co. v. Fray*, 35 Kan. 700; *Atchison, etc., R. Co. v. Wilkinson (Kan.)*, 39 Pac. Rep. 1093, 2 Am. & Eng. R. Cas., N. S., 473, *abs.*; *Gulf, etc., R. Co. v. Southwick (Tex. Civ. App.)*, 30

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S. W. Rep. 592; Gulf, etc., R. Co. v. York, 74 Tex. 364; Chesapeake & O. R. Co. v. Reeves (Ky.), 11 S. W. Rep. 464; Louisville, etc., R. Co. v. Ellis's Adm'x (Ky.), 2 Am. & Eng. R. Cas., N. S., 132, 30 S. W. Rep. 928; Wendt v. Chicago, etc., R. Co. (S. Dak.), 57 N. W. Rep. 226; Dietrich v. Baltimore, etc., R. Co., 58 Md. 356; Baltimore, etc., R. Co. v. State, 62 Md. 479, 50 Am. Rep. 233; Petrie v. Columbia, etc., R. Co., 27 S. Car. 63; Patterson v. South Carolina R. Co., 4 S. Car. 153; Wakefield v. South Boston R. Co., 117 Mass. 544; Stiles v. Western R. Corp., 8 Met. (Mass.) 44, 12 Am. Dec. 486; Huntingdon R., etc., Co. v. Decker, 82 Pa. St. 119; Erie, etc., R. Co. v. Smith, 125 Pa. St. 259, 11 Am. St. Rep. 895; Forsee v. Alabama G. S. R. Co., 63 Miss. 67, 56 Am. Rep. 801; Vicksburg, etc., R. Co. v. McGowan, 62 Miss. 684, 52 Am. Rep. 205; Southerland v. Wilmington, etc., R. Co., 106 N. Car. 100; Barker v. St. Louis, I. M. & S. R. Co. (Mo.), 2 Am. & Eng. R. Cas., N. S., 157, *abs.*, 28 S. W. Rep. 866; McDermott v. Hannibal, etc., R. Co., 73 Mo. 516, 39 Am. Rep. 526; Luby v. Hudson River R. Co., 17 N. Y. 131; Anderson v. Rome, etc., R. Co., 54 N. Y. 340; North Hudson County R. Co. v. May, 48 N. J. L. 401; Ohio, etc., R. Co. v. Stein, 133 Ind. 243; Bellefontaine R. Co. v. Hunter, 33 Ind. 336, 5 Am. Rep. 201; Vicksburg, etc., R. Co. v. O'Brien, 119 U. S. 99; St. Louis, etc., R. Co. v. Sweet, 57 Ark. 287; St. Louis, etc., R. Co. v. Kelley (Ark.), 31 S. W. Rep. 884; Durkee v. Cent. Pac. R. Co., 69 Cal. 533, 58 Am. Rep. 562; Hematite Min. Co. v. East Tenn., etc., R. Co., 92 Ga. 268; Carroll v. East Tenn., etc., R. Co., 82 Ga. 452; Holt v. Spokane, etc., R. Co. (Idaho), 35 Pac. Rep. 39; Michigan Cent. R. Co. v. Carrow, 73 Ill. 348; Chicago, etc., R. Co. v. Riddle, 60 Ill. 534; Wormsdorf v. Detroit City R. Co., 75 Mich. 472; Philbrook v. Clark, 77 Me. 176; Demeritt v. Meserve, 39 N. H. 521; Weideman v. Tacoma, etc., R. Co., 7 Wash. 517.

See generally, 1 Am. & Eng. Enc. Law (2nd Ed.), at p. 695.

Same—Admissions by General Agents.—See *note*, 1 Am. & Eng. Enc. Law (2nd Ed.) 697.

MILITARY INTERSTATE ASS'N OF SAVANNAH

v.

SAVANNAH T. & I. OF H. RY.

(*Supreme Court of Georgia, July, 27, 1898.*)

Railroads Subscribing to Stock—Action on Contract—Sufficiency of Petition.*—There was no error in dismissing on demurrer an action brought against a railway company of this state, chartered

*See note at end of case.

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under the general law, upon a contract of subscription for shares of stock in another incorporated company, when the plaintiff's petition alleged nothing showing how or why it was, for any legitimate use or purpose, either necessary or proper for the defendant to own and hold such stock.

(Syllabus by the Court.)

ERROR by plaintiff from city court of Savannah. *Affirmed.*

Alexander & Hitch, for plaintiff in error.

Barrow & Osborne, for defendant in error.

NOTE.

Power of Railroad Company to Take and Hold Stock in Another Corporation.—Railroad companies are no exception to the general rule which forbids one corporation, in the absence of express authority, to hold stock in another corporation. *Pearson v. Concord*, etc., R. Co., 62 N. H. 537, 13 Am. & Eng. R. Cas. 102, 119, *note*; *Hazelhurst v. Savannah*, etc., R. Co., 43 Ga. 13; *Central R. Co. v. Collins*, Ga. 582; *Green's Brice's Ultra Vires* 91; *Pierce on Railroads* 505; *Elkins v. Camden*, etc., R. Co., 36 N. J. Eq. 5, 233, 9 Am. & Eng. R. Cas. 590, 639; *Brightley's Digest* (Pa.), vol. 1, p. 343.

See also *Burke v. Concord R. Co.*, 61 N. H. 160, 8 Am. & Eng. R. Cas. 552 (railroad has no power to form partnership with another company). A railway corporation cannot in its own name subscribe for stock or be a corporator, under the general railroad law of New Jersey; nor can it do so by a simulated compliance with the provisions of the law through its agents as pretended corporators and subscribers of stock. *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475.

In *Pierce on Railroads* 505, it is said that the purchase by a railroad company of the stock of other corporations when not prohibited by statute may be allowed to a limited extent and for incidental purposes; but when it involves a misappropriation of the corporate funds or is a mere speculation, or is induced by a vicious purpose, it will be enjoined at the instance of the stockholders. See also *Hodges v. New England Screw Co.*, 1 R. I. 312, 3 R. I. 9.

In *Ryan v. Leavenworth*, etc., R. Co., 21 Kan. 365, it was held that, a railroad having authority to hold real and personal estate necessary for its uses, it will be presumed that a purchase by it of the stock of a connecting road was made for corporate purposes, and it will therefore be upheld.

Authority to subscribe may be given by express statutory provisions. See *White v. Syracuse*, etc., R. Co., 14 Barb. (N. Y.) 559 (such provisions are constitutional); *Mayor*, etc., of Baltimore *v. Baltimore*, etc., R. Co., 21 Md. 50 (Baltimore and Ohio road author

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ized to acquire any interest in any connecting road, not exceeding two-fifths of its estimated cost) ; *Atchison, etc., R. Co. v. Cochran*, 43 Can. 225, 19 Am. St. Rep. 129, 41 Am. & Eng. R. Cas. 48.

The mere fact that a corporation will be benefited by its subscription to or purchase of shares in another corporation does not affect the rule. Thus a subscription by an iron manufacturing company to the stock of a railroad company is not authorized merely because the construction of the railroad will enable the manufacturing company to get cheaper coal for use in its manufactures. *Valley R. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 26 Am. & Eng. Corp. Cas. 55.

LUND

v.

CHICAGO, R. I. & P. RY. CO. *et al.*

(*Circuit Court, D. Nebraska, Jan. 25, 1897.*)

Federal and State Jurisdiction—Removal to Federal Court.*—Where a railroad company subject to the jurisdiction of the courts of plaintiff's state, and the Union Pac. Ry. Co. and its receivers, appointed by a federal court, are sued jointly in a state court, the suit is removable to the federal court.

L. D. Holmes, for plaintiff.

W. R. Kelly and *E. P. Smith*, for defendants Union Pac. Ry. Co. and receivers.

McHUGH, D. J., in delivering the opinion of the court, said : "It is urged, however, that, conceding the correctness of what has been said, this cause is not removable, because the defendant Chicago, Rock Island & Pacific Railway Company, Consolidated, is a Nebraska corporation; that as to it no federal law is involved; that, since this last-named company could not, if sued alone, remove the cause to this court, this cause, being against all the defendants jointly, cannot be so removed. I do not think this position well taken. The fact that the action is against the defendants jointly, under the circumstances of this case, makes it removable. In this suit it is sought to hold the defendants jointly liable. We have already seen that all suits against the Union Pacific Railway Company and the receivers are suits which, of ne-

*See note at end of case.

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cessity, arise under federal law. No suit can be brought against them which does not involve the power under which they act, which is, as we have seen, the laws of the United States. So every action against them jointly with another must be a suit arising under federal law. No joint recovery can be had, no joint suit can be prosecuted, which does not reach all the defendants. To reach the Union Pacific Railway Company and the receivers in this case it is necessary to involve the laws whence they derive their power."

NOTE.

Removal of Causes against Federal Corporation to Federal Court.—See Railroad Removal Causes, 115 U. S. 1, 20 Am. & Eng. R. Cas. 324; *Ames v. Kansas*, 111 U. S. 449, 16 Am. & Eng. R. Cas. 522; *Union Pac. R. Co. v. McComb*, 1 Fed. Rep. 799, 68 How. Pr. (N. Y.) 478; *Osborn v. Bank*, 9 Wheat. (U. S.), 738; *Allen v. Texas Pac. R. Co.*, 24 Am. & Eng. R. Cas. 18, 25 Fed. Rep. 513; *Cruikshank v. Fourth Nat. Bank*, 16 Fed. Rep. 888; *Carpenter v. Northern Pac. R. Co.*, 75 Fed. Rep. 850, 5 Am. & Eng. R. Cas., N. S., 712, *abs*.

CHESAPEAKE & O. RY. CO.

v.

DIXON'S ADM'X.

(Court of Appeals of Kentucky, Oct. 28, 1898.)

Death by Wrongful Act—Damages—Question for Jury.—The court of appeals, in actions for death by wrongful act, will not interfere with the verdicts of juries upon the ground of excessive damages, unless they appear to have been given under the influence of passion or prejudice; and will not hold that a jury was so influenced merely because a verdict for \$10,000 was given for the death of a man 70 years of age.

Same—Same—Instructions.—In such action it was not error to instruct, in substance, that plaintiff should be reasonably compensated for the death of her intestate to an amount not exceeding \$30,000; and that the jury might consider the earning capacity of deceased.

Evidence.—Defendants were not prejudiced by the admission of evidence showing there was no flagman at the crossing where the accident happened, the jury not having been instructed in regard to

*See note at end of case.

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the railroad company's duty in this particular, and it appearing from the evidence that the crossing was such a one as to require a flagman, and, the rule confining the evidence to the particular acts of negligence charged not being applicable where no specific acts of negligence are pleaded.

Trainmen Made Joint Defendants to Prevent Removal to Federal Court.*—Where the railroad company is a citizen of another state, and the employees in charge of the train by which plaintiff's intestate was killed are citizens of the state, such employees may be made joint defendants with the company in order to prevent the removal of the case upon the ground of diverse citizenship, if the death was the result of negligence in running the train.

APPEAL by defendant from Boyd county circuit court.
Affirmed.

W. H. Wadsworth and A. M. J. Cochran, for appellants.

Jas. A. Scott and John F. Hager, for appellee.

NOTE.

Action for Tort of Servant—Joinder of Master and Servant.—Both the railroad company and its servant may be joined as defendants in an action for a tort of the servant committed while he was acting within the scope of his employment, even though the duty he was discharging could have been discharged without committing such tort. *Hussey v. Norfolk Southern R. Co.*, 98 N. Car. 34, 3 S. E. Rep. 923; *Hewett v. Swift*, 3 Allen (Mass.) 420.

CHICAGO & E. I. R. CO.

v.

KNAPP.

(*Supreme Court of Illinois*, Oct. 24, 1898.)

Master and Servant—Use of Defective Appliance—When Contributory Negligence.*—To charge a railroad employee with negligence in using an appliance known by him to be defective it must be shown that he knew the defect rendered its use dangerous.

Instructions.—Defendant's conductor, while inspecting his train before starting, noticed that a coupling pin was not exactly in place; and, while trying to remedy the defect, a drawbar pushed back and caused the coupling pin to crush his hand. In an action for the injury it was contended that certain instructions did not submit to the jury the question whether the plaintiff knew at the

*See note at end of case.

time that the drawbar was not reasonably safe. *Held*, that this contention was without merit, as both instructions required plaintiff to show that he was exercising reasonable care for his own safety.

APPEAL by defendant from Second district appellate court. *Affirmed*.

W. H. Lyford (*W. J. Calhoun*, of counsel), for appellant.
D. & T. J. and *J. M. Sheean*, for appellee.

WILKIN, J., in delivering the opinion of the court, said: "It is conceded the judgment of the appellate court settles the controverted questions of fact that the drawbar and coupling device were unsafe, and that the company was chargeable with negligence in allowing them to be in that condition at the time of the accident; but it is insisted that, the danger being known and obvious, the plaintiff, having voluntarily incurred it, cannot recover from the defendant for injuries suffered in consequence, and to allow him to do so would amount to compensating him for his own negligence,—citing *Pennsylvania Co. v. Lynch*, 90 Ill. 333, and *Stafford v. Railroad Co.*, 114 Ill. 244, 2 N. E. 185. We do not think the rule is properly applicable to the facts of this case. While it is true the plaintiff admitted that, before going between the cars, he saw the drawbar hanging down, and that the pin was not exactly in place, it does not appear that he knew these defects necessarily rendered the coupling dangerous. The evidence shows that notwithstanding the obvious conditions referred to, had the car been equipped with other usual appliances, and had the drawbar been in proper condition, the act of appellee in taking hold of the pin would not necessarily have been dangerous. 'Unless it shall appear from the evidence that a servant injured in his master's service had knowledge of the dangers of the service from the master's neglect of duty, it will not be presumed, as no one is presumed to knowingly incur physical pain and death when he can avoid it, at his discretion.' *Railroad Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021. To charge an employee with negligence in using a machine or appliance

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known by him to be defective, it must also be shown that he knew the defect rendered its use dangerous."

NOTE.

Defective Appliance—Assumption of Risk.—The fact that a servant knows the defective condition of the instrumentalities with which he works does not necessarily charge him with contributory negligence, or the assumption of the risks growing out of such defects. He must also understand, or ought, in the exercise of ordinary prudence, to understand, the risks to which these defects expose him. *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153, 33 N. W. Rep. 551, 5 Am. St. Rep. 832.

If a person of ordinary prudence would not have believed the defects dangerous, he may disregard them without losing his right to complain, if he suffers from the defect while pursuing his ordinary course. *Colorado C. R. Co. v. Ogden*, 3 Colo. 499.

There is a material distinction between knowledge of a defect in defective machinery furnished to an employee, and knowledge on his part of the danger of using or continuing to use such machinery until the danger is reasonably apparent. The master is not absolved from liability by the mere fact that the servant used the machinery in its defective condition, for whether the servant used ordinary care under the circumstances is for the jury. *St. Louis & S. F. R. Co. v. McClain*, 80 Tex. 85, 15 S. W. Rep. 789; *Cook v. St. Paul, M. & M. R. Co.*, 34 Minn. 45, 24 N. W. Rep. 311.

GUNN

v.

NEW YORK, N. H. & H. R. Co.

(*Supreme Judicial Court of Massachusetts, June 22, 1898.*)

Personal Injuries—Interrogatories by Plaintiff—President Refusing to Answer.—In an action in tort against a railroad company for personal injuries, under Pub. St. of Massachusetts, c. 167, § 53, defendant's president may be compelled to answer to interrogatories propounded by plaintiff relating to matters pertaining to the accident, knowledge of which he may have obtained in his official capacity, where his only objection to answer is that he has no personal knowledge of such matters.

Same—Error Not Cured.—The fact that testimony was introduced by plaintiff at the trial tending to show what the facts were in regard to many, if not all, of such matters, did not cure the error of refusing to order the president to answer such interrogatories.

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EXCEPTIONS by plaintiff from Suffolk county superior court. *Exceptions sustained.*

Shepard, Stebbins & Storer, for plaintiff.

Benton & Choate, for defendant.

YOUNG

v.

TEXAS & P. RY. CO.

(*Supreme Court of Louisiana, June 22, 1898.*)

Ejection of Trespasser—Negligence—Liability of Company.*—A company is liable if a conductor ejects a person from a car improperly, while the train is in motion.

Same—Perilous Place.—A trespasser on a railroad train must be ejected at a place not perilous for one alighting in the nighttime.

Same—Care Due Cripples.—To a crippled person, though unlawfully on a train, greater care and attention should be shown than to the one who may better protect himself in an unsafe place.

(Syllabus by the Court.)

APPEAL by defendant from parish of Caddo judicial district court. *Affirmed.*

Wise & Herndon, for appellant.

Thatcher & Welsh, for appellee.

CLEVELAND, C., C. & ST. L. RY. CO.

v.

BALLENTINE.

(*Circuit Court of Appeals, Seventh Circuit, Feb. 16, 1898.*)

Explosion of Oil Tank in Train Yard—Injury to Spectator Liability of Company.—A person who, merely to gratify his curiosity, goes into the yard of a railroad company where cars containing oil tanks are burning assumes the risk of injury therefrom; and the company is not liable for injuries sustained by him through the explosion of such tanks; and the fact that he was voluntarily assisting in saving property at the time is immaterial.

*See *Chesapeake & O. R. Co. v. Anderson*, Va., 9 Am. & Eng. R. Cas., N. S., 136 and foot-note.

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ERROR by defendant to the Circuit Court of the United States for the Southern District of Illinois. *Reversed and remanded.*

John T. Dye and George T. McNulty, for plaintiff in error.
James W. Patton, for defendant in error.

SOUTHERN RY. CO.

v.

PRATHER.

(*Supreme Court of Alabama, Nov. 5, 1898.*)

Accident at Crossing Obstructed by Cars—Proximate Cause.*—A railroad company is only liable for damage resulting proximately from its violation of a city ordinance prohibiting any railroad from allowing its cars to stand upon public street crossings.

Same—Crossing between Trains—Not Negligence Per Se.—Plaintiff, it was alleged in the complaint, on approaching a crossing, found it obstructed by defendant's cars, contrary to the city ordinances. There were double tracks, both of which were occupied by the cars. He undertook to drive around the cars on the near track and make a short turn in order to get across; and in doing so his buggy collided with the rails of defendant's track so violently as to throw him upon the ground to his personal injury. *Held*, that it did not appear that plaintiff was guilty of negligence *per se* in making such attempt.

Same—Negligence and Contributory Negligence.—The complaint did not present the case of injury resulting to a person who abandons the highway, and seeks a crossing by some other route, it appearing therefrom that there was sufficient space left of the public crossing over which plaintiff could pass, by driving in front of the cars on one side, and then, by making a short turn between the cars, he could pass in front of the cars on the other track, and never leave the highway. *Held*, that the complaint presented a good cause of action, but subject to the defense of contributory negligence.

Same—Wantonness or Recklessness—Pleading.*—The averment in such complaint that the failure to remove the cars constituted wantonness, recklessness, or wilful negligence was a mere conclusion of the pleader, as it did not appear from the facts alleged that defendant placed the cars on the crossing for the purpose of causing injury, or failed to remove them from any reckless indifference to conse-

*See notes at end of case.

quences, when conscious that such failure would probably result in injury.

Same—Pleading.—In one count of such complaint, plaintiff based his right of action on an ordinance set out therein, declaring that “no person shall obstruct any street in any manner calculated to delay any company in carrying their apparatus to or from any fire,” but did not allege that any company was so obstructed by defendant’s alleged negligence. *Held*, that such count should be amended.

Same—Same.—Plaintiff, not being defendant’s employee, was not required to aver the name of the agent of defendant by whose negligence or misconduct the alleged injury was sustained.

APPEAL by defendant from city court of Anniston. *Reversed*.

John B. Knox, for appellant.

T. C. Sensabaugh, for appellee.

COLEMAN, J., in delivering the opinion of the court, said : “The defendant is liable for all damage resulting proximately from a violation of valid city ordinances made for the protection of the public, but is not liable for damages which do not result proximately from such causes ; nor can it be said that a violation of a statute or ordinance made for the benefit or protection of certain persons or classes gives a right of action, under all circumstances, to persons or classes not within its purposes. The defendant’s cars remained stationary, and the injury resulted from the attempt of the plaintiff to cross the tracks in their obstructed condition. In the case of *Land Co. v. Mingea*, 89 Ala. 521, 529, 43 Am. & Eng. R. Cas. 309, 7 South. 666, we said : ‘It is not negligence *per se* for one who knows the dangerous condition of a highway to persist in traveling over it. He may lawfully proceed to do so if the act, under the circumstances of the particular case, does not evince a want of ordinary care on his part.’ This case cited that of *City Council of Montgomery v. Wright*, 72 Ala. 411. In the latter case the facts are that there had been a washout extending about two feet or more into the sidewalk, but there was a space of about seven feet, which furnished a safe way for

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pedestrians, and which was in constant use as such. In attempting to pass along the sidewalk at night, the plaintiff, who had knowledge of the defect, stepped into the washout, and was injured. This court held that the plaintiff was not guilty of negligence *per se* in attempting to walk along the sidewalk, but that it was a question for the jury. The decisions are not altogether in harmony as to what constitutes the proximate cause of an injury, resulting from obstructions of a highway. Turnpike Co. *v.* Jackson, 44 Am. Rep. 274, and note, p. 278; Turner *v.* Buchanan, 42 Am. Rep. 485, 16 Am. & Eng. Enc. Law, pp. 436, 440, and notes; Railway Co. *v.* Staley, 41 Ohio St. 118, 52 Am. Rep. 74.

NOTES.

Obstruction of Crossings in Violation of Ordinance or Statute—Negligence Per Se.—The obstruction of a street crossing by railroad engines in violation of an ordinance constitutes negligence *per se* on the part of the company. Central R. Co. *v.* Curtis, 87 Ga. 416, 13 S. E. Rep. 757; Denver, T. & G. R. Co. *v.* Robbins, 2 Colo. App. 313, 30 Pac. Rep. 261.

Same—Proximate Cause of Injury—Illustrations.—Plaintiff's intestate was driving on the highway, and upon approaching a track found it obstructed by a train of cars, and attempted to drive around at a dangerous place, and his cart was overturned and he was killed. *Held*, that the negligence of the company in obstructing the crossing could not be considered the proximate cause of the death. Jackson *v.* Nashville, C. & St. L. R. Co., 19 Am. & Eng. R. Cas. 433, 13 Lea (Tenn.) 491, 49 Am. Rep. 663.

S., who was engaged in carrying passengers from a hotel to defendant's depot, was compelled to stop and wait for a freight train which obstructed the street for more than five minutes, in violation of the statute to move on or divide and let him pass, when a passenger train came by, and the blowing of the steam and noise of the cars frightened his horses and they ran away, and he was severely injured. *Held*, that no negligence being shown in the management of the passenger train he could not recover, as the statutory negligence in allowing the freight train to obstruct the street was not the proximate cause of the injury. Sellick *v.* Lake Shore and Michigan Southern R. R. Co., 23 Am. & Eng. R. Cas. 338.

The Supreme Court of Ohio, in June, 1834, passed upon a case like the principal case in Pittsburgh, etc., R. R. Co. *v.* Staley, 52 Am.

R. 74. The railway company by its train, unlawfully obstructed a village street. Staley walked around the rear of the train, entered another street, and then having selected one of the many routes to her home, slipped on some ice, fell and sustained serious injury. The same company had placed the ice there in the process of clearing its track, which occupied a part of the street. *Held*, 1. That the proximate cause of the injury was the placing of the ice on the street. 2. If the company was not in fault in so placing the ice, it was not liable for the injury caused by the fall.

In the case of *Jackson v. N. C. & St. L. R. R. Co.*, 13 Lea, 491 (Tenn.), 49 Am. R. 663, the defendant had left a train of cars standing entirely across a highway crossing near its depot, and the plaintiff, desiring to reach the station, undertook to drive with a horse and cart, at a point where there was no crossing, and the track was raised above the ground and he was thrown off by the jolting of the cart and injured. *Held*, That the injury was not the proximate result of the defendant's conduct.

Willful Negligence—Pleading.—See *Louisville & N. R. Co. v. Brown*, 14 Am. & Eng. R. Cas., N. S., 794, and *note*, p. 802.

BALTIMORE & O. R. CO.

v.

LERSCH.

(*Supreme Court of Ohio, Jan. 26, 1897.*)

Abutting Owners—Damages.—When a railroad company has laid upon and along a street of a city a railroad track, and is running trains thereon, and the owner of abutting improved property, in an action brought under section 3283, Rev. St., to recover damages on account thereof, specifically alleges that the injuries of which he complains were caused by noises, smoke, dust, and sparks of fire, resulting from passing locomotives and cars, but does not set up any easement, fee, or other interest in the street, or aver any injury thereto, he should not be permitted on the trial of the action, over the objection of the railroad company, to establish, as the measure of his recovery, the difference between the value of the property before and after the track was laid.

Same—Evidence.—Where, in such case, the trial court, over the objection of the railroad company, permits the plaintiff to offer evidence of damages that did not result from the causes so specifically alleged, or if the court, over the objection of the railroad company, should instruct the jury to consider, in estimating damages, any impairment of the easement to his property, each of such rulings

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will constitute prejudicial error, for which a judgment for the plaintiff will be reversed.

Same--Limitations.—The provision of section 3283, Rev. St., by which an action brought under that section is required to be commenced within two years after the completion of the track, is a statute of limitation, and a delay beyond that period does not extinguish the right of recovery. If the railroad company does not, either by demurrer or answer, interpose an objection on account of the lapse of time, but proceeds to trial on the merits, it will be deemed to have waived the benefit of the provision.

(Syllabus by the Court.)

ERROR by defendant to Richland county circuit court.
Reversed.

Cummings & McBride and *J. H. Collins*, for plaintiff in error.

Jabez Dickey, for defendant in error.

BRADBURY, J., in delivering the opinion of the court, said: "The action was brought under section 3283, Rev. St., which reads: 'If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms, and conditions upon which the same may be used or occupied; and if the parties be unable to agree thereon, and it be necessary, in the judgment of the directors of such company, to use or occupy such road, street, alley, way, or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the appropriation of the property of individuals, but every company which lays a track upon any such street, alley, road, or ground, shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by civil action brought by the owner, before the proper court, at any time within two years from the completion of such track.' This language is so comprehensive that, if alone considered, no violence would be done to it by a construc-

tion which would permit, in an action brought under the statute, a full recovery for every injury inflicted to abutting property by the construction and operation of a railroad track along the street or other highway upon which the property abuts, including, if the averments of the petition are broad enough, not only damages for annoyance and injury resulting from smoke, sparks, dust, noises, caused by passing cars and locomotives, interruption of ingress and egress to the abutting property, but for appropriating to the use of the railroad whatever interest, whether a fee or easement, the abutting owner might own in the street. If the law affords no other remedy than that provided by this statute for such injuries, the inference might be very strong—perhaps irresistible—that full relief as above recited might be had in an action brought under it. This view of the subject seems to have been taken by OWEN, C. J., in *Railway Co. v. Gardner*, 45 Ohio St. 322, 13 N. E. 69. And, in such state of the law, a petition in such action might be regarded as sufficient to authorize that full measure of relief, if couched in terms broad enough, although failing to set forth specific injuries. Where, however, the party injured, as in the present case, specifies the injuries sustained, there seems to be no sound reason for affording him relief on account of other injuries of which he has not complained; and in this connection it is immaterial that the statute, or the rule of common law, under which the action was brought, authorizes a demand for more extended relief. The plaintiff, by his own averments, having limited his demand, should be held to the claim he has made. The claim thus put forth is the only one of which the defendant has notice, or is presumed to have made preparation to contest."

KERR

v.

GEORGIA R. CO.

(Supreme Court of Georgia, July 20, 1898.)

Damage to Goods Shipped into State—Remedies.—An action for damages to goods brought against a railroad company under section

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2298 of the Civil Code is not maintainable when it affirmatively appears that the goods in question were consigned from a point beyond the limits of this state under a contract stipulating for their delivery at a point within this state which could not, in the usual and ordinary course of transportation, be reached, and was not intended to be reached, by the defendant's railroad. If it incurred liability for damaging the goods while being transported on its line from the point to which they had been consigned under a contract of that kind to one of its stations, such liability could be established only by bringing a proper action, and supporting the same by appropriate evidence.

(Syllabus by the Court.)

ERROR by plaintiff from Dekalb county superior court.
Affirmed.

J. N. Glenn and J. L. C. Kerr, for plaintiff in error.

Jos. B. & Bryan Cumming and M. A. Candler, for defendant in error.

LUMPKINS, P. J., in delivering the opinion of the court, said: "The record discloses with certainty that his action was predicated upon section 2298 of the Civil Code, which reads as follows: 'When there are several connecting railroads under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus and until delivery to the connecting road; the last company which has received the goods as "in good order" shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability.' We are quite clear that, if Kerr had any cause of action at all against the Georgia Railroad Company, it was not maintainable under this section. It unquestionably refers to shipments over connecting lines of railroad over each of which the goods must pass, and are intended to pass, in order to reach the point of destination specified in the contract of shipment. As to this consignment from Murphysboro, Ill., to Atlanta, Ga., the Georgia Railroad could not possibly have been intended to be one of such connecting lines, and therefore the phrase

'the last company which has received the goods as "in good order," ' as used in the section cited, can have no bearing upon a case of this kind. The decision of this court in Railroad Co. v. Gann, 68 Ga. 350, is not applicable here, for it appeared in that case that the goods for injury to which the action was brought were billed from St. Louis, Mo., to Athens, Ga., and the contract of shipment contemplated that they should reach the latter place by being transported over the Georgia Railroad. The case of Western & A. R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, is directly in point, and supports the conclusion reached in the case at bar."

JONES

v.

ILLINOIS CENT. R. CO.

(*Supreme Court of Mississippi, April 17, 1899.*)

Loss of Dog—Damages—Question for Jury.—In an action for the value of a dog killed by a train, plaintiff was not entitled to a peremptory instruction, based merely on his opinion and that of his wife, fixing such value at \$100; and the question as to the value of the animal was properly left to the jury.

APPEAL by plaintiff from Yalobusha county circuit court.
Affirmed.

Brewer & Wilson, for appellant.

Mayes & Harris, for appellee.

WALKER

v.

NEW MEXICO & S. P. R. CO.

(*Supreme Court, March 1, 1897.*)

Obstruction of Surface Waters by Railroads—Liability under Common Law.*—Under the common-law rule, which governs in New Mexico, a railroad company may so construct the embankment of its roadbed as to hinder the natural flow of mere surface water, and thereby cause it to overflow higher ground.

*See notes at end of case.

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IN Error by plaintiff to the Supreme Court of the Territory of New Mexico. *Affirmed.*

Neill B. Field, for plaintiff in error.

Robert Dunlap, for defendant in error.

NOTES.

Obstruction of Surface Waters.—The decisions of the various courts of the several states concerning surface waters show an irreconcilable difference of opinion. In a number of states the courts have adopted what is known as the common-law rule, while in others what is called the civil-law rule has been followed. Referring to the origin of this difference, the Supreme Court of Missouri say, in the case of *Shane v. Kansas City, St. J. & C. B. R. Co.*, 71 Mo. 237, 5 Am. & Eng. R. Cas. 64, 36 Am. Rep. 480, "This difference may be traced to the great importance attached by the courts on one side to the maxim, *Sic ulere tuo, ut alienum non lædas*; whilst those adopting a contrary view seem disposed to give unlimited effect to the maxim, *Cujus est solum, ejus est usque ad cælum*, and therefore to leave every proprietor to take care of himself, except where streams are concerned."

Common-Law Rule.—The common-law rule was stated by the Massachusetts Supreme Court in the case of *Gannon v. Hargadon*, 92 Mass. (10 Allen) 106, 109, in the following terms: "The right of an owner of land to occupy and improve it in such manner and for such purpose as he may see fit, either by changing the surface, or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water which may accumulate thereon by rains and snows falling on its surface, or flowing on it from the surface of adjoining lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow. . . . *Cujus est solum, ejus est usque ad cælum* is a general rule applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land above, upon, and beneath the surface cannot be interfered with or restrained by any consideration of injury to other land which may be occasioned by the flow of more surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment; nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface waters by preventing it from going within the limits of his land, or by erecting barriers,

or changing the level of the soil so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface waters or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom, against one who does no act inconsistent with the due exercise of dominion over his own soil." This rule has been adopted in the following states :

Connecticut.—Adams *v.* Walker, 34 Conn. 466; Gillett *v.* Johnson, 30 Conn. 180; Wadsworth *v.* Tillotson, 15 Conn. 356, 39 Am. Dec. 391.

Indiana.—Cairo & V. R. Co. *v.* Stevens, 73 Ind. 278, 38 Am. Rep. 139; Schlichter *v.* Phillipy, 67 Ind. 201; Taylor *v.* Fickas, 64 Ind. 167, 31 Am. Rep. 114.

Kansas.—Kansas City & E. R. Co. *v.* Riley, 33 Kan. 374, 20 Am. & Eng. R. Cas. 116; Gibbs *v.* Williams, 25 Kan. 214, 37 Am. Rep. 241; Atchison, T. & S. F. R. Co. *v.* Hammer, 22 Kan. 763; Palmer *v.* Waddell, 22 Kan. 352.

Maine.—Murphy *v.* Kelley, 68 Me. 521; Morrison *v.* Bucksport & B. R. R. Co., 67 Me. 353; Greeley *v.* Maine Cent. R. R. Co., 53 Me. 200; Bangor *v.* Lausil, 51 Me. 521.

Massachusetts.—Jackman *v.* Arlington Mills, 137 Mass. 277; Rathke *v.* Gardner, 134 Mass. 14; Macomber *v.* Godfrey, 108 Mass. 219; Emery *v.* Lowell, 104 Mass. 13; Bates *v.* Smith, 100 Mass. 181; Curtis *v.* Eastern R. Co., 96 Mass. (14 Allen) 55; Franklin *v.* Fisk, 95 Mass., 13 Allen 211; Gannon *v.* Hargadon, 92 Mass., 10 Allen 106; Dickinson *v.* Worcester, 89 Mass., 7 Allen 19; Flagg *v.* Worcester, 79 Mass. (13 Gray) 601; Parks *v.* Newburyport, 76 Mass., 10 Gray 28; Ashley *v.* Wolcott, 65 Mass., 11 Cush. 192.

New Hampshire.—Sweet *v.* Cutts, 50 N. H. 376, 9 Am. Rep. 276.

New York.—Barkley *v.* Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Lynch *v.* Mayor, 76 N. Y. 60, 32 Am. Rep. 271; Gould *v.* Booth, 66 N. Y. 62; Vanderwiele *v.* Taylor, 65 N. Y. 341; Cohocton Stone R. *v.* Buffalo, N. Y. & E. R. R., 51 N. Y. 573; Curtiss *v.* Ayrault, 47 N. Y. 73; Cott *v.* Lewiston R. R. Co., 36 N. Y. 214; Pixley *v.* Clark, 35 N. Y. 532; Brown *v.* Bowen, 30 N. Y. 538; Goodale *v.* Tuttle, 29 N. Y. 459; Bellinger *v.* New York Cent. R. R., 23 N. Y. 42; Waffle *v.* Porter, 61 Barb. (N. Y.) 130; Waffle *v.* New York C. R., 58 Barb. (N. Y.), 413; Trustees *v.* Youmans, 50 Barb. (N. Y.) 316; Ellis *v.* Duncan, 21 Barb. (N. Y.) 230; Sleight *v.* Kingston, 11 Hun (N. Y.), 594; Wagner *v.* Long Island R. Co. 2 Hun (N. Y.), 633; Gardner *v.* Newburgh, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526.

Rhode Island.—Wakefield *v.* Newell, 12 R. I. 75, 34 Am. Rep. 598; Buffum *v.* Harris, 5 R. I. 253.

Vermont.—Beard *v.* Murphy, 37 Vt. 104; Chatfield *v.* Wilson, 28 Vt. 49.

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Wisconsin.—*Lessard v. Stram*, 62 Wis. 112, 51 Am. Rep. 715; *Hanlin v. C. & U. W. R. Co.*, 61 Wis. 515; *O'Connor v. Fond du Lac, A. & P. R. Co.*, 52 Wis. 530, 5 Am. & Eng. R. Cas. 82, 38 Am. Rep. 753; *Allen v. Chippewa Falls*, 52 Wis. 434, 38 Am. Rep. 748; *Eulrich v. Richter*, 37 Wis. 226; *Fryer v. Warne*, 29 Wis. 511; *Hoyt v. Hudson*, 27 Wis. 656; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50.

Civil-Law Rule.—Under what is known as the civil-law rule, the owner of the higher land has a servitude or natural easement upon the lower adjoining land for the discharge of all surface waters flowing naturally thereon from the higher land, and the owner of the lower land cannot prevent or obstruct the natural passage of such water to the injury of the higher land. The grounds upon which this rule rests are given in the case of *Martin v. Riddle*, 29 Pa. St. 415, in which the court said, "Where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arising from this position is usually more than compensated by other circumstances: hence the owner of the lower ground has no right to erect embankments whereby the natural flow of the water from the upper grounds shall be stopped, nor has the owner of the upper ground a right to make any excavations or drains by which the flow of water is diverted from its natural channel, and a new channel made on the lower ground; nor can he collect into one channel, waters usually flowing off into his neighbors' fields by several channels, and thus increase the waste upon the lower fields." And in the case of *Kauffman v. Griesemer*, 26 Pa. St. 407, 413, 67 Am. Dec. 437, it was remarked, that "almost the whole law of water courses is founded in the maxim of the civil law, *aqua currit et debet currere ut currere solebat*. Because water is descendible by nature, the owner of the dominant or superior heritage has an easement in the servient or inferior tenement for the discharge of all waters which by nature rise in or fall upon the superior." The rules set out in these two cases have been adopted in the following states: to wit,—

Alabama.—*Farris v. Dudley*, 78 Ala. 124, 56 Am. Rep. 24; *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147.

California.—*Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213.

Illinois.—*Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Gormley v. Sanford*, 52 Ill. 158; *Gilham v. Madison County R. Co.*, 49 Ill. 484; *Nevins v. City of Peoria*, 41 Ill. 502.

Iowa.—*Bartle v. City of Des Moines*, 38 Iowa, 414; *Simpson v. Keokuk*, 34 Iowa, 568; *Russell v. Burlington*, 30 Iowa, 262; *Ellis v. Iowa City*, 29 Iowa, 229; *Livingston v. McDonald*, 21 Iowa, 160.

Louisiana.—Lattimore *v.* Davis, 14 La. 161, 33 Am. Dec. 581; Martin *v.* Jett, 12 La. 501, 32 Am. Dec. 120; Minor *v.* Wright, 16 La. An. 151; Hooper *v.* Wilkinson, 15 La. An. 497, 77 Am. Dec. 194.

Maryland.—Philadelphia, W. & B. R. Co. *v.* Davis, 34 Am. & Eng. R. Cas. 143.

Michigan.—Boyd *v.* Conklin, 54 Mich. 583.

North Carolina.—Porter *v.* Durham, 74 N. C. 767; Overton *v.* Sawyer, 1 Jones (N. C.), L. 308, 75 Am. Dec. 444.

Ohio.—Tootle *v.* Clifton, 20 Ohio St. 247, 10 Am. Rep. 732; Butler *v.* Peck, 16 Ohio St. 334; Crawford *v.* Rambo, 44 Ohio St. 279.

Pennsylvania.—Hays *v.* Hinkleman, 68 Pa. St. 324; Martin *v.* Riddle, 26 Pa. St. 415; Kauffman *v.* Griesemer, 26 Pa. St. 407, 67 Am. Dec. 437.

Tennessee.—Louisville & N. R. Co. *v.* Hays, 11 Lea (Tenn.), 382, 14 Am. & Eng. R. Cas. 284; Carriger *v.* East Tennessee & V. R. Co., 8 Lea (Tenn.), 388.

Modified Doctrine.—In *Arkansas* the court, in the case of Little Rock & F. S. R. Co. *v.* Chapman, 39 Ark. 463, 43 Am. Rep. 280. repudiated the civil-law rule purely as such, and also the common-law rule in its utmost rigidity, and expressed preference for a rule under which each case would be decided upon its merits, with a reasonable regard at once to the right of the lower owner to ward off surface waters from his premises, and of the maxim, *sic utere tuo, ut alienum non lædas*.

In South Carolina.—In Waldrop *v.* Greenville, L. & S. Ry. Co., the South Carolina court has, in an opinion *obiter*, expressed its preference for the rule as laid down in Arkansas court.

Conflicting Decisions.—In *Missouri*.—In Missouri the court in their earlier decisions followed the common-law rule (see Munkers *v.* Kansas City, St. J. & C. B. R. Co., 60 Mo. 334, 72 Mo. 514, 5 Am. & Eng. R. Cas. 79; Hoshier *v.* Kansas City, St. J. & C. B. R. Co., 60 Mo. 329; McCormick *v.* Kansas City, St. J. & C. B. R. Co., 57 Mo. 433), but departed therefrom in two subsequent cases, and announced their preference for the civil-law rule. See Shane *v.* Kansas City, St. J. & C. B. R. Co., 71 Mo. 239, 5 Am. & Eng. R. Cas. 64, 36 Am. Rep. 480; McCormick *v.* Kansas City, St. J. & C. B. R. Co., 70 Mo. 359, 35 Am. Rep. 43. In the later cases it has, however, reverted to the common-law rule, originally sanctioned by them. See Benson *v.* C. & A. R. R. Co., 78 Mo. 504; Stewart *v.* City of Clinton, 70 Mo. 603. And in the case of Abbott *v.* Kansas City, St. J. & C. B. R. R. Co., 83 Mo. 271, 20 Am. & Eng. R. Cas. 103, 53 Am. Rep. 481, it expressly overruled the decisions which follow the civil-law rule.

In New Jersey.—In New Jersey the only decision directly in point

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adopts the common-law rule. See *Bowlsby v. Speer*, 31 N. J. L., 2 Vr. 352. But in the case of *Field v. West Orange*, 36 N. J. Eq., 9 Stew. 118, 27 N. J. Eq., 12 C. E. Gr. 600, the vice-chancellor said, "The broad doctrine declared by some courts, that no right of any kind can be claimed in the flow of surface water, and that neither its retention, diversion, repulsion, nor altered transmission will constitute an actionable injury, has never been adopted in all its length and breadth in this state."

Obiter Dicta.—*In West Virginia.*—In this state there are no decisions bearing directly upon the point; but in *Gillison v. Charleston*, 16 W. Va. 284, 303, the court, after an examination of the authorities, say, "A part of the authorities we have cited seem to recognize the principle that individuals and municipal corporations have the right to dispose of surface water in any manner they please, to prevent its flow over adjoining land upon their premises, although the result may be to flood the adjoining land, or expel it, throw it upon the lands of their neighbors, and in either case are not liable to an action. These cases seem to lose sight entirely of the wholesome principle of ethics, as well as law, that a man may use his own property in any manner he pleases, providing he does not thereby interfere with the rights of his neighbor."

Statutory Provisions.—*In Texas.*—In Texas there has been no decision upon the point, but in the case of railroads there is a statute of that state which provides that railroads shall be liable for any obstruction in the flow of surface waters. See *Gulf, Colorado, & S. F. R. R. Co. v. Helsley*, 62 Tex. 593, 20 Am. & Eug. R. Cas. 89.

PARKER

v.

NORFOLK & C. R. Co.

(*Supreme Court of North Carolina, Nov. 1, 1898.*)

Railroad Diverting Surface Water—Damage to Lower Land.—The holder of upper land may increase and accelerate the flow of water in its natural course, but cannot divert other waters, to the damage of the lower lands, and the fact that the upper holder is a railroad company does not confer additional privileges upon it, in this respect.

Damages*—Appeal.—Where the evidence as to damages was conflicting the verdict cannot be disturbed on appeal upon the ground that the jury in assessing damages were not governed by the evidence.

*See *Walker v. New Mexico & S. P. R. Co.* (U. S.), *ante*, and *notes*.

APPEAL by defendant from Bertie county superior court.
Affirmed.

George Cowper, for appellant.

Francis D. Winston, for appellee.

BALTZEGER

v.

CAROLINA MIDLAND RY. CO.

(*Supreme Court of South Carolina, Feb. 23, 1899.*)

Accumulation of Surface Water—Liability.*—Under the common law, damages caused by the mere accumulation of surface water are not actionable.

Same—Nuisances—Pleading.—Allegations that surface water, accumulated by a railroad embankment, and by a ditch on the lower side of the embankment, remains a considerable while after each rain and flood, and emits nauseous odors and gases, which poison and pollute the air in and around plaintiff's dwelling house, and renders it dangerous to live in, are not sufficient to show that such accumulation of surface water is a nuisance *per se*.

Same—Same—Same.—Such allegations together with the statement that plaintiff's dwelling is in the corporate limits of a town, and within 100 feet of the line of railroad, show that such accumulation of surface water constitutes a public nuisance.

Same—Same—Same.—Such allegations show that the causes which led to plaintiff's injury might reasonably be expected to affect others in the neighborhood, and therefore his injury was not special.

Statutes.—The statutory provisions cited by plaintiff's attorneys are not applicable.

APPEAL by plaintiff from Aiken county circuit court of common pleas. *Affirmed.*

G. W. Croft & Son and *R. L. Gunter*, for appellant.

Henderson Bros. and *Robt. Aldrich*, for respondent.

*See *Walker v. New Mexico & S. P. R. Co.* (U. S.), *ante* and *notes*.

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CLEVELAND, C., C. & ST. L. RY. CO.

v.

PEOPLE *ex rel.* JETT.*(Supreme Court of Illinois, Oct. 24, 1898.)*

Trains Engaged in Interstate Travel—Mandamus to Compel Stoppage at Stations—Police Powers of State.—It was within the power of the legislature to enact the law requiring railroad corporations to stop all their regular passenger trains at their railroad stations at county seats for a sufficient length of time to receive and let off passengers with safety; and such law is applicable to a train running regularly every day upon an advertised time-card of the company, although it is engaged exclusively in interstate travel, from points wholly without to points wholly without the state of Illinois, and no tickets are sold, or passengers received thereon from points in the state to points in the state, a corporation operating such a train being, for all purposes of local government a domestic corporation subject to the police control of the state legislature.

Same—Interstate Commerce.—The application of the law to such train is not an interference with interstate commerce, but a lawful exercise of the police power of the state; although the company furnishes sufficient accommodation for intra state travel, and there is an urgent demand on the route for a train devoted exclusively to interstate travel.

APPEAL by defendant from Montgomery county circuit court. *Affirmed.*

John T. Dye and Geo. F. McNulty, for appellant.

M. T. Moloney, Atty. Gen., and Thos. M. Jett, State's Atty. (T. J. Scofield, Jas. M. Truett, and M. L. Newell, of counsel), for appellee.

PHILLIPS, J., in delivering the opinion, said: "In *Chicago & A. R. Co. v. People*, 105 Ill. 657, 13 Am. & Eng. R. Cas. 42, we said (page 661): 'In the enactment of the law requiring all regular passenger trains to stop at county seats, the legislature, no doubt, had in view the great benefit the public would derive in the increased facilities for reaching the county seat, to aid in the dispatch of business in courts, in

*See notes at end of case.

the prompt arrest and prosecution of criminals who might be indicted in the courts, in the attendance of witnesses, grand and petit jurors,—indeed, the prompt and efficient transaction of all business in the courts held at the county seat,—and the facility for the examination of the records on the sale and conveyance of property. These and various other matters pertaining to the welfare of the public doubtless led to the enactment of the law, and in its enactment we are fully satisfied that the legislature transcended none of its powers, nor did it violate any chartered right of the railroad company.'

In granting a charter to a private corporation, the state does not part with its power to enact proper police regulations. Corporations accept their charters upon the implied condition that they are to exercise their rights subject to this power of the state. The legislature has the power, by the enactment of general laws from time to time, as the public exigences may require, to regulate corporations in the exercise of their franchises, so as to provide for the public safety, health, and welfare. *Railroad Co. v. Loomis*, 13 Ill. 548; *Railroad Co. v. McClelland*, 25 Ill. 123; *Illinois Cent. R. Co. v. People*, 143 Ill. 434, 33 N. E. 173. This corporation, operating a railroad across the state of Illinois, is, for all purposes of local government, a domestic corporation, subject to the police control of the legislature of this state.

In *Chicago & A. R. Co. v. People*, 13 Am. & Eng. R. Cas. 42, *supra*, it was said (page 659): 'The train in question was equipped and operated in the same manner as any other passenger train on the road. It carried passengers and baggage, as did other trains. It ran upon the official time-table of the company, as other trains did. Indeed, the only difference between this and the other passenger trains on the road was that the other two stopped at all the stations, while this did not. On account of this difference, can the train, within the meaning of the statute, be regarded other than a regular passenger train? We think not. The language of the act would not, perhaps, include a wild train, a freight train, an excursion train, or a special train; but where a

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train was engaged in carrying passengers, running regularly every day upon an advertised time-card of the company, equipped as all other passenger trains are, we are satisfied such a train was designed by the legislature to fall within the terms of the act, "all regular passenger trains." Had the legislature intended to except a fast train or a through train from the operation of the law, it would have been an easy matter to have framed the law in such a way that no doubt could have existed in regard to the intention, and, if such had been intended, language of a different character would no doubt have been used.' To the same effect is *People v. Louisville & N. R. Co.*, 120 Ill. 48, 10 N. E. 657.

In the case of *Stone v. Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, it was said: 'There can be no doubt that each of the states through which the Mobile & Ohio Railroad passes incorporated the company for the purpose of securing the construction of a railroad from Mobile, through Alabama, Mississippi, Tennessee, and Kentucky, to some point near the mouth of the Ohio river, where it would connect with another railroad to the Lakes, and thus form a continuous line of interstate communication between the Gulf of Mexico in the South and the Great Lakes in the North. It is equally certain that congress aided in the construction of parts of this line of road so as to establish such a route of travel and transportation; but it is none the less true that the corporation created by each state is, for all the purposes of local government, a domestic corporation, and that its railroad within the state is a matter of domestic concern. Every person, every corporation, everything within the territorial limits of a state, is, while there, subject to the constitutional authority of the state government. Clearly, under this rule, Mississippi may govern this corporation, as it does all domestic corporations, in respect to every act and everything within the state which is the lawful subject of state government. It may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state, and it

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would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi. So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of the road as lies within the state; to stop its trains at railroad crossings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and time-tables at proper places, and other things of a kindred character, affecting the comfort, convenience, or safety of those who are entitled to look to the state for protection against the wrongful or negligent conduct of others. This company is not relieved entirely from state regulation or state control in Mississippi simply because it has been incorporated by, and is carrying on business in, the other states through which its road runs. While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed by the constitution of the United States within the exclusive jurisdiction of congress; that is to say, using the language of this court in *Cardwell v. Bridge Co.*, 113 U. S. 210, 5 Sup. Ct. 425, "when the subjects on which it is exerted are national in their character, and admit and require uniformity of regulations affecting all states alike." Under this rule, nothing can be done by the government of Mississippi which will operate as a burden on the interstate business of the company, or impair the usefulness of its facilities for interstate traffic. It is not enough to prevent the state from acting that the road in Mississippi is used in the aid of interstate commerce. Legislation of this kind, to be unconstitutional, must be such as will necessarily amount to or operate as a regulation of business without the state as well as within.'

While the regulation and control of interstate commerce has been confided exclusively to congress, and a state can interfere with transportation into or through its borders only to the extent absolutely necessary for its own protection,

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still, whatever tends to promote the health, safety or welfare of society would be a proper exercise of the police power. *Toledo, W. & W. Ry. Co. v. City of Jacksonville*, 67 Ill. 37. Whatever it is necessary to provide for the public welfare and the general security is within the police power of the government. Whether a particular regulation is a reasonable exercise of the police power is strictly a judicial question, but the lawmaking power is the sole judge of when the necessity exists, and when, if at all, it will exercise the right to enact such laws. As held in *Chicago & A. R. Co. v. People*, 13 Am. & Eng. R. Cas. 42, *supra*: 'The prompt and efficient transaction of all business in the courts held at the county seat, * * * and various other matters pertaining to the welfare of the public, doubtless led to the enactment of the law.' Such a statute for such a purpose would be a proper exercise of the police power of the state.

It is insisted that while, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health, and comfort of persons, and for the protection of property there situated, yet a subject-matter which has been confided exclusively to congress by the constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action. While admitting this proposition to be true so far as it goes, yet we find no warrant for holding that the state is excluded from an exercise of a police power looking to the general welfare of the public, or that that subject-matter has been by the constitution confided exclusively to the congress of the United States. Although the regulation of interstate commerce is confided to congress, the railroads within this state are domestic concerns, subject to the constitutional authority of the state government, which may regulate freights and fares for business done exclusively within the state, and make needful police regulations. As held in *Stone v. Trust Co.*, *supra*: 'This company is not relieved entirely from state regulation or state control * * * because it has been incorporated by, and is carrying on busi-

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ness in, the other states through which its road runs.' If this latter fact deprived the state of the exercise of the police power, the lives and property of its citizens might be sacrificed in crowded thoroughfares, and the state be powerless to protect them."

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Constitutionality of Statute Requiring Trains to Stop at County Seats.—See *Gladson v. State of Minnesota* (U. S.), 7 Am. & Eng. R. Cas., N. S., 558 and *foot-note*.

In *Illinois* and *Minnesota* there are statutes which provide that all regular passenger trains run by any common carrier operating a railroad in these states shall stop a sufficient time at all county seats within the state to take on and discharge passengers from such trains with safety. *Chicago, etc., R. Co. v. People*, 105 Ill. 657, 13 Am. & Eng. R. Cas. 42; *People v. Louisville, etc., R. Co.*, 120 Ill. 48; *Illinois Cent. R. Co. v. People*, 143 Ill. 434; *Gladson v. State*, 17 Sup. Ct. Rep. 627, *affirming* 57 Minn. 385.

These statutes have been held to be a valid exercise of the police power of the state so far as regards the running of trains wholly within the state. *Chicago, etc., R. Co. v. People*, 105 Ill. 657.

Not a Violation of Federal Constitution.—In *Chicago, etc., R. Co. v. People*, 105 Ill. 657, it was claimed that the statute requiring passenger trains to stop at county seats was, in effect, a regulation of interstate commerce, and therefore invalid. The court held, however, that the statute did not undertake to regulate commerce between the states, that it imposed no restriction upon the introduction or transportation of any articles of commerce, and was but a proper exercise of the police power of the state. See also *Illinois Cent. R. Co. v. People*, 143 Ill. 434.

Modification of Rule by Supreme Court.—In *Illinois Cent. R. Co. v. Illinois*, 163 U. S. 142, the Supreme Court of the United States, while recognizing the right of the state of Illinois to compel a railroad company to perform the duties imposed by its charter of carrying passengers and goods between its *termini* within the state, modifies the rule as laid down by the Supreme Court of Illinois and holds that the state can do nothing which will directly burden or impede the interstate traffic of the company or impair the usefulness of its facilities for such traffic. A state statute which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States cannot be considered as a reasonable police regulation. See also *Dubuque, etc., R. Co. v. Richmond*, 19 Wall. (U. S.) 584; *Stone v. Farmers' L. & T. Co.*, 116 U. S. 308; *Smith v. Alabama*, 124 U. S. 465.

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Presumption as to, in action for death of employee.

Louisville & N. R. Co. *v.* Miliken's Adm'x (Ky.), 742.

Question for jury.

Crouse *v.* Chicago & N. W. Ry. Co. (Wis.), 780.

Exton *et ux.* *v.* Central R. Co. of New Jersey (N. J.), 240.

Louisville & N. R. Co. *v.* Miliken's Adm'x (Ky.), 742.

McTavish *v.* Great Northern Ry. Co. (N. Dak.), 59.

Nelson *v.* Southern Pac. Co. (Utah), 374.

Servant guilty of, cannot recover for injuries.

Seldomridge *v.* Chesapeake & O. Ry. Co. (W. Va.), 639.

Servant using defective appliance with knowledge of defect is not guilty of contribu-

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tory negligence unless he knew such defect rendered it dangerous.

Chicago & E. I. R. Co. *v.* Knapp (Ill.), 828.

CONTRACT OF INDEMNITY.

Railway company may contract with news company for indemnity against any loss by reason of injury to latter's newsboys.

Kansas City, M. & B. R. Co. *v.* Southern Ry. News Co. (Mo.), 528.

Right of indemnified party to compromise claim.

Kansas City, M. & B. R. Co. *v.* Southern Ry. News Co. (Mo.), 528.

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Mandamus to compel trains to stop at.

Cleveland, C. & St. L. Ry. Co. *v.* People *ex rel.* Jett (Ill.), 846.

CROSSINGS.

Crossing between trains not negligence per se.

Southern Ry. Co. *v.* Prather (Ala.), 832.

Duty of passenger crossing track at station to stop, look and listen.

Atlantic City R. Co. *v.* Goodin (N. J.), 291.

Betts *v.* Lehigh Val. R. Co. (Pa.), 299.

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Failure to observe statutory rule as to, does not render company liable for killing stock beyond crossing.

Southern Ry. Co. *v.* New (Ga.), 19.

Proximate cause of accident at crossing obstructed by cars.

Southern Ry. Co. *v.* Prather (Ala.), 832.

Servant at work on track at crossing cannot rely on rule of

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master requiring lookout on rear of car backing over crossing.

Carlson *v.* Cincinnati, S. & M. R. Co. (Mich.), 803.

Wantonness or willful negligence in obstructing crossing.
Southern Ry. Co. *v.* Prather (Ala.), 832.

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Admission of evidence as to customary construction of switches.

Indiana, I. & I. R. Co. *v.* Bundy (Ind.), 660.

DAMAGES.

Consequential damages only may be included.

Fowles *v.* Southern Ry. Co. (Va.), 250.

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Louisville & N. R. Co. *v.* Hine (Ala.), 382.

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Masterson *v.* Chicago & N. W. Ry. Co. (Wis.), 395.

Passenger's duty to avoid increasing.

Louisville & N. R. Co. *v.* Hine (Ala.), 382.

Ridicule not an element unless approximate upon the wrong.

Louisville & N. R. Co. *v.* Hine (Ala.), 382.

Evidence in action for injuries to property by railroad in street.

Baltimore & O. R. Co. *v.* Lersch (Ohio), 835.

Evidence of family relations.

Crouse *v.* Chicago & N. W. Ry. Co. (Wis.), 780.

Exemplary Damages.

Not recoverable by passenger for illegal arrest caused by conductor if made through mistake, not through malice.

Claiborne *v.* Chesapeake & O. Ry. Co. (W. Va.), 217.

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Pollock *v.* Maysville & B. S. R. Co. (Ky.), 821.

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Louisville & N. R. Co. *v.* Brown (Ala.), 794.

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Rooney *v.* New York, N. H. & H. R. Co. (Mass.), 452.

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Act of widow without consent of child cannot prevent its recovery for injuries and death of father.

Pittsburg, C., C. & St. L. Ry. Co. *v.* Hosea (Ind.), 692.

Pittsburg, C., C. & St. L. Ry. Co. *v.* Moore (Ind.), 678.

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Chicago, R. I. & P. Ry. Co. v. Young (Neb.), 343.

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Personal representative's right of action.

Pittsburg, C., C. & St. L. Ry. Co. v. Hosea (Ind.), 692.

Pittsburg, C., C. & St. L. Ry. Co. v. Moore (Ind.), 678.

Petition in action for must show that beneficiary had a pecuniary interest.

Chicago, R. I. & P. Ry. Co. v. Young (Neb.), 343.

Right of action for death of husband and father survives in widow and heirs.

Missouri, K. & T. Ry. Co. v. Elliott *et al.* (Ind. Terr.), 587.**DECLARATIONS.***See Evidence.***DEFECTIVE APPLIANCES.***See Master and Servant.***DEMURRER.***See Pleading.*

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Missouri, K. & T. Ry. Co. v. Elliott *et al.* (Ind. Terr.), 587.

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Weinkle *et al.* v. Brunswick & W. R. Co. (Ga.), 50.

Deed is not competent as evidence of grantee's title where no title is shown in grantor.

Pollock v. Maysville & B. S. R. Co. (Ky.), 821.

Defects in spark arrester.

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Central of Georgia Ry. Co. v. Ross (Ga.), 12.

Evidence of similar injuries to stock inadmissible.

Central of Georgia Ry. Co. v. Ross (Ga.), 12.

Evidence of similar occurrences admissible.

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McGeary *v.* Old Colony R. Co. (R. I.), 764.

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Louisville & N. R. Co. *v.* Milligen's Adm'x (Ky.), 742.

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Indiana, I. & I. R. Co. *v.* Bundy (Ind.), 660.

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Rules of master cannot change status of employees with regard to each other.

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Master not liable for tort of fellow servant beyond scope of his employment.

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